The Conduct of Hostilities under the Law of International Armed Conflict

YORAM DINSTEIN

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A companion volume to the author's seminal textbook *War, Aggression and Self-Defence*, Third Edition, Cambridge (2001), this book focuses on issues arising in the course of hostilities between States, with an emphasis on the most recent conflicts in Iraq and Afghanistan. The main themes considered by Yoram Dinstein are lawful and unlawful combatants, war crimes, including command responsibility and defences, prohibited weapons, the distinction between combatants and civilians, legitimate military objectives, and the protection of the environment and cultural property. Numerous specific topics that have attracted much interest in recent hostilities are addressed, such as human shields, feigned surrenders, collateral damage and proportionality, belligerent reprisals and weapons of mass destruction.

YORAM DINSTEIN is Professor of International Law at Tel Aviv University. He is a Member of the Institute of International Law, a former Stockton Professor of International Law at the US Naval War College and a former Humboldt Fellow at the Max Planck Institute for International Law. Professor Dinstein is editor of the *Israel Yearbook on Human Rights* and has published extensively in the field of international law.

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Acknowledgements

The concept and scheme of this book have emerged from constant encounters – in and out of the classroom – with officer-students in the US Naval War College (in Newport, R.I.) during my two terms there (in 1999/2000 and 2002/3) as Stockton Professor of International Law. I also had the benefit of intellectually enriching dialogues with the members of the faculty of what is now called the International Law Department (headed by Professor Dennis Mandsager). The problems addressed in class and in extracurricular discussions, the theoretical issues that were debated, and the practical challenges that surfaced in the actual experience of aviators, sailors, marines and army commanders, have all forced me to see the law relating to the conduct of hostilities in a new (much more realistic) light.

I was fortunate to have the opportunity of spending more than a year (2000/1) as a Humboldt Fellow at the Max Planck Institute of International Law at Heidelberg (Germany). In that pleasant and research-oriented ambiance, I could converse, compare notes and occasionally argue with a fairly large number of scholars, headed by the Institute's Director, Professor Rüdiger Wolfrum. Moreover, I had free access to the vast collections of the peerless library of international law which is the bedrock of the Institute. Most of the book was researched and written in Heidelberg.

Since then, I have put the final touches to the manuscript, and have constantly updated the text as well as the footnotes against the background of events in progress and the spate of recent relevant publications. Additionally, I have addressed some new questions that have come up, especially since the horrendous events of 11 September 2001.

Table of cases

Table of treaties

Abbreviations

AASL	Annals of Air and Space Law
AC	Appeal Cases [United Kingdom]
AD	Annual Digest and Reports of Public International Law Cases
AFDI	Annuaire Français de Droit International
AFLR	Air Force Law Review
AIDI	Annuaire de l'Institut de Droit International
AJIL	American Journal of International Law
ALJ	Australian Law Journal
ALR	Alberta Law Review
ASILSILJ	ASILS International Law Journal
AUILR	American University International Law Review
AUJILP	American University Journal of International Law and Policy
AULR	American University Law Review
Annotated Supplement	*Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, 73 *ILS* (US Naval War College, A. R. Thomas and J. C. Duncan eds., 1999)
Ar.V.	Archiv des Völkerrechts
BCEALR	Boston College Environmental Affairs Law Review
BJIL	Buffalo Journal of International Law
BPP	Bulletin of Peace Proposals
BUILJ	Boston University International Law Journal
BYBIL	British Year Book of International Law
CILJ	Cornell International Law Journal
CJTL	Columbia Journal of Transnational Law
CLR	California Law Review
CWILJ	California Western International Law Journal
CWRJIL	Case Western Reserve Journal of International Law
CYIL	Canadian Yearbook of International Law

Commentary on the Additional Protocols	*Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Y. Sandoz *et al.* eds., 1987)
DJCIL	Duke Journal of Comparative & International Law
DJIL	Dickinson Journal of International Law
DJILP	Denver Journal of International Law and Policy
DSB	Department of State Bulletin
EILR	Emory International Law Review
EJCCLCJ	European Journal of Crime, Criminal Law and Criminal Justice
EJIL	European Journal of International Law
ENMOD	Environmental Modification
EPIL	*Encyclopedia of Public International Law* (R. Bernhardt ed., 1992–2000)
EPL	Environmental Policy and Law
EPLJ	Environmental and Planning Law Journal
Env.L	Environmental Law
FILJ	Fordham International Law Journal
GIELR	Georgetown International Environmental Law Review
GJICL	Georgia Journal of International and Comparative Law
GLJ	Georgetown Law Journal
GWJILE	George Washington Journal of International Law and Economics
GYIL	German Yearbook of International Law
HHRJ	Harvard Human Rights Journal
HICLR	Hastings International and Comparative Law Review
HILJ	Harvard International Law Journal
HJLPP	Harvard Journal of Law & Public Policy
HRQ	Human Rights Quarterly
Handbook	*The Handbook of Humanitarian Law in Armed Conflicts* (D. Fleck ed., 1995)
Hum.V.	Humanitäres Völkerrecht
ICC	International Criminal Court
ICJ Rep.	Reports of the International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia

IHL	International Humanitarian Law
IJCP	International Journal of Cultural Property
ILM	International Legal Materials
ILR	International Law Reports
ILS	International Law Studies
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IRRC	International Review of the Red Cross
IYHR	Israel Yearbook on Human Rights
Int.Aff.	International Affairs
Int.Law.	International Lawyer
Int.Leg.	*International Legislation* (M. O. Hudson ed., 1931–50)
Int.Org.	International Organization
Int.Rel.	International Relations
JACL	Journal of Armed Conflict Law
JCSL	Journal of Conflict & Security Law
JPR	Journal of Peace Research
JSS	Journal of Strategic Studies
LJIL	Leiden Journal of International Law
LLAICLJ	Loyola of Los Angeles International & Comparative Law Journal
LOIAC	Law of International Armed Conflict
LRTWC	Law Reports of Trials of War Criminals
Laws of Armed Conflicts	*The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (D. Schindler and J. Toman eds., 3rd edn, 1988)
MJIL	Michigan Journal of International Law
MPYUNL	Max Planck Yearbook of United Nations Law
Mer.LR	Mercer Law Review
Mich.LR	Michigan Law Review
Mil.LR	Military Law Review
NATO	North Atlantic Treaty Organization
NCLR	North Carolina Law Review
NILR	Netherlands International Law Review
NJIL	Nordic Journal of International Law
NLR	Naval Law Review
NMT	Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10
NTIR	Nordisk Tidsskrift for International Ret

NWCR	Naval War College Review
NYIL	Netherlands Yearbook of International Law
NYUJILP	New York University Journal of International Law and Politics
New Rules	*New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (M. Bothe, K. J. Partsch and W. A. Solf eds., 1982)
PASIL	Proceedings of the American Society of International Law
RCADI	Recueil des Cours de l'Académie de Droit International
RDMDG	Revue de Droit Militaire et de Droit de la Guerre
RDSC	Resolutions and Decisions of the Security Council
RGDIP	Revue Générale de Droit International Public
ROE	Rules of Engagement
SIULJ	Southern Illinois University Law Journal
SJICL	Singapore Journal of International and Comparative Law
SJIL	Stanford Journal of International Law
SJLR	St John's Law Review
SMLJ	St Mary's Law Journal
Ste.LR	Stetson Law Review
Supp.	Supplement
Syd.LR	Sydney Law Review
TJCIL	Tulsa Journal of Comparative and International Law
TJICL	Tulane Journal of International and Comparative Law
UCLAPBLJ	UCLA Pacific Basin Law Journal
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNJY	United Nations Juridical Yearbook
UNTS	United Nations Treaty Series
URLR	University of Richmond Law Review
USAFAJLS	United States Air Force Academy Journal of Legal Studies
VJIL	Virginia Journal of International Law
VJTL	Vanderbilt Journal of Transnational Law
VLR	Virginia Law Review
WILJ	Wisconsin International Law Journal

YIEL	Yearbook of International Environmental Law
YIHL	Yearbook of International Humanitarian Law
YJIL	Yale Journal of International Law
YUN	Yearbook of the United Nations
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Introduction

Once it was believed that when the cannons roar, the laws are silent. Today everybody knows better. In fact, the sheer number of international legal norms governing the conduct of hostilities is phenomenal. Legal themes like proportionality, indiscriminate warfare or the prohibition of mass destruction weapons (to cite just a few prime examples) are bruited about – not necessarily in legal terminology – by statesmen, journalists and lay persons around the globe. The public posture seems to be that, if wars are too important to be left entirely to generals and admirals, so are the laws applicable in war.

The growing public interest in the law of international armed conflict – like the increasing desire to see those who breach it criminally prosecuted – attests to a radical change in the Zeitgeist, compared to yesteryear. The reasons for the change are immaterial for the present volume. Perhaps the evolution is simply due to the fact that, in the electronic era, the horrors of war can be literally brought home to television screens thousands of miles away from the battlefield. Be it as it may, everybody feels more than ever affected by any armed conflict raging anywhere. By the same token, almost everybody seems to have ideas and suggestions as to how to augment the humanitarian component in the law of international armed conflict. This is a laudable development. But it is important to keep constantly in mind the sobering thought that wars are fought to be won.

Some people, no doubt animated by the noblest humanitarian impulses, would like to see zero-casualty warfare. However, this is an impossible dream. War is not a chess game. Almost by definition, it entails human losses, suffering and pain. As long as it is waged, humanitarian considerations cannot be the sole legal arbiters of the conduct of hostilities. The law of international armed conflict can and does forbid some modes of behaviour, with a view to minimizing the losses, the suffering and the pain. But it can do so only when there are realistic alternatives to achieving the military goal of victory in war. Should nothing be

theoretically permissible to a belligerent engaged in war, ultimately everything will be permitted in practice – because the rules will be ignored.

The present volume deals with the conduct of hostilities in international (inter-State) armed conflict, i.e., armed conflicts raging between two or more sovereign States. The international legal norms dealing with internal (intra-State) armed conflict – once negligible in number and range – have constantly grown in recent years and, in many respects, now emulate the rules pertaining to inter-State hostilities. But, both legally and pragmatically speaking, there are still crucial aspects of dissimilarity between international (inter-State) and internal (intra-State) armed conflicts. Here we shall focus exclusively on the law of international armed conflict (hereinafter: LOIAC), applicable chiefly in wartime but also in clashes 'short of war'.

The book will not address all legal issues related to inter-State armed conflicts, and will concentrate on the conduct of hostilities. En passant, some peripheral references will be made to subjects like neutrality, belligerent occupation or the treatment of prisoners of war in custody, but that will be done solely in order to illuminate a point or to draw a comparison. In particular, this volume avoids all questions of the legality of recourse to the use of inter-State force in accordance with the *jus ad bellum*, a major topic addressed by the present writer in another book.[1]

The nine chapters of the book will examine the themes of general framework, lawful combatancy, prohibited weapons, legitimate military objectives, protection of civilians and civilian objects from attack, measures of special protection, protection of the environment, other methods and means of warfare, and war crimes (including command responsibility and defences). Numerous specific topics – ranging from 'collateral damage' to belligerent reprisals, from 'target area' air bombings to attacks against merchant vessels at sea, from the legality of nuclear weapons to individual targeting of enemy commanders – will be analysed against the background of customary international law and treaties in force.

The book is designed not only for international lawyers, but also as a tool for the instruction of military officers. There is a manifest need to train officers at all levels of command in the principles and rules of international armed conflict. This must be done in advance, namely, already in peacetime. Decisions in wartime – especially in the electronic era – are often split-second, and must be predicated on instinct as developed in training. Just as every military service is seeking to have officers and other ranks thoroughly prepared for the eventualities of combat likely to be encountered on the operational side, it is indispensable to imbue

[1] Y. Dinstein, *War, Aggression and Self-Defence* (3rd edn, 2001).

soldiers, sailors and aviators with the sense of duty to comply with legal requirements.

It goes without saying that laymen cannot be expected to know all the intricacies of a system of law. Yet, all those going through military training must familiarize themselves with the salient rules of LOIAC, understanding the legal implications of commands issued and obeyed in combat conditions. That is the only way to guarantee that no serious violations of LOIAC will be perpetrated, and that no charges of war crimes will be instigated. It is also the only way to ensure that no gap will develop between legal norms and reality: the 'ought' and the 'is'.

1 The general framework

The present volume deals with the contemporary norms of LOIAC (the law of international armed conflict) under customary international law and treaties in force. The purpose is to present – and analyse – LOIAC neither as it was practised in the past nor as it may evolve in the future, but only as it is legally prescribed and actually implemented at present.

LOIAC constitutes a branch of international law, and as such it is binding on all belligerent States. LOIAC must be differentiated from Rules of Engagement (ROE) issued by various countries (sometimes by diverse commands in the same country), or by international organizations, and altered at will. 'ROE may be framed to restrict certain actions or they may permit actions to the full extent allowable under international law'.[1] Accordingly, a belligerent State – animated by political or other reasons of its own – may opt not to employ in given hostilities some destructive weapons the use of which is lawful under LOIAC (see *infra*, Chapter 3), or to avoid attacking singular targets constituting legitimate military objectives (see *infra*, Chapter 4). As long as it is acting within the powers vested in it by LOIAC, a belligerent State may at its discretion indulge in a degree of self-restraint. However, under no circumstances can a belligerent State – through ROE or otherwise – authorize its armed forces to commit acts which are incompatible with international obligations imposed by LOIAC.

It must be emphasized at the outset that LOIAC (also known as the *jus in bello*) is predicated on the postulate of equal application of its legal norms to all Parties to the conflict, irrespective of any belligerent State's standing from the viewpoint of the *jus ad bellum*. That is to say, LOIAC does not distinguish between the armed forces (or civilians) of the aggressor State(s), on the one hand, and those of the State(s) resorting to self-defence or participating in collective security operations enforced or authorized by the UN Security Council, on the other.[2] Breaches of

[1] A. P. V. Rogers and P. Malherbe, *Model Manual on the Law of Armed Conflict* 151 (ICRC, 1999).

[2] See Y. Dinstein, *War, Aggression and Self-Defence* 140–7 (3rd edn, 2001).

LOIAC cannot be justified on the ground that the enemy is responsible for commencing the hostilities in flagrant breach of the *jus ad bellum*. In the words of the Preamble to Protocol I of 1977, Additional to the Geneva Conventions for the Protection of War Victims:

> the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.[3]

Even United Nations forces (when engaged as combatants in situations of armed conflicts) are obligated to respect the principles and rules of LOIAC.[4]

A few explanatory comments are called for to set out (a) the sources of the international legal norms forming the underlying strata of the ensuing discourse; (b) the semantics of this *materia*; (c) caveats relating to the inter-State character of the conflicts in which the legal norms operate; (d) the balance between military necessity and humanitarian considerations; (e) the interrelationship between LOIAC and human rights law; and (f) the dissemination of LOIAC.

I. The sources

A. Customary international law and treaty law

Most of the rules of LOIAC governing the conduct of hostilities have consolidated over the decades in customary international law. Customary international law crystallizes when there is 'evidence of a general practice accepted as law' (to repeat the well-known formula appearing in Article 38(1)(b) of the Statute of the International Court of Justice).[5] Two constituent elements are condensed here, one objective and the other subjective. The objective component of the definition relates to the (general) practice of States; and the subjective element is telescoped in the words 'accepted as law'. The subjective factor is often phrased in the Latin expression *opinio juris sive necessitatis*, meaning 'a belief that

[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, *Laws of Armed Conflicts* 621, 628.

[4] See UN Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law, 1999, 38 *ILM* 1656, *id.* (1999).

[5] Statute of the International Court of Justice, Annexed to Charter of the United Nations, 1945, 9 *Int.Leg.* 510, 522.

this practice is rendered obligatory by the existence of a rule of law requiring it'.[6]

As for State practice, it consists primarily of actual conduct (acts of commission or omission), but additionally of declarations and statements (often explaining the conduct of the acting State or challenging the conduct of another State). Special importance in the context of LOIAC is attached to military manuals and operational handbooks.

The reference to a 'general' practice calls for four brief observations:

(i) Not every State need necessarily participate (expressly or tacitly) in the general practice.[7] In other words, 'general' is not to be confused with universal.

(ii) In certain fields, the practice of some States – which are most directly active – is of overriding import.[8] This is true, for example, of naval law (considering that not every State is a significant actor in maritime affairs). It is true all the more where it comes to esoteric areas of State activities.

(iii) Even where not all States have contributed to the emergence of a particular norm, once that norm has solidified as an integral part of general customary international law (as evidenced by 'a general practice accepted as law'), it is binding on all States.

(iv) Customary international law is not always general in scope. The application of some customary norms is confined to a particular region of the world (say, Latin America) or even to the bilateral relations between two States.[9]

Many of the rules governing the conduct of hostilities in international armed conflict have been incorporated in a host of multilateral treaties (see *infra*, B). When taken together, these treaties encompass much of LOIAC. Yet, no single treaty – and no cluster of treaties – purports to cover the whole span of LOIAC. Hence, customary international law remains of immense significance. As pronounced in Article 1(2) of Additional Protocol I:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[10]

[6] *North Sea Continental Shelf* cases, [1969] *ICJ Rep.* 3, 44.

[7] See 1(1) Oppenheim's *International Law* 29 (R. Jennings and A. Watts eds., 9th edn, 1992).

[8] See *ibid.*

[9] The construct of bilateral customary international law was confirmed by the International Court of Justice in *Case Concerning Right of Passage over Indian Territory* (Merits), [1960] *ICJ Rep.* 6, 39.

[10] Protocol I, *supra* note 3, at 627.

This is a modern version of the so-called Martens Clause, which will be examined *infra* (Chapter 3, I).

A treaty – by whatever designation (including Convention, Charter, Protocol, Declaration, etc.) – is an agreement concluded between States in written form and governed by international law.[11] A treaty (in force) is binding only on contracting Parties: the legal nexus between such States and the treaty is derived from their consent to be bound by it (*ex consensu advenit vinculum*).[12]

The bifurcation of LOIAC into treaty law and general customary international law does not preclude interaction between the two sources of law. The interaction exists on several levels:

(i) The framers of some treaty provisions seek to attain a genuine codification, reflecting customary international law. That is to say, the authors of the relevant texts wish to give customary international law the imprimatur of *lex scripta* without altering its substance, and the international community as a whole (not merely States Parties) acknowledges that the effort has been crowned with success. That being so, a non-contracting Party will also be bound by the norms encapsulated in the treaty, not because they form part of a treaty (which as such binds solely contracting Parties) but because they articulate customary international law.

(ii) Some treaty provisions are adopted with a view to creating new law, openly diverging from pre-existing customary international law. As a rule, a treaty can modify customary international law. The only exception is a conflict between a treaty and 'a peremptory norm of international law' (*jus cogens*), in which case the treaty is or becomes void.[13] There are few norms which are undeniably peremptory in nature, but when a given norm acquires that hallmark – for example, freedom from torture (see *infra*, V) – modification by treaty (or even by custom) is hard to accomplish.[14] Assuming that the customary norm is not peremptory (*jus dispositivum*), the treaty will effect a departure from that norm, it being understood that the treaty will apply exclusively in the relations between contracting States *inter se*. Then, one of two things can transpire: either (aa) a long-lasting gap will be formed between the legal regime created by contracting Parties to the treaty and that applicable – under customary international

[11] See Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties, [1969] *UNJY* 140, 141.

[12] See S. Rosenne, '"Consent" and Related Words in the Codified Law of Treaties', *An International Law Miscellany* 357, 360 (1993).

[13] See Articles 53 and 64 of the Vienna Convention, *supra* note 11, at 154, 157.

[14] See Dinstein, *supra* note 2, at 96–8.

law – in the legal relations between non-contracting Parties (as well as between contracting and non-contracting Parties); or (bb) over the years, the general practice of States will gravitate towards the (originally innovative) treaty provisions, thereby turning them into a true mirror image of customary international law: not the law as it was at the time when the treaty was first formulated, but the law as it has evolved since. For a prominent illustration, see *infra*, B.

In every international armed conflict, it is indispensable to determine whether a belligerent State whose conduct is at issue has expressed its consent to be bound by any germane treaty in force. But that is not enough. It must be appreciated that:

(i) The treaty may include a general participation clause (or *clausula si omnes*), whereby its provisions will apply 'only if all the belligerents are parties to the Convention' (the quotation is from Article 2 of Hague Convention (IV) of 1907[15]). In such a setting, if a single belligerent State in an international armed conflict declines to be a contracting Party to a treaty, the instrument would become inoperative even between all other belligerent States (notwithstanding the fact that they are all contracting Parties and therefore bound by the treaty). The purpose of a general participation clause is to avoid a dual legal regime in wars between coalitions, but the result can be 'especially onerous' when one small State precludes the application of a treaty in a major war.[16]

(ii) The treaty may mandate that, if one of the belligerent States is not a contracting Party, the others 'shall remain bound by it in their mutual relations' (the quotation is from common Article 2, third Paragraph, of the four Geneva Conventions of 1949 for the Protection of War Victims[17]). Evidently, such a stipulation will have no practical repercussions in a bilateral armed conflict where one of the belligerent States is not a contracting Party to the treaty (thus leaving no room for any 'mutual relations'). Even in a multipartite armed conflict, the treaty cannot be applied unless at least two opposing belligerent States are contracting Parties, so that they are capable of applying the treaty 'in their mutual relations'.

[15] Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, *Laws of Armed Conflicts* 63, 71. Cf. Hague Convention (II) with Respect to the Laws and Customs of War on Land, 1899, *ibid.*

[16] See W. K. Geck, 'General Participation Clause', 2 *EPIL* 510, *id.*

[17] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, *Laws of Armed Conflicts* 373, 376; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, *ibid.*, 401, 404; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, *ibid.*, 423, 429; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, *ibid.*, 495, 501.

(iii) Conversely, if the treaty is declaratory of customary international law, it is immaterial whether any belligerent State in an international armed conflict is a contracting Party. Nor does it matter if the treaty is legally in force or if it has a general participation clause. Whatever the juridical status of the treaty *per se* happens to be, the general obligations of customary international law (enunciated in the text) are binding on every belligerent State. These obligations must be complied with unstintingly, not because they are incorporated in the treaty but – regardless of that fact – because they are independently embedded in customary international law.

Any treaty promulgating rules of LOIAC would usually be consulted by belligerent States (as well as by international fora and tribunals), in order to determine whether or not it impinges upon customary international law. Arriving at the conclusion that the text is in conformity with customary international law is alluring, given the relative clarity of the written word. Nevertheless, as far as customary international law is concerned, the dominant consideration must be evidence that the text coincides with the general practice of States accepted as law. In reality, every treaty codification – even when broadly reflecting pre-existing customary international law – inevitably sharpens the image (lending it, as it were, higher resolution) and often polishes the edges of the picture.

B. The principal treaties

The formulation of treaties pertaining to the conduct of hostilities goes back to the mid-nineteenth century.[18] An important landmark was the 1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, which – notwithstanding its narrowly defined theme – proclaims in the Preamble that 'the progress of civilization should have the effect of alleviating as much as possible the calamities of war'.[19] This Declaration has been followed, in the main, by two series of treaties often referred to as the 'Hague law' and the 'Geneva law':

(i) The Hague Conventions of 1899 and 1907. These Conventions, adopted by the Peace Conferences of those years, are apposite to multiple facets of the conduct of hostilities on land, sea and even the air (through the use of balloons). Various texts adopted in 1899 were revised in 1907, at which time further instruments were added:

[18] The earliest instrument is the Paris Declaration Respecting Maritime Law, 1856, *Laws of Armed Conflicts* 787.

[19] St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 1868, *Laws of Armed Conflicts* 101, 102.

altogether, six Conventions and Declarations were adopted in 1899, and fourteen in 1907.[20] Some have not really stood the test of time and have fallen by the wayside. But others have become part and parcel of customary international law. Indeed, the International Military Tribunal at Nuremberg held, in 1946, that – although innovative at its genesis, and notwithstanding the above-mentioned general participation clause appearing in the instrument – Hague Convention (IV) of 1907 has acquired over the years the lineaments of customary international law:

> The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But . . . by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war.[21]

The International Military Tribunal for the Far East in Tokyo echoed this ruling in its majority Judgment of 1948:

> Although the obligation to observe the provisions of the Convention as a binding treaty may be swept away by operation of the 'general participation clause', or otherwise, the Convention remains as good evidence of the customary law of nations.[22]

(ii) The Geneva Conventions for the Protection of War Victims, also known as the 'Red Cross Conventions'.[23] The original Geneva Convention, relating to the wounded in armies in the field, was adopted in 1864[24] (with the impetus of the foundation of the Red Cross movement on the initiative of H. Dunant[25]). It was revised and replaced in 1906,[26] and then again in 1929,[27] at which time a second Convention on prisoners of war was added.[28] In 1949, both instruments

[20] For the lists of the instruments, see Final Act of the International Peace Conference, The Hague, 1899, *Laws of Armed Conflicts* 49, 50; Final Act of the Second International Peace Conference, The Hague, 1907, *ibid.*, 53, 54.
[21] International Military Tribunal (Nuremberg), Judgment and Sentences, 1946, 41 *AJIL* 172, 248–9 (1947).
[22] International Military Tribunal for the Far East (Tokyo), 1948, [1948] *AD* 356, 366.
[23] See, e.g., A. Schlögel, 'Geneva Red Cross Conventions and Protocols', 2 *EPIL* 531, *id.*
[24] Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1864, *Laws of Armed Conflicts* 279.
[25] See 'Introductory Note', *ibid.*, 275.
[26] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 1906, *Laws of Armed Conflicts* 301.
[27] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 1929, *Laws of Armed Conflicts* 325.
[28] Geneva Convention Relative to the Treatment of Prisoners of War, 1929, *Laws of Armed Conflicts* 339.

were superseded by four Conventions dealing with the wounded and sick in armed forces in the field (Convention (I)), wounded, sick and shipwrecked members of armed forces at sea (Convention (II)), prisoners of war (Convention (III)), and the protection of civilians (Convention (IV)).[29]

In 1977, a Protocol relating to international armed conflicts (Protocol I) was added to the Geneva Conventions,[30] jointly with another instrument (Protocol II) dealing with non-international armed conflicts.[31] The two Additional Protocols do not supersede the four Geneva Conventions of 1949: the new texts merely complement the original ones. Protocol I goes beyond the traditional bounds of the Geneva Conventions (protection of victims) and addresses many issues directly related to the actual conduct of hostilities. However, whereas the four Geneva Conventions have gained virtually universal acceptance – in that almost every State in the world is a contracting Party to them – several sections of the Protocol are implacably objected to by the United States[32] and by an array of other countries. Much of the Protocol may be regarded as declaratory of customary international law,[33] or at least as non-controversial. Unfortunately, the provisions which have proved to be bones of contention are too poignant to be glossed over. The contested provisions will be critiqued in their context, in the following chapters of the present volume.

The two legislative embroideries of the 'Hague law' and the 'Geneva law' by no means exhaust the tapestry of the treaty law guiding the conduct of hostilities in inter-State armed conflicts. There are numerous other treaties, some of which – while not associated with the 'Hague law' or the 'Geneva law' – were also adopted either in Geneva or at The Hague. It is worthwhile to mention in particular three instruments:

(i) In 1925, a Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, was drawn up by a conference held in Geneva under the auspices of the League of Nations.[34]

[29] Geneva Convention (I), *supra* note 17, at 373; Geneva Convention (II), *ibid.*, 401; Geneva Convention (III), *ibid.*, 423; Geneva Convention (IV), *ibid.*, 495.

[30] Protocol I, *supra* note 3, at 621.

[31] 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, *Laws of Armed Conflicts* 689.

[32] See *Operational Law Handbook* 11 (US Army Judge Advocate General, 2003).

[33] This is not denied by the United States. See *ibid.* A comprehensive project, attempting to identify the provisions of the Protocol reflecting customary international law, is in progress under the aegis of the ICRC.

[34] Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925, *Laws of Armed Conflicts* 115.

(ii) In 1954, under the aegis of UNESCO (United Nations Educational, Scientific and Cultural Organization), a Convention for the Protection of Cultural Property in the Event of Armed Conflict was concluded at The Hague.[35] Additional Protocols have been appended subsequently.

(iii) In 1980, a conference organized by the United Nations produced in Geneva a 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.[36] This is a framework instrument to which several substantive Protocols are attached, their roster growing since 1980.

Other relevant treaties will be mentioned in their proper place in the scheme of this volume. Treaties must not be confused with restatements of the law prepared by groups of experts and having no binding force *per se*. All the same, such restatements may at times be perceived as accurate replicas of customary international law, and in their innovative parts may have a lot of influence on future treaties and on the practice of States. Two such texts stand out:

(i) The 1923 Hague Rules of Air Warfare, drafted by a Commission of Jurists charged with the preparation of those and other rules by the 1922 Washington Conference on the Limitation of Armaments.[37]

(ii) The 1995 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, formulated by a group of international lawyers and naval experts sponsored by the San Remo International Institute of Humanitarian Law.[38]

II. The semantics

For a long time, it used to be fashionable to juxtapose the 'Hague law' and the 'Geneva law' as if they were two different branches of LOIAC (broadly representing conduct of hostilities versus protection of victims). Such an approach was never really justified, inasmuch as the 'Geneva law' and the 'Hague law' have always intersected, and a large number of norms switched back and forth between the two strings of treaties. Initially, Hague Convention (III) of 1899 adapted to maritime warfare

[35] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, *Laws of Armed Conflicts* 745.

[36] Geneva 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, *Laws of Armed Conflicts* 179.

[37] Hague Rules of Air Warfare, 1923, *Laws of Armed Conflicts* 207.

[38] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (L. Doswald-Beck ed., 1995).

the principles of the original Geneva Convention of 1864.[39] Subsequent to the revision of the 1864 Geneva Convention in 1906, Hague Convention (X) of 1907 introduced a new adaptation to maritime warfare based on the revised Geneva text.[40] In 1949, Geneva Convention (II) expressly replaced Hague Convention (X),[41] bringing the subject back to the Geneva fold. Furthermore, rules pertaining to prisoners of war were first incorporated in Chapter II of the Regulations Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907.[42] Supplementary provisions, in much greater detail, appear in the Prisoners of War Geneva Convention of 1929, superseded by Geneva Convention (III) of 1949.[43]

Other examples may also be cited, but upon the adoption of Additional Protocol I, the entire distinction between 'Hague law' and 'Geneva law' became conspicuously outdated. In its Advisory Opinion of 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice had this to say about the 'Hague law' and the 'Geneva law':

> These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.[44]

Semantically, the term 'International Humanitarian Law' (IHL) – as indicated by the Court – is an amalgam of both 'Hague law' and 'Geneva law'. Despite its popular usage today, and the stamp of approval of the International Court of Justice, 'International Humanitarian Law' as an umbrella designation has a marked disadvantage. This is due to the fact that the coinage IHL is liable to create the false impression that all the rules governing hostilities are – and have to be – truly humanitarian in nature, whereas in fact not a few of them reflect the countervailing constraints of military necessity (see *infra*, IV). An alternative appellation,

[39] Hague Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, 1899, *Laws of Armed Conflicts* 289.

[40] Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, 1907, *Laws of Armed Conflicts* 313.

[41] Geneva Convention (II), *supra* note 17, at 419 (Article 58).

[42] Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, *Laws of Armed Conflicts* 75, 76–82 (Articles 4–20).

[43] Geneva Convention (III), *supra* note 17, at 477, explicitly states that it replaces (in relations between contracting Parties) the 1929 Convention (Article 134), but it is complementary to Chapter II of the Hague Regulations (Article 135).

[44] Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, [1996] *ICJ Rep.* 226, 256.

popular in the past – 'the Laws of Warfare' (or *jus in bello*) – is equally unsatisfactory, because it is irreconcilable with the reality that the norms in question are also in effect in international armed conflicts falling short of full-fledged wars (see *infra*, III). In this volume, therefore, it is proposed to use the term LOIAC (law of international armed conflict) instead of either IHL or *jus in bello*. Naturally, this is a semantic preference, which has no impact on the substance of the law.

III. Inter-State armed conflicts

The present volume will be confined to international (inter-State) armed conflicts, that is to say, armed conflicts in which two or more sovereign States are engaged. No attempt will be made to address the separate issue of intra-State (civil) wars, which are regulated by a different set of rules (such as Additional Protocol II of 1977). It must be conceded, however, that drawing the line of demarcation between inter-State and intra-State armed conflicts may be a complicated task in two amorphous situations:

(i) Armed conflicts may be mixed horizontally in the sense that they incorporate elements of both inter-State hostilities (between two or more belligerent States) and intra-State hostilities (between two or more clashing groups within the territory of one of the belligerent States where a civil war is raging). The dual conflicts, internal and international, may commence simultaneously or consecutively (the international armed conflict preceded by the internal armed conflict or vice versa). But the point is that the armed conflict has disparate inter-State and intra-State strands.[45] This is what happened, for instance, in Afghanistan in 2001: the Taliban regime, having fought a long-standing civil war with the Northern Alliance, got itself embroiled in an inter-State war with an American-led Coalition as a result of providing shelter and support to the Al Qaeda terrorists who had launched the notorious attack against the United States on September 11th of that year.[46]

The fact that a belligerent State is beset by enemies from both inside and outside its territory does not mean that the international and the internal armed conflicts necessarily merge. Specific hostilities may be waged exclusively between the domestic foes (e.g., between the Taliban forces and the Northern Alliance), whereas other hostilities

[45] See C. Greenwood, 'The Development of International Humanitarian Law by the International Tribunal for the Former Yugoslavia', 2 *MPYUNL* 97, 117 (1998).

[46] See C. Greenwood, 'International Law and the "War against Terrorism"', 78 *Int.Aff.* 301, 309 (2002).

may take place on the inter-State plane (e.g., between the Taliban forces and the Americans). LOIAC will control only the international military operations. As the International Court of Justice pronounced in the *Nicaragua* case of 1986:

> The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.[47]

(ii) Armed conflicts may also be mixed vertically in the sense that what has started as an intra-State armed conflict evolves into an inter-State armed conflict. One potential development is that the intra-State armed conflict would spawn an inter-State armed conflict through the military intervention of a foreign State on the side of rebels against the central Government. Another possibility is the implosion of a State which has plunged into a civil war, and has then fragmented into two or more independent States. Such implosion and fragmentation occurred in Yugoslavia in the 1990s. As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia held in the *Tadic* case, in 1999, the participation of the Federal Republic of Yugoslavia (Serbia-Montenegro) in hostilities in Bosnia-Herzegovina – once the latter seceded from Yugoslavia and emerged as an independent State in 1992 – denoted that a state of international armed conflict existed between them.[48]

LOIAC relates to hostilities carried out between belligerent States, regardless of a declaration of war.[49] This is due to two considerations:

(i) War between sovereign States can exist either in the technical sense (commencing with a formal declaration of war by one State against another) or in the material sense (i.e., the comprehensive use of armed force in the relations between two States, irrespective of any formal declaration).[50]

(ii) LOIAC is brought to bear upon the conduct of hostilities between sovereign States, even if these hostilities fall short of war, namely,

[47] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), [1986] *ICJ Rep.* 14, 114.

[48] ICTY, Appeals Chamber, *Prosecutor* v. *Tadic*, Judgment (1999), Case IT-94-1-A, 38 *ILM* 1518, 1549 (1999).

[49] See C. Greenwood, 'Scope of Application of Humanitarian Law', *Handbook* 39, 43.

[50] On the distinction between war in the technical and in the material sense, see Dinstein, *supra* note 2, at 9–10.

constitute a mere incident.[51] Article 2 common to the 1949 Geneva Conventions for the Protection of War Victims appropriately proclaims in its first Paragraph:

> [T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.[52]

The application of LOIAC to inter-State hostilities is not conditioned on any formal recognition of the enemy either as a State or as a Government:

(i) No formal recognition is required by a belligerent State as to the statehood of the opposing side.[53] As long as the adversary satisfies objective criteria of statehood under international law,[54] any armed conflict between the two belligerent Parties would be characterized as inter-State.

(ii) In the same vein, no formal recognition of a particular regime as the Government of the enemy State is necessary. Consequently, in the 2001 hostilities, it did not matter that the Taliban regime failed to gain recognition as the Government of Afghanistan by the international community at large (and specifically by the United States). The fact that the Taliban regime was in control of most of the territory of Afghanistan meant that (recognized or not) it was the *de facto* Government, and the regime's actions had to 'be treated as the actions of the state of Afghanistan'.[55]

IV. Military necessity and humanitarian considerations

LOIAC in its entirety is predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations. If military necessity were to prevail completely, no limitation of any kind would have been imposed on the freedom of action of belligerent States: *à la guerre comme à la guerre*. Conversely, if benevolent humanitarianism were the only beacon to guide the path of armed forces, war would have entailed no bloodshed, no destruction and no human suffering; in short, war would not have been war. In actuality, LOIAC takes

[51] See *ibid.*, 16.
[52] Geneva Convention (I), *supra* note 17, at 376; Geneva Convention (II), *ibid.*, 404; Geneva Convention (III), *ibid.*, 429; Geneva Convention (IV), *ibid.*, 501.
[53] See Greenwood, *supra* note 49, at 45.
[54] For these criteria, see J. Crawford, *The Creation of States in International Law* 36 ff (1979).
[55] Greenwood, *supra* note 46, at 312–13.

a middle road, allowing belligerent States much leeway (in keeping with the demands of military necessity) and yet circumscribing their freedom of action (in the name of humanitarianism). The challenge whenever a LOIAC norm is fashioned is – in the words of the 1868 St Petersburg Declaration – to fix 'the technical limits at which the necessities of war ought to yield to the requirements of humanity'.[56]

The paramount precept of LOIAC – to reiterate again the language of the St Petersburg Declaration (quoted *supra*, I, B) – is 'alleviating as much as possible the calamities of war'. The humanitarian desire to attenuate human anguish in any armed conflict is natural. However, the thrust of the concept is not absolute mitigation of the calamities of war (which would be utterly impractical), but relief from the tribulations of war 'as much as possible': that is to say, as much as possible considering that war is prosecuted for military ends, and the ascendant objective of each belligerent State is to win the war. The St Petersburg dictum is bolstered by the affirmation in Article 22 of the Hague Regulations of 1899/1907,[57] as well as Article 35(1) of Additional Protocol I of 1977,[58] that the right of belligerents to choose methods or means of warfare 'is not unlimited'.

LOIAC amounts to a checks-and-balances system, intended to minimize human suffering without undermining the effectiveness of military operations. Military commanders are often the first to understand that their duties can be discharged without causing pointless torment. It is noteworthy that the St Petersburg Declaration was crafted by an international conference attended solely by military men.[59] The input of military experts to all subsequent efforts to draft treaty law governing the conduct of hostilities has been enormous. As for customary international law, it is forged in the crucible of State practice during hostilities (predominantly through the action of armed forces).

Every single norm of LOIAC is moulded by a parallelogram of forces: it confronts a built-in tension between the relentless demands of military necessity and humanitarian considerations, working out a compromise formula. The outlines of the compromise vary from one LOIAC norm to another. Still, in general terms, it can be stated categorically that no part of LOIAC overlooks military requirements, just as no part of LOIAC loses sight of humanitarian considerations. All segments of this body of law are stimulated by a realistic (as distinct from a purely idealistic) approach to armed conflict.

[56] St Petersburg Declaration, *supra* note 19, at 102.
[57] Hague Regulations, *supra* note 42, at 82. [58] Protocol I, *supra* note 3, at 644.
[59] See L. Renault, 'War and the Law of Nations in the Twentieth Century', 9 *AJIL* 1, 3 (1915).

Often, when LOIAC is breached, the individual perpetrator claims 'military necessity' as a justification for his acts. Is this an admissible excuse? An American Military Tribunal, in the 'Subsequent Proceedings' at Nuremberg, proclaimed in the *Hostage* case of 1948:

> Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.[60]

The key words here are 'subject to the laws of war'. What ensues is:

(i) A belligerent is entitled to do whatever is dictated by military necessity in order to win the war, provided that the act does not exceed the bounds of legitimacy pursuant to LOIAC. This implies a tangible operational latitude. The dynamics of the law are such that whatever is required by military necessity, and is not prohibited by LOIAC, is permissible.

(ii) Occasionally, the very prohibition of a certain act by LOIAC contains a built-in exception in case of military necessity. The template is Article 23(g) of the Hague Regulations of 1899/1907, by which it is forbidden:

> To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.[61]

What this signifies is that destruction of property is illicit when unjustified by military necessity, i.e., when carried out wantonly (see *infra*, Chapter 8, III, D). Again in the words of the *Hostage* Judgment:

> The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.[62]

(iii) Once LOIAC bans a particular conduct without hedging the prohibition with limiting words, it must be grasped that the framers of the norm have already taken into account the exigencies of military necessity and (for humanitarian reasons) have rejected it as a valid exception. In such circumstances, it is illegitimate to rely on military necessity as a justification for deviating from the norm. Otherwise, the whole fabric of LOIAC would unravel. Unqualified norms

[60] *Hostage* case (*USA* v. *List et al.*) (American Military Tribunal, Nuremberg, 1948), 11 *NMT* 1230, 1253.
[61] Hague Regulations, *supra* note 42, at 83.
[62] *Hostage* case, *supra* note 60, at 1253–4.

of LOIAC must be obeyed in an unqualified manner, even if military necessity militates in another direction. To quote once more the *Hostage* Judgment, '[m]ilitary necessity or expediency do not justify a violation of positive rules'.[63]

A good example relates to the capture of prisoners of war. Under Geneva Convention (III), prisoners of war in custody must not be put to death,[64] and, as soon as possible after capture, they have to be evacuated to camps situated in an area far from the combat zone.[65] As a rule, this will be done by assigning an escort to carry out the process of evacuation, ensuring that the prisoners of war will not be able to escape en route and, at the same time, that they will be protected from any extraneous danger. The question is what happens when enemy combatants are captured by a small light unit (of, e.g., commandos or special forces), which can neither encumber itself with prisoners of war nor detach guards for their proper evacuation. Can the prisoners of war be killed out of military necessity? The answer is unequivocally negative. Article 41(3) of Additional Protocol I addresses the issue forthrightly, laying down that – in these unusual conditions – the prisoners of war must be released.[66] This had actually been the law long before the Protocol was adopted. Customary international law proscribes the killing of prisoners of war, 'even in cases of extreme necessity', e.g., when they slow up military movements or weaken the fighting force by requiring an escort.[67] Military necessity cannot override the rule, since 'it is an integral part of it'.[68] The legally binding compromise between military necessity and humanitarian considerations has been worked out in such a way that prisoners of war must either be kept safely in custody or released.

Article 23(g) of the Hague Regulations adds to military necessity the adverb 'imperatively', as do some other texts. The 'precise significance' of this addition 'is less than wholly clear':[69] especially when it is recalled that diverse adverbs and adjectives are also in common use, such as 'absolute',[70] 'urgent'[71] or 'unavoidable'[72] military necessity. The addition

[63] *Ibid.*, 1256.
[64] Geneva Convention (III), *supra* note 17, at 435 (Article 13).
[65] *Ibid.*, 437 (Article 19).
[66] Protocol I, *supra* note 3, at 646.
[67] M. Greenspan, *The Modern Law of Land Warfare* 103 (1959).
[68] C. Greenwood, 'Historical Development and Legal Basis', *Handbook* 1, 33.
[69] See H. McCoubrey, 'The Nature of the Modern Doctrine of Military Necessity', 30 *RDMDG* 215, 234 (1991).
[70] See Article 54 of the 1907 Hague Regulations, *supra* note 42, at 91.
[71] See Articles 33–4 of Geneva Convention (I), *supra* note 17, at 387.
[72] See Article 11(2) of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 35, at 751.

of the adverb/adjective indicates that when military necessity is weighed, this has to be done with great care.[73] But great care in the application of LOIAC must be wielded at all times.

V. Humanitarian law and human rights

When LOIAC is referred to as 'International Humanitarian Law' (IHL), it is easy to assume – wrongly – that it is 'a law concerning the protection of human rights in armed conflicts'.[74] This can be a misconception. Although the expressions 'human' and 'humanitarian' strike a similar chord, it is essential to resist any temptation to regard them as intertwined or interchangeable. The adjective 'human' in the phrase 'human rights' points at the subject in whom the rights are vested: human rights are conferred on human beings as such (without the interposition of States). In contrast, the adjective 'humanitarian' in the term 'International Humanitarian Law' merely indicates the considerations that may have steered those responsible for the formation and formulation of the legal norms. IHL – or LOIAC – is the law channelling conduct in international armed conflict, with a view to mitigating human suffering.

Undeniably, LOIAC (or IHL) contains norms protecting human rights. However, many of the rights established by LOIAC are granted exclusively to States and not to individual human beings. A comparison of some provisions of the Geneva Conventions of 1949 (the core of IHL) easily demonstrates that they cover both State rights and human rights.

Article 7 of Geneva Convention (I) sets forth:

> Wounded and sick, as well as members of the medical personnel and chaplains, may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention.[75]

Parallel stipulations appear in Geneva Convention (II) (embracing the same categories plus shipwrecked persons);[76] Geneva Convention (III) (relating to prisoners of war);[77] and Geneva Convention (IV) (pertaining to '[p]rotected persons').[78] The phrase 'rights secured to them' palpably denotes that these rights are bestowed directly on individuals belonging

[73] See E. Rauch, 'Le Concept de Nécessité Militaire dans le Droit de la Guerre', 19 *RDMDG* 205, 216–18 (1980).
[74] S. Miyazaki, 'The Martens Law and International Humanitarian Law', *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* 433, *id.* (C. Swinarski ed., 1984).
[75] Geneva Convention (I), *supra* note 17, at 377.
[76] Geneva Convention (II), *supra* note 17, at 405 (Article 7).
[77] Geneva Convention (III), *supra* note 17, at 432 (Article 7).
[78] Geneva Convention (IV), *supra* note 17, at 504 (Article 8).

to the categories indicated, and that they are not only State rights from which individuals derive benefit.[79]

On the other hand, Article 16 of Geneva Convention (I) includes the following obligation in its fourth Paragraph, dealing with enemy dead persons:

> Parties to the conflict shall prepare and forward to each other through the same bureau [Information Bureau], certificates of death or duly authenticated lists of the dead.[80]

The clause then goes on to ordain that the Parties to the conflict are to collect and forward to one another itemized personal effects of the deceased.[81] A matching duty appears in Geneva Convention (II).[82] Indisputably, the right to receive death certificates and personal effects – corresponding to the obligation to prepare and forward them – is accorded not to individual human beings, but to belligerent States. Human beings, in this instance the next of kin, will benefit from the implementation of the provision, but the right is not conferred directly on them.

These illustrations admittedly represent cases of unusual clarity. At times, it is not so easy to determine whether the entitlements created by LOIAC amount to human rights or to State rights. Moreover, a duty incurred by a belligerent State may engender corresponding rights both for the enemy belligerent (State right) and for an individual affected (human right). This is exemplified by Article 33 of Geneva Convention (IV) with respect to civilians:

> No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.[83]

The first sentence is glaringly couched in individual human rights terminology. But the second sentence, cast in general terms and affecting groups of people – perhaps even the civilian population as a whole – is more relevant to the legal relations between the two adversary Parties. The existence of dual rights (a State right and an individual human right), corresponding to a single obligation devolving on the enemy State, is conducive to a better protection regime. The individual may stand on his right without necessarily relying on the goodwill of his belligerent State, and symmetrically the belligerent State has a *jus standi* of its own. Each is empowered to take whatever steps are available and deemed appropriate

[79] See *Commentary, I Geneva Convention* 82–3 (ICRC, J. S. Pictet ed., 1952).
[80] Geneva Convention (I), *supra* note 17, at 381. [81] *Ibid.*
[82] Geneva Convention (II), *supra* note 17, at 410 (Article 19).
[83] Geneva Convention (IV), *supra* note 17, at 511.

by virtue of the separate (State or individual) right, and neither one is capable of waiving the other's independent right.

It ought to be stressed that all rights and duties created by LOIAC (including human rights and their corresponding duties) come into play upon the outbreak of an international armed conflict, and they remain fully applicable throughout the conflict. LOIAC human rights – like LOIAC State rights – are in force, in their full vigour, in wartime (as well as in hostilities short of war), inasmuch as they are directly engendered and shaped by the special demands of the armed conflict. Derogation from LOIAC rights is possible in some extreme instances,[84] but it is limited to specific persons or situations and no others (see *infra*, Chapter 2, II; Chapter 5, VIII, A).

In this crucial respect, LOIAC human rights are utterly different from ordinary (peacetime) human rights. Ordinary (peacetime) human rights are frequently subject to restrictions, which can be placed on their exercise 'in the interests of national security or public safety'.[85] Even more significantly, the application of ordinary (peacetime) human rights – whether or not restricted – can usually be derogated from in time of an international armed conflict.

The derogation from ordinary (peacetime) human rights is authorized, e.g., in Article 4(1) of the 1966 International Covenant on Civil and Political Rights:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[86]

Although Article 4(1) avoids a direct reference to war, there is general recognition that war 'represents the prototype of a public emergency that threatens the life of the nation'.[87] Indeed, the *travaux préparatoires* divulge that war was uppermost in the minds of the drafters of the derogation

[84] See Article 5 of Geneva Convention (IV), *ibid.*, 503; and Article 54(5) of Protocol I, *supra* note 3, at 653.

[85] For instance, freedom of assembly and freedom of association, as per Articles 21 and 22(2) of the International Covenant on Civil and Political Rights, 1966, [1966] *UNJY* 178, 184–5.

[86] *Ibid.*, 180.

[87] M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* 78 (1993).

clause.[88] It is worth noting that Article 15(1) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, in laying down a comparable derogation clause, adverts expressly to a 'time of war or other public emergency threatening the life of the nation'.[89] When derogation from ordinary (peacetime) human rights occurs, one can say that LOIAC (war-oriented) human rights fill much of the vacant space. This is of particular import if due process of law is imperilled. Peacetime judicial guarantees may be derogated from in wartime, yet LOIAC introduces other minimum guarantees in their place.[90]

Not all peacetime human rights are derogable in wartime (or in any other public emergency). Article 4(2) of the Covenant forbids any derogation from itemized human rights.[91] These are the right to life; freedom from torture or cruel, inhuman or degrading treatment or punishment (including non-subjection to medical or scientific experimentation without free consent); freedom from slavery or servitude; freedom from imprisonment on the ground of inability to fulfil a contractual obligation; freedom from being held guilty of any act or omission which did not constitute a criminal offence at the time of its commission, or being subject to a heavier penalty than the one applicable at that time; the right to recognition as a person before the law; freedom of thought, conscience and religion.

Some of the non-derogable rights enumerated in Article 4(2) have little or no special impact in wartime, as attested by the right to recognition as a person. The right to life is more directly apposite, but it does not protect persons from the ordinary consequences of hostilities (which can lead to catastrophic losses of human lives). An exception to the non-derogation clause 'in respect of deaths resulting from lawful acts of war' is explicitly made in Article 15(2) of the European Convention.[92] As for the Covenant, the International Court of Justice held in the Advisory Opinion on *Nuclear Weapons* that, in the conduct of hostilities, the test of an (unlawful) arbitrary deprivation of life is determined by the *lex specialis* of LOIAC.[93] In time of international armed conflict, the right to life is

[88] See A.-L. Svenson-McCarthy, *The International Law of Human Rights and States of Exception with Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs* 214 (1998).

[89] [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 213 *UNTS* 222, 232.

[90] See R. E. Vinuesa, 'Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law', 1 *YIHL* 69, 89 (1998).

[91] International Covenant on Civil and Political Rights, *supra* note 85, at 180.

[92] [European] Convention, *supra* note 89, at 232.

[93] Advisory Opinion on *Nuclear Weapons*, *supra* note 44, at 240.

tied to 'acts such as the killing of prisoners [of war] and the execution of hostages',[94] which are specifically prohibited by LOIAC.

Other non-derogable human rights usually coincide with rights established directly by LOIAC. Thus, torture in international armed conflicts is forbidden by LOIAC treaties: both in general[95] and in the specific contexts of the wounded, sick and shipwrecked;[96] prisoners of war;[97] and civilians.[98] The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia held in the *Furundzija* case, in 1998, that the LOIAC prohibition of torture constitutes a peremptory norm of customary international law (*jus cogens*)[99] (see *supra*, I, A). This LOIAC interdiction operates independently of non-derogable human rights.

Torture is by no means the only activity detrimental to human rights banned directly by LOIAC. By and large, assuming that a belligerent State has issued the proclamation that is a prerequisite to the derogation from ordinary (peacetime) human rights, most of the substantive protection of human rights in the course of an international armed conflict stems from LOIAC and not from the continued operation of non-derogable (peacetime) human rights.

LOIAC may even guarantee human rights to a greater extent than is done by a non-derogable human right under the Covenant. A case in point is freedom from medical experimentation. Article 7 of the Covenant (a non-derogable provision) states that 'no one shall be subjected without his free consent to medical or scientific experimentation'.[100] The Geneva Conventions go beyond the issue of consent and forbid subjecting a prisoner of war to 'medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest',[101] or a civilian to 'medical or scientific experiments not necessitated by the medical treatment of a protected person'.[102] Additional Protocol I – in dealing with internees, detainees and other persons who are in the power of the adverse Party – expatiates on the theme, ruling out for instance removal of tissue or organs for transplantation even with the consent of the donor (except in

[94] See A. H. Robertson and J. G. Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* 312 (4th edn, 1996).
[95] Protocol I, *supra* note 3, at 665 (Article 75(2)(a)(ii)).
[96] Geneva Convention (I), *supra* note 17, at 379 (Article 12, second Paragraph); Geneva Convention (II), *ibid.*, 408 (Article 12, second Paragraph).
[97] Geneva Convention (III), *supra* note 17, at 436 (Article 17, fourth Paragraph).
[98] Geneva Convention (IV), *supra* note 17, at 511 (Article 32).
[99] ICTY, Trial Chamber, *Prosecutor* v. *Furundzija*, Judgment (1998), Case IT-95-17/1, 121 *ILR* 213, 254–7, 260–1.
[100] International Covenant on Civil and Political Rights, *supra* note 85, at 181.
[101] Geneva Convention (III), *supra* note 17, at 435 (Article 13, first Paragraph).
[102] Geneva Convention (IV), *supra* note 17, at 511 (Article 32).

cases of blood transfusion or skin grafting).[103] Of course, there is a good reason for the extra caution shown by the framers of the Protocol, since 'the persons concerned here are especially vulnerable in this field'.[104] But, without disparaging the non-derogable clause of the Covenant, the fact remains that LOIAC is more advanced on this specific issue.

The continued operation in wartime of non-derogable human rights – side by side with LOIAC norms – may prove of signal benefit to some individual victims of breaches. The reason is that, when it comes to seeking remedies for failure to comply with the law (such as financial compensation), human rights law may offer effective channels of action to individuals, whereas no equivalent avenues are opened by LOIAC.[105] This is particularly manifest when human rights instruments set up supervisory organs (epitomized by the European Court of Human Rights) vested with jurisdiction to provide adequate remedies to victims of breaches. On the other hand, the European Court of Human Rights – in the 2001 *Bankovic* case – declared inadmissible applications by relatives of civilians killed or injured in a NATO bombing of the Belgrade Television and Radio Station (during the 1999 Kosovo air campaign), because of lack of 'any jurisdictional link' between the alleged victims and the acts in complaint.[106] The Court concluded that the responsibility of States under the European Convention on Human Rights is essentially territorial, not covering acts of war outside their territories.[107] Such acts, removed from the protection of human rights instruments, are the main thrust of LOIAC regulation.

VI. Dissemination

LOIAC is different from most other branches of international law in that incalculable infractions and abuses can be committed by an extraordinary number of persons acting on behalf of the State, wearing its uniform or placed by it in a position of power or responsibility. All combatants, as well as most civilians, are at least potentially capable of contravening some of the norms of LOIAC. It is therefore requisite that every combatant – and as many civilians as possible – will be familiarized with these norms. Only the widest possible dissemination of the norms of LOIAC, as well as their study and instruction – pursued in peacetime but intensified in wartime, pre-eminently in the training of armed forces – can produce an

[103] Protocol I, *supra* note 3, at 633–4 (Article 11).
[104] Y. Sandoz, 'Article 11', *Commentary on the Additional Protocols* 149, 156.
[105] See R. Provost, *International Human Rights and Humanitarian Law* 45 (2002).
[106] European Court of Human Rights, *Bankovic et al.* v. *Belgium et al.* (2001), 41 *ILM* 517, 530 (2002).
[107] *Ibid.*, 526.

atmosphere in which respect for these rules becomes almost a conditioned reflex. The duty of dissemination and instruction is accentuated in the four Geneva Conventions,[108] in Additional Protocol I[109] and in the Hague Convention on Cultural Property.[110]

Article 82 of Protocol I decrees that legal advisers will be made available to military commanders at the appropriate level, in order to facilitate the application of the Geneva Conventions and the Protocol (and tender advice on instruction given to the armed forces).[111] This is an important pragmatic measure, although the Protocol leaves it open to each contracting Party to determine the minimum level of command to which legal advisers would be assigned.[112] In practice, such level of command is usually taken to mean that of a division or any other independent unit.[113]

The propinquity of legal advisers is meaningless as long as military commanders are not ordered by higher echelons to obey the rules of LOIAC. More than a century ago, Article 1 of Hague Convention (II) of 1899 – followed by Article 1 of Hague Convention (IV) of 1907 – already set forth the obligation of States to issue instructions to their armed forces in conformity with the Regulations annexed to the (respective) instrument.[114] Geneva Conventions (I) and (II) lay down that each contracting Party, through its Commander-in-Chief, must ensure the detailed execution of their stipulations and even provide for unforeseen circumstances (in light of general principles of the Conventions).[115] Under Article 80(2) of Protocol I, orders and instructions to ensure observance of the Geneva Conventions and the Protocol must be handed down by contracting Parties who are required to supervise their execution.[116]

The primary goal of this volume is to assist commanders, legal advisers and instructors in carrying out the missions assigned to them by LOIAC.

[108] Geneva Convention (I), *supra* note 17, at 391 (Article 47); Geneva Convention (II), *ibid.*, 417 (Article 48); Geneva Convention (III), *ibid.*, 475 (Article 127); Geneva Convention (IV), *ibid.*, 546 (Article 144).
[109] Protocol I, *supra* note 3, at 670 (Article 83).
[110] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 35, at 755 (Article 25).
[111] Protocol I, *supra* note 3, at 670.
[112] See L. C. Green, 'The Role of Legal Advisers in the Armed Forces', 7 *IYHR* 154, 163 (1977).
[113] See J. de Preux, 'Article 82', *Commentary on the Additional Protocols* 947, 954.
[114] Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, *supra* note 15, at 71.
[115] Geneva Convention (I), *supra* note 17, at 391 (Article 45); Geneva Convention (II), *ibid.*, 417 (Article 46).
[116] Protocol I, *supra* note 3, at 669.

2 Lawful combatancy

I. Combatants and civilians

Under LOIAC, combatants in an international armed conflict fall into two alternative categories:

(i) Members of the armed forces of a belligerent Party (except medical and religious personnel, discussed *infra*, Chapter 6, I, A, (vii)–(viii)), even if their specific task is not linked to active hostilities.

(ii) Any other persons who take an active part in the hostilities.[1]

LOIAC posits a fundamental principle of distinction between combatants and non-combatants (civilians)[2] (see *infra*, Chapter 4, I). The goal is to ensure in every feasible manner that international armed conflicts be waged solely among the combatants of the belligerent Parties. Lawful combatants can attack enemy combatants or military objectives, causing death, injury and destruction. In contrast, civilians are not allowed to participate actively in the fighting: if they do, they lose their status as civilians. But as long as they retain that status, civilians 'enjoy general protection against dangers arising from military operations'.[3]

It is not always easy to define what active participation in hostilities denotes. Usually, the reference is to 'direct' participation in hostilities.[4] However, the adjective 'direct' does not shed much light on the extent of participation required. For instance, a driver delivering ammunition to combatants and a person who gathers military intelligence in enemy-controlled territory are commonly acknowledged to be actively taking part in hostilities.[5] There is a disparity between the latter and a civilian

[1] See A. P. V. Rogers and P. Malherbe, *Model Manual on the Law of Armed Conflict* 29 (ICRC, 1999).

[2] See Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, [1996] *ICJ Rep.* 226, 257.

[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, *Laws of Armed Conflicts* 621, 651 (Article 51(1)).

[4] See, e.g., Article 51(3) of Protocol I, *supra* note 3, at 651.

[5] See Rogers and Malherbe, *supra* note 1, at 29.

who retrieves intelligence data from satellites or listening posts, working in terminals located in his home country.[6] Needless to say, perhaps, a mere contribution to the general war effort (e.g., by supplying foodstuffs to combatants) is not tantamount to active participation in hostilities.

A civilian may convert himself into a combatant. In fact, every combatant is a former civilian: nobody is born a combatant. In the same vein, a combatant may retire and become a civilian. But a person cannot (and is not allowed to) be both a combatant and a civilian at the same time, nor can he constantly shift from one status to the other.

Whether on land, by sea or in the air, one cannot fight the enemy and remain a civilian. Interestingly, this general norm first crystallized in the law of sea warfare. Already in Article 1 of the Declaration of Paris of 1856, it is proclaimed:

> Privateering is, and remains, abolished.[7]

Privateers were private persons (at times known as corsairs, not to be confused with pirates) who obtained official letters of marque from a Government, allowing them to attack enemy merchant vessels.[8] As the language of the Declaration of Paris indicates, it merely confirms the abolition of privateering as 'an already established situation' under customary international law.[9] The law of land (and air) warfare ultimately adjusted to proscribe parallel modes of behaviour.

Combatants can withdraw from the hostilities not only by retiring and turning into civilians, but also by becoming *hors de combat*. This can happen either by choice (through laying down of arms and surrendering) or by force of circumstances (as a result of getting wounded, sick or shipwrecked). A combatant who is *hors de combat* and falls into the hands of the enemy is in principle entitled to the privileges of a prisoner of war. Being a prisoner of war means denial of liberty, i.e., detention for the duration of the hostilities (which may go on for many years). However, that detention has only one purpose: to preclude the further participation of the prisoner of war in the ongoing hostilities. The detention is not due to any criminal act committed by the prisoner of war, and he cannot be prosecuted and punished 'simply for having taken part in hostilities'.[10]

[6] See M. E. Guillory, 'Civilianizing the Force: Is the United States Crossing the Rubicon?', 51 *AFLR* 111, 135–6 (2001).
[7] Paris Declaration Respecting Maritime Law, 1856, *Laws of Armed Conflicts* 787, 788.
[8] See U. Scheuner, 'Privateering', 3 *EPIL* 1120, 1120–1.
[9] *Ibid.*, 1122.
[10] A. Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts* 82 (1976).

While his liberty is temporarily denied, the decisive point is that the life, health and dignity of a prisoner of war are guaranteed. Detailed provisions to that end are incorporated in 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War.[11]

II. Lawful and unlawful combatants

Entitlement to the status of a prisoner of war – upon being captured by the enemy – is vouchsafed to every combatant, subject to the *conditio sine qua non* that he is a lawful combatant. The distinction between lawful and unlawful combatants is a corollary of the fundamental distinction between combatants and civilians: the paramount purpose of the former is to preserve the latter.[12] LOIAC can effectively protect civilians from being objects of attack in war only if and when they can be identified by the enemy as non-combatants. Combatants 'may try to become invisible in the landscape, but not in the crowd'.[13] Blurring the lines of division between combatants and civilians is bound to end in civilians suffering the consequences of being suspected as covert combatants. Hence, under customary international law, a sanction (deprivation of the privileges of a prisoner of war) is imposed on any combatant masquerading as a civilian in order to mislead the enemy and avoid detection.

An enemy civilian who does not take arms, and does not otherwise participate actively in the hostilities, is guaranteed by LOIAC not only his life, health and dignity (as is done with respect to prisoners of war), but even his personal liberty which cannot be withheld (through detention) without cause. However, a person is not allowed to wear simultaneously two caps: the hat of a civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant. He is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status: Article 5 (first Paragraph) of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War specifically permits

[11] Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, *Laws of Armed Conflicts* 423.

[12] See T. Meron, 'Some Legal Aspects of Arab Terrorists' Claims to Privileged Combatancy', 40 *NTIR* 47, 62 (1970).

[13] D. Bindschedler-Robert, 'A Reconsideration of the Law of Armed Conflicts', *The Law of Armed Conflicts: Report of the Conference on Contemporary Problems of the Law of Armed Conflict, 1969* 1, 43 (Carnegie Endowment, 1971).

derogation from the rights of such a person (the derogation being less extensive in occupied territories, pursuant to the second Paragraph of Article 5).[14]

The legal position re unlawful combatancy was summed up by the Supreme Court of the United States, in the *Quirin* case of 1942 (per Chief Justice Stone):

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[15]

With the exception of the last few words, this is an accurate reflection of LOIAC.

The gist of the *Quirin* decision is that, upon being captured by the enemy, an unlawful combatant – like a lawful combatant (and unlike a civilian) – is subject to automatic detention. Yet, in contradistinction to a lawful combatant, an unlawful combatant fails to reap the benefits of the status of a prisoner of war. Hence, although he cannot be executed without trial, he is susceptible to being prosecuted and punished by military tribunals.

What can unlawful combatants be prosecuted and punished for? The *Quirin* Judgment refers to trial and punishment 'for acts which render their belligerency unlawful'. It is true that sometimes the act which turns a person into an unlawful combatant constitutes by itself an offence (under either domestic or international law) and can be prosecuted and punished as such before a military tribunal. But the fulcrum of unlawful combatancy is that the judicial proceedings may be conducted before regular domestic (civil or military) courts and, significantly, they may relate to acts other than those that divested the person of the status of lawful combatant. Even when the act negating the status of a lawful combatant does not constitute a crime *per se* (under either domestic or international law), it can expose the perpetrator to ordinary penal sanctions (pursuant to the domestic legal system) for other acts committed by him that are branded as criminal. Unlawful combatants 'may be punished under the internal criminal legislation of the adversary for having committed hostile acts

[14] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, *Laws of Armed Conflicts* 495, 503.
[15] *Ex parte Quirin et al.* (1942), 317 US [Supreme Court Reports] 1, 30–1.

in violation of its provisions (e.g., for murder), even if these acts do not constitute war crimes under international law'.[16]

At bottom, warfare by its very nature consists of a series of acts of violence (like homicide, assault, battery and arson) ordinarily penalized by the criminal codes of all countries. When a combatant, John Doe, holds a rifle, aims it at Richard Roe (a soldier belonging to the enemy's armed forces) with an intent to kill, pulls the trigger, and causes Richard Roe's death, what we have is a premeditated homicide fitting the definition of murder in virtually all domestic penal codes. If, upon being captured by the enemy, John Doe is not prosecuted for murder, this is due to one reason only. LOIAC provides John Doe with a legal shield, protecting him from trial and punishment, by conferring upon him the status of a prisoner of war. That is not to say that the shield is available unconditionally. If John Doe acts beyond the pale of lawful combatancy, LOIAC removes the protective shield. Thereby, it subjects John Doe to the full rigour of the enemy's domestic legal system, and the ordinary penal sanctions provided by that law will become applicable to him.

There are several differences between prosecution of war criminals and that of unlawful combatants (see *infra*, Chapter 9, II). The principal distinction is derived from the active or passive role of LOIAC. War criminals are brought to trial for serious violations of LOIAC itself. With unlawful combatants, LOIAC refrains from stigmatizing the acts as criminal. It merely takes off a mantle of immunity from the defendant, who is therefore accessible to penal charges for any offence committed against the domestic legal system.

It is also noteworthy that, unlike war criminals (who must be brought to trial), unlawful combatants may be subjected to administrative detention without trial (and without the attendant privileges of prisoners of war). Detention of unlawful combatants without trial was specifically mentioned as an option in the *Quirin* case (as quoted above), and the option has indeed been used widely by the United States in the war in Afghanistan (see *infra*, V).

Detention of unlawful combatants is also the subject of special legislation of Israel, passed by the Knesset in 2002.[17] This Detention of Unlawful Combatants Law defines an unlawful combatant as anyone taking part – directly or indirectly – in hostilities against the State of Israel, who is not entitled to a prisoner of war status under Geneva Convention (III).[18] Detention is based on the decision of the Chief of General Staff of

[16] Rosas, *supra* note 10, at 305.
[17] See Detention of Unlawful Combatants Law, 2002, 1834 *Sefer Hahukim* [Laws of the State of Israel, Hebrew] 192.
[18] *Ibid.* (Section 2).

the Israel Defence Forces, on grounds of State security, but it is subject to judicial review by a (civilian) District Court (both initially and every six months thereafter).[19] The Law emphasizes that detention is just one option, and that an unlawful combatant can equally be brought to trial under any criminal law.[20] An important point addressed by the Law is the maximum duration of the detention. An unlawful combatant can be held in detention as long as hostilities by the force to which he belongs have not been terminated.[21]

Whether detained or prosecuted, unlawful combatants must not be deemed beyond the ambit of the law. Even the derogation clause of Geneva Convention (IV) – in the third paragraph of Article 5 – mandates that 'such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention'.[22] There are also certain minimum standards imposed by customary international law, which cannot be ignored. The majority of the International Court of Justice, in the *Nicaragua* case of 1986, held that 'minimum rules applicable to international and to non-international conflicts' are expressed in common Article 3 of the 1949 Geneva Conventions.[23] Admittedly, the text of common Article 3[24] does not purport to be germane to armed conflicts of an international character. In his Dissenting Opinion, Sir Robert Jennings commented that the majority's view of common Article 3 as a minimum yardstick 'is not a matter free from difficulty'.[25] This is particularly true considering that the Court did not deem fit to produce any evidence for the conclusion that the provision reflects norms identically applicable to international and to non-international armed conflicts.[26] Still, it can hardly be disputed that when common Article 3 prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment', or establishes the need to afford in trial 'all the judicial guarantees which are recognized as indispensable by civilized people', the text reflects an irreducible minimum that no State is allowed to ratchet down even a notch in any armed conflict (whether international or non-international).

[19] *Ibid.* (Sections 3, 5). [20] *Ibid.*, 193 (Section 9). [21] *Ibid.* (Sections 7–8).
[22] Geneva Convention (IV), *supra* note 14, at 503.
[23] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), [1986] *ICJ Rep.* 14, 114.
[24] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, *Laws of Armed Conflicts* 373, 376–7; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, *ibid.*, 401, 404–5; Geneva Convention (III), *supra* note 11, at 430; Geneva Convention (IV), *supra* note 14, 501–2.
[25] Dissenting Opinion of Judge Sir Robert Jennings, *Nicaragua* case, *supra* note 22, at 528, 537.
[26] See T. Meron, *Human Rights and Humanitarian Norms as Customary International Law* 36–7 (1989).

Fundamental guarantees to persons 'who are in the power of a Party to the conflict and who do not benefit from more favourable treatment' are the subject of Article 75 of Additional Protocol I of 1977.[27] This provision is particularly important as regards unlawful combatants who are not entitled to the more favourable treatment of prisoners of war, and it is widely viewed as an expression of customary international law.[28]

By its very nature, the sanction of detention or prosecution (under the domestic legal system) is irrelevant to a prime category of unlawful combatants, i.e., successful suicide bombers disguised in civilian clothes.[29] A civilian (or a combatant out of uniform) who merely prepares himself to become a human bomb, but is thwarted in the attempt, can still be subject to detention or prosecution. Once the act is executed, the perpetrator is beyond the reach of the law. The question as to which measures can be taken by way of deterrence against potential suicide bombers is by no means resolved at the time of writing, especially in light of the generally upheld principle that nobody can be punished for an offence he has not personally committed.[30] Accomplices and accessories to the terrorist act can evidently be prosecuted or detained, but members of the perpetrator's family – or others associated with him – cannot be held responsible for his conduct solely because of that connection.

III. The entitlement to prisoners of war status under customary international law

Article 1 of the Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, proclaims:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;
> 3. To carry arms openly; and
> 4. To conduct their operations in accordance with the laws and customs of war.[31]

[27] Protocol I, *supra* note 3, at 665–7.

[28] See K. Dörmann, 'The Legal Situation of "Unlawful/Unprivileged" Combatants', 85 *IRRC* 45, 70 (2003).

[29] The wearing of civilian clothes lies at the core of the problem (see *infra*, III, condition (ii)). Some suicide attacks (epitomized by Japanese kamikaze pilots in World War II, flying properly marked warplanes) are brave manifestations of lawful combatancy.

[30] See Article 33 (first Paragraph) of Geneva Convention (IV), *supra* note 14, at 511.

[31] Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, *Laws of Armed Conflicts* 63, 75.

Article 2 adds a provision entitled 'Levée en masse', which reads in the revised 1907 version:

> The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.[32]

Article 3 prescribes further:

> The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.[33]

As far as civilians who are not employed by the armed forces, yet accompany them, are concerned, Article 13 stipulates:

> Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.[34]

The Hague formula establishes four general – and cumulative – conditions for lawful combatancy: (i) subordination to responsible command; (ii) a fixed distinctive emblem; (iii) carrying arms openly; and (iv) conduct in accordance with LOIAC. Solely in the special setting of a 'levée en masse' (to be discussed *infra*) are conditions (i) and (ii) dispensed with. The provisions of the Hague Regulations on the four conditions of lawful combatancy (as in other matters) 'are considered to embody the customary law of war on land'.[35]

The Geneva Conventions of 1949 retain the Hague formula, making it even more stringent. Article 4(A) of Geneva Convention (III) sets forth:

> Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

[32] *Ibid.*, 75–6. [33] *Ibid.*, 76. [34] *Ibid.*, 79.
[35] See G. I. A. D. Draper, 'The Status of Combatants and the Question of Guerilla Warfare', 45 *BYBIL* 173, 186 (1971).

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.[36]

This language is replicated in Article 13 of both Geneva Convention (I)[37] and Geneva Convention (II) dealing with wounded, sick and shipwrecked.[38] Article 4(B) of Geneva Convention (III) goes on to create two further categories of persons who should be treated as prisoners of war: one relating to occupied territories (members of armed forces who have been released from detention in an occupied territory and are then reinterned),[39] and the other pertaining to neutral countries (members of armed forces of belligerents who reach neutral territory and have to be interned there under international law).[40] Article 4(C) states that nothing in the above provisions affects the status of medical personnel and chaplains,[41] who – under Article 33 of Geneva Convention (III) – cannot themselves be taken prisoners of war, but may be retained by the Detaining Power with a view to assisting prisoners of war.[42]

The first and foremost category of persons entitled to the status of prisoners of war covers members of the armed forces of the Parties to the

[36] Geneva Convention (III), *supra* note 11, at 430–1.
[37] Geneva Convention (I), *supra* note 24, at 379–80.
[38] Geneva Convention (II), *supra* note 24, at 401, 408.
[39] This special category makes it 'impossible for an occupying Power to deprive prisoners of war of the benefit of the convention through the subterfuge of release and subsequent arrest'. R. T. Yingling and R. W. Ginnane, 'The Geneva Conventions of 1949', 46 *AJIL* 393, 405–6 (1952).
[40] Geneva Convention (III), *supra* note 11, at 431–2.
[41] *Ibid.*, 432. [42] *Ibid.*, 442–3.

conflict. These are the regular forces of the belligerent States. It does not matter what the semantic appellation of regular forces is (they may function, e.g., under the technical designation of militias); how they are structured; whether military service is compulsory or voluntary; and whether the units are part of standing armed forces or consist of reservists called up for active duty. The distinction is between regular forces of all types, on the one hand, and irregular forces in the sense of guerrilla forces or resistance movements, on the other.

On the face of it, the Geneva Conventions do not pose any conditions to the eligibility of regular forces to prisoners of war status. Nevertheless, regular forces are not absolved from meeting the cumulative conditions binding irregular forces. There is merely a presumption that regular forces would, by their very nature, meet those conditions. But the presumption can definitely be rebutted. The issue came to the fore in the *Mohamed Ali* case of 1968, where the Privy Council held (per Viscount Dilhorne) that it is not enough to establish that a person belongs to the regular armed forces, in order to guarantee to him the status of a prisoner of war.[43] The Privy Council pronounced that even members of the armed forces must observe the cumulative conditions imposed on irregular forces, although this is not stated *expressis verbis* in the Geneva Conventions or in the Hague Regulations.[44] The facts of the case related to Indonesian soldiers who – at a time of a 'confrontation' between Indonesia and Malaysia – planted explosives in a building in Singapore (then a part of Malaysia) while wearing civilian clothes. The Privy Council confirmed the Appellants' death sentence for murder, on the ground that a regular soldier committing an act of sabotage when not in uniform loses his entitlement to a prisoner of war status.[45] The earlier *Quirin* Judgment – concerning German members of the armed forces who took off their uniforms on a sabotage mission in the United States (where they had landed by submarine) – is to the same effect.[46]

The second category of prisoners of war under the Geneva Conventions comprises irregular forces: guerrillas, partisans, resistance movements and the like, whatever they call themselves. This is the most problematic category, given the proliferation of such forces in modern warfare. The Geneva Conventions repeat the four Hague conditions verbatim. Moreover, two additional conditions are implied from the *chapeau* of Article 4(A)(2): (v) organization, and (vi) belonging to a Party to the conflict. One more condition is distilled in the case law from the text of

[43] *Mohamed Ali et al.* v. *Public Prosecutor* (1968), [1969] AC 430, 449.
[44] *Ibid.*, 449–50. [45] *Ibid.*, 451–4.
[46] *Ex parte Quirin et al.*, *supra* note 15, at 35–6.

the Geneva Conventions: (vii) lack of duty of allegiance to the Detaining Power.

Each of the four Hague conditions, and the additional three conditions, deserves a few words of explanation:

(i) The first condition – of subordination to a responsible commander – is designed to exclude individuals (known in French as 'franctireurs') acting on their own. The operation of small units of irregular forces is permissible, provided that the other conditions are fulfilled, but there is no room for individual initiatives. John Doe or Richard Roe – especially in an occupied territory – cannot legitimately conduct a private war against the enemy.

(ii) The second and third conditions are linked to the basic principle of distinction between combatants and civilians. The two conditions are intended to eliminate confusion in this regard and to preclude any attempt at deception.

The second condition – of having a fixed distinct emblem recognizable at a distance – is predicated on two elements. The emblem in question must meet the dual requirement of distinction (i.e., it must identify and characterize the force using it) and fixity (to wit, the force is not allowed to confuse the enemy by ceaselessly changing its distinctive emblem). The most obvious fixed distinct emblem of regular armed forces is that of a particular uniform. But irregular armed forces need not have any uniform, and suffice it for them to possess a less complex fixed distinctive emblem: part of the clothing (like a special shirt or a particular headgear) or certain insignia.[47]

The fixed distinctive emblem must be worn by combatants throughout any military mission in which they are likely to get in contact with the enemy (throughout means from start to finish, namely, from the beginning of deployment to the end of disengagement), and the emblem must not be deliberately removed at any time in the course of that operation.[48] Still, combatants are not bound to wear the distinctive emblem when off-duty or when discharging duties not linked to a military mission (such as training or administration).[49] Nor do they necessarily have to wear the distinctive emblem if operating (e.g., in a command, control or communications centre) in a location remote from the front line. The pivotal point is lack of intent to deceive the enemy. Thus, if uniformed soldiers who are on a mission bivouac overnight, they can remove their uniforms in

[47] See *Commentary, III Geneva Convention* 60 (ICRC, J. de Preux ed., 1960).
[48] See H. S. Levie, *Prisoners of War in International Armed Conflict*, 59 *ILS* 47 (1978).
[49] See W. A. Solf, 'Article 44', *New Rules* 241, 252.

their tents: should the encampment be subjected to a surprise attack by the enemy, the aroused defenders can instantaneously use their weapons to repel the raid without being concerned about their semi-clad state.

The condition of having a fixed distinctive emblem raises a number of questions owing to the choice of words. It is not easy to understand fully the obligation that the distinctive emblem will be recognizable at a distance. The phraseology must be reasonably construed. Combatants seeking to stay alive do not attempt to draw attention to themselves. On the contrary, even soldiers in uniform are prone to use camouflage. This is a legitimate ruse of war[50] (see *infra*, Chapter 8, I, B, c), as long as the combatants merely exploit the topographical conditions: the physical as distinct from the demographic landscape of civilians.[51] Another question is connected with night warfare. Needless to say, if the combatants do not carry an illuminated distinctive emblem, that emblem will not be recognizable at a distance in the dark. Again, it is important that the terse and imperfect language would not overshadow the thrust of the condition, which is crystal clear. Just as regular forces wear uniforms, so must irregular forces on a military mission use a fixed emblem which will distinguish them – in a reasonable fashion – from the civilian population. The issue is not whether combatants can be seen, but the lack of desire on their part to create the false impression that they are civilians.

When combatants go to (or from) battle in a vehicle or a tank – and, similarly, if they sail in a vessel or fly in an aircraft – it is not enough for each individual person to have the distinctive emblem: the vehicle or other platform must itself be properly identified.[52] By the same token, the external marking of the vehicle or platform does not absolve the combatants on board from having their personal distinctive emblems. As for members of the crew of a military aircraft, there is a specific provision to that effect in Article 15 of the (non-binding) 1923 Hague Rules of Air Warfare, where it is observed that this is required in case the members of the crew 'become separated from their aircraft'.[53]

(iii) The third condition – of carrying arms openly – has the same rationale and brings up similar issues as the second. Does this condition imply that a combatant is barred from carrying a sidearm in a holster

[50] See Article 37(2) of Protocol I, *supra* note 3, at 645.
[51] See Bindschedler-Robert, *supra* note 13, at 43.
[52] See *Commentary*, *supra* note 47, at 60.
[53] Hague Rules of Air Warfare, 1923, *Laws of Armed Conflicts* 207, 209.

or hand grenades in a pouch? The question is plainly rhetorical. Once more, what counts is not the ambiguous language but the nucleus of the condition. A lawful combatant must abstain from creating the false impression that he is an innocent civilian, with a view to facilitating access to the enemy by stealth. He must carry his arms openly in a reasonable way, depending on the nature of the weapon and the prevailing circumstances.

(iv) The fourth condition – conduct in accordance with LOIAC – is the key to understanding the philosophy underlying the distinction between lawful and unlawful combatants. Unless a combatant is willing himself to respect LOIAC, he is estopped from relying on that body of law when desirous of enjoying its benefits.[54] Often, a person relegated to the grade of unlawful combatancy for failure to meet this condition is also a war criminal. But the condition is linked to all conduct incompatible with LOIAC, and not necessarily to the commission of war crimes (for the definition of which see *infra*, Chapter 9, I).

These are the original Hague conditions, endorsed by the Geneva Conventions. As mentioned, the following supplementary conditions can be inferred from the Conventions:

(v) The fifth condition – organization – actually reinvigorates the first condition in a somewhat different way. Lawful combatants must act within a hierarchic framework, embedded in discipline, and subject to supervision by upper echelons of what is being done by subordinate units in the field.

(vi) The sixth condition – belonging to a Party to the conflict – got a practical expression in the 1969 Judgment of an Israeli Military Court in the *Kassem* case.[55] Here a number of persons, who belonged to an organization calling itself the 'Popular Front for the Liberation of Palestine', crossed the Jordan River from the East Bank (the Kingdom of Jordan) to the West Bank (Israeli occupied territory) for sabotage purposes. When captured and charged with security offences, they claimed entitlement to prisoners of war status. The Israeli Military Court held that irregular forces must belong to a Party to the conflict.[56] Since no Arab Government at war with Israel had assumed responsibility for the activities of the Popular Front – which was indeed illegal in the Kingdom of Jordan – the condition was not fulfilled.[57] The Judgment was criticized by G. Schwarzenberger on

[54] See Levie, *supra* note 48, at 50–1.
[55] *Military Prosecutor* v. *Kassem and Others* (Israel, Military Court, 1969), 42 *ILR* 470.
[56] *Ibid.*, 476. [57] *Ibid.*, 477–8.

the ground that the Geneva Conventions were not meant to limit the scope of lawful combatancy under pre-existing rules of international law.[58] However, even prior to the Geneva Conventions, the premise was that the Hague conditions apply only to combatants acting on behalf of a State Party to the conflict.[59] It is evident that members of an independent band of guerrillas cannot be regarded as lawful combatants, even if they observe LOIAC, use a fixed distinctive emblem, and carry their arms openly. One way or another, 'a certain relationship with a belligerent government is necessary'.[60] One can, of course, argue whether Palestinian guerrillas factually belonged at the time to a Party to the conflict. But the condition itself is irreproachable.

(vii) The seventh and last condition – of non-allegiance to the Detaining Power – is not specifically mentioned in the Geneva Conventions, and is derived from the case law. The principal authority is the 1967 Judgment of the Privy Council in the *Koi* case,[61] in which captured Indonesian paratroopers – landing in Malaysia – included a number of Malays convicted and sentenced to death for having unlawfully possessed arms in a security zone. The question on appeal before the Privy Council was whether they were entitled to prisoners of war status. The Privy Council held (per Lord Hodson) that nationals of the Detaining Power, as well as other persons owing it a duty of allegiance, are not entitled to such status.[62] This was viewed by the Privy Council as a rule of customary international law.[63] Although the condition does not appear in the text of Article 4(A), the Privy Council found other provisions of Geneva Convention (III) – specifically Articles 87 and 100[64] – in which it is coherently stated that prisoners of war are not nationals of the Detaining Power and do not owe it any duty of allegiance.[65]

The requirement of nationality (or allegiance) has to be approached carefully. The fact that a combatant belonging to State A – captured by State B – is a national of State C, does not make any difference (subject to treaty rules re mercenaries, *infra*, VI). A German soldier in the French Foreign Legion was entitled to a

[58] See G. Schwarzenberger, 'Human Rights and Guerrilla Warfare', 1 *IYHR* 246, 252 (1971).
[59] See L. Nurick and R. W. Barrett, 'Legality of Guerrilla Forces under the Laws of War', 40 *AJIL* 563, 567–9 (1946).
[60] Bindschedler-Robert, *supra* note 13, at 40.
[61] *Public Prosecutor* v. *Koi et al.* (1967), [1968] AC 829.
[62] *Ibid.*, 856–8. [63] *Ibid.*, 856–7.
[64] Geneva Convention (III), *supra* note 11, at 460, 464.
[65] *Koi* case, *supra* note 61, at 857.

prisoner of war status in the Indo-China War. But such a soldier would not have been entitled to the same status if fighting in a war against Germany.

The *Koi* case also occasions a question of the law of evidence. Under Article 5 (second Paragraph) of Geneva Convention (III) – quoted in full *infra*, V, (i) – should any doubt arise as to whether certain persons belong to any of the categories enumerated in Article 4, they enjoy the Convention's protection until their status is determined by a competent tribunal. Opinions in the Privy Council were divided as to whether the mere allegation by a defendant that he is a foreign national generates doubt in accordance with Article 5: the majority held that that was the legal position, but a minority dissented.[66] The more central issue relates to the burden of proof. The minority opined that the burden of proof lies on the defendant, who must show that he is entitled to a prisoner of war status (and consequently that he is not a national of the Detaining Power).[67] The majority did not address the point. But the correct interpretation of the law apparently is that, once a defendant persuades the court that he is a member of the enemy armed forces, the burden of proof that he owes allegiance to the Detaining Power (and is therefore not entitled to a prisoner of war status) falls on the prosecution.[68] Incontestably, the defendant first has to establish that he is a member of the enemy armed forces.

Given the exigencies of guerrilla warfare, it is not easy for irregular forces to comply cumulatively with the seven Geneva conditions or even with the core four Hague conditions. These conditions are actually patterned after the operations of regular forces (to which they do not explicitly allude). Regular forces are organized, are subject to hierarchical discipline, and naturally belong to a Party to the conflict; they have a proud tradition of wearing uniforms and carrying their arms openly; they are trained to respect LOIAC; and the issue of allegiance scarcely arises. However, with irregular forces (to whom the conditions expressly refer), the situation is more complicated. Even if other problems are ignored, the difficulty of meeting both conditions of distinction – conditions (ii) and (iii) of a fixed distinctive emblem and carrying arms openly – is patent, 'since secrecy and surprise are the essence' of guerrilla warfare.[69] Most of the resistance movements of World War II did not fulfil all the cumulative

[66] *Ibid.*, 855, 865. [67] *Ibid.*, 864.

[68] See R. R. Baxter, 'The Privy Council on the Qualifications of Belligerents', 63 *AJIL* 290, 293 (1969).

[69] See R. R. Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs', 28 *BYBIL* 323, 328 (1951).

conditions.[70] From a pragmatic standpoint, many believe that 'obedience to these rules would be tantamount to committing suicide, as far as most guerrillas would be concerned'.[71] Still, these are the norms of the Hague Regulations, the Geneva Conventions and customary international law.

Under the Hague Regulations, the Geneva Conventions and customary international law, the only time that the cumulative conditions are eased is that of 'levée en masse'. It must be accentuated that this category applies only to the inhabitants of unoccupied areas, so that there is no 'levée en masse' in occupied territories. The idea (originating in the French Revolution[72]) is that at the point of invasion – and in order to forestall occupation – the civilian population can take up arms spontaneously. This is an extraordinary state of affairs in the course of which – for a short while and as an interim stage in the fighting – there is no need to meet all seven cumulative conditions to the status of lawful combatancy. The Hague Regulations and Geneva Conventions enumerate only two cumulative conditions: carrying arms openly and respect for LOIAC (conditions (iii) and (iv)). It follows that there is no need to meet the two other Hague conditions of subordination to a responsible commander and using a fixed distinctive emblem (conditions (i) and (ii)). Bearing in mind that a 'levée en masse' takes place on the spur of the moment, condition (v) is inapplicable. Condition (vi) is also irrelevant: when the civilian population resists invasion, the problem of belonging to a Party to the conflict is moot. On the other hand, it is arguable that condition (vii) of nationality (or allegiance) remains in place. In any event, the transitional phase of 'levée en masse' lapses *ex hypothesi* after a relatively short duration. One of three scenarios is bound to unfold: either the territory will be occupied (despite the 'levée en masse'); or the invading force will be repulsed (thanks to the 'levée en masse' or to the timely arrival of reinforcements); or the battle of defence will stabilize, and then there will be ample opportunity for organization.

Both the Hague Regulations and the Geneva Conventions equate the standing of certain civilians – employed by or accompanying the armed forces – to that of lawful combatants as far as prisoners of war status is concerned. Obviously, the fact that a civilian is employed by or accompanies the armed forces does not turn him into a combatant. Hence, the question of the fulfilment of most of the cumulative conditions does not

[70] See J. S. Pictet, 'The New Geneva Conventions for the Protection of War Victims', 45 *AJIL* 462, 472 (1951).

[71] G. von Glahn, 'The Protection of Human Rights in Time of Armed Conflicts', 1 *IYHR* 208, 223 (1971).

[72] On the origins of the institution, see W. G. Rabus, 'A New Definition of the "Levée en Masse" ', 24 *NILR* 232, *id.* (1977).

arise. Yet, in all instances condition (iv) must be regarded as paramount: anybody seeking the privileges of LOIAC must himself respect the laws from which he proposes to benefit. Condition (vii) of nationality – or allegiance – is also relevant to civilians. Should the civilian bear light arms for self-defence, condition (iii) relating to carrying arms openly will apply.

Who should observe the seven conditions: the individual or the group of which he is a member? The issue does not arise with respect to regular troops. The assumption is that these forces collectively fulfil all the conditions, and to the extent that there is doubt in the concrete case, it affects John Doe but not an entire army. In the *Mohamed Ali* and *Koi* cases, there was no doubt that members of the armed forces of Indonesia generally wear uniforms and do not owe allegiance to Malaysia, although the defendants in the dock failed to meet these conditions (and were therefore denied prisoners of war status). However, in the operations of irregular forces, the question of whether the conditions of lawful combatancy are met may relate both to a guerrilla movement collectively and to each of its members individually. The answer to the question varies with the divergent conditions.

By their nature, conditions (i), (v) and (vi) are addressed to the group collectively, and not to any of the members individually. It is necessary to ascertain that the group as a whole is organized, has a responsible commander and belongs to a Party to the conflict. Should that be the case, the same yardsticks must be applied to all members of the group.[73] The reverse applies to condition (vii), directed at each member of the group rather than the group in its entirety: the link of nationality is determined individually. In between are the other conditions: (ii), (iii) and (iv). Condition (ii) on a fixed distinctive emblem requires some preliminary action on the part of the group, which must adopt its identifying emblem; if it does not do that, no member of the group is capable of meeting the condition. All the same, even if the group adopts a fixed distinctive emblem, that does not mean that John Doe will use it at the critical time (just as the defendants in the *Mohamed Ali* or *Quirin* cases did not wear their uniforms at the critical time). If John Doe fails to do that, his misconduct does not contaminate the entire group, but the personal consequences are liable to be dire.

As for conditions (iii) and (iv) – carrying arms openly and observance of LOIAC – the present writer believes that the correct approach is that their fulfilment should be monitored primarily on an individual basis and only secondarily on a group basis. In other words, if observance of these conditions in the individual instance comes to a test in reality, John Doe

[73] See Draper, *supra* note 35, at 196.

has to answer for his actual behaviour. However, if no opportunity for such individual verification presents itself – for instance, when John Doe is captured in possession of arms but before setting out to accomplish any hostile mission – it is possible to establish how the group behaves in general and extrapolate from the collectivity to the individual. If the group as a whole has a record of disrespect for LOIAC, there is no need to accord John Doe a prisoner of war status. Conversely, if the group as a whole habitually acts in compliance with LOIAC, John Doe should be allowed the benefit of the doubt. It has been contended that – even if John Doe actually observes LOIAC – he should not be deemed a lawful combatant when the group commonly acts in breach of that body of law.[74] This is unassailable in extreme cases like Al Qaeda (see *infra*, V, (ii)). But if the conduct of the members of the group is uneven, John Doe should be judged on the merits of his own case and not on the demerits of that of some of his comrades at arms.

IV. The legal position under Protocol I of 1977

The legal position is radically altered pursuant to Additional Protocol I. Article 43 of the Protocol promulgates:

> 1. The armed forces of a Party to a conflict consist of organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.
>
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
>
> 3. Whenever a Party to the conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.[75]

By itself, Article 43 appears to follow in the footsteps of the Hague and Geneva rules, as reflected in customary international law. Indeed, it reaffirms four of the seven conditions for (lawful) combatancy: condition (i) concerning the existence of a command responsible for the conduct of its subordinates; condition (iv) about compliance with the rules of LOIAC; condition (v) stressing the need for organization and discipline; and condition (vi) pertaining to the need to belong to a Party to the conflict.[76]

[74] See *ibid.*, 197; and Meron, *supra* note 12, at 65.
[75] Protocol I, *supra* note 3, at 647.
[76] See J. de Preux, 'Article 43', *Commentary on the Additional Protocols* 505, 517.

Unfortunately, Article 44 goes much further:

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. The protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. This article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.[77]

The language of this verbose text is quite convoluted, not to say opaque. But when a serious attempt is made to reconcile its disparate Paragraphs with one another, a dismaying picture emerges. Notwithstanding the provision of Article 43, Article 44(2) does away – to all intents and

[77] Protocol I, *supra* note 3, at 647–8.

purposes – with condition (iv): whether or not in compliance with LOIAC, all combatants (i.e., those taking a direct part in hostilities) are entitled to the status of lawful combatancy and to the attendant privileges of prisoners of war. Paragraph (3) of Article 44, while paying lip-service to the principle of distinction, retains only a truncated version of condition (iii): the duty to carry arms openly is restricted to the duration of the battle itself and to the preliminary phase of deployment in preparation for the launching of an attack, while being visible to the enemy. The issue of visibility to the enemy is complex, implying that if the combatant neither knows nor should know that he is visible, the obligation does not apply.[78] It is not clear whether visibility is determined solely by the naked eye or it also includes observation by means of binoculars and even infrared equipment.[79] More significantly, there is no agreement as to when deployment begins: at the original assembly point (from which the combatants proceed to their destination) or only moments before the attack is launched.[80] But these and other points are quite moot, since – in a most enigmatic fashion[81] – Paragraph (4) mandates that, albeit technically deprived of prisoners of war status, transgressors must be accorded every protection conferred on prisoners of war. Thus, in terms of practicality, condition (iii) – however circumscribed – is vitiated by Article 44. When it comes to condition (ii), the sole reference to it is made in Paragraph (7), articulating an intention not to affect the practice of wearing uniforms by regular armies. Thereby, Article 44 only underscores the elimination of condition (ii) where it really counts, namely, when irregular forces take part in hostilities. In fact, the consequence is 'to tip the balance of protection in favor of irregular combatants to the detriment of the regular soldier and the civilian'.[82] In the final analysis, it is the civilians who will suffer. 'Inevitably, regular forces would treat civilians more harshly and with less restraint if they believed that their opponents were free to pose as civilians while retaining their right to act as combatants and their POW status if captured'.[83]

As pointed out above, the seven cumulative conditions of lawful combatancy are onerous for irregular forces. Hence, it would have made sense to alleviate the conditions to some extent. In particular, the two conditions of distinction – conditions (ii) and (iii) – could become alternative

[78] See J. de Preux, 'Article 44', *Commentary on the Additional Protocols* 519, 535.
[79] See Solf, *supra* note 49, at 254–5.
[80] See de Preux, *supra* note 78, at 534–5.
[81] See R. Lapidoth, 'Qui a Droit au Statut de Prisonnier de Guerre?', 82 *RGDIP* 170, 204 (1978).
[82] G. B. Roberts, 'The New Rules for Waging War: The Case against Ratification of Additional Protocol I', 26 *VJIL* 109, 129 (1985–6).
[83] A. D. Sofaer, 'The Rationale for the United States Decision', 82 *AJIL* 784, 786 (1988).

rather than cumulative, considering that when one is fulfilled the other may be deemed redundant.[84] Still, this is not the path taken by the framers of Article 44. The pendulum in the Article has swung from one extreme to the other, reducing *ad absurdum* the conditions of lawful combatancy. The outcome is that, for contracting Parties to the Protocol, the general distinction between lawful and unlawful combatants becomes nominal in value. The dichotomy of lawful and unlawful combatants is prominently retained in the Protocol in only two exceptional cases: spies[85] (see *infra*, Chapter 8, II) and mercenaries (see *infra*, VI).

Objections to the new legal regime created in Article 44 are among the key reasons why the leading military Power of the day – the United States – declines to ratify Protocol I,[86] and this negative assessment of the Article is shared by an array of other States.

V. A case study: the war in Afghanistan

The war in Afghanistan, waged by the United States and several allied countries against the Taliban regime and the Al Qaeda terrorist network – following the armed attacks of 11 September 2001 – raises multiple issues pertinent to the status of lawful/unlawful combatancy:

(i) The first problem relates to the standing of Taliban fighters. On the one hand, the Taliban regime – on the eve of the war – was in *de facto* control of as much as 90 per cent of the territory of Afghanistan. On the other hand, the regime was unrecognized by the overwhelming majority of the international community.[87] By itself, this lack of recognition cannot erode the privileges of combatants under customary international law. As indicated (*supra*, Chapter 1, III), the application of LOIAC is not dependent on recognition of a particular regime as the Government of the enemy State. According to Article 4(A)(3) of Geneva Convention (III) – quoted *supra*, III – members of regular armed forces professing allegiance to a Government unrecognized by the Detaining Power (the paradigmatic case being that of the 'Free France' forces of General de Gaulle in World War II, unrecognized by Nazi Germany[88]) are entitled to prisoners of war status. Yet, inasmuch as the underlying idea is the equivalence of armed forces of recognized and unrecognized governments, the

[84] See W. J. Ford, 'Members of Resistance Movements', 24 *NILR* 92, 104 (1977).
[85] Protocol I, *supra* note 3, at 649 (Article 46(1)).
[86] See *Operational Law Handbook* 11 (US Army Judge Advocate General, 2003).
[87] See R. Wolfrum and C. E. Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law', 6 *MPYUNL* 559, 570–7 (2002).
[88] See *Commentary*, *supra* note 47, at 62.

latter – no less than the former – are bound by the seven cumulative conditions of lawful combatancy. The proper question, therefore, is not whether the Taliban regime was recognized, but whether the Taliban forces actually observed all these conditions.

In light of close scrutiny of the war in Afghanistan by the world media – and, in particular, the live coverage by television of literally thousands of Taliban troops before and after their surrender – it is undeniable that, whereas Taliban forces were carrying their arms openly (condition (iii)) and possibly meeting other conditions of lawful combatancy, they did not wear uniforms nor did they display any other fixed distinctive emblem (condition (ii)). Since the conditions are cumulative, members of the Taliban forces failed to qualify as prisoners of war under the customary international law criteria. These criteria admit of no exception, not even in the unusual circumstances of Afghanistan as run by the Taliban regime. To say that '[t]he Taliban do not wear uniform in the traditional western sense'[89] is quite misleading, for the Taliban forces did not wear any uniform in any sense at all, Western or Eastern (nor even any special headgear that would single them out from civilians). All armed forces – including the Taliban – are required to wear uniforms or use some other fixed distinctive emblem. If they do not, they cannot claim prisoners of war status under customary international law.

The legal position seems singularly clear to the present writer. But since some observers appear to entertain doubt in the matter[90] (perhaps because the case of governmental forces not wearing any uniform is so unique), the issue could be put to judicial test. Article 5 (second Paragraph) of Geneva Convention (III) enunciates:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[91]

Ex abundante cautela, the United States might be well advised to have the status of Taliban forces determined by a competent tribunal. A competent tribunal for this purpose can be a military commission.[92]

[89] R. Cryer, 'The Fine Art of Friendship: *Jus in Bello* in Afghanistan', 7 *JCSL* 37, 70 (2002).
[90] See G. H. Aldrich, 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants', 96 *AJIL* 891, 896–7 (2002).
[91] Geneva Convention (III), *supra* note 11, at 432.
[92] See K. Anderson, 'What to Do with Bin Laden and Al Qaeda Terrorists? A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base', 25 *HJLPP* 591, 619–20 (2002).

(ii) The legal status of Al Qaeda fighters must not be confused with that of Taliban forces. Al Qaeda fighters constitute irregular forces. They easily satisfy the requirement of belonging to a Party to the conflict (condition (vi)). In reality, in the relations between Al Qaeda and the Taliban regime, there were times when it appeared that 'the tail was wagging the dog': the Party to the conflict (Afghanistan) seemed to belong to Al Qaeda, rather than the reverse. Incontrovertibly, Al Qaeda is a well-organized group (condition (v)), with subordination to command structure (condition (i)), and in the hostilities in Afghanistan its members carried their arms openly (condition (iii)). However, apart from the fact that Al Qaeda (like the Taliban regime) has declined to use a uniform or possess a fixed distinctive emblem (condition (ii)), the group has displayed utter disdain towards LOIAC in brazen disregard of condition (iv). Al Qaeda's contempt for this quintessential prerequisite qualification of lawful combatancy was flaunted in the execution of the original armed attack of 9/11. Not only did the Al Qaeda terrorists, wearing civilian clothes, hijack US civilian passenger airliners. The most striking aspects of the shocking events of 9/11 are that (a) the primary objective targeted (the Twin Towers of the World Trade Center in New York City) was unmistakably a civilian object rather than a military objective (see *infra*, Chapter 4, II): close to 3,000 innocent civilians lost their lives in the ensuing carnage; (b) the Twin Towers – as well as the other target of the attack (the Pentagon, no doubt a military objective (see *infra*, Chapter 4, II, A, (xv)) – were struck by hijacked passenger airliners, which (with their explosive fuel load) were used as flying bombs, in total oblivion to the fate of hundreds of civilian passengers on board. No group conducting attacks in such an egregious fashion can claim for its fighters prisoners of war status. Whatever the lingering doubt which may exist with respect to the entitlement of Taliban forces to prisoners of war status, there is – and there can be – none as regards Al Qaeda terrorists.

(iii) The Al Qaeda involvement raises another issue. Whereas the Taliban forces were composed of Afghan (and some Pakistani) nationals, Al Qaeda is an assemblage of Moslem fanatics from all parts of the world. Most of them are apparently Arabs, but some have come from Western countries, and there have been several cases of renegade American nationals. Without getting here into the question of how the US should have handled the matter from the standpoint of its domestic – constitutional and criminal – legal system, the salient point is that, under LOIAC, irrespective of all other considerations,

nobody owing allegiance to the Detaining Power can expect to be treated as a prisoner of war (condition (vii)).

(iv) The constraints of the conditions of lawful combatancy must not, however, be seen as binding on only one Party to the conflict in Afghanistan. As the hostilities progressed, it became all too evident (again, thanks to the ubiquitous TV cameras) that some American combatants – especially CIA agents in the field – were not wearing uniforms while in combat. It ought to be emphasized that observance by even 99 per cent of the armed forces of a Party to a conflict of the seven conditions of lawful combatancy – including the condition relating to a fixed distinctive emblem, such as a uniform (condition (ii)) – does not absolve the remaining 1 per cent from the unshakable obligation to conduct themselves pursuant to the same conditions. Consequently, had any American combatants in civilian clothing been captured by the enemy, they would not have been entitled to prisoners of war status any more than Taliban and Al Qaeda fighters in a similar plight.

(v) Perhaps 'the primary focus of debate and controversy' in this field has been the detention of Al Qaeda terrorists transferred by the US from Afghanistan to Guantanamo Bay (on the island of Cuba).[93] Since unlawful combatants are not entitled to prisoners of war status, most criticisms against conditions of detention in Guantanamo are beside the point. However, detention (as a purely administrative measure) of those persons who are not charged with any crime in judicial proceedings cannot go on beyond the termination of hostilities: hostilities in Afghanistan in connection with Taliban personnel; hostilities in which Al Qaeda is involved in the case of its incarcerated fighters.

VI. Mercenaries

Article 47 of Additional Protocol I introduces a new rubric of unlawful combatants, viz. that of mercenaries:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;
(b) does, in fact, take a direct part in the hostilities;
(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid

[93] *Ibid.*, 621.

to combatants of similar ranks and functions in the armed forces of that Party;
(d) is neither a national of a Party to a conflict nor a resident of territory controlled by a Party to the conflict;
(e) is not a member of the armed forces of a Party to the conflict; and
(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.[94]

Article 47 constitutes a departure from customary international law.[95] Interestingly enough, the new class of unlawful combatants – mercenaries – does not resemble traditional classes of unlawful combatants: unlike other categories, this peculiar novel category has no links to the principle of distinction between combatants and civilians.

Admittedly, the definition of mercenaries in Article 47 is crafted quite restrictively. Its six conditions are cumulative. Many commentators maintain that, taken together, these conditions 'render Article 47 unworkable'.[96] As a rule, the acid test is the venal motivation of those coming within the bounds of the definition.[97] 'If the desire for private gain is removed from the definition of mercenary, then the term "mercenary" as ordinarily understood becomes devoid of substantive content'.[98] Mercenaries not motivated by greed, but acting on ideological or other grounds, are therefore not deprived of lawful combatancy.[99]

Mercenaries coming within the range of Article 47 have to be recruited for a particular armed conflict.[100] The definition specifically excludes foreign nationals serving in standing units integrated in the armed forces, 'like the Gurkhas in the British Army or the members of the French Foreign Legion'.[101] There is consequently a palpable loophole: if foreigners enlist to serve in a standing Foreign Legion for the duration of a single conflict, they are not mercenaries in the eyes of the framers of Article 47.[102] Moreover, since one of the conditions is that of actually taking a direct part in the hostilities, foreign advisers and military technicians

[94] Protocol I, *supra* note 3, at 649.
[95] See H. C. Burmester, 'The Recruitment and Use of Mercenaries in Armed Conflicts', 72 *AJIL* 37, 43 (1978).
[96] F. J. Hampson, 'Mercenaries: Diagnosis before Prescription', 22 *NYIL* 3, 30 (1991).
[97] See L. C. Green, 'The Status of Mercenaries in International Law', 8 *IYHR* 9, 60–1 (1978).
[98] J. L. Taulbee, 'Myths, Mercenaries and Contemporary International Law', 15 *CWILJ* 339, 352–3 (1985).
[99] See J. de Preux, 'Article 47', *Commentary on the Additional Protocols* 571, 580.
[100] See E. Kwakwa, 'The Current Status of Mercenaries in the Law of Armed Conflict', 14 *HICLR* 67, 70 (1990–1).
[101] See A. A. Yusuf, 'Mercenaries in the Law of Armed Conflicts', *A New Humanitarian Law of Armed Conflict* 113, 117 (A. Cassese ed., 1979).
[102] See M. F. Major, 'Mercenaries and International Law', 22 *GJICL* 103, 113 (1992).

(albeit motivated by financial gain) are not covered either.[103] The same applies to members of foreign armed forces officially sent by their State, even if they consist of well-rewarded volunteers.[104]

The nationality dimension also plays an important role in the definition of mercenaries. A mercenary caught in the net of Article 47 cannot be a national of the country that he serves (again, irrespective of financial inducements).[105] Nor can he be a national of any other Party to the conflict. This is of some consequence when the person is a national of an allied State. But if he is a national of the Detaining Power, it must be recalled that – while avoiding characterization as a mercenary under the Protocol[106] – he will not be entitled to a prisoner of war status owing to condition (vii) of lawful combatancy, as laid down by customary international law.[107]

In 1989, the UN General Assembly formulated an International Convention (not widely ratified) against the Recruitment, Use, Financing and Training of Mercenaries, which redefines mercenaries in Article 1.[108] This is a broader definition compared to the Protocol's, since, *inter alia*, it is no longer necessary for a person recruited as a mercenary to actually take part in the hostilities.[109] But under Article 3(1) of the Convention, a mercenary who participates directly in hostilities is not merely stripped of lawful combatancy: he commits a punishable offence.[110]

VII. Armed merchant vessels

The issue of arming merchant vessels at sea relates to the abolition of privateering[111] (*supra*, I) and to the status of lawful/unlawful combatancy. Under Hague Convention (VII) of 1907, a belligerent may convert a merchant ship into a warship, provided that six cumulative conditions are met:

(i) The converted ship must be put under the authority, control and responsibility of the State whose flag it flies (that is, the vessel cannot continue to be a private ship).

[103] See de Preux, *supra* note 99, at 579. [104] See *ibid.*, 581.
[105] See H. W. Van Deventer, 'Mercenaries at Geneva', 70 *AJIL* 811, 813–14 (1976).
[106] A point made by Kwakwa, *supra* note 100, at 72.
[107] See W. A. Solf, 'Article 47', *New Rules* 267, 271.
[108] International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989, 29 *ILM* 89, 92 (1990).
[109] See L. C. Green, *The Contemporary Law of Armed Conflict* 116 (2nd edn, 2000).
[110] Mercenaries Convention, *supra* note 108, at 93.
[111] See H. Fujita, '1856 Paris Declaration Respecting Maritime Law', *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* 61, 71 (N. Ronzitti ed., 1988).

(ii) The converted ship must bear the external distinguishing marks of warships of that State.
(iii) The ship's commander must be a naval officer in the service of the State.
(iv) The crew must be subject to military discipline.
(v) The converted ship must observe LOIAC in its operations.
(vi) The State performing the conversion must announce it as soon as possible in the list of warships.[112]

The objective of the six conditions is to draw a clear-cut distinction between privateers and converted merchant ships. However, Hague Convention (VII) does not settle two questions crucial to compliance with the distinction, namely (a) whether conversion of a merchant ship can be effected anywhere as well as at any time, and (b) whether the transformed vessel may be reconverted back into a merchant ship before the termination of the war.[113] If the answer to both questions is affirmative, the consequence is that a merchant ship can actually be converted into a warship whenever it encounters an easy prey on the high seas, and immediately after the engagement it can place itself back in the protected niche of a non-combatant vessel. If so, the difference between privateers and converted merchant ships would become more apparent than real. This writer believes that any reconversion during the hostilities should be forbidden.[114]

An (unconverted) enemy merchant vessel summoned by a warship to stop – prior to capture – is not duty-bound to do so, and it may attempt to escape or resist capture.[115] Yet, by trying to do that, it exposes itself to attack, i.e., it turns itself into a legitimate military objective (see *infra*, Chapter 4, V, C, (v)).[116] With a view to enabling merchant ships to better resist capture, a number of maritime Powers (primarily, the United Kingdom) have taken the step of arming them with light guns. Such an act has potentially far-reaching consequences for submarines, which – when surfaced – are vulnerable to damage even by light guns.[117] Consequently, the rule has developed that an armed merchant ship can

[112] Hague Convention (VII) Relating to the Conversion of Merchant Ships into Warships, 1907, *Laws of Armed Conflicts* 797, 798 (Articles 1–6).
[113] See G. Venturini, '1907 Hague Convention VII Relating to the Conversion of Merchant Ships into Warships', *The Law of Naval Warfare*, *supra* note 111, at 111, 122–4.
[114] Cf. *ibid.*, 123.
[115] See L. Oppenheim, 2 *International Law: A Treatise* 467 (H. Lauterpacht ed., 7th edn, 1952).
[116] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* 147 (L. Doswald-Beck ed., 1995).
[117] See J. Gilliland, 'Submarines and Targets: Suggestions for New Codified Rules of Submarine Warfare', 73 *GLJ* 975, 984 (1984–5).

be attacked and sunk as a military objective (see *infra*, Chapter 4, V, C, (vi)).[118] This is confirmed by the Nuremberg Judgment of 1946, in which the International Military Tribunal pronounced that it would not hold Dönitz guilty for having waged 'submarine warfare against British armed merchant ships'.[119] Still, the arming of a merchant ship – like evasion of, or resistance to, capture – is not regarded as unlawful combatancy. Should members of the crew be captured by the enemy, they would be entitled to the status of prisoners of war.[120]

[118] See *San Remo Manual*, *supra* note 116, at 147. Cf. G. P. Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality* 292 (1998).
[119] International Military Tribunal (Nuremberg), Judgment and Sentences, 1946, 41 *AJIL* 172, 304 (1947).
[120] See K. Zemanek, 'Merchant Ships, Armed', 3 *EPIL* 350, 352.

3 Prohibited weapons

I. Introduction

The International Court of Justice, in its Advisory Opinion of 1996 on *Legality of the Threat or Use of Nuclear Weapons*, recognized two 'cardinal principles contained in the texts constituting the fabric of humanitarian law'.[1] The first is the principle of distinction between combatants and civilians, from which the Court deduced:

> States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.[2]

In any given international armed conflict, some weapons can be employed in a manner breaching the principle of distinction by being instruments of direct or indiscriminate attack against civilians (see *infra*, Chapter 5, II–III). The fact that this happens in a particular military action does not stain the weapons themselves with an indelible mark of illegitimacy, since in other operations the same weapons may be used within the framework of LOIAC. The issue, however, is whether a certain weapon is designed in such a way that, intrinsically, it is (in the Court's words) 'incapable of distinguishing between civilian and military targets'. If so, the weapon is illegitimate regardless of circumstances. Putting it somewhat differently, 'a weapon will be unlawful *per se* if it is incapable of being targeted at a military objective only, even if collateral harm occurs'.[3] More often than not, the problem would relate to an inability (stemming, for instance, from a faulty guidance system in a long-range missile) to aim the weapon exclusively at military objectives.[4] But with biological weapons (see *infra*, III, B, b) the crux of the matter is

[1] Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, [1996] *ICJ Rep.* 226, 257.
[2] *Ibid.* [3] Dissenting Opinion of Judge Higgins, *ibid.*, 588–9.
[4] M. N. Schmitt, 'Future War and the Principle of Discrimination', 28 *IYHR* 51, 55 (1998).

that, when unchecked by an antidote, they can spread contagious disease far and wide without sparing civilians.[5]

The second cardinal principle adverted to by the Court relates to unnecessary suffering by combatants (the meaning of the expression will be examined *infra*, II). The Court said:

> According to the second principle, it is prohibited to cause unnecessary suffering to combatants; it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.[6]

As pointed out by the Court:

> In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives.[7]

In the context of the two cardinal principles, the Court cited the Martens Clause.[8] This Clause, the brainchild of M. de Martens (a leading international lawyer who was a Russian delegate to both Hague Peace Conferences of 1899 and 1907), was first incorporated in the Preamble of Hague Convention (II) of 1899 and Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land.[9] A 'modern version of that clause' – as the Court put it[10] – is to be found in Article 1(2) of Additional Protocol I of 1977 (see *supra*, Chapter 1, I):

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[11]

The reference to customary law is self-evident. But the thrust of the Martens Clause is the additional allusion to the 'principles of humanity' and to 'the dictates of public conscience'. In the *Corfu Channel* case of 1949, the International Court of Justice used the phrase 'elementary

[5] See *ibid.* [6] Advisory Opinion on *Nuclear Weapons*, *supra* note 1, at 257.
[7] *Ibid.* [8] *Ibid.*
[9] Hague Convention (II) and Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1899 and 1907, *Laws of Armed Conflicts* 69, 70.
[10] Advisory Opinion on *Nuclear Weapons*, *supra* note 1, at 257.
[11] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, *Laws of Armed Conflicts* 621, 628.

considerations of humanity',[12] which has overtones of the Martens Clause. In 1996, the Court said about the Martens Clause that its 'continuing existence and applicability is not to be doubted'.[13]

While the 'principles of humanity' and 'the dictates of public conscience' may explain the evolution of LOIAC, it must be taken into account that they do not directly affect the legality of weapons. It is obvious that 'the yardsticks used by the Court were the principle of distinction and prohibition of unnecessary suffering, rather than principles of humanity and dictates of public conscience'.[14] General revulsion in the face of a certain conduct during hostilities (assuming that it can be established beyond the fluctuations of public opinion) does not create 'an independent legal criterion regulating weaponry'.[15]

Together with the two cardinal principles applicable in armed conflicts, the Court identified a third fundamental principle: the principle of neutrality, whereby (*inter alia*) the effects of weapons must be contained within the territories of the belligerent States.[16] This principle would strengthen objections to virulent biological weapons that can spread disease everywhere, showing no respect for the frontiers of neutral countries.

II. The principle prohibiting unnecessary suffering

The principle prohibiting the infliction of unnecessary suffering was first enshrined in the Preamble of the 1868 St Petersburg Declaration:

> Considering:
>
> That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
>
> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity.[17]

[12] *Corfu Channel* case (Merits), [1949] *ICJ Rep.* 4, 22.
[13] Advisory Opinion on *Nuclear Weapons*, *supra* note 1, at 260.
[14] T. Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', 94 *AJIL* 78, 87 (2000).
[15] P. A. Robblee, 'The Legitimacy of Modern Conventional Weaponry', 71 *Mil.LR* 95, 125 (1976).
[16] Advisory Opinion on *Nuclear Weapons*, *supra* note 1, at 261–2.
[17] St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 1868, *Laws of Armed Conflicts*, at 101, 102.

The basic concept underlying this text is that '[i]t is sufficient to render enemy combatants *hors de combat*'.[18]

Article 23(e) of the Hague Regulations of 1899, in the authentic French text, forbids

> d'employer des armes, des projectiles ou des matières propres à causer des maux superflus.[19]

The language is reiterated word-for-word, in French, in Article 23(e) of the revised Hague Regulations of 1907.[20]

In the non-binding yet commonly used English translation, the 1899 language of Article 23(e) was rendered as follows:

> To employ arms, projectiles, or material of a nature to cause superfluous injury.[21]

On the other hand, the 1907 translation is different (despite the fact that the authentic French text remained unaltered):

> To employ arms, projectiles, or material calculated to cause unnecessary suffering.[22]

Thus, the words 'of a nature' were replaced by 'calculated' (thereby appearing to put the emphasis on the intention rather than on the nature of the weapon), and 'superfluous injury' was substituted by 'unnecessary suffering'.

Article 35(2) of Protocol I of 1977 – stating a '[b]asic rule' – extends the scope from weapons to 'methods of warfare'; reverts to the phrase (employed in the 1899 English version) 'of a nature'; and, to be on the safe side, combines the two alternative English coinages of 'superfluous injury' and 'unnecessary suffering' (used in the translation of the single French idiom 'maux superflus'):

> It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.[23]

This language is repeated in the Preamble of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons

[18] J. de Preux, 'Article 35', *Commentary on the Additional Protocols* 389, 401.
[19] J. B. Brown, 2 *The Hague Peace Conferences of 1899 and 1907 (Documents)* 110, 116, 126 (1909).
[20] *Ibid.*, 368, 376, 388.
[21] Hague Regulations Annexed to Hague Convention (II), 1899, *supra* note 9, at 75, 83.
[22] Hague Regulations Annexed to Hague Convention (IV), 1907, *supra* note 9, at 75, 83.
[23] Protocol I, *supra* note 11, at 644.

Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.[24]

Plainly, the emphasis in the Protocol (as in the English version of the 1899 Regulations) is placed on the objective nature of the weapon, and not on the subjective intention of whoever is using it.[25] The double English expression 'superfluous injury or unnecessary suffering' is purposed to cover both measurable–objective (mostly physical) injury and subjective–psychological suffering and pain.[26]

What injury or suffering can be deemed 'superfluous' or 'unnecessary'? The common interpretation of this dual phrase is that 'international law only forbids the use of weapons that increase suffering without really increasing military advantage'.[27] In the words of the International Court of Justice (as quoted above), the test is 'a harm greater than that unavoidable to achieve legitimate military objectives'.

It follows that a weapon is not banned on the ground of 'superfluous injury or unnecessary suffering' merely because it causes 'great' or even 'horrendous' suffering or injury.[28] The effects of the use of certain weapons may be repulsive, but this is not, 'in and of itself, enough to render these weapons illegal'.[29] A weapon is proscribed only if it causes injury or suffering that can be avoided, given the military constraints of the situation. Some scholars speak about proportionality between the injury or suffering and the military advantage anticipated.[30] The reference to proportionality in this context has been criticized,[31] and rightly so. The principle of proportionality is linked to the issue of collateral damage to civilians resulting from attacks against military objectives (see *infra*, Chapter 5, IV) and has nothing to do with injury or suffering sustained by combatants.

There must also be no confusion between the issue of 'superfluous injury or unnecessary suffering' and that of the lethality or non-lethality

[24] 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, *Laws of Armed Conflicts* 179, *id.*

[25] See H. Blix, 'Means and Methods of Combat', *International Dimensions of Humanitarian Law* 135, 138 (UNESCO, 1988).

[26] See M. G. Granat, 'Modern Small-Arms Ammunition in International Law', 40 *NILR* 149, 161–2 (1993).

[27] See B. M. Carnahan, 'Unnecessary Suffering, the Red Cross and Tactical Laser Weapons', 18 *LLAICLJ* 705, 713 (1995–6).

[28] See the Dissenting Opinion of Judge Higgins, Advisory Opinion on *Nuclear Weapons*, *supra* note 1, at 585–7.

[29] R. Cryer, 'The Fine Art of Friendship: *Jus in Bello* in Afghanistan', 7 *JCSL* 37, 60 (2002).

[30] See W. A. Solf, 'Article 35', *New Rules* 192, 196.

[31] See H. Meyrowitz, 'The Principle of Superfluous Injury or Unnecessary Suffering from the Declaration of St Petersburg of 1868 to Additional Protocol I of 1977', 34 *IRRC* 98, 109–10 (1994).

of the weapon employed. Unlike lethal weapons, ' "non-lethal" weapons are designed not to kill but to incapacitate'.[32] However, the distinction between these two types of weapons is often more apparent than real. Lethal weapons are frequently non-lethal in their practical effects (judging by the percentage of wounded combatants who survive injuries caused by such weapons).[33] Conversely, non-lethal weapons (e.g., tear gas or rubber bullets) 'can cause fatalities under certain circumstances'.[34] Moreover, some weapons (like blinding lasers) – albeit uniformly non-lethal – are intractably spurned, because they are deemed to cause 'superfluous injury or unnecessary suffering' (see *infra*, III, A, (i)).

In essence, the injunction against 'superfluous injury or unnecessary suffering' hangs on a distinction between injury/suffering that is avoidable and unavoidable. This requires a comparison between the weapon in question and other options.[35] Two issues arise in particular: (a) whether an alternative weapon is available, causing less injury or suffering; and, shifting the focus, (b) whether the effects produced by the alternative weapon are sufficiently effective in neutralizing enemy personnel.[36] Inescapably, the 'test is valid only for weapons designed exclusively for antipersonnel purposes', inasmuch as (for instance) artillery explosives designed to pulverize military fortifications 'may be expected to cause injuries to personnel in the vicinity of the target which would be more severe than necessary to render these combatants *hors de combat*'.[37]

To conclude this section, it should be mentioned that, under Article 3(a) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the employment of 'weapons calculated to cause unnecessary suffering' is regarded as a violation of the laws and customs of war giving rise to individual criminal responsibility.[38] As noted in the accompanying commentary, this text is based on the (English translation of the) Hague Regulations of 1907.[39] The reversion to the term

[32] D. P. Fidler, 'The International Legal Implications of "Non-Lethal" Weapons', 21 *MJIL* 51, 55 (1999–2000).

[33] See R. Coupland and D. Loye, 'International Humanitarian Law and the Lethality or Non-Lethality of Weapons', *Non-Lethal Weapons: Technological and Operational Prospects* 60, 62 (M. Dando ed., 2000).

[34] *Ibid.*

[35] See C. Greenwood, 'The Law of Weaponry at the Start of the New Millennium', 71 *ILS* 185, 197 (*The Law of Armed Conflict: Into the Next Millennium*, M. N. Schmitt and L. C. Green eds., 1998).

[36] See Solf, *supra* note 30, at 196.

[37] *Ibid.*, 196–7.

[38] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY), Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 32 *ILM* 1159, 1192 (1993).

[39] *Ibid.*, 1171–2.

'calculated' – concentrating on intention – makes more sense, of course, when penal proceedings are instigated.

Article 8(2)(b)(xx) of the 1998 Rome Statute of the International Criminal Court lists as a war crime:

> 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, provided 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 an amendment in accordance with the relevant provisions set forth in articles 121 and 123.[40]

Whereas the definition of the war crime is entirely correct, its actual implementation is contingent on the text of an annex that will be prepared only in the indefinite future. Articles 121 and 123 of the Rome Statute, dealing respectively with amendments and review of the Statute, provide for a process due to begin seven years after the entry into force of the Statute[41] (which occurred in 2002). Patently, what we have in the meantime is merely lip-service to the general principles.

III. Explicit prohibitions or restrictions of certain weapons

As affirmed by the International Court of Justice (*supra*, I), the two cardinal principles of distinction (between civilians and combatants) and prohibition of unnecessary suffering to combatants are universally acknowledged. It is, therefore, undeniable that the use of any weapon inherently infringing either one of these principles is prohibited. Yet, it is easier to state the proposition *in abstracto* than to reach an agreement as to which actual weapons run afoul of LOIAC. Hence, from the days of the St Petersburg Declaration onwards it has become quite clear that, in case of doubt, the sole safe means of ensuring that a specific weapon will be interdicted is to say so unequivocally in a binding multilateral treaty. Indeed, there is by now a fairly long chain of such treaties (forged link by link), and over the years many of them have been recognized as declaratory of customary international law.

Of course, the existence of explicit prohibitions barring the use of certain weapons 'does not exhaust the meaning of the general principle'.[42] Accordingly, it is uncontested that the use of bayonets with a serrated

[40] Rome Statute of the International Criminal Court, 1998, 37 *ILM* 999, 1007 (1998).
[41] *Ibid.*, 1067–8.
[42] R. S. Clark, 'Methods of Warfare that Cause Unnecessary Suffering or Are Inherently Indiscriminate: A Memorial Tribute to Howard Berman', 28 *CWILJ* 379, 385 (1997–8).

edge and lances with barbed heads (not forbidden specifically by treaty) would be in breach of the norm proscribing unnecessary suffering to combatants.[43] But, absent an overt exclusion clause in the *lex scripta*, there are frequent disagreements which cannot be easily resolved. Thus, opinions are divided as regards the legitimacy of the use of small-calibre (high velocity) bullets,[44] shot guns,[45] cluster bombs[46] and depleted uranium projectiles.[47]

When weapons – or types of weapons, such as projectiles of a given shape, velocity or effect – are deemed to cause unnecessary suffering to combatants, they must be banned altogether (paying no attention to the circumstances of their use). The same is true of weapons which intrinsically clash with the principle of distinction, being 'incapable of distinguishing between civilian and military targets' (*supra*, I). However, in reality, the salient problem often is use of a weapon in a particular setting, rather than its original characteristics. The paradigmatic example is that of napalm – '[d]esigned for use against armored vehicles, bunkers, and built-up emplacements'[48] – which will cause unnecessary suffering if directed against infantry in the open. Furthermore, experience shows that certain situations are fraught with special danger to civilians. In order to eliminate or reduce that danger, LOIAC sometimes imposes restrictions – rather than an absolute prohibition – on recourse to a selected weapon. Restrictions may stigmatize use in specified conditions (without ruling out resort to the same weapon on other occasions). For instance, as will be shown (*infra*, A, d), booby-traps can be licit weapons, but not when they are attached to children's toys or other select objects. Restrictions may also mean that munitions of determined types (see, e.g., *infra*, A, e–f) must be equipped with self-destruct mechanisms rendering them harmless after an interval of time.[49] These types of restrictions are not

[43] See de Preux, *supra* note 18, at 405.

[44] See E. Prokosch, 'The Swiss Draft Protocol on Small-Calibre Weapon Systems: Bringing the Dumdum Ban (1899) Up to Date', 35 *IRRC* 411–21 (1995).

[45] See S. Oeter, 'Methods and Means of Combat', *Handbook* 105, 122–3. *Per contra*, see *Annotated Supplement* 439.

[46] See T. J. Herthel, 'On the Chopping Block: Cluster Munitions and the Law of War', 51 *AFLR* 229–69 (2001).

[47] See E. David, 'Respect for the Principle of Distinction in the Kosovo War', 3 *YIHL* 81, 96–7 (2000).

[48] *Operational Law Handbook* 15 (US Army Judge Advocate General, 2003).

[49] Proposals are currently under discussion to require the equipment with self-destruct mechanisms of an increasing number of munitions (which may initially fail to explode and become a tangible threat as 'remnants of war' even in the post-conflict timeframe). See P. Herby and A. R. Nuiten, 'Explosive Remnants of War: Protecting Civilians through an Additional Protocol to the 1980 Convention on Certain Conventional Weapons', 83 *IRRC* 195–205 (2001).

to be confused with numerical restrictions of weapons, which are the hallmark of arms control treaties.[50]

Weapons subject by treaty to prohibition or restriction of use can be divided into two categories: conventional weapons and weapons of mass destruction.

A. Conventional weapons

(a) Poison Article 23(a) of the Hague Regulations of 1899/1907 forbids the employment of poison or poisoned weapons.[51] The banning of poison as such relates mainly to the poisoning of drinking water (e.g., wells used by enemy forces) or foodstuffs. The condemnation of poisoned weapons applies, by way of illustration, to poisoned arrows or spears. Akin to poison is 'any substance intended to aggravate a wound'.[52]

The repudiation of poison is the oldest of all injunctions against use of weapons in international armed conflict: it goes back to the dawn of international law and beyond.[53] The International Military Tribunal, in the Nuremberg Judgment of 1946, cited the Hague prohibition of poisoned weapons as enforced long before the date of the Regulations and a punishable offence against the laws of war since 1907.[54] Recourse to poisonous weapons is inscribed as a violation of the laws or customs of war, carrying individual criminal responsibility, in Article 3(a) of the ICTY Statute of 1993.[55] 'Employing poison or poisoned weapons' is a war crime under Article 8(2)(b)(xvii) of the Rome Statute of the International Criminal Court.[56]

(b) Certain projectiles

(i) Under the 1868 St Petersburg Declaration, it is not permissible to use in war – by land or sea – projectiles weighing below 400 grammes, which are either explosive or charged with fulminating or inflammable substances.[57] It must be understood that '[t]he limit of 400 grammes was more or less arbitrary', but it was supposed to draw a dividing

[50] Cf. E. P. J. Myjer, 'Means and Methods of Warfare and the Coincidence of Norms between the Humanitarian Law of Armed Conflict and the Law of Arms Control', *International Law and the Hague's 750th Anniversary* 371, 373 (W. P. Heere ed., 1999).
[51] Hague Regulations, *supra* notes 21–2, at 82.
[52] See de Preux, *supra* note 18, at 405.
[53] See L. C. Green, *The Contemporary Law of Armed Conflict* 142 (2nd edn, 2000).
[54] International Military Tribunal (Nuremberg), Judgment and Sentences, 1946, 41 *AJIL* 172, 218 (1947).
[55] ICTY Statute, *supra* note 38, at 1192. [56] Rome Statute, *supra* note 40, at 1007.
[57] St Petersburg Declaration, *supra* note 17, at 102.

line 'between explosive artillery and rifle munitions'.[58] Explosive or inflammable artillery shells (designed against 'hard' targets, such as fortifications) are legitimate ordnance – notwithstanding their devastating effect on individual soldiers caught in the fire – while rifle or machine-gun bullets (designed against 'soft' targets, i.e., human bodies) must not be explosive or inflammable.[59]

Article 18 of the 1923 (non-binding) Hague Rules of Air Warfare sanctions the use of explosive projectiles by or against aircraft, stating that this applies equally to Parties and non-Parties to the St Petersburg Declaration.[60] The Commission of Jurists, which drew up the Rules, commented (in an explanatory note) that, since it is impracticable for airmen in flight to change ammunition when aiming at different targets, the provision applies even if aircraft fire at land forces.[61] Hence, air warfare constitutes an exception to the application of the St Petersburg Declaration.

(ii) Pursuant to Hague Declaration (IV, 3) of 1899 Concerning Expanding Bullets, it is illegal to use bullets that 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.[62] The projectiles in question are usually known as 'dum-dum' bullets (named after a British arsenal in India where they were first manufactured). 'Employing 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 a war crime under Article 8(2)(b)(xix) of the Rome Statute.[63] It must be appreciated, however, that (aa) bullets designed with a hollow point for increased accuracy are not banned if they do not expand on impact; (bb) expanding soft-nosed bullets, indisputably prohibited in international armed conflict, are not ruled out in certain circumstances of internal law enforcement operations (primarily, against terrorists).[64]

(c) Non-detectable fragments In conformity with Protocol I of the 1980 Convention on Certain Conventional Weapons, '[i]t is prohibited to

[58] F. Kalshoven, 'Arms, Armaments and International Law', 191 *RCADI* 183, 207 (1985).
[59] *Ibid.*, 208.
[60] Hague Rules of Air Warfare, 1923, *Laws of Armed Conflicts* 207, 210.
[61] See Commission of Jurists to Consider and Report upon the Revision of the General Rules of Warfare, General Report, 32 *AJIL*, Supp., 1, 20–1 (1938) (explanatory note to Article 18).
[62] Hague Declaration (IV, 3) Concerning Expanding Bullets, 1899, *Laws of Armed Conflicts* 109, *id.*
[63] Rome Statute, *supra* note 40, at 1007.
[64] See A. P. V. Rogers and P. Malherbe, *Model Manual on the Law of Armed Conflict for Armed Forces* 213 (ICRC, 1999).

use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays'.[65] The rationale is that, since such fragments cannot be detected by X-rays, they render medical treatment almost impossible and thereby cause unnecessary suffering.[66] Metal fragments (produced, e.g., by ordinary hand grenades) are not affected by the Protocol, which is relevant only to materials immune from detection by X-rays such as plastic or glass. The crux of the text is the 'primary effect' of the weapon. Consequently, the use of plastic casings of anti-vehicle landmines (the foremost purpose of which is to make mine detection more difficult) is not forbidden.[67]

(d) Booby-traps Article 6 of Protocol II of the 1980 Convention prohibits in all circumstances the use of booby-traps:

(i) In the form of 'an apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached';
(ii) In any way attached to or associated with internationally recognized protective emblems; sick, wounded or dead persons; burial or cremation sites; medical facilities, equipment, supplies or transportation; children's toys and other portable objects specially designed for the feeding, health, hygiene, clothing or education of children; food or drink; kitchen utensils or appliances, except in military locations; objects of a religious nature; historic monuments, works of art or places of worship; animals or their carcasses;
(iii) Designed to cause superfluous injury or unnecessary suffering.[68]

The first category of prohibited booby-traps defined in Article 6 applies only to devices – in the form of ostensibly harmless portable objects – specifically designed and constructed ('prefabricated') to contain explosives, and it is not forbidden to booby-trap 'existing attractive items'.[69] In other words, 'a belligerent may booby-trap a camera, but it may not manufacture booby-traps which appear to be cameras'.[70] It is noteworthy that the prohibition applies to the use of 'letter bombs'.[71]

[65] Protocol on Non-Detectable Fragments (Protocol I), Annexed to Convention on Certain Conventional Weapons, *supra* note 24, at 185, *id.*
[66] See Rogers and Malherbe, *supra* note 64, at 45. [67] See *ibid.*
[68] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II), Annexed to Convention on Certain Conventional Weapons, *supra* note 24, at 185, 187.
[69] See A. P. V. Rogers, 'A Commentary on the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices', 26 *RDMDG* 185, 199 (1987).
[70] H. Levie, 'Prohibitions and Restrictions on the Use of Conventional Weapons', 68 *SJLR* 643, 658 n. 69 (1994).
[71] B. M. Carnahan, 'The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons', 105 *Mil.LR* 73, 89 (1984).

Article 3 of the Protocol disallows the use of booby-traps, directly or indiscriminately, against civilians.[72] This prohibition is not strictly required, inasmuch as it merely reiterates the general rule of LOIAC in the specific context of booby-traps.[73] What is more important is that Article 4 restricts the use of booby-traps in any city, town, village or other area containing a similar civilian concentration – where combat between ground forces is not taking place or does not appear to be imminent – unless they are placed in close vicinity to a military objective or measures are taken to protect civilians from their effects (by posting sentries or warning signs, constructing fences, etc.).[74]

Most of the protection from booby-traps is established with civilians in mind, although some of it is conferred on combatants.[75] The degree of combatants' protection from booby-traps varies with circumstances. Thus, it is permitted in Article 6 to booby-trap a kitchen appliance (such as a refrigerator) in a military location, but not food or drink.[76] The fact that combatants are not entirely protected from booby-traps indicates that booby-traps *per se* are not deemed to contravene the principle of unnecessary suffering.[77] The specific ban of any booby-trap designed to cause superfluous injury or unnecessary suffering bolsters the argument. By implication, other booby-traps – not having such a design – are legitimate. Yet, Parties to the conflict are probably enjoined from using the archetypical booby-trap – a hidden hole in the ground with sharp bamboo spears embedded underneath a false cover – inasmuch as a person falling into the trap is likely to 'die a slow and painful death'.[78]

(e) Landmines Protocol II of the 1980 Convention treats landmines on a parity with booby-traps, in so far as the prohibitions and restrictions of Articles 3–4 are concerned.[79] Article 5 adds limitations on the employment of remotely delivered mines (especially, by requiring the use of an effective self-actuating neutralizing mechanism, which would render each such mine harmless once it no longer serves a military purpose).[80] These mines, generally scattered in strings by long-range aircraft, are designed to strike at military objectives far behind the front line.[81] However, since

[72] Protocol II, *supra* note 68, at 185–6.
[73] See M. Nash (Leich), 'Contemporary Practice of the United States Relating to International Law', 91 *AJIL* 325, 335–6 (1997).
[74] Protocol II, *supra* note 68, at 186.
[75] See Kalshoven, *supra* note 58, at 255.
[76] See Rogers, *supra* note 69, at 199.
[77] See Nash, *supra* note 73, at 334–5.
[78] F. Kalshoven and L. Zegveld, *Constraints on the Waging of War* 161 (ICRC, 3rd edn, 2001).
[79] Protocol II, *supra* note 68, at 185–6.
[80] *Ibid.*, 186.
[81] See E. Rauch, 'The Protection of the Civilian Population in International Armed Conflicts and the Use of Landmines', 24 *GYIL* 262, 268, 282–4 (1981).

they are not laid in minefields, their location – even if recorded – can only be estimated and they pose an increased menace to civilians.[82]

In 1996, Protocol II was amended, prohibiting the use of certain types of landmines equipped with (aa) a mechanism designed to detonate the munition in response to the operation of commonly available (usually magnetic) mine detectors; or with (bb) an anti-handling device capable of functioning after the mine has been deactivated.[83] In order to facilitate their ultimate clearance, the amended text also forbids the use of non-detectable anti-personnel mines (as distinct from anti-vehicle or anti-tank mines) and introduces further restrictions: anti-personnel mines must either be equipped with a self-deactivation device or be placed in an area marked, fenced and monitored by military personnel (remotely delivered mines must, therefore, always have a self-deactivation device).[84] Accordingly, anti-personnel mines cannot simply be abandoned live in the ground: unless properly marked and controlled, they must deactivate themselves.

The location of pre-planned minefields (as well as areas in which large-scale use of booby-traps was made) must be recorded by the belligerent laying them, in accordance with Article 7 of Protocol II.[85] The amended Protocol of 1996 requires recording of all information concerning minefields,[86] i.e., irrespective of their being pre-planned.[87] The benefits of recording are readily apparent after the cessation of active hostilities, when the removal of minefields has to be undertaken.[88]

Amended Protocol II, while making progress in addressing the issue of anti-personnel landmines, fell far short of common expectations.[89] The ICRC deemed the new text 'woefully inadequate', chiefly because (i) anti-personnel landmines can be long-lasting; (ii) protections such as constant marking, fencing and monitoring are often unrealistic; and (iii) self-deactivating devices commence functioning after considerable time.[90] The problem is that, even if originally (when laid in the ground) anti-personnel landmines are exclusively directed at enemy combatants,

[82] See W. J. Fenrick, 'The Conventional Weapons Convention: A Modest but Useful Treaty', 30 *IRRC* 498, 504 (1990).
[83] Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 1996, 35 *ILM* 1209, 1210 (1996) (Article 3(5)–(6)).
[84] *Ibid.*, 1211 (Articles 4–6).
[85] Protocol II, *supra* note 68, at 187.
[86] Amended Protocol II, *supra* note 83, at 1212 (Article 9(1)).
[87] See M. A. Ferrer, 'Affirming Our Common Humanity: Regulating Landmines to Protect Civilians and Children in the Developing World', 20 *HICLR* 135, 153 (1996–7).
[88] See Article 9 of Protocol II, *supra* note 68, at 188.
[89] See S. Maslen and P. Herby, 'An International Ban on Anti-Personnel Mines: History and Negotiations of the "Ottawa Treaty"', 38 *IRRC* 693, *id.* (1998).
[90] *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross* 448, 458–9 (L. Maresca and S. Maslen eds., 2000).

they are liable to kill or injure civilians at the actual time of detonation.[91] Through their delayed-action mechanism, anti-personnel landmines can lie dormant long after the military objective has moved away, and – lacking the capability to distinguish between the footfalls of combatant and civilians – they detonate with indiscriminate effects.[92] If that is not enough, countless anti-personnel landmines remain active for many years following the end of the armed conflict and may cause 'severe disruption to civilian life' in peacetime.[93]

Spurred by public opinion, efforts to bring about an overall renunciation of anti-personnel landmines continued, culminating in the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.[94] Under Article 1 of the Convention, States Parties undertake 'never under any circumstances' to use anti-personnel mines, to develop, produce, acquire, stockpile, retain or transfer them; and further assume the obligation to destroy all existing anti-personnel mines.[95] Article 5 clarifies that the destruction obligation applies also to existing mined areas under the control of States Parties (temporally, this may be done over a period of ten years, and the deadline can be extended).[96]

Article 2(1) of the Convention defines an anti-personnel mine as 'a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons'.[97] There are two important aspects to this definition. First, it deletes the adverb 'primarily', which originally preceded the word 'designed' in the same text adopted only a year earlier, in amended Protocol II.[98] The adverb was removed, since numerous observers thought that it had introduced a dangerous loophole into the prohibition.[99] Secondly, the definition goes on to state that '[m]ines designed to be detonated by the presence, proximity or contact of vehicles as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped'.[100] An anti-handling device is defined as 'a device intended to protect a mine and which is part of,

[91] *Landmines: A Deadly Legacy* 274–5 (Human Rights Watch and Physicians for Human Rights, 1993).
[92] See Ferrer, *supra* note 87, at 157–8.
[93] A. Parlow, 'Banning Land Mines', 16 *HRQ* 715, 718 (1994).
[94] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 1997, 36 *ILM* 1507 (1997).
[95] *Ibid.*, 1510. [96] *Ibid.*, 1511. [97] *Ibid.*, 1510.
[98] Amended Protocol II, *supra* note 83, at 1209 (Article 2(3)).
[99] See S. D. Goose, 'The Ottawa Process and the 1997 Mine Ban Treaty', 1 *YIHL* 269, 281 (1998).
[100] Anti-Personnel Mines Convention, *supra* note 94, at 1510.

linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine'.[101] The *travaux préparatoires* indicate that, should an anti-handling device explode in the absence of an intentional attempt to tamper with the anti-vehicle mine, it would itself be banned as an anti-personnel mine.[102]

In any event, anti-vehicle mines are not banned, notwithstanding the fact that they too may have a delayed-action impact on civilian tractors and trucks long after the hostilities are over.[103]

The United States has refused to sign the Anti-Personnel Mines Convention, after failing to secure an exception for the immense minefields in place in Korea, but it undertook extensive de-mining efforts elsewhere.[104] There is every reason to believe that the prohibition of anti-personnel mines will gradually be endorsed by customary international law.

(f) Naval mines Modern naval mines fall into diverse categories. Some technologically advanced naval mines are controlled, meaning that they 'have no destructive capability until affirmatively activated by some form of arming order'.[105] As such, they can be supervised and need have no bearing on the application of the principle of distinction. Other sophisticated naval mines have specifically been designed to seek out and destroy submarines, so they pose no risk to any surface ships.[106] There are even naval mines fitted with sensors activated by particular types of surface warships (to the exclusion of others). Unfortunately, not every naval mine in use at the present time is state-of-the-art.

Uncontrolled naval mines – not equipped with high-tech target selection devices – can endanger all shipping indiscriminately, including neutral vessels, enemy merchant vessels immune from attack, passenger liners and hospital ships (see *infra*, Chapter 4, V). Neutral territorial or internal waters may also be affected when free-floating mines are swept there by currents, waves and winds. There is no doubt that naval minefields, laid by belligerent States, must not abolish freedom of navigation for neutral shipping on the high seas and must not block navigation to and from neutral ports.[107]

[101] *Ibid.* (Article 2(3)). [102] See Goose, *supra* note 99, at 281–2.
[103] On recent developments with respect to anti-vehicle mines, see D. Kaye and S. A. Solomon, 'The Second Review Conference of the 1980 Convention on Certain Conventional Weapons', 96 *AJIL* 922, 931–3 (2002).
[104] See J. P. Mustoe, 'The 1997 Treaty to Ban the Use of Landmines: Was President Clinton's Refusal to Become a Signatory Warranted?', 27 *GJICL* 541, 555–7 (1998–9).
[105] *Annotated Supplement* 442. [106] See H. S. Levie, *Mine Warfare at Sea* 114 (1992).
[107] See R. Wolfrum, 'Military Activities on the High Seas: What are the Impacts of the UN Convention on the Law of the Sea?', *The Law of Armed Conflict*, *supra* note 35, at 501, 508.

Article 1 of Protocol II of 1980 incorporates a disclaimer to the effect that it 'does not apply to the use of anti-ship mines',[108] and the governing text apposite to the latter is Hague Convention (VIII) of 1907 Relative to the Laying of Automatic Submarine Contact Mines.[109] Evidently, quite a lot has happened since 1907, and it is sometimes asserted that Hague Convention (VIII) could be regarded as overtaken by technological developments.[110] But the International Court of Justice relied on the Convention in its *Nicaragua* Judgment of 1986.[111] More recently, these norms have been restated in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea (adopted by a group of experts in 1995).[112]

Hague Convention (VIII) deals with automatic contact mines, namely, free-floating mines not secured by weights keeping them in place (and, therefore, likely to be swept from one spot to another). The main rules encapsulated in the Convention are:

(i) Article 1(1) forbids laying unanchored automatic contact mines, unless they are so constructed as to become harmless one hour at the most after whoever laid them ceases to be in control.[113]

(ii) Article 1(2) prohibits laying anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings.[114] Therefore, it is not enough for automatic contact mines to be anchored (so as to be held in place): should such a mine become disconnected, it must disarm itself.

(iii) Article 3 sets forth that (aa) when automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping; (bb) belligerent States must do their utmost to render the mines harmless within a limited time; (cc) should the mines cease to be under surveillance, belligerent States must address a notice of danger zones to all concerned as soon as military exigencies permit.[115]

The argument has been made that these rules ought to be taken as strictly germane to automatic contact mines, anchors and moorings.[116]

[108] Protocol II, *supra* note 68, at 185.
[109] Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, 1907, *Laws of Armed Conflicts* 803.
[110] See J. J. Busuttil, *Naval Weapons Systems and the Contemporary Law of War* 66 (1998).
[111] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), [1986] *ICJ Rep.* 14, 112.
[112] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* 170–2 (L. Doswald-Beck ed., 1995).
[113] Hague Convention (VIII), *supra* note 109, at 804. [114] *Ibid.* [115] *Ibid.*
[116] On this question, see Levie, *supra* note 106, at 105–6.

Yet, there is no reason to refrain from applying the Hague norms to modern naval mines emplaced on the seabed and activated by acoustic or magnetic devices (or even by water pressure generated by passing ships). The core of the Hague concept is as valid as ever: when naval mines are free-floating (or get detached from their emplacement), they must become harmless within an hour after loss of control over them.[117] Notification to neutrals of minefields as a hazard to navigation is required, unless the mines are equipped with target selection devices and therefore present no danger to shipping at large.[118]

(g) Torpedoes Article 1(3) of Hague Convention (VIII) prohibits the use of torpedoes which do not become harmless when they have missed their mark.[119] The reference to torpedoes in an instrument dealing with naval mines is due to the fact that, having run its course, a torpedo may lie in the water like a free-floating mine.[120] The resemblance between the two categories of munitions is even more acute today when a modern naval mine (fitted with sensors) is laid under water at great depth. Once activated by a passing ship, the target is acquired in such a manner that 'a mine transforms itself into a torpedo'.[121]

Normally, a torpedo that has missed its mark would sink, but one way or another it must be rendered harmless: this rule reflects contemporary customary international law.[122]

(h) Incendiaries Under Article 2(1) of Protocol III of the 1980 Convention, it is prohibited 'in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons'.[123] Standing by itself, this interdiction is redundant, inasmuch as it is unlawful to attack civilians with any weapon, whether or not incendiary.[124] However, Article 2(2) goes on to forbid 'in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons', and Article 2(3) further proscribes such an attack (unless the military

[117] See *San Remo Manual*, *supra* note 112, at 170–1. [118] *Ibid.*, 172.
[119] Hague Convention (VIII), *supra* note 109, at 804.
[120] See *San Remo Manual*, *supra* note 112, at 168.
[121] O. Bring, 'International Law and Arms Restraint at Sea', *Naval Arms Control* 187, 195 (S. Lodgaard ed., 1990).
[122] See *San Remo Manual*, *supra* note 112, at 168.
[123] Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Annexed to Convention on Certain Conventional Weapons, *supra* note 24, at 190.
[124] See Nash, *supra* note 73, at 346.

objective is clearly separated from the concentration of civilians) when the incendiary weapon is not air-delivered.[125]

When not present near a civilian concentration, combatants are not protected by Protocol III from incendiary weapons, e.g., flame-throwers or napalm.[126] Napalm is not referred to expressly in the Protocol, although it indisputably comes within the ambit of the Protocol's definition of incendiary weapons.[127] Flame-throwers are mentioned in Article 1(1)(a).[128] The implicit permission to use flame-throwers as legitimate weapons against combatants (away from a concentration of civilians) is incompatible with the provisions of four of the five treaties of peace terminating World War I. These instruments, signed in the suburbs of Paris in 1919–20 (the St Germain Treaty of Peace with Austria,[129] the Neuilly Treaty of Peace with Bulgaria,[130] the Trianon Treaty of Peace with Hungary[131] and the (unratified) Sèvres Treaty of Peace with Turkey[132]) – all but the most important Versailles Treaty of Peace with Germany – enunciate in a declaratory fashion that the use of flame-throwers is forbidden. Admittedly, the subsequent conduct of armed forces in the field (e.g., in World War II) shows that the prohibition has been ignored in practice.

As elucidated in Article 1(1)(b) of Protocol III, the definition of incendiary weapons does not include munitions with incidental incendiary effects, like illuminants, tracers, smoke or signalling systems.[133] Such munitions can therefore be employed against combatants even within a concentration of civilians. This is of signal import where tracer bullets are concerned, since they contain a small amount of pyrophoric material but are widely in use and cause a large percentage of battlefield casualties.[134]

(i) Blinding laser weapons In 1996, a Protocol on Blinding Laser Weapons (Protocol IV) was added to the 1980 Convention.[135] Article 1 of Protocol IV bans the use and transfer of laser weapons 'specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices'.[136] The expression

[125] Protocol III, *supra* note 123, at 190–1. [126] See de Preux, *supra* note 18, at 406.
[127] See Nash, *supra* note 73, at 345. [128] Protocol III, *supra* note 123, at 190.
[129] St Germain Treaty of Peace with Austria, 1919, 3 *Major Peace Treaties of Modern History 1648–1967* 1535, 1582 (F. L. Israel ed., 1967) (Article 135).
[130] Neuilly Treaty of Peace with Bulgaria, 1919, *ibid.*, 1727, 1754 (Article 82).
[131] Trianon Treaty of Peace with Hungary, 1920, *ibid.*, 1863, 1906 (Article 119).
[132] Sèvres Treaty of Peace with Turkey, 1920, *ibid.*, 2055, 2113 (Article 176).
[133] Protocol III, *supra* note 123, at 190.
[134] See W. H. Parks, 'The Protocol on Incendiary Weapons', 30 *IRRC* 535, 545 (1990).
[135] Protocol on Blinding Laser Weapons (Protocol IV), 35 *ILM* 1218, *id.* (1996).
[136] *Ibid.*

'specifically designed' relates to the objective nature or capacity of the weapon, regardless of the subjective intent of the user.[137] As for 'unenhanced vision', the phrase openly covers eye glasses or contact lenses. But it omits from consideration binoculars, night vision goggles or a telescoping gunsight.[138]

'The effects of laser beams are not indiscriminate, rather the opposite; they can always be directed against specific targets'.[139] The reason for the disavowal of this particular weapon is that its impact – permanent loss of vision – is a severe life-long incapacitation, which is irreversible.[140] This was recognized as 'superfluous injury or unnecessary suffering', because the temporary flash blinding of enemy personnel would be sufficient for military purposes.[141] The prohibition is inapplicable if the blinding effect is not permanent.

Blinding as an 'incidental or collateral effect' of the military employment of laser systems does not come within the ambit of the prohibition under Article 3 of the Protocol.[142] The main purpose of the exception is to allow the continued use of battlefield lasers, mostly for range-finding and target designation.[143]

B. Weapons of mass destruction

(a) Chemical weapons Hague Declaration (IV, 2) of 1899 Concerning Asphyxiating Gases forbids the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.[144] It goes without saying that poisonous gases were employed on a massive scale in the course of World War I. However, Article 171 of the 1919 Versailles Treaty of Peace with Germany referred to '[t]he use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited' as the ground for forbidding their manufacture in and

[137] See M. C. Zöckler, 'Commentary on Protocol IV on Blinding Laser Weapons', 1 *YIHL* 333, 336 (1998).
[138] See J. H. McCall, 'Blinded by the Light: International Law and the Legality of Anti-Optic Laser Weapons', 30 *CILJ* 1, 37 (1997).
[139] B. Anderberg and O. Bring, 'Battlefield Laser Weapons and International Law', 57 *NJIL* 457, 459 (1988).
[140] See A. Peters, 'Blinding Laser Weapons: New Limits on the Technology of Warfare', 18 *LLAICLJ* 733, 752–3 (1995–6).
[141] See B. M. Carnahan and M. Robertson, 'The Protocol on "Blinding Weapons": A New Direction for International Humanitarian Law', 90 *AJIL* 484, 486 (1996).
[142] Protocol IV, *supra* note 135, at 1218.
[143] See L. Doswald-Beck, 'New Protocol on Blinding Laser Weapons', 36 *IRRC* 272, 290, 293 (1996).
[144] Hague Declaration (IV, 2) Concerning Asphyxiating Gases, 1899, *Laws of Armed Conflicts* 106 *id.*

importation to Germany.[145] A parallel clause was inserted into the other Treaties of Peace of St Germain,[146] Neuilly,[147] Trianon[148] and Sèvres.[149] A short time later, a declaration appeared in Article 5 of the 1922 Washington Treaty Relating to the Use of Submarines and Noxious Gases in Warfare (which never entered into force), whereby a prohibition of 'asphyxiating, poisonous or other gases and all analogous liquids, materials or devices' had already been incorporated in treaties to which the majority of States are Parties, and all contracting Parties agreed to be bound by the prohibition between themselves in order to make it universally accepted.[150]

The watershed instrument on gas warfare is the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.[151] The Geneva Protocol follows the language of the Washington Treaty: it starts by stating that 'the use in war of asphyxiating, poisonous or other gases and of all analogous liquid materials or devices' has already been prohibited in treaties to which the majority of States are Parties; adding that those contracting Parties to the Protocol not having done so now accept the prohibition as binding between themselves, with a view to making it universally accepted as a part of international law.[152]

The reference to the acceptance of the Geneva Protocol's prohibition in the relations between the Parties (*inter se*) might suggest that – at the time the text was adopted – the injunction did not reach the goal of general acceptance as part of customary international law. Not surprisingly, perhaps, it took the United States half a century to ratify the Geneva Protocol (in 1975). Still, even prior to the American ratification, the 'weight of opinion' favoured the view that the Protocol had come to reflect customary international law.[153] Whatever the legal position was by 1975, there is no doubt at all that at present the Geneva Protocol is fully

[145] Versailles Treaty of Peace with Germany, 1919, 2 *Major Peace Treaties of Modern History 1648–1967*, *supra* note 129, at 1265, 1367.
[146] St Germain Treaty of Peace with Austria, *supra* note 129, at 1582 (Article 135).
[147] Neuilly Treaty of Peace with Bulgaria, *supra* note 130, at 1754 (Article 82).
[148] Trianon Treaty of Peace with Hungary, *supra* note 131, at 1906 (Article 119).
[149] Sèvres Treaty of Peace with Turkey, *supra* note 132, at 2113 (Article 176).
[150] Washington Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, 1922, *Laws of Armed Conflicts* 877, 878.
[151] Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925, *Laws of Armed Conflicts* 115.
[152] *Ibid.*, 116.
[153] See R. R. Baxter and T. Buergenthal, 'Legal Aspects of the Geneva Protocol of 1925', 64 *AJIL* 853, *id.* (1970).

consolidated as customary international law. That is not to say that the use of gas warfare has disappeared in practice. In fact, mustard gas and nerve gas were resorted to by Iraq in the course of the Iran–Iraq War of the 1980s.[154] But this was a flagrant breach of LOIAC. 'Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices' is a war crime pursuant to Article 8(b)(2)(xviii) of the Rome Statute.[155]

The question of chemical weapons in their totality was laid to rest only in 1993, in the Paris Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.[156] In Article I of this Convention, States Parties are obligated 'never under any circumstances' to use chemical weapons, to engage in military preparations for such use, or to develop, produce, acquire, stockpile, retain or transfer them; and they undertake to destroy chemical weapons that they possess.[157] The paramount legal engagement is not to use chemical weapons, all the other prohibitions being 'secondary to the objective'.[158]

The term 'chemical weapons' is defined in Article II, and the linchpin of the definition (in Paragraph 2) is that the chemical is toxic, i.e., 'its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals'.[159] The reference to humans and animals leaves out anti-plant agents (herbicides). This resulted from a 'compromise package',[160] which deleted herbicides from the definition in the operative clause yet inserted in the Preamble the following Paragraph:

> *Recognizing* the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare.[161]

We shall return to herbicides *infra* (Chapter 7, II, C, c).

Non-lethal chemicals (mainly tear gas) are included in the definition of chemical weapons which refers to temporary incapacitation. In

[154] See T. L. H. McCormack, 'International Law and the Use of Chemical Weapons in the Gulf War', 21 *CWILJ* 1, 12–17 (1990–1).
[155] Rome Statute, *supra* note 40, at 1007.
[156] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993, 32 *ILM* 800 (1993).
[157] *Ibid.*, 804.
[158] W. Krutzsch and R. Trapp, *A Commentary on the Chemical Weapons Convention* 14 (1994).
[159] Chemical Weapons Convention, *supra* note 156, at 805.
[160] See Krutzsch and Trapp, *supra* note 158, at 8, 30.
[161] Chemical Weapons Convention, *supra* note 156, at 804.

Article I(5), States Parties undertake not to use riot control agents as a method of warfare; whereas Article II(9)(d) explicitly allows the employment of chemicals for law enforcement purposes, including domestic riot control.[162] The net outcome is that recourse to tear gas and other riot-control chemicals is permissible in non-combat situations in wartime, e.g., 'in prisoners-of-war camps or military prisons'.[163]

(b) Biological weapons The 1925 Geneva Protocol states that it extends the prohibition of gas warfare to the use of bacteriological methods of warfare as between contracting Parties.[164] Over the years it was felt necessary to address the issue of biological weapons head on, delinked from gas warfare. This was accomplished when the UN General Assembly drew up in 1971 a Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, opened for signature in 1972.[165] In this instrument, the Parties undertake 'never in any circumstances to develop, produce, stockpile or otherwise acquire or retain' biological weapons designed to be used for hostile purposes or in armed conflict, and to destroy (or divert to peaceful purposes) and not to transfer existing weapons.[166]

The formula first agreed upon here has served as a model for the two subsequent instruments (mentioned *supra*) on chemical weapons and anti-personnel landmines. There is one major difference, however. In the more recent treaties, the capstone of the prohibition is use (which is the most important issue from the standpoint of LOIAC). The original formula of 1971 does not allude to use, it being understood that use of biological weapons was proscribed already in the 1925 Geneva Protocol.[167] In any event, when States undertake not to produce, acquire or retain a certain weapon under any circumstances – namely, not to possess it – this effectively precludes any possible use as well.[168] After all, 'what is not possessed cannot be used'.[169]

[162] *Ibid.*, 804, 806. [163] See Krutzsch and Trapp, *supra* note 158, at 42.
[164] Geneva Protocol, *supra* note 151, at 116.
[165] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1971, *Laws of Armed Conflicts* 137.
[166] *Ibid.*, 138–9.
[167] See J. Goldblat, 'The Biological Weapons Convention: An Overview', 37 *IRRC* 251, 257 (1997).
[168] See Myjer, *supra* note 50, at 374.
[169] A. V. Lowe, '1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction', *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* 623, 643 (N. Ronzitti ed., 1988).

IV. The status of nuclear weapons

Unlike biological and chemical weapons, nuclear weapons are not subject to any general treaty banning their use. That does not denote that nuclear weapons are beyond the reach of LOIAC. As the International Court of Justice held in the Advisory Opinion on *Nuclear Weapons*:

> In the view of the vast majority of States as well as writers there can be no doubt as to the applicability of humanitarian law to nuclear weapons. The Court shares that view.[170]

Given this underlying concept as a starting point, many commentators have argued that the general prohibitions of poison and asphyxiating gases encompass the specific case of nuclear weapons, especially in light of the Geneva Protocol's reference to 'all analogous liquids, materials or devices'.[171] The Court found the thesis to be unpersuasive on the ground that other weapons of mass destruction (biological and chemical) are declared illegal by specific instruments, each 'negotiated and adopted in its own context and for its own reasons'.[172] The Court noted that there have been many rounds of negotiations regarding nuclear weapons, none of which has generated a comprehensive prohibition resembling the conventions on biological and chemical weapons.[173] There are a number of treaties prohibiting the deployment of nuclear weapons in designated areas (such as Antarctica, outer space and the seabed), their testing, and even their possession by certain countries; establishing nuclear-free zones; and creating non-proliferation obligations.[174] The Court concluded that all these treaties may foreshadow a future general prohibition of nuclear weapons, but 'they do not constitute such a prohibition by themselves'.[175]

The Court also spurned the contention that customary international law forbids the use of nuclear weapons (a contention based essentially on a series of UN General Assembly resolutions).[176] By eleven votes to three, the Court pronounced:

> There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.[177]

The Court proceeded to address the assertion that nuclear weapons by their nature are indiscriminate, since their effects are largely uncontrollable and cannot be restricted – either in time or in space – to lawful military targets.[178] The Court even stated that, '[i]n view of the unique

[170] Advisory Opinion on *Nuclear Weapons*, *supra* note 1, at 259.
[171] *Ibid.*, 248. [172] *Ibid.* [173] *Ibid.*, 248–9. [174] *Ibid.*, 249–51.
[175] *Ibid.*, 253. [176] *Ibid.*, 253–5. [177] *Ibid.*, 266. [178] *Ibid.*, 262.

characteristics of nuclear weapons', their use 'seems scarcely reconcilable' with respect for the requirements of distinction (between combatants and non-combatants) and avoidance of unnecessary suffering to combatants.[179] 'Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules applicable in armed conflict in any circumstances'.[180] The Court also enunciated that it does not have sufficient basis for determination whether and when 'clean', smaller, low-yield, tactical nuclear weapons would be legal.[181]

The Court mentioned the claim that the effects of nuclear weapons cannot be contained within the territories of the belligerent States and that they therefore necessarily run counter to the principle of neutrality.[182] But the Court did not approve or disapprove that approach either.[183]

The Court proclaimed that it 'cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake',[184] and – by seven votes to seven, by the President's casting vote – set forth:

> the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;
>
> However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.[185]

The last sentence is most troublesome. The linkage between the use of nuclear weapons and 'extreme circumstance of self-defence, in which the very survival of a State would be at stake' is hard to digest: it appears to be utterly inconsistent with the basic tenet that LOIAC (the *jus in bello*) applies equally to all belligerent States, irrespective of the merits of their cause pursuant to the *jus ad bellum*[186] (see *supra*, Chapter 1). At bottom, the Court's language implies a *non liquet*, since the Court could not conclude definitively whether the disputed action is lawful or unlawful.[187]

[179] *Ibid.* [180] *Ibid.*, 262–3. [181] *Ibid.*, 262. [182] *Ibid.*
[183] See D. Akande, 'Nuclear Weapons, Unclear Law? Deciphering the *Nuclear Weapons* Advisory Opinion of the International Court', 68 *BYBIL* 165, 202–3 (1997).
[184] Advisory Opinion on *Nuclear Weapons*, *supra* note 1, at 263. [185] *Ibid.*, 266.
[186] See Y. Dinstein, *War, Aggression and Self-Defence* 145–6 (3rd edn, 2001).
[187] See the Dissenting Opinion of Vice-President Schwebel, Advisory Opinion on *Nuclear Weapons*, *supra* note 1, at 322–3.

This is quite surprising, considering that – as pointed out – the Court (by eleven votes to three) determined that there was no conventional or customary comprehensive prohibition of the use of nuclear weapons as such. It is ordinarily understood that, if international law does not prohibit a certain conduct, that conduct is lawful.[188]

These observations do not take issue with the Court's point of departure, namely, that the employment of nuclear weapons in any international armed conflict has to be in conformity with LOIAC (international humanitarian law). The proposition, once quite common, that nuclear weapons are beyond the pale of LOIAC deserves no support at all.[189] But the rejection of such claims leaves open the question of the legality (in accordance with LOIAC) of the use of nuclear weapons in concrete cases. Having pronounced that the employment of nuclear weapons is 'generally' – to wit, not always and not inherently – contrary to the principles of LOIAC, the Court should have come to grips with the exceptional circumstances in which recourse to nuclear weapons is legitimate. That it did not do.[190]

The failure by the Court to adumbrate the scenarios in which the use of nuclear weapons will not be incompatible with LOIAC leaves this critical issue open to discussion and controversy. The overriding consideration must be the legitimate extent of anticipated collateral damage to civilians.[191] With that in mind, there seems to be no reason to fault the use of nuclear weapons in 'a strike upon troops and armor in an isolated desert region with a low-yield air-burst in conditions of no wind'.[192] Another apparently legitimate setting would be that of detonating 'clean' nuclear weapons against an enemy fleet in the middle of the ocean. In neither one of these two exceptional situations should the employment of nuclear weapons give rise to significant collateral damage to civilians.

All States members of the nuclear club are soberly aware of the colossal ramifications of a decision to unleash these cataclysmic weapons. It is no accident that, despite the huge investment in the development of nuclear arsenals and the proliferation in the number of States with access to the technology, nuclear weapons have remained on the shelf since 1945. All

[188] See the Dissenting Opinion of Judge Shahabuddeen, *ibid.*, 389–90.

[189] See C. Greenwood, '*Jus ad Bellum* and *Jus in Bello* in the *Nuclear Weapons* Advisory Opinion', *International Law, the International Court of Justice and Nuclear Weapons* 247, 259 (L. Boisson de Chazournes and P. Sands eds., 1999).

[190] See the Dissenting Opinion of Judge Higgins, Advisory Opinion on *Nuclear Weapons*, *supra* note 1, at 589.

[191] The subject is addressed *ibid.*, 587–8.

[192] M. N. Schmitt, 'The International Court of Justice and the Use of Nuclear Weapons', 362 *NWCR* 91, 108 (1998).

the same, unless their use is expressly forbidden by treaty, there is always the chance (however remote) that a series of unanticipated events will induce the dreaded chain reaction.

V. Development of new weapons

The development of new weapons need not pose a challenge to LOIAC. Indeed, new weapons can produce a greater degree of accuracy in targeting, thereby minimizing injury to civilians.[193] But that is not always the case. Some new weapons can clash with fundamental principles, for instance, by inflicting unnecessary suffering on combatants. Article 36 of Protocol I sets forth:

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.[194]

Although an innovation, this provision 'appears to be an obvious and indispensable corollary' of Articles 23(e) of the Hague Regulations and 35(2) of Protocol I.[195] If assessment of the legality of a projected weapon leads to the conclusion that its future use would be in breach of LOIAC, a decision to discard it must be taken at an early phase (preferably, at the development or pre-purchase stage) prior to actual deployment.[196] The phrase 'in some or all circumstances' in Article 36 is somewhat problematic, since it seems to cover far-fetched potentialities and even possibilities of misuse. But the correct interpretation of the wording is that the clause applies only to the 'normal or expected use' of a new weapon.[197]

The crux of the problem is that military research and development is inescapably carried out in secret, and, since States are not bound to divulge publicly what they are striving to accomplish in new armaments, other States cannot verify compliance with the provision of Article 36.[198]

[193] See L. Doswald-Beck, 'Implementation of International Humanitarian Law in Future Wars', *The Law of Armed Conflict*, *supra* note 35, at 39, 44.
[194] Protocol I, *supra* note 11, at 645.
[195] W. A. Solf, 'Article 36', *New Rules* 198, 199.
[196] See I. Daoust, R. Coupland and R. Ishoey, 'New Wars, New Weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare', 84 *IRRC* 345, 348 (2002).
[197] Solf, *supra* note 195, at 200–1.
[198] See A. Cassese, 'Means of Warfare: The Traditional and the New Law', *The New Humanitarian Law of Armed Conflict* 161, 178 (A. Cassese ed., 1979).

Any unilateral assessment of the probable effects of a new weapon in light of LOIAC 'leaves much room for subjective interpretation'.[199] There is a tangible need of an objective – and impartial – inspection of weapon development programmes by an international monitoring body, but no such procedure exists at the present time.

[199] F. Kalshoven, 'The Conventional Weapons Convention: Underlying Legal Principles', 30 *IRRC* 510, 518 (1990).

4 Legitimate military objectives

I. The principle of distinction and military objectives

In its Advisory Opinion of 1996 on *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice recognized the 'principle of distinction' – between combatants and non-combatants (civilians) – as a fundamental and 'intransgressible' principle of customary international law.[1] The requirement of distinction between combatants and civilians lies at the root of LOIAC. It is reflected in Article 48 of Additional Protocol I of 1977, entitled '[b]asic rule':

> the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[2]

There is no doubt that, irrespective of objections to sundry other stipulations of Protocol I, 'the principle of the military objective has become a part of customary international law for armed conflict' whether on land, at sea or in the air.[3]

The coinage 'military objectives' first came into use in the (non-binding) 1923 Hague Rules of Air Warfare.[4] It was replicated in the 1949 Geneva Conventions[5] (which fail to define it),[6] the 1954 Hague

[1] Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, [1996] *ICJ Rep.* 26, 257.

[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, *Laws of Armed Conflicts* 621, 650.

[3] See H. B. Robertson, 'The Principle of the Military Objective in the Law of Armed Conflict', 72 *ILS* 197, 207 (*The Law of Military Operations, Liber Amicorum Professor Jack Grunawalt*, M. N. Schmitt ed., 1998).

[4] Hague Rules of Air Warfare, 1923, *Laws of Armed Conflicts* 207, 210 (Article 24(1)).

[5] See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, *Laws of Armed Conflicts* 373, 379 (Article 19, second Paragraph); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, *ibid.*, 495, 507 (Article 18, fifth Paragraph). Both texts refer to the perils to which medical establishments may be exposed by being situated close to 'military objectives'.

[6] See E. Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application* 141 (1992).

Cultural Property Convention[7] (and especially the 1999 Second Protocol appended to the Hague Convention),[8] as well as the 1998 Rome Statute of the International Criminal Court.[9]

A binding definition of military objectives was crafted in 1977, in Article 52(2) of Protocol I:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[10]

The definition of military objectives appearing in Article 52(2) is repeated verbatim in several subsequent instruments: Protocols II and III, Annexed to the 1980 Conventional Weapons Convention;[11] and the 1999 Second Protocol to the Hague Cultural Property Convention.[12] It is reiterated in the (non-binding) San Remo Manual of 1995 on International Law Applicable to Armed Conflicts at Sea.[13] Many scholars regard the definition as embodying customary international law.[14] With one significant textual modification – to be examined *infra* – that is equally the view of the United States, which objects on other grounds to Protocol I.[15]

Notwithstanding its authoritative status, Article 52(2)'s definition leaves a lot to be desired. It is an exaggeration to claim (as does A. Cassese) that '[t]his definition is so sweeping that it can cover practically anything'.[16] Still, it is regrettable that the wording is abstract and generic, and no list of specific military objectives is provided (if only on an illustrative, non-exhaustive, basis). Under Article 57(2)(a)(i) of the Protocol,

[7] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, *Laws of Armed Conflicts* 745, 750 (Article 8(1)(a)).

[8] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 1999, 38 *ILM* 769, 770–1, 773 (1999) (Articles 6(a), 8, 13(1)(b)).

[9] Rome Statute of the International Criminal Court, 1998, 37 *ILM* 999, 1006–7 (1998) (Article 8(2)(b)(ii), (v), (ix)).

[10] Protocol I, *supra* note 2, at 652.

[11] 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, *Laws of Armed Conflicts* 179, 185 (Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, Article 2(4)); 190 (Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, Article 1(3)).

[12] Second Protocol, *supra* note 8, at 769 (Article 1(f)).

[13] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* 114 (L. Doswald-Beck ed., 1995).

[14] See T. Meron, *Human Rights and Humanitarian Norms as Customary Law* 64–5 (1989).

[15] See *Annotated Supplement* 402 n. 9.

[16] A. Cassese, *International Law* 339 (2001).

those who plan or decide upon an attack must 'do everything feasible to verify that the objectives to be attacked . . . are military objectives within the meaning of paragraph 2 of Article 52'.[17] Due to its abstract character, the definition in Article 52(2) does not produce a workable acid test for such verification. The text lends itself to 'divergent interpretations' in application, and, needless to say perhaps, '[a]mbiguous language encourages abuse'.[18]

The relative advantages of a general definition versus an enumeration of military objectives – or a combination of both – have been thoroughly discussed in connection with the preparation of the San Remo Manual.[19] The present writer believes that only a composite definition – combining an abstract statement with a non-exhaustive catalogue of concrete illustrations[20] – can effectively avoid vagueness, on the one hand, and overcome the built-in inability to anticipate future scenarios, on the other. No abstract definition standing by itself (unaccompanied by actual examples) can possibly offer a practical solution to real problems emerging – often in dismaying rapidity – on the battlefield.

The term 'attacks' is defined in Article 49(1) of the Protocol as 'acts of violence against the adversary, whether in offence or in defence'.[21] Any act of violence fits this matrix: not only massive air attacks or artillery barrages, but also small-scale attacks (like a sniper firing a single bullet). The violence must be understood in terms of the consequences of the act rather than the act itself; hence, violent acts may include cyber (computer network) attacks leading to mayhem and destruction.[22]

As Article 52(2) elucidates, all attacks must be strictly limited to military objectives. The noun 'objects', used in the definition, intrinsically relates to material and tangible things.[23] All the same, the phrase 'military objectives' is not confined to inanimate objects,[24] and the present writer

[17] Protocol I, *supra* note 2, at 654–5.
[18] E. Rosenblad, *International Humanitarian Law of Armed Conflict* 71 (1979).
[19] *San Remo Manual*, *supra* note 13, at 114–16. See also W. J. Fenrick, 'Military Objectives in the Law of Naval Warfare', *The Military Objective and the Principle of Distinction in the Law of Naval Warfare: Report, Commentaries and Proceedings of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea* 1, 4–5 (W. Heintschel von Heinegg ed., 1991).
[20] This legal technique is exhibited in Articles 2–3 of the 1974 UN General Assembly consensus Definition of Aggression, GA Resolution 3314 (XXIX), 15 *United Nations Resolutions: Series I, Resolutions Adopted by the General Assembly* 392, 393 (D. J. Djonovich ed., 1984).
[21] Protocol I, *supra* note 2, at 650.
[22] See M. N. Schmitt, 'Wired Warfare: Computer Network Attack and *Jus in Bello*', 84 *IRRC* 365, 377 (2002).
[23] C. Pilloud and J. Pictet, 'Article 52', *Commentary on the Additional Protocols* 629, 633–4.
[24] A. P. V. Rogers, *Law on the Battlefield* 33 (1996).

does not share the view that the Protocol's language fails to cover enemy military personnel.[25] To be on the safe side, the framers of Article 52(2) added the (otherwise superfluous) words '[i]n so far as objects are concerned', underscoring that not only inanimate objects constitute military objectives. Human beings can categorically come within the ambit of military objectives.[26] Indeed, all combatants, as defined *supra* (Chapter 2, I), may be targeted. Moreover, human beings are not the only living creatures who can be legitimate targets: certain types of animals – cavalry horses and pack mules in particular – qualify as military objectives.

The pivotal issue is what ingredient or dimension serves to identify a military objective. On the face of it, under Article 52(2), an object must fulfil two cumulative criteria in order to qualify as a military objective: (a) by nature, location, purpose or use, it must make an effective contribution to military action; and (b) its destruction, capture or neutralization, in the circumstances ruling at the time, must offer a definite military advantage.[27] 'In practice, however, one cannot imagine that the destruction, capture, or neutralization of an object contributing to the military action of one side would not be militarily advantageous for the enemy; it is just as difficult to imagine how the destruction, capture, or neutralization of an object could be a military advantage for one side if that same object did not somehow contribute to the military action of the enemy'.[28]

Article 52(2) refers to 'a definite military advantage' that must be gained from the (total or partial) destruction, capture or neutralization[29] of the targets. The expression 'a definite military advantage' (like 'military objectives') is derived from the Hague Rules of Air Warfare, which resorted to the formula 'a distinct military advantage'.[30] There is no apparent difference in the present context between the adjectives 'distinct' and 'definite' or, for that matter, several other alternatives pondered by the framers of Article 52(2).[31] Whatever the adjective preferred, the idea conveyed is that of 'a concrete and perceptible military advantage rather

[25] Such a view is expressed by H. DeSaussure, 'Comment', 31 *AULR* 883, 885 (1981–2).
[26] See E. Rauch, 'Attack Restraints, Target Limitations and Prohibitions or Restrictions of Use of Certain Conventional Weapons', 18 *RDMDG* 51, 55 (1979).
[27] See M. Sassòli and A. A. Bouvier, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law* 161 (ICRC, 1999).
[28] *Ibid*., n. 140.
[29] The term 'neutralization' in this setting means denial of use of an objective to the enemy without destroying it. See W. A. Solf, 'Article 52', *New Rules* 318, 325.
[30] Hague Rules of Air Warfare, *supra* note 4, at 210 (Article 24(1)).
[31] See F. Kalshoven, 'Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974–1977, Part II', 9 *NYIL* 107, 111 (1978).

than a hypothetical and speculative one'.[32] The advantage gained must be military and not, say, purely political[33] (ergo, 'forcing a change in the negotiating attitudes' of the adverse Party[34] cannot be deemed a proper military advantage). But when coalition war is being waged, the military advantage may accrue to the benefit of an allied country – or the alliance in general – rather than the attacking Party itself.[35]

The process of appraising military advantage must be made against the background of the circumstances prevailing at the time, so that the same object may be legitimately attacked in one temporal framework while not in others.[36] A church, as a place of worship, is not a military objective; nor is it a military objective when converted into a hospital; yet, if the church steeple is used by snipers, it becomes a military objective.[37] In this sense, the definition of military objectives is 'relativized':[38] there is 'no fixed borderline between civilian objects and military objectives'.[39]

The trouble is that the notion of 'military advantage' is not singularly helpful. Surely, military advantage is not restricted to tactical gains.[40] The spectrum is necessarily wide, and it extends to the security of the attacking force.[41] The key problem is that the outlook of the attacking Party is unlikely to match that of the Party under attack in evaluating the long-term military benefits of any action contemplated.[42] Moreover, the dominant view is that assessment of the military advantage can be made in light of 'an attack as a whole', as distinct from 'isolated or specific parts of the attack'.[43] The attacking Party may thus argue, e.g., that an air raid of no perceptible military advantage in itself is justified by having misled the enemy to shift its strategic gaze to the wrong sector of the front.[44]

[32] Solf, *supra* note 29, at 326.
[33] See H. DeSaussure, 'Remarks', 2 *AUJILP* 511, 513–14 (1987).
[34] Forcing such a change is viewed (wrongly) as a legitimate military advantage by B. M. Carnahan, ' "Linebacker II" and Protocol I: The Convergence of Law and Professionalism', 31 *AULR* 861, 867 (1981–2).
[35] See H. Meyrowitz, 'Le Bombardement Stratégique d'après le Protocole Additionnel I aux Conventions de Genève', 41 *ZaöRV* 1, 41 (1981).
[36] See DeSaussure, *supra* note 33, at 513.
[37] See B. A. Wortley, 'Observations on the Revision of the 1949 Geneva "Red Cross" Conventions', 54 *BYBIL* 143, 154 (1983).
[38] G. Best, *War and Law Since 1945* 272 (1994).
[39] A. Randelzhofer, 'Civilian Objects', 1 *EPIL* 603, 604.
[40] See J. A. Burger, 'International Humanitarian Law and the Kosovo Crisis: Lessons Learned or to Be Learned', 82 *IRRC* 129, 132 (2000).
[41] See *Annotated Supplement* 402.
[42] See D. Fleck, 'Strategic Bombing and the Definition of Military Objectives', 27 *IYHR* 41, 48 (1997).
[43] See S. Oeter, 'Methods and Means of Combat', *Handbook* 105, 162.
[44] See Solf, *supra* note 29, at 325.

Nonetheless, 'an attack as a whole' is a finite event, not to be confused with the entire war.[45]

II. The definition of military objectives by nature, location, purpose and use

The text of Article 52(2) incorporates helpful definitional guidelines by adverting to the nature, location, purpose and use of military objectives 'making an effective contribution to military action'. The requirement of effective contribution relates to military action in general, and there need be no 'direct connection' with specific combat operations.[46] But the expression is not open-ended. An American attempt (reflected in the US Commander's Handbook on the Law of Naval Operations[47]) to substitute the words 'military action' by the idiom 'war-fighting or war-sustaining capability' goes too far.[48] The 'war-fighting' limb can pass muster, since it may be looked upon as equivalent to military action.[49] In contrast, the 'war-sustaining' portion is too lax. The American position is that '[e]conomic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked', and the example offered is that of the destruction of raw cotton within Confederate territory by Union forces during the Civil War on the ground that sale of cotton provided funds for almost all Confederate arms and ammunition.[50] As will be seen *infra*, multiple economic objects do constitute military objectives, inasmuch as they directly support military action. The raw cotton model (which may be substituted today by the instance of a country relying almost entirely on the export of coffee beans or bananas)[51] displays the danger of introducing the slippery-slope concept of 'war-sustaining capability'. The connection between military action and exports, required to finance the war effort, is 'too remote'.[52] Had raw cotton been acknowledged as a valid military objective, almost every civilian activity might be construed by the enemy as indirectly sustaining the war effort (especially when hostilities are protracted). For an object to qualify as a military objective, there must exist a proximate nexus to military action (or 'war-fighting'). No wonder that the San Remo Manual rejected an attempt to incorporate the wording 'war-sustaining effort'.[53]

[45] See F. J. Hampson, 'Means and Methods of Warfare in the Conflict in the Gulf', *The Gulf War 1990–91 in International and English Law* 89, 94 (P. Rowe ed., 1993).
[46] See Solf, *supra* note 29, at 324. [47] *Annotated Supplement* 402.
[48] See J. J. Busuttil, *Naval Weapons Systems and the Contemporary Law of War* 148 (1998).
[49] Robertson, *supra* note 3, at 209.
[50] *Annotated Supplement* 403. [51] See Rogers, *supra* note 24, at 41.
[52] See *San Remo Manual*, *supra* note 13, at 161. [53] See *ibid.*, 150.

As for 'nature, location, purpose or use', each of these terms deserves a closer look.

A. The nature of the objective

'Nature' denotes the intrinsic character of the military objective. To meet this yardstick, an object (or living creature) must be endowed with some inherent attribute which *eo ipso* makes an effective contribution to military action. As such, the object, person, etc., automatically constitutes a legitimate target for attack in wartime.

Although no list of military objectives by nature has been compiled in a binding manner, the following non-exhaustive enumeration is believed by the present writer to reflect current legal thinking:[54]

(i) Fixed military fortifications, bases, barracks,[55] installations and emplacements, including training and war-gaming facilities;
(ii) Temporary military camps, entrenchments, staging areas, deployment positions and embarkation points;
(iii) Military units and individual members of the armed forces, whether stationed or mobile;
(iv) Weapon systems, military equipment and ordnance, armour and artillery, and military vehicles of all types;
(v) Military aircraft and missiles of all types;
(vi) Military airfields and missile launching sites;
(vii) Warships (whether surface vessels or submarines) of all types;
(viii) Military ports and docks;
(ix) Military depots, munitions dumps, warehouses or stockrooms for the storage of weapons, ordnance, military equipment and supplies (including raw materials for military use, such as petroleum);
(x) Industrial plants (even when privately owned) engaged in the manufacture of arms, munitions, military supplies and essential parts for military vehicles, vessels and aircraft (like ball-bearing factories);
(xi) Laboratories or other facilities for the research and development of new weapons and military devices;

[54] Compare the various lists of legitimate military objectives offered by *Annotated Supplement* 402; A. P. V. Rogers and P. Malherbe, *Model Manual on the Law of Armed Conflict* 72 (ICRC, 1999). See also L. C. Green, *The Contemporary Law of Armed Conflict* 191 (2nd edn, 2000).

[55] A question has been raised about the status of deserted military barracks (see K. Obradovic, 'International Humanitarian Law and the Kosovo Crisis', 82 *IRRC* 699, 720 (2000)). But the whole point about military barracks is that they constitute a military objective *per se*, irrespective of being in use. When military units are stationed there, they qualify as military objectives by themselves (see (iii)). On the other hand, if deserted military barracks are used (for instance) to house civilian refugees, the object changes its nature.

(xii) Military repair facilities;
(xiii) Power plants (electric, hydroelectric, etc.) serving the military;
(xiv) Arteries of transportation of strategic importance, principally main-line railroads and rail marshalling yards, major motorways (like the interstate roads in the USA,[56] the *Autobahnen* in Germany and the *autostradas* in Italy), navigable rivers and canals (including the tunnels and bridges of railways and trunk roads);
(xv) Ministries of Defence and any national, regional or local operational or coordination centres of command, control and communication relating to running the war (including computer centres, as well as telephone and telegraph exchanges, for military use);
(xvi) Intelligence-gathering centres related to the war effort (even when not run by the military establishment).

B. The purpose of the objective

More often than not, the 'purpose' of a military objective is determined either by its (inherent) nature or by its (*de facto*) use. But if the word 'purpose' in Article 52(2) is not redundant, it must be distinguished from both nature and use. The present writer is of the opinion that the purpose of an object – as a separate ground for classifying it as a military target – is determined after the crystallization of its original nature, albeit prior to actual use. In other words, the military purpose is assumed not to be stamped on the objective from the outset (otherwise, the target would be military by nature). Military purpose is deduced from an established intention of a belligerent as regards future use. As pointed out by the official ICRC Commentary:

> The criterion of *purpose* is concerned with the intended future use of an object, while that of *use* is concerned with its present function.[57]

At times, enemy intentions are crystal clear, and then the branding of an object (by purpose) as a military target becomes rather easy. A good illustration might be that of a civilian luxury liner, which a belligerent overtly plans (already in peacetime) to turn into a troop ship at the moment of general mobilization. Whereas by nature a civilian object, and not yet in use as a troop ship, it may be attacked as a military objective

[56] Appropriately enough, the mammoth US interstate network (with a total length of more than 45,000 miles) – initiated by President Eisenhower – is formally known as the National System of Interstate and Defense Highways. See 26 *The New Encyclopaedia Britannica* 324 (15th edn, 1997).
[57] Pilloud and Pictet, *supra* note 23, at 636.

at the outbreak of hostilities (assuming that it is no longer serving as a passenger liner).

Unfortunately, most enemy intentions are not so easy to decipher, and then much depends on the gathering and analysis of intelligence which may be faulty. When in doubt, caution is called for. Thus, field intelligence revealing that the enemy intends to use a particular school as a munitions depot does not justify an attack against the school as long as the munitions have not been moved in.[58] The Allied bombing in 1944 of the famous Abbey of Monte Cassino is a notorious case of a decision founded on flimsy intelligence reports, linked to a firm supposition ('the abbey made such a perfect observation point that surely no army could have refrained from using it') which turned out to have been entirely false.[59] This writer cannot subscribe to the conclusion that the Abbey was a military objective only because it appeared to be important to deny its potential use to an enemy (who in reality refrained from using it).[60] Purpose is predicated on intentions known to guide the adversary, and not on those figured out hypothetically in contingency plans based on a 'worst case scenario'.

C. The use of the objective

Actual 'use' of an objective does not depend necessarily on its original nature or on any (later) intended purpose. A leading example is that of the celebrated 'Taxis of the Marne' commandeered in September 1914 to transport French reserves to the front line, thereby saving Paris from the advancing German forces.[61] 'So long as these privately owned taxicabs were operated for profit and served their normal purposes, they were not military equipment. Once they were requisitioned for the transportation of French troops, their function changed'.[62] They became military objectives through use.

Article 52(3) of the Protocol prescribes:

> In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.[63]

There are three elements here:

(i) Certain objects are normally (by nature) dedicated to civilian purposes and, as long as they fulfil only their essential function, they

[58] See Rogers, *supra* note 24, at 36. [59] *Ibid.*, 54–5. [60] See *ibid.*, 55.
[61] See G. Schwarzenberger, 2 *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* 112 (1968).
[62] *Ibid.*, 113. [63] Protocol I, *supra* note 2, at 652.

must not be treated as military targets. The templates are places of worship, civilian dwellings and schools.

(ii) The same objects may nevertheless be used in actuality in a manner making an effective contribution to military action. When (and as long as) they are subject to such use, outside their original function, they can be treated as military objectives. The dominant consideration ought to be 'the circumstances ruling at the time' (referred to in the text of Article 52(2)).

(iii) Article 52(3) adds a caveat that, should there be doubt whether an object normally dedicated to civilian purposes is actually used to make an effective contribution to military action, it must 'be presumed not to be so used'. The presumption gave rise to controversy at the time of the drafting of this clause, and an attempt to create an exception for objects located in the contact zone[64] failed in the ensuing vote.[65] While the results of the vote may reflect a '[r]efusal to recognize the realities of combat' in some situations,[66] it must be taken into account that the presumption (which is rebuttable) comes into play only in case of doubt. There is no room for doubt once combatants are exposed to direct fire from a supposedly civilian object.[67] If a steeple of a church or a minaret of a mosque is used as a sniper's nest, doubt is eliminated and the enemy is entitled to treat it as a military objective.[68] The degree of doubt that has to exist prior to the emergence of the (rebuttable) presumption is by no means clear. But surely that doubt has to arise in the mind of the attacker, based upon 'the circumstances ruling at the time'.

It follows that, by dint of military use (or, more precisely, abuse), virtually every civilian object – albeit, innately, deemed worthy of protection by LOIAC – can become a military objective.[69]

D. The location of the objective

'Location' of an objective must be factored in, regardless of the nature, purpose and use thereof. It stands to reason that the location of a civilian object within a military objective (exemplified by a children's day

[64] A contact zone means the area where the most forward elements of the armed forces of both sides are in contact with each other. See C. Pilloud and J. Pictet, 'Article 59', *Commentary on the Additional Protocols* 699, 701 n. 2.

[65] See Solf, *supra* note 29, at 326–7.

[66] See W. H. Parks, 'Air War and the Law of War', 32 *AFLR* 1, 137 (1990).

[67] See Solf, *supra* note 29, at 327.

[68] Countless other examples can be postulated. Rogers refers to the case of a cathedral used as divisional headquarters. Rogers, *supra* note 24, at 35.

[69] See Sassòli and Bouvier, *supra* note 27, at 161.

care centre for the benefit of civilian employees and dependents within a sprawling military base) may expose it to the risks of an attack from a distance against that military objective. The same applies to a merchant vessel entering a military port.

The primary issue with respect to location goes beyond these elementary observations. The notion underlying the reference to location is that a specific land area can be regarded *per se* as a military objective.[70] Admittedly, the incidence of such locations cannot be too widespread: there must be a distinctive feature turning a piece of land into a military objective (e.g., an important mountain pass; a trail in the jungle or in a swamp area; a bridgehead; or a spit of land controlling the entrance of a harbour).[71]

E. Bridges

The quadruple subdivision of military objectives by nature, purpose, use and location is not as neat as it sounds, and certain objectives can be catalogued within more than one subset. Bridges may serve as a prime illustration. Bridges constructed for the engineering needs of major motorways and rail tracks are surely integrated in the overall network: like the roads and the tracks that they serve, they constitute military objectives by nature. Additionally, even where bridges connect non-arterial lines of transportation, as long as they are apt to have a perceptible role in the transport of military reinforcements and supplies, their destruction is almost self-explanatory as a measure playing havoc with enemy logistics. It is wrong to assume (as does M. Bothe in the context of bridges targeted during the Kosovo air campaign of 1999) that bridges can be attacked only 'where supplies destined for the front must pass over' them.[72] The destruction of bridges can be effected to disrupt any movements of troops and military supplies, not necessarily in the direction of the front.

If not by nature, most bridges may qualify as military objectives by purpose, use or – above all – location.[73] Every significant waterway or similar geophysical obstruction to traffic (like a deep ravine) must be perceived as a possible military barrier, and there comes a time when the strategy of either belligerent would dictate that all bridges (including pedestrian

[70] For the underlying reasons, see Rogers, *supra* note 24, at 38–9.

[71] See E. Rauch, 'The Protection of the Civilian Population in International Armed Conflicts and the Use of Landmines', 24 *GYIL* 262, 273–7 (1981).

[72] M. Bothe, 'The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY', 12 *EJIL* 531, 534 (2001).

[73] As for bridges as military objectives by location, see Pilloud and Pictet, *supra* note 23, at 636.

overpasses) across the obstacle have to be destroyed or neutralized. There is nothing wrong in a military policy striving to effect a fragmentation of enemy land forces through the destruction of all bridges – however minor in themselves – spanning a wide river. Thus, in the Gulf War in 1991, destruction of bridges over the Euphrates River impeded the deployment of Iraqi forces and their supplies (severing also communications cables).[74]

It has been asserted that '[b]ridges are not, as such, military objectives',[75] and that a bridge is like a school: the question of whether one or the other represents a military objective depends entirely on 'actual circumstances'.[76] But the comparison between bridges and schools is untenable. This is a matter of (rebuttable) presumptions: where a school is concerned, the presumption is that it is a civilian object (see *supra*, C); with a bridge, the reverse is true. A school is recognized as a military objective only in extraordinary circumstances, primarily military use by the adverse Party. A bridge, as a rule, would qualify as a military objective (by nature, location, purpose or use). It would fail to be a military objective only when it is neither actually nor potentially of any military benefit to the enemy (e.g., when it is located in a residential area away from the contact zone).

F. Military objectives exempt from attack

The military character of an object is not always conclusive in legitimizing an attack against it. Thus, military medical units (like military hospitals and hospital ships) and personnel are granted special protection (see *infra*, Chapter 6, I, III). Some military objectives are exempted from attack owing to extraordinary circumstances. This is epitomized by Article 56(1) of the Protocol:

> Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works and installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.[77]

[74] See Rogers, *supra* note 24, at 42.
[75] F. J. Hampson, 'Proportionality and Necessity in the Gulf Conflict', 86 *PASIL* 45, 49 (1992).
[76] F. Kalshoven and L. Zegveld, *Constraints on the Waging of War* 101 (ICRC, 3rd edn, 2001).
[77] Protocol I, *supra* note 2, at 653.

However, the stipulation of Article 56 is innovative and binding only on contracting Parties (see *infra*, Chapter 6, IV).

Above all, an attack against a military objective of whatever type may be illicit owing to the principle of proportionality, whereby the 'collateral damage' or injury to civilians (or civilian objects) must not be excessive (see *infra*, Chapter 5, IV).

III. General problems relating to the scope of military objectives

The definition of military objectives, as discussed above, raises a number of question marks:

(i) *Retreating troops*: It is sometimes contended that when an army has been routed, and its soldiers are retreating in disarray – as did the Iraqi land forces pulling out of Kuwait in 1991 – they should not be further attacked.[78] But this is a serious misconception. The only way for members of the armed forces to immunize themselves from further attack is to surrender, thereby becoming *hors de combat*[79] (see *infra*, Chapter 6, I, A, (v)). Otherwise, as the Gulf War amply demonstrates, the fleeing soldiers of today are likely to regroup tomorrow as viable military units.

(ii) *Targeting individuals*: Is it permissible to target specific individuals who are members of the armed forces? As indicated (*supra*, I), all combatants can be lawfully targeted. This includes all members of the armed forces, whether or not they are actually engaged in combat.[80] When a person takes up arms or merely dons a uniform as a member of the armed forces, he automatically exposes himself to enemy attack. LOIAC prohibits treacherous killing of enemy individuals (see *infra*, Chapter 8, I, A). It does not preclude singling out an individual enemy combatant as a target, if the attack is carried out without treachery.[81] Differently put, the prohibition of treacherous killing does not cover 'attacks, by regular armed military forces, on specific individuals who are themselves legitimate military targets'.[82] Thus, the use by Israel of helicopters (firing missiles), tanks and regular infantry units in 2001/3 to target individual Palestinian

[78] See E. David, *Principes de Droit des Conflits Armés* 246 (2nd edn, 1999).
[79] See P. Barber, 'Scuds, Shelters and Retreating Soldiers: The Laws of Aerial Bombardment in the Gulf War', 31 *ALR* 662, 690 (1993).
[80] See M. N. Schmitt, 'State-Sponsored Assassination in International and Domestic Law', 17 *YJIL* 609, 674 (1992).
[81] See Rogers and Malherbe, *supra* note 54, at 62.
[82] B. M. Carnahan, 'Correspondent's Report', 2 *YIHL* 423, 424 (1999).

fighters accused of terrorism was not in breach of LOIAC.[83] Conversely, use of non-uniformed snipers against the same individual targets is a form of unlawful combatancy (see *supra*, Chapter 2, III).

To sharpen the legal position, it may be useful to juxtapose two prominent instances of targeting enemy individuals in the course of World War II. In 1943, the United States targeted the Commander-in-Chief of the Japanese Fleet, Admiral Yamamoto, whose plane was ambushed (subsequent to the successful breaking of the Japanese communication codes) and shot down over Bougainville.[84] This was a perfectly legitimate act within the rights of a belligerent Party. In contrast, the ambush of the car of SS General Heydrich in 1942 amounted to unlawful combatancy. Heydrich – as a military officer – was a legitimate target, just like Yamamoto. Still, the act constituted unlawful combatancy, since Heydrich was killed by members of the Free Czechoslovak army (parachuted from London) who were not wearing uniforms.[85]

(iii) *Police*: Can police officers and other law enforcement agents be subsumed under the heading of members of armed forces (who are legitimately subject to attack)? The answer to the question depends on whether the policemen have been officially incorporated into the armed forces[86] or (despite the absence of official incorporation) have taken part in hostilities.[87] If integrated into the armed forces, policemen – like all combatants – 'may be attacked at any time simply because they have that particular status'.[88]

(iv) *Industrial plants*: It is frequently difficult to draw a stark distinction between military and civilian industries. Sometimes, even the facts are hard to establish: who is to say whether a textile factory is producing military uniforms or civilian clothing? In wartime, civilian consumption gives way as a matter of course to military priorities. Can one seriously maintain that steel works or petrochemical industries ought not to be classified as military objectives for the sole reason that their output in peacetime has been channelled to the civilian market? The long-time civilian-oriented character of an assembly line prior to the armed conflict provides no guarantee that

[83] See J. N. Kendall, 'Israeli Counter-Terrorism: "Targeted Killings" under International Law', 80 *NCLR* 1069, 1076–7 (2001–2).
[84] See J. B. Kelly, 'Assassination in War Time', 30 *Mil.LR* 101, 102–3 (1965).
[85] See P. Zengel, 'Assassination and the Law of Armed Conflict', 43 *Mer.LR* 615, 628 (1991–2).
[86] On such incorporation, cf. Article 43(3) of Protocol I, *supra* note 2, at 647.
[87] See P. Rowe, 'Kosovo 1999: The Air Campaign', 82 *IRRC* 147, 150–1 (2000).
[88] *Ibid.*, 151.

production would not be switched to war materials during hostilities. By way of illustration, tractors for agricultural use can swiftly be replaced on the assembly line by tanks. The children's toys factory of today may become tomorrow's leading manufacturer of electronic precision-guided munitions. Besides, in the present era of high technology, the construction of any computer hardware architecture or software program can be readjusted to become a central pillar of the war effort.[89] 'The problem is that the [computer] technology capable of performing . . . [military] functions differs little, if at all, from that used in the civilian community'.[90] If that is not enough, subcontracting in the manufacture of components of modern weapon systems causes a dispersion in the fabrication of war materials which is almost impossible to trail.[91] All in all, very few industrial plants can be regarded as strictly civilian by nature and therefore immune from attack.

(v) *Oil, coal and other minerals*: What is the status of oil fields and rigs, refineries, coal mines and other mineral extraction plants which are not ostensibly tied to military production? In the final analysis, despite their civilian bearings, all of them can be deemed to constitute the infrastructure of the military industry. It can well be argued that 'oil installations of every kind are in fact legitimate military objectives open to destruction by any belligerent'.[92] As regards petrol filling stations, only those functioning in civilian residential areas – away from major motorways – may be exempted from attack.

(vi) *Electricity grids*: What about power plants serving both the military and the civilian population (so-called 'dual use' plants)? During the Gulf War, the Coalition air campaign in 1991 treated as a military target the integrated Iraqi national grid generating and distributing electricity (used by both the armed forces and civilians).[93] Undeniably, an integrated power grid makes an effective contribution to modern military action:[94] any shortfall in military requirements can be compensated at the expense of civilian needs. Indeed, the

[89] As regards the growing military reliance on computers, see M. N. Schmitt, 'Computer Network Attacks and the Use of Force in International Law: Thoughts on a Normative Framework', 37 *CJTL* 885, 887 (1998–9).

[90] M. N. Schmitt, 'Future War and the Principle of Discrimination', 28 *IYHR* 51, 68 (1998).

[91] See Parks, *supra* note 66, at 140.

[92] L. C. Green, 'The Environment and the Law of Conventional Warfare', 29 *CYIL* 222, 233 (1991).

[93] See C. Greenwood, 'Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict', *The Gulf War 1990–91 in International and English Law*, *supra* note 45, at 63, 73.

[94] See *ibid*., 74.

Coalition attacks against Iraqi power generating plants and transformer stations had a great impact on the Iraqi air defence structure (supported by computers), unconventional weapons research and development facilities, and telecommunications systems.[95] The large-scale attacks also had unintended non-military consequences, such as the disruption of water supply (due to loss of electric pumps) and the inability to segregate the electricity that powers a hospital from 'other' electricity in the same lines.[96] But these unfortunate results did not detract from the standing of the Iraqi electricity grid system as a military objective.[97]

(vii) *Civilian airports and maritime ports*: It would be imprudent to disregard the possibility that civilian airports and maritime ports can become hubs of military operations, side by side with continued civilian activities (which can conceivably be a fig leaf). No wonder that the 1954 Hague Cultural Property Convention refers to 'an aerodrome' or 'a port' – in a generic fashion – as a military objective.[98]

(viii) *Trains, trucks and barges*: If strategic arteries of transportation come within the bounds of military objectives (as stated), should the definition not incorporate all the railway rolling stock, the truck fleets which are the backbone of motorway traffic, and the barges plying the rivers and canals? The consequences for civilian traffic are palpable. Unlike passenger liners or airliners (mentioned *infra*, V and VI), passenger trains do not have any visible hallmarks setting them apart from troop-carrying trains. If an inter-urban train (as distinct from a city tram) is sighted from the air, there being no telling signs of the civilian identity of the train riders, this writer believes that the train would be a legitimate military objective. In the Kosovo air campaign of 1999, a passenger train (not targeted as such) was struck while crossing a railway bridge.[99] In analysing the case, N. Ronzitti seems to take the position that – although the bridge was no doubt a legitimate military objective – a passenger train should not be attacked.[100] However, in the opinion of this writer it would

[95] See D. T. Kuehl, 'Airpower vs. Electricity: Electric Power as a Target for Strategic Air Operations', 18 *JSS* 237, 251–2 (1995).

[96] See *ibid.*, 254.

[97] See C. Greenwood, 'Current Issues in the Law of Armed Conflict: Weapons, Targets and International Criminal Liability', 1 *SJICL* 441, 461 (1997).

[98] Hague Cultural Property Convention, *supra* note 7, at 750 (Article 8(1)(a)).

[99] See International Criminal Tribunal for the Former Yugoslavia (ICTY): Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 2000, 39 *ILM* 1257, 1273 (2000).

[100] N. Ronzitti, 'Is the *Non Liquet* of the Final Report by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia Acceptable?', 82 *IRRC* 1017, 1025 (2000).

all depend on whether or not the passengers were identified by the aviators as civilians.

(ix) *Civilian television and radio stations*: In wartime, control of civilian broadcasting stations can at any time be assumed by the military apparatus, which may wish to use it in communications (e.g., summoning reservists to service), in pursuit of psychological warfare, and for other purposes. In the hostilities of March 2003, the Iraqi State Television Station in Baghdad was intentionally bombed by the US. Earlier, in April 1999, NATO bombed the State Serbian Television and Radio Station in Belgrade. Are such bombings legally warranted? The Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia averred that, had the attack in Belgrade been pursued because the local station played a role in the Serbian propaganda machinery, the legality of the act might well be questioned.[101] In the Committee's opinion, the attack could be justified only if the TV and radio transmitters were integrated into the military command and control communications network.[102] Yet, it is noteworthy that the Hague Cultural Property Convention of 1954 refers to any 'broadcasting station' as a military objective (in the same breath as an aerodrome and a port).[103] The phrase clearly covers civilian TV and radio stations.[104]

(x) *Government offices*: It is occasionally questioned 'whether government buildings are excluded under any clear rule of law from enemy attack'.[105] Such a sweeping allusion to Government buildings is wrong. Government offices can be considered legitimate targets for attack only when used in pursuance or support of military functions. The premises of the Ministry of Defence have already been mentioned. Any subordinate or independent Department of the Army, Navy, Air Force, Munitions and so forth is embraced. There is less certitude about the mansion of the Head of State. Whereas the White House in Washington would constitute a legitimate military target (since the American President is the Commander-in-Chief of all US armed forces), Buckingham Palace in London would not (inasmuch as the Queen has no parallel role).

[101] Final Report to the Prosecutor by the Committee, *supra* note 99, at 1278.
[102] *Ibid.*, 1279.
[103] Hague Cultural Property Convention, *supra* note 7, at 750 (Article 8(1)(a)).
[104] See the reference to a radio broadcasting station in the Vatican City, in the UNESCO Commentary on the Convention: *The Protection of Cultural Property in the Event of Armed Conflict: Commentary* 106 (J. Toman ed., 1996).
[105] I. Detter, *The Law of War* 294 (2nd edn, 2000).

(xi) *Political leadership*: It is necessary to distinguish between political leaders who are purely and simply politicians, and those who are also serving in the armed forces. The latter can be targeted, even individually (see *supra*, (ii)).[106] This is particularly true of a Head of State who is constitutionally the Commander-in-Chief of those forces. It is sometimes asserted that there is a tradition of sparing enemy Heads of State, but if such a tradition has ever developed it has certainly 'suffered setbacks' in a number of (unsuccessful) attacks against dictators in supreme command positions.[107]

Obviously, when civilian leaders are present in any military installation or Government office constituting a legitimate military objective – or when they are visiting either the front line or a munitions factory in the rear area, when they board a military aircraft or are driven by a military command car, etc. – they expose themselves to danger. But notwithstanding the personal risk run when present in a military objective, a civilian member of the political leadership (not associated with the military) does not become a legitimate object of attack by himself and cannot be targeted away from a military objective.

IV. Defended and undefended localities in land warfare

The real test in land warfare is whether a given place, inhabited by civilians, is actually defended by military personnel. Should that be the case, the civil object becomes – owing to its use – a military objective. The criterion of the defence of an otherwise civilian object is highlighted in Article 25 of the Hague Regulations:

> The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.[108]

Similar language appears in Article 3(c) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY).[109] Article 8(2)(b)(v) of the Rome Statute brands as a war crime:

[106] See Rogers and Malherbe, *supra* note 54, at 62.

[107] See A. R. Coll, 'Kosovo and the Moral Burdens of Power', *War over Kosovo: Politics and Strategy in a Global Age* 124, 145–6 (A. J. Bacevich and E. A. Cohen eds., 2001).

[108] Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to 1899 Hague Convention (II) and 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, *Laws of Armed Conflicts* 63, 83–4. The words 'by whatever means' were added to the text in 1907.

[109] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY), Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 32 *ILM* 1159, 1193 (1993).

Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives.[110]

The last words are plainly an addition to the original Hague formula. They sharpen the issue by denoting that some undefended civilian habitations may constitute military objectives.

Article 59(1) of Protocol I sets forth:

It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.[111]

Once more it is the Hague criterion of defending a place that counts: if a place is defended, it may be attacked. The major change in the Protocol is reflected in employing the term 'localities', which is wider than single buildings but narrower than a whole city or town. This is important to bear in mind, for land warfare cannot always be analysed on a building-by-building basis. Not infrequently, large-scale combat is conducted in an extensive built-up area, particularly a large city. It goes without saying that 'any building sheltering combatants becomes a military objective'.[112] In extreme cases, when fierce fighting is conducted from house to house (*à la* Stalingrad), a whole city block or section may be regarded as a single military objective: partly by (actual) use and partly by purpose (namely, potential use). The fact that, in the meantime, a given building within that block or section is not yet occupied by any military unit is immaterial. The reasonable expectation is that, as soon as the tide of battle gets nearer, it would be converted into a military stronghold. Hence, it may be bombarded even prior to that eventuality. Still, the old Hague broad-brush reference to a town *in toto* (defended or undefended) must be regarded as obsolete.[113]

A belligerent desirous of not defending a city – with a view to saving it from harm's way – can convey that message effectively to the enemy. Article 59(2) of the Protocol prescribes:

The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party. Such a locality shall fulfil the following conditions:

(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.[114]

[110] Rome Statute, *supra* note 9, at 1006.
[111] Protocol I, *supra* note 2, at 656.
[112] Pilloud and Pictet, *supra* note 64, at 701.
[113] See Oeter, *supra* note 43, at 171.
[114] Protocol I, *supra* note 2, at 656.

There seem to be some complementary implicit conditions not enumerated in the text: roads and railways crossing the locality must not be used for military purposes, and factories situated there must not manufacture products of military significance.[115] Nevertheless, the presence in the non-defended locality of police forces retained for the sole purpose of maintaining law and order is permissible under Article 59(3).[116]

Apart from the explicit and implicit cumulative conditions, it is *sine qua non* that (i) the declared non-defended locality would be in or near the contact zone, and that (ii) it would be open for occupation.[117] A declared non-defended locality cannot be situated in the hinterland – far away from the contact zone – for the simple reason that it is not yet within 'the effective grasp of the attacker's land forces'.[118] *Au fond*, a non-defended locality cannot be established in anticipation of future events, but only 'in the "heat of the moment", i.e., when the fighting comes close'.[119]

Article 59(4) goes on to state that the declaration mentioned in Paragraph (2) – defining as precisely as possible the limits of the non-defended locality – is to be addressed to the adverse Party, which must treat the locality as non-defended unless the prerequisite conditions are not in fact fulfilled.[120] The outcome is that, subject to the observation of all the conditions (specified and unspecified in the text), the unilateral declaration of a locality as non-defended binds the adverse Party by virtue of the Protocol.[121]

Article 59(5) adds that the two Parties to the conflict may agree on the establishment of non-defended localities, even when the conditions are not met.[122] Of course, in that case, it is the bilateral agreement (as distinct from the unilateral declaration) that is decisive. Article 15 of Geneva Convention (IV)[123] provides that the belligerents may establish in the combat zone neutralized areas intended to serve as a shelter for (combatant or non-combatant) sick and wounded as well as for civilians who perform no work of a military character. Again, the creation of such areas and their demarcation is contingent on the agreement of the Parties.

[115] See Pilloud and Pictet, *supra* note 64, at 702.
[116] Protocol I, *supra* note 2, at 656.
[117] Indeed, prior to Protocol I, the expression commonly used was not a 'non-defended locality' but an 'open city'. For the transition in terminology, see J. G. Starke, 'The Concept of Open Cities in International Humanitarian Law', 56 *ALJ* 593–7 (1982).
[118] J. Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Dispute – and War – Law* 622 (2nd edn, 1959). The comment was made prior to the drafting of Protocol I, but it is still valid.
[119] C. Pilloud and J. Pictet, 'Localities and Zones under Special Protection', *Commentary on the Additional Protocols* 697, *id*. See also M. Torrelli, 'Les Zones de Sécurité', 99 *RGDIP* 787, 795 (1995).
[120] Protocol I, *supra* note 2, at 656.
[121] W. A. Solf, 'Article 59', *New Rules* 379, 383–4.
[122] Protocol I, *supra* note 2, at 656.
[123] Geneva Convention (IV), *supra* note 5, at 506.

V. Special problems relating to sea warfare

A. Areas of naval warfare

Hostile actions by naval forces may be conducted in or over the internal waters, the territorial sea, the continental shelf, the exclusive economic zone and (where applicable) the archipelagic waters of the belligerent States; the high seas; and (subject to certain conditions) the continental shelf and the exclusive economic zone of neutral States.[124] Military objectives at sea include not only vessels but also fixed installations (especially weapon facilities and detection or communication devices), which can be emplaced on – or beneath – the seabed, anywhere within the areas of naval warfare.[125] Cables and pipelines laid on the seabed and serving a belligerent may similarly constitute legitimate military objectives.[126]

B. Enemy warships

Every enemy warship is a military objective. The locution 'warships' covers all military floating platforms, whether surface vessels or submarines, including light craft (e.g., torpedo boats). Enemy warships include unarmed auxiliary vessels providing direct support for the enemy armed forces (for example, by carrying troops or supplies).[127] However, hospital ships (see *infra*, Chapter 6, III, B) cannot be deemed enemy warships.

An enemy warship can be attacked on sight and sunk (within the areas of naval warfare). 'These attacks may be exercised without warning and without regard to the safety of the enemy crew'.[128]

C. Enemy merchant vessels

Enemy merchant vessels are generally deemed to be civilian objects, and are therefore exempt from attack (even though they are subject to capture and condemnation as prize; see *infra*, Chapter 8, III, C).[129] Still, the San Remo Manual lists no less than seven exceptions to the exemption rule.[130]

[124] See *San Remo Manual*, *supra* note 13, at 80.
[125] See T. Treves, 'Military Installations, Structures, and Devices on the Seabed', 74 *AJIL* 808, 809, 819 ff (1980).
[126] See *San Remo Manual*, *supra* note 13, at 111.
[127] See W. J. Fenrick, 'Legal Aspects of Targeting in the Law of Naval Warfare', 29 *CYIL* 238, 279 (1991).
[128] *Ibid.*, 269.
[129] See N. Ronzitti, 'Le Droit Humanitaire Applicable aux Conflits Armés en Mer', 242 *RCADI* 9, 69–71 (1993).
[130] *San Remo Manual*, *supra* note 13, at 146–51.

In these seven instances, merchant vessels may be attacked and sunk as military objectives:

(i) When an enemy merchant vessel is engaged directly in belligerent acts (e.g., laying mines or minesweeping);
(ii) When an enemy merchant vessel acts as an auxiliary to the enemy armed forces (e.g., carrying troops or replenishing warships);
(iii) When an enemy merchant vessel engages in reconnaissance or otherwise assists in intelligence-gathering for the enemy armed forces;
(iv) When an enemy merchant vessel refuses an order to stop or actively resists capture (the purpose of which is condemnation of the vessel in prize proceedings);
(v) When an enemy merchant vessel is armed to an extent that it can inflict damage on a warship (especially a submarine);
(vi) When an enemy merchant vessel travels under convoy, escorted by warships, thereby benefiting from the (more powerful) armament of the latter;
(vii) When an enemy merchant vessel makes an effective contribution to military action (e.g., by carrying military materials[131]).

Some vessels – above all, passenger liners exclusively engaged in carrying civilian passengers – are generally immune from attack.[132] Even if the passenger liner is carrying a military cargo in breach of the requirement of exclusive civilian engagement, an attack against it may be unlawful because it would be patently disproportionate to the military advantage expected[133] (see *infra*, Chapter 5, IV).

D. Neutral merchant vessels

As a rule, neutral merchant vessels are exempted from attack, although subject to visit and search by belligerent warships (and military aircraft) and possible capture for adjudication as prize in appropriate circumstances (see *infra*, Chapter 8, III, C).[134] All the same, according to the San Remo Manual, neutral merchant vessels are susceptible to attack – as if they were enemy military objectives – in the six following cases:[135]

[131] The materials under this rubric cannot be exports. Except in the context of refusing an order to stop, resisting capture as prize or breaching a blockade, a private tanker cannot be attacked as a military objective when carrying oil exported from a belligerent oil-producing State, even though the revenue derived from the export may prove essential to sustaining the war effort. See M. Bothe, 'Neutrality in Naval Warfare: What Is Left of Traditional International Law?', *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven* 387, 401 (A. J. M. Delissen and G. J. Tanja eds., 1991). Cf. the comments *supra*, II, about raw cotton in the American Civil War.

[132] On passenger liners, see *San Remo Manual*, *supra* note 13, at 132.

[133] See *ibid.* [134] See *ibid.*, 154, 212–13. [135] *Ibid.*, 154–61.

(i) When a neutral merchant vessel is engaged in belligerent acts on behalf of the enemy;
(ii) When a neutral merchant vessel acts as an auxiliary to the enemy armed forces;
(iii) When a neutral merchant vessel assists the enemy's intelligence system;
(iv) When a neutral merchant vessel is suspected of breaching a blockade (see *infra*, F) or of carrying contraband (see *infra*, Chapter 8, III, C) and clearly refuses an order to stop, or resists visit, search or capture;
(v) When a neutral merchant vessel travels under convoy, escorted by enemy warships;
(vi) When a neutral merchant vessel makes an effective contribution to the enemy's military action (e.g., by carrying military materials[136]).

Thus, '[t]he mere fact that a neutral merchant vessel is armed provides no grounds for attacking it'.[137] Travelling under convoy exposes a neutral merchant vessel to attack only when the convoy is escorted by enemy warships. Neutral merchant vessels travelling under convoy escorted by neutral warships, in transit to neutral ports, cannot be attacked (neither are they subject to visit and search).[138] The neutral escort can belong to a State other than the State of the flag.[139] During the Iran–Iraq War, the practice developed of reflagging the merchant vessels of one neutral State (like Kuwait) escorted by warships of another (like the US).[140] But reflagging (in the absence of a 'genuine link' between the merchant vessels and their new flag State[141]) is not strictly necessary. Suffice it for the two neutral States to conclude an agreement enabling the flag State of the escorting warships to verify and warrant that the merchant vessel (flying a different neutral flag) is not carrying contraband and is not otherwise engaged in activities inconsistent with its neutral status.[142]

Of course, neutral passenger liners would benefit from special protection.[143]

E. Destruction of enemy merchant vessels after capture

When enemy merchant vessels are protected from attack, that does not mean that they cannot be destroyed. The rule is that warships (and

[136] See *supra* note 131. [137] *San Remo Manual*, *supra* note 13, at 161.
[138] See G. P. Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality* 560–1 (1998).
[139] See *ibid.*, 571–5. [140] See *ibid.*, 560–71.
[141] See M. H. Nordquist and M. G. Wachenfeld, 'Legal Aspects of Reflagging Kuwaiti Tankers and Laying of Mines in the Persian Gulf', 31 *GYIL* 138, 140–51 (1988).
[142] See *San Remo Manual*, *supra* note 13, at 197–9.
[143] See G. K. Walker, 'Information Warfare and Neutrality', 33 *VJTL* 1079, 1164 (2000).

military aircraft) have a right to capture enemy merchant vessels, with a view to taking them into port for adjudication and condemnation as prize (see *infra*, Chapter 8, III, C).[144] As an exceptional measure, when circumstances preclude taking it into port, the captured merchant vessel may be destroyed.[145] The legality of the destruction of the captured ship is to be adjudicated by the prize court.[146]

There is a vital distinction between the destruction of an enemy merchant vessel subsequent to capture and an attack launched against it on the ground that it constitutes a military objective (*supra*, C). An enemy merchant vessel liable to attack as a military objective can be sunk at sight with all those on board. Conversely, the destruction of an enemy merchant vessel in the exceptional circumstances following capture can only take place subject to the dual condition that (i) the safety of passengers and crew is assured; and (ii) the documents and papers relating to the prize proceedings are safeguarded.[147] A special *Procès-Verbal* of 1936 applies this general rule to submarine warfare.[148] The *Procès-Verbal* specifies that the ship's boats are not regarded as a place of safety for the passengers and crew unless that safety is assured by the existing sea and weather conditions, the proximity of land, or the presence of another vessel in a position to take them on board.[149] The San Remo Manual follows the *Procès-Verbal*, adding an important caveat: the vessel subject to destruction must not be a passenger liner.[150]

F. Blockade

'Blockade is the blocking of the approach to the enemy coast, or a part of it, for the purpose of preventing ingress and egress of vessels or aircraft of all States'.[151] It must be underlined that a blockade does not target any particular cargo as contraband: instead, it operates 'to exclude all transit into and out of a defined area or location'.[152]

The term 'blockade' is used in the UN Charter (Article 42).[153] There are several instances of contemporary (post-Charter) practices of blockades, e.g., in the Vietnam War[154] and in the Gulf War.[155] The imposition

[144] *San Remo Manual*, *supra* note 13, at 205, 208. [145] See *ibid*., 209.
[146] See W. Heintschel von Heinegg, 'Visit, Search, Diversion, and Capture in Naval Warfare: Part I, The Traditional Law', 29 *CYIL* 283, 309 (1991).
[147] See *San Remo Manual*, *supra* note 13, at 209.
[148] *Procès-Verbal* Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, 1936, *Laws of Armed Conflicts* 883, 884.
[149] *Ibid*. [150] *San Remo Manual*, *supra* note 13, at 210. [151] *Ibid*., 176.
[152] M. N. Schmitt, *Blockade Law: Research Design and Sources* 3 (1991).
[153] Charter of the United Nations, 1945, 9 *Int.Leg.* 327, 343–4.
[154] See *Annotated Supplement* 394.
[155] See Y. Dinstein, *War, Aggression and Self-Defence* 259 (3rd edn, 2001).

of a blockade is subject to several conditions pursuant to customary international law (primarily, the issuance of declaration and notification; maintaining an effective – as distinct from a 'paper' – blockade; and impartiality in application).[156] When duly established, the salient point is that merchant vessels – whether enemy or even neutral (see *supra*, C–D) – can be attacked and sunk if they attempt to breach a blockade and resist capture or an order to stop.[157] In the same vein, aircraft breaching a blockade are liable to be shot down.[158]

G. Exclusion zones

The San Remo Manual rejects the notion that a belligerent may absolve itself of its duties under LOIAC by establishing maritime 'exclusion zones' which might enable it to attack enemy merchant vessels and even neutral ships entering the zones.[159] The practice of establishing exclusion zones evolved during World Wars I and II, and was resorted to – albeit with considerable conceptual differences – in the Iran–Iraq War and in the Falkland Islands War.[160] It is clear from the 1946 Judgment of the International Military Tribunal at Nuremberg that the sinking of neutral merchant vessels without warning when entering unilaterally proclaimed exclusion zones is unlawful.[161] This holding is not germane, however, to enemy merchant vessels in such zones.[162]

Most commentators agree that, given the ongoing practice, the legality of exclusion zones should be acknowledged in some manner.[163] The San Remo Manual itself concedes that belligerents may establish exclusion zones as exceptional measures, subject to the condition that no new rights be acquired – and no existing duties be absolved – through such establishment.[164] The condition is somewhat softened when the Manual adds that, should a belligerent create an exclusion zone, 'it might be more likely to presume that ships or aircraft in the area without permission were

[156] See *San Remo Manual*, *supra* note 13, at 177–8. [157] See *ibid.*, 178.
[158] See M. N. Schmitt, 'Aerial Blockades in Historical, Legal, and Practical Perspective', 2 *USAFAJLS* 21, 48 (1991).
[159] *San Remo Manual*, *supra* note 13, at 181.
[160] See W. J. Fenrick, 'The Exclusion Zone Device in the Law of Naval Warfare', 24 *CYIL* 91–126 (1986).
[161] International Military Tribunal (Nuremberg), Judgment and Sentences, 1946, 41 *AJIL* 172, 304 (1947).
[162] See E. I. Nwogugu, '1936 London Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930', *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* 349, 358–9 (N. Ronzitti ed., 1988).
[163] See Politakis, *supra* note 138, at 145. [164] *San Remo Manual*, *supra* note 13, at 181–2.

there for hostile purposes'.[165] This proviso 'allows a "grey area" '.[166] Incontestably, exclusion zones must not become 'free-fire zones', and specified sea lanes ensuring safe passage to hospital ships, neutral shipping, etc., must be made available.[167] However, the specifics of any new law regarding exclusion zones have not yet crystallized.[168] Until the new law emerges in detail, the *lex lata* remains valid, so that 'an otherwise protected platform does not lose that protection by crossing an imaginary line drawn in the ocean by a belligerent'.[169]

The reverse side of the coin is that enemy warships – being military objectives subject to attack at sight – do not gain any protection by staying away from an exclusion zone. Consequently, there was no legal fault in the sinking by the British of the Argentine cruiser *General Belgrano* outside a proclaimed exclusion zone (in the course of the Falkland Islands War of 1982): an enemy warship 'has no right to consider itself immune' from attack beyond the range of an exclusion zone.[170]

H. Bombardment of coastal areas

A special problem appertains to the bombardment from the sea of enemy coastal areas. The matter is governed by Hague Convention (IX) of 1907, which sets forth in Article 1:

> The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden.[171]

Article 2, for its part, clarifies that military works, military or naval establishments, depots of arms or war materials, workshops or plant which can be utilized for the needs of the hostile fleet or army, and warships in the harbour, are excluded from this prohibition.[172] Article 3 – which is 'a throwback to a bygone era of naval warfare'[173] – permits the bombardment

[165] *Ibid.*, 181.
[166] F. Pocar, 'Missile Warfare and Exclusion Zones in Naval Warfare', 27 *IYHR* 215, 223 (1997).
[167] See W. Heintschel von Heinegg, 'The Law of Armed Conflicts at Sea', *Handbook* 405, 468.
[168] See L. F. E. Goldie, 'Maritime War Zones and Exclusion Zones', 64 *ILS* 156, 193–4 (*The Law of Naval Operations*, H. B. Robertson ed., 1991).
[169] *Annotated Supplement* 395–6.
[170] See H. S. Levie, 'The Falklands Crisis and the Laws of War', *The Falklands War: Lessons for Strategy, Diplomacy and International Law* 64, 66 (A. R. Coll and A. C. Arend eds., 1985).
[171] Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, 1907, *Laws of Armed Conflicts* 811, 812.
[172] *Ibid.*
[173] H. B. Robertson, '1907 Hague Convention IX Concerning Bombardment by Naval Forces in Time of War', *Law of Naval Warfare* 149, 166.

of ports, towns, etc., if the local authorities (having been summoned to do so) fail to furnish supplies to the naval force before them.[174]

Article 1 of Hague Convention (IX) applies to coastal bombardment a land warfare rule, laid down in Article 25 of Hague Convention (IV) (discussed *supra*, IV). As noted, the sweeping reference in the Hague Conventions to entire towns as either defended or undefended (and accordingly subject to, or exempted from, attack) is obsolete, and the term 'localities' – employed by Protocol I – is more precise. Additionally, coastal bombardments are in general different from land warfare. Whereas on land a bombardment usually serves as a prelude to assault on the target with a view to its occupation, naval bombardment is more frequently intended to inflict sheer destruction on the enemy rear (only exceptionally is the intention to land troops).[175] If there is room for some elasticity in treating whole sections of a city as a single military objective – when house-to-house combat is raging – no similar impetus affects coastal bombardment. The grafting of a land warfare rule onto coastal bombardment is therefore inappropriate.[176]

A specific issue in the context of coastal bombardment is that of lighthouses. Can they be treated as military objectives? On the one hand, they deserve protection as installations designed to ensure the safety of navigation in general.[177] On the other hand, the French Court of Cassation held in 1948 that a lighthouse is a military objective, since it can be used for the needs of a hostile fleet.[178] The present practice of States is certainly not conclusive.

VI. Special problems relating to air warfare

A. Military aircraft

Enemy military aircraft – and any other military aerial platforms, including gliders, drones, blimps, dirigibles, etc. – are legitimate targets for attack. In fact, in two respects air combat is intrinsically different from land or sea combat: (i) it is most difficult for a military aircraft in flight to convey a wish to surrender (i.e., there is no effective counterpart in the air to the land or sea method of hoisting a white flag, striking colours or – in the case of submarines – surfacing); and (ii) it is generally permissible to

[174] Hague Convention (IX), *supra* note 171, at 813.
[175] See R. W. Tucker, *The Law of War and Neutrality at Sea*, 50 *ILS* 143 (1955).
[176] See Robertson, *supra* note 173, at 163–4.
[177] See M. Hartwig, 'Lighthouses and Lightships', 3 *EPIL* 220, *id.*
[178] *In re Gross-Brauckmann* (France, Court of Cassation (Criminal Division), 1948), [1948] *AD* 687, 688.

continue to fire upon a military aircraft that has become disabled.[179] The sole concession to humanitarianism is that, under Article 42 of Protocol I, persons parachuting from an aircraft in distress – in contradistinction to airborne troops – must not be made the object of attack during their descent, and upon reaching hostile ground must be given an opportunity to surrender (see *infra*, Chapter 6, I, A, (iv)).[180]

B. Civilian aircraft

Enemy civilian aircraft *per se* do not constitute military objectives. Nevertheless, civilian aircraft are subject to rather stringent strictures under the non-binding Hague Rules of Air Warfare, whereby such aircraft in flight are liable to be fired upon – as if they were military objectives – in the following circumstances:

(i) When flying within the jurisdiction of their own State, should enemy military aircraft approach and they do not make the nearest available landing;[181]

(ii) When flying (aa) within the jurisdiction of the enemy; or (bb) in the immediate vicinity thereof and outside the jurisdiction of their own State; or (cc) in the immediate vicinity of the military operations of the enemy by land or sea (the exceptional right of prompt landing is inapplicable).[182]

Consistent with the Hague Rules, even neutral civilian aircraft are exposed to the risk of being fired upon if they are flying within the jurisdiction of a belligerent, are warned of the approach of military aircraft of the opposing side, and do not land immediately.[183] Thus, the only advantage that neutral civilian aircraft have over belligerent civilian aircraft within enemy airspace is that the neutral civilian aircraft must be warned first (belligerent civilian aircraft in that situation must establish at their own peril whether the enemy military aircraft are approaching).

These provisions have been criticized as impractical, addressing an improbable contingency (of civilian aircraft venturing into the enemy's jurisdiction) and creating new and difficult categories (what is the vicinity of the enemy's jurisdiction?).[184] Notwithstanding the substantial influence of the Hague Rules on the evolution of customary international law[185] – and their impact on the terminology adopted by the framers of Protocol I,

[179] See *Annotated Supplement* 407–8. [180] Protocol I, *supra* note 2, at 646.
[181] Hague Rules of Air Warfare, *supra* note 4, at 212 (Article 33).
[182] *Ibid.* (Article 34). [183] *Ibid.*, 213 (Article 35).
[184] See J. M. Spaight, *Air Power and War Rights* 402 (3rd edn, 1947).
[185] See R. R. Baxter, 'The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)', *International Dimensions of Humanitarian Law* 93, 115 (UNESCO, 1988).

as noted – it is impossible to forget that they were enunciated in 1923, at the dawn of civil aviation and prior to the exponential growth of passenger traffic by air. The normal modern procedure of declaring air exclusion zones in wartime is supposed to preclude any type of undesirable overflight in sensitive areas.[186] But even within a 'no-fly' zone, it is arguable that attack against civilian aircraft in flight should follow a due warning.[187] Outside 'no-fly' zones, contemporary LOIAC (as corroborated by military manuals) forbids attacks against civilian aircraft in flight unless they are utilized for military purposes or refuse to respond to interception signals; and civilian airliners (engaged in passenger traffic) are singled out for special protection.[188] Regrettably, as demonstrated by the 1988 incident of the US cruiser *Vincennes* shooting down an Iranian passenger aircraft (with 290 civilians on board), the speed of modern electronics often creates insurmountable problems of erroneous identification.[189]

The status of civilian aircraft is different when they are not in flight (nor in the process of taking off or landing with passengers), but parked on the ground. It must be recalled that the airport in which they are parked is liable to be deemed a military objective (see *supra*, III, (vii)), so any civilian aircraft may be at risk owing to its mere presence there.[190] Moreover, irrespective of where civilian aircraft are situated, they are often viewed as constituting 'an important part of the infrastructure supporting an enemy's war-fighting capability', since they can be used later for the transport of troops or military supplies.[191] Consequently, unoccupied civilian aircraft on the ground appear to be legitimate military objectives.

C. Strategic and 'target area' bombing

The most crucial issue of air warfare is that of strategic bombing, to wit, bombing of targets in the interior, beyond the front line (the contact zone). Conditions of air warfare have always defied the logic of the distinction between defended and undefended sites, enshrined in the traditional law of Article 25 of the 1907 Hague Regulations (cited *supra*, IV), even though the words 'by whatever means' were inserted into the

[186] See J. G. Gómez, 'The Law of Air Warfare', 38 *IRRC* 347, 356 (1998).
[187] See T. Stein, 'No-Fly-Zones', 27 *IYHR* 193, 196 (1997).
[188] See H. B. Robertson, 'The Status of Civil Aircraft in Armed Conflict', 27 *IYHR* 113, 125–6 (1997).
[189] On this incident, see J. A. Reilly and R. A. Moreno, 'Commentary', *The Military Objective and the Principle of Distinction in the Law of Naval Warfare*, *supra* note 19, at 111, 114–15.
[190] Cf. L. C. Green, 'Aerial Considerations in the Law of Armed Conflict', 5 *AASL* 89, 109 (1980).
[191] Robertson, *supra* note 188, at 127.

Article with the deliberate intention of covering 'attack from balloons'.[192] After all, there is no real meaning to lack of defences *in situ* as long as the front line remains a great distance away. First, a rear zone is actually defended (however remotely) by the land forces facing the enemy on the front line. Secondly, the fact that a place in the interior is undefended by land forces as long as the front line is far off is no indication of future events: it may still be converted into an impregnable citadel once the front line gets nearer. Thirdly, and most significantly for air warfare, the emplacement of anti-aircraft guns and fighter squadrons en route from the front line to the rear zone may serve as a more effective screen against intruding bombers than any defence mechanism provided locally.[193]

For these and other reasons, the Hague Rules of Air Warfare introduced the concept of military objectives, endorsed and further elaborated – with a new definition – by Protocol I. Strategic bombing triggers the complementary question of whether it is permissible to treat a cluster of military objectives in relative spatial proximity to each other as a single 'target area'. The issue arises occasionally in some settings of long-range artillery bombardment, but it is particularly apposite to air warfare. The nub of the matter is that target identification may be detrimentally affected by poor visibility as a result of inclement weather, effective air defence systems, failure of electronic devices (sometimes because of enemy jamming), sophisticated camouflage, etc. When the target is screened by a determined air defence, the attacking force may be compelled to conduct a raid from the highest possible altitudes, compromising precision bombing (especially when 'smart bombs' are unavailable).[194] The practice which evolved during World War II was that of 'saturation bombings', aimed at large 'target areas' in which there were heavy concentrations of military objectives (as well as civilian objects).[195] Such air attacks were designed to blanket or envelop the entire area where military objectives abounded, rather than search for a point target.[196] The operating assumption was that, if one military objective would be missed, others stood a good chance of being hit. This practice (entailing, as it did, immense civilian casualties by way of 'collateral damage') was harshly criticized after the War.[197]

[192] T. E. Holland, *The Laws of War on Land (Written and Unwritten)* 46 (1908).
[193] See R. Y. Jennings, 'Open Towns', 22 *BYBIL* 258, 261 (1945).
[194] It must be appreciated that 'smart bombs' are not a panacea: much can go wrong even when they are available. See A. P. V. Rogers, 'Zero-Casualty Warfare', 82 *IRRC* 165, 170–2 (2000).
[195] See Stone, *supra* note 118, at 626–7.
[196] See E. Rosenblad, 'Area Bombing and International Law', 15 *RDMDG* 53, 63 (1976).
[197] See, e.g., H. Blix, 'Area Bombardment: Rules and Reasons', 49 *BYBIL* 31, 58–61 (1978).

The World War II experience may create the impression that 'target area' bombing is relevant mostly to sizeable tracts of land – like the Ruhr Valley in Germany – where the preponderant presence of first-class military objectives stamps an indelible mark on their surroundings, thereby creating 'an indivisible whole'.[198] But the dilemma whether or not to lump together as a single target several military objectives may be prompted even by run-of-the-mill objects when they are located at a relatively small distance from each other. The dilemma is addressed by Article 51(5)(a) of Protocol I, where it is prohibited to conduct

> an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.[199]

While placing a reasonable limitation on the concept of 'target area' bombing, Article 51(5)(a) does not completely ban it. 'Target area' bombing remains legitimate when the military objectives are not clearly separated and distinct. Understandably, 'the interpretation of the words "clearly separated and distinct" leaves some degree of latitude to those mounting an attack'.[200] In particular, the adverb 'clearly' blurs the issue: is the prerequisite clarity a matter of objective determination or subjective appreciation (depending, e.g., on the degree of visibility when weather conditions are poor)?[201] Another question is what a 'similar concentration' of civilian objects within the 'target area' means in practice. The ambiguities are regrettable, considering that 'target area' bombing stretches to the limit the principle of distinction between military objectives and civilian objects. But notwithstanding the ambiguities, legitimate 'target area' bombings must not be confused with (illegitimate) direct attacks against civilians (see *infra*, Chapter 5, II).

[198] M. Greenspan, *The Modern Law of Land Warfare* 335–6 (1959).
[199] Protocol I, *supra* note 2, at 651.
[200] See C. Pilloud and J. Pictet, 'Article 51', *Commentary on the Additional Protocols* 613, 624.
[201] See H. DeSaussure, 'Belligerent Air Operations and the 1977 Geneva Protocol I', 4 *AASL* 459, 471–2 (1979).

5 Protection of civilians and civilian objects from attack

I. Definitions

Civilians are non-combatants. Article 50(1) of Additional Protocol I of 1977 defines civilians as persons who do not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of Geneva Convention (III) as well as in Article 43 of the Protocol.[1] These texts are quoted in full above (Chapter 2, III–IV). The cited Paragraphs of Article 4(A) of Geneva Convention (III) refer to members of regular armed forces (even when professing allegiance to unrecognized Governments), members of resistance movements and 'levée en masse'.[2] Article 43 of the Protocol defines armed forces.[3] In all, clearly, the hallmark of civilians is that they are neither members of the armed forces nor do they actively participate in hostilities (cf. *supra*, Chapter 2, I).

Civilians can be employed by the armed forces (either full-time or as contractors), and they can accompany the armed forces for other reasons. As long as they are not members of the armed forces – and do not actively participate in hostilities – their line of work does not detract from their civilian standing, although they do run a perceptible risk of being caught in the crossfire (for instance, should the enemy attack a military base in which they are employed;[4] see *infra*, V, (i)). They are particularly vulnerable to attack if they put on military uniforms while in service (no trifling matter, since wearing the uniform creates the misleading impression of a combatant status).

Under Article 4(A)(4) of Geneva Convention (III) of 1949, '[p]ersons who accompany the armed forces without actually being members

[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, *Laws of Armed Conflicts* 621, 650.
[2] Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, *Laws of Armed Conflicts* 423, 430–1.
[3] Protocol I, *supra* note 1, at 647.
[4] See L. L. Turner and L. G. Norton, 'Civilians at the Tip of the Spear', 51 *AFLR* 1, 26 (2001).

thereof', including 'members of labour units' and 'supply contractors', are entitled – if captured – to prisoners of war status.[5] This entitlement is contingent, however, on the conduct of the civilians in question. If they actively participate in hostilities – without fulfilling the cumulative conditions of lawful combatancy – they would lose their entitlement to prisoners of war status (see *supra*, Chapter 2, II–III).

The civilian population is defined in Article 50(2) of Protocol I as comprising all persons who are civilians.[6] Article 50(3) adds that the presence of non-civilian individuals amidst the civilian population does not deprive that population of its civilian character.[7] Whereas the phrase 'civilian population' embraces in principle all the country's civilians, in certain contexts of protection it relates merely to the civilians (in the aggregate) residing in a particular area.[8]

Civilian objects are defined in Article 52(1) as all objects which are not military objectives[9] (as defined *supra*, Chapter 4, I–II).

The striking feature of the Protocol's definitions is that they follow a 'negative approach'.[10] They do not tell us who or what the protected persons and objects are. They tell us who or what the protected persons and objects are not. The negative character of the definitions 'is justified by the fact that the concepts of the civilian population and of the armed forces are only conceived in opposition to each other'.[11] The advantage of such an approach is that there is no undistributed middle between the categories of combatants (or military objectives) and civilians (or civilian objects).

As far as civilian objects are concerned, the outcome of the negative definitional approach is that some objects are deemed 'civilian' even when *stricto sensu* they are not civilian in the dictionary meaning of the word. Thus, when it is prohibited to attack a given installation – owing to the fact that its 'total or partial destruction, capture or neutralization, in the circumstances ruling at the time', does not offer 'a definite military advantage'[12] – the installation need not be strictly civilian. If it qualifies as a 'civilian object', this must be understood in the context of a dichotomy stamping with that label any object not constituting a 'military objective'.[13]

[5] Geneva Convention (III), *supra* note 2, at 431.
[6] Protocol I, *supra* note 1, at 650. [7] *Ibid.*, 651.
[8] For an example, see W. A. Solf, 'Article 54', *New Rules* 334, 341.
[9] Protocol I, *supra* note 1, at 652.
[10] W. A. Solf, 'Article 50', *New Rules* 292, 293.
[11] C. Pilloud and J. Pictet, 'Article 50', *Commentary on the Additional Protocols* 609, 610.
[12] Protocol I, *supra* note 1, at 652 (Article 52(2)).
[13] See H. S. Levie, 1 *The Code of International Armed Conflict* 35–6 (1986).

II. Direct attacks against civilians

Article 48 of Protocol I highlights the '[b]asic rule' of LOIAC in the form of an obligation of Parties to an international armed conflict to distinguish at all times between civilians and combatants, as well as between civilian objects and military objectives, so that operations be directed solely against military objectives.[14] This is the kernel of LOIAC as it currently stands. Contentions (made chiefly during World War II) to the effect that '[t]he distinction between combatant and non-combatant has all but vanished'[15] are utterly at odds with present-day LOIAC.

The first and foremost inference from the basic rule is that direct – and deliberate – attacks against civilians are forbidden. The International Court of Justice proclaimed in 1996, in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, that 'States must never make civilians the object of attack'.[16] Protocol I sets forth in Article 51(2):

> The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.[17]

Article 52(1) of the Protocol adds that '[c]ivilian objects shall not be the object of attack'.[18]

Article 8(2)(b)(i)–(ii) of the 1998 Rome Statute of the International Criminal Court categorizes as a war crime an intentional direct attack against the civilian population as such, individual civilians or civilian objects.[19] The intention is crucial – and so is the phrase 'as such', incorporated in both Article 51(2) and Article 8(2)(b)(i) – since 'there can be no assurance that attacks against combatants and other military objectives will not result in civilian casualties in or near such military objectives'.[20] This is the phenomenon of 'collateral damage' (to be examined *infra*, IV–V), which postulates that the attack against civilians is not deliberate. Civilian casualties may also be caused by a human error or by a mechanical malfunction, and when that occurs there is no stigma of a direct attack either. Just as absence of intention relieves the actor of accountability for the unforeseen consequences of the attack, presence of intention would tilt the balance in a reverse situation. Where a premeditated attack is

[14] Protocol I, *supra* note 1, at 650.
[15] K. V. R. Townsend, 'Aerial Warfare and International Law', 28 *VLR* 516, 526 (1941–2).
[16] Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, [1996] *ICJ Rep.* 226, 257.
[17] Protocol I, *supra* note 1, at 651. [18] *Ibid.*, 652.
[19] Rome Statute of the International Criminal Court, 1998, 37 *ILM* 999, 1006 (1998).
[20] W. A. Solf, 'Article 51', *New Rules* 296, 300.

directed against civilians as such, but (due, e.g., to a failure of the weapon system) does not achieve the purpose in the actor's mind, the act would still amount to a war crime under the Rome Statute.[21]

There is no basis in contemporary international legal thinking to the claim (also fashionable during World War II) that military operations – pre-eminently in the form of aerial bombings – can be launched, with a view to shattering the morale of the enemy civilian population and its determination to continue to prosecute the war.[22] The lesson of history is that military operations directed exclusively at civilian morale are ineffective and, therefore, pointless.[23] Yet, the cardinal point is that – even if a deliberate attack against civilians can truly 'bend the will of the enemy'[24] – it is proscribed.[25] In other words, the prohibition of direct attacks against civilians applies irrespective of utilitarian considerations. Threats no less than acts are interdicted when the primary goal is to intimidate or cause panic in the civilian population.[26] Once more it is the intention that counts, and not the actual result of the attack.

Having said that, it must be perceived that spreading terror among the civilian population is banned only when an attack is conducted 'for the specific purpose of producing this effect'.[27] There is no legal blemish in a 'shock and awe' air offensive (like the one undertaken in the hostilities against Iraq in 2003), designed to pound military objectives and break the back of the enemy armed forces. A large-scale aerial bombardment – inflicting extensive destruction on military units and objectives – is liable to terrify civilians, and may be inimical to their morale, but it does not *per se* taint such an attack with illegality.[28]

III. Indiscriminate attacks

Attacks against civilians or civilian objects are banned not only when they are direct and deliberate, but also when they are indiscriminate. The

[21] See K. Dörmann, 'Preparatory Commission for the International Criminal Court: The Elements of War Crimes – Part II', 83 *IRRC* 461, 467 (2001).
[22] See S. Oeter, 'Methods and Means of Combat', *Handbook* 105, 157.
[23] See H. Parks, 'The Protection of Civilians from Air Warfare', 27 *IYHR* 65, 77–84 (1997).
[24] See the view expressed by J. M. Meyer, 'Tearing down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine', 51 *AFLR* 143, 182 (2001).
[25] See W. J. Fenrick, 'Attacking the Enemy Civilian as a Punishable Offense', 7 *DJCIL* 539, 547–8 (1996–7).
[26] C. Pilloud and J. Pictet, 'Article 51', *Commentary on the Additional Protocols* 613, 618.
[27] Solf, *supra* note 20, at 300–1.
[28] See C. Greenwood, 'The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign', 31 *IYHR* 111, 124 (2001).

injunction against 'indiscriminate bombardment of the civilian population' goes back to the (non-binding) 1923 Hague Rules of Air Warfare.[29] Article 51(4) of Protocol I enunciates:

> Indiscriminate attacks are prohibited. Indiscriminate attacks are:
> (a) those which are not directed at a specific military objective;
> (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
> (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
> and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.[30]

Indiscriminate attacks differ from direct attacks against civilians in that 'the attacker is not actually *trying* to harm the civilian population': the injury to the civilians is merely a matter of 'no concern to the attacker'.[31] From the standpoint of LOIAC, there is no genuine difference between a premeditated attack against civilians (or civilian objects) and a reckless disregard of the principle of distinction: they are equally forbidden.

The indiscriminate character of an attack is not a by-product of 'body count' (i.e., the ensuing number of civilian fatalities). The key to a finding that a given attack has been indiscriminate is the state of mind of the attacker. Any reconstruction of that state of mind must, however, factor in the habitual 'fog of war' (recalling that the information available to the attacker in real time may have been faulty or incomplete). A good illustration is the case of a well-known incident that occurred in 1991, during the Gulf War. It is generally accepted that the 1991 hostilities against Iraq were characterized by an unprecedented desire to avoid large-scale civilian casualties. Actually, commentators were at times prone to wax rhapsodic: 'The most effective aerial bombing campaign in history was also the most discriminate'.[32] Nonetheless, in the course of the self-same campaign, Coalition (American) air forces struck a bunker used in part as an air-raid shelter, killing hundreds of civilians. The Americans relied on intelligence evidence indicating that the bunker was serving as a command and control centre, and denied any knowledge of its concurrent use as an air-raid shelter for civilians.[33] Based on the information at hand,

[29] Hague Rules of Air Warfare, 1923, *Laws of Armed Conflicts* 207, 210 (Article 24(3)).
[30] Protocol I, *supra* note 1, at 651.
[31] H. M. Hanke, 'The 1923 Hague Rules of Air Warfare', 33 *IRRC* 12, 26 (1993).
[32] T. D. Biddle, 'Air Power', *The Laws of War: Constraints on Warfare in the Western World* 140, 158 (M. Howard *et al.* eds., 1994).
[33] See United States: Department of Defense Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War, 31 *ILM* 612, 626–7 (1992).

there is scarcely any doubt that the bunker could be considered in good faith 'a military objective and hence a lawful target'.[34]

The principle interdicting indiscriminate attacks spawns, *inter alia*, the following specific prohibitions:

(i) To fire blindly – namely, without a clear idea of the nature of the target – into a territory controlled by the enemy (not to be confused with legitimate 'harassing fire' or 'interdiction fire' against identified enemy military objectives, such as deployment areas or bridgeheads);[35]

(ii) To release at random bombs from aircraft over enemy territory after missing the original target (unless it has been established that there are no civilians or civilian objects in that location);[36]

(iii) To conduct bombing raids at night, in inclement weather or from extremely high altitudes – when visibility is impaired – in the absence of adequate equipment for target identification;[37]

(iv) To fire imprecise missiles against military objectives located near, or intermingled with, civilian objects. The very first employment of modern missiles in warfare – that of the German V1s and V2s in World War II[38] – was an epitome of an indiscriminate attack. Since these missiles were technologically incapable of being aimed at a specific military objective, they were pointed in the general direction of a large metropolitan area; in consequence, they violated the principle of distinction.[39] This was also true of the imprecise Scud missiles fired by Iraq in 1991 against Israel: most of the missiles were directed at the metropolitan area of Tel Aviv, in breach of LOIAC.[40] There was no way to ensure that the Scuds would strike military objectives rather than civilians or civilian objects.[41]

The Kosovo air campaign of 1999 brought to the fore the issue of conducting bombing raids from a relatively high altitude (above local air defences) in order to minimize air crew casualties. It turned out that, even when visibility was not impaired and when state-of-the-art targeting equipment was in use, pilots moving at great speed and at high altitude tended to confuse, e.g., civilian tractors with military tracked vehicles

[34] F. Hampson, 'Means and Methods of Warfare in the Conflict in the Gulf', *The Gulf War 1990–91 in International and English Law* 89, 96–7 (P. Rowe ed., 1993).

[35] See Oeter, *supra* note 22, at 174. [36] See *ibid.* [37] See *ibid.*, 175.

[38] On the difference between the subsonic V1 and the supersonic V2 missiles, see G. von Glahn, *Law among Nations* 633 (7th edn, 1996).

[39] See M. J. Matheson, 'The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons', 91 *AJIL* 417, 428 (1997).

[40] See P. Barber, 'Scuds, Shelters and Returning Soldiers: The Laws of Aerial Bombardment in the Gulf War', 31 *ALR* 662, 686 (1993).

[41] See M. N. Schmitt, 'Future War and the Principle of Discrimination', 28 *IYHR* 51, 55 (1998).

(both means of conveyance sharing as they do certain attributes relating to size, shape, speed, etc.).[42] But there is nothing wrong with high-altitude bombing as such: the question is merely one of ability to identify and acquire potential military objectives.[43]

IV. The principle of proportionality

The fact that a military objective has been properly identified as such, and is the exclusive target of attack, does not preclude the possibility that civilians or civilian objects would be hit. First, civilians may be located inside the target (e.g., civilian dependents or employees in a military base). Secondly, civilians may reside in the vicinity of a military target, work in an adjacent shopping mall, or even pass by car or on foot near its perimeter, thereby exposing themselves to what may be described as the side effects of an attack. Thirdly, due to a technical malfunction, inclement weather, faulty intelligence, a human error in navigation, etc., a bomb can fall short of a military objective – or a missile may go off course – wreaking civilian losses instead. It is typical that during the US air campaign in Afghanistan in 2001 – where the equipment used was the most advanced – '[a]lthough the airstrikes were against military targets, collateral civilian casualties did occur, with bombing mistakes reported almost every day of the campaign' (including a mistaken bombing of a Red Cross complex in Kabul on two separate occasions).[44]

There is no way to avert altogether harmful consequences to civilians flowing from attacks against military objectives. Accidents are beyond control by human beings. So are weapon malfunctions.[45] All the same, a belligerent may fully realize in advance that the destruction of a particular military objective can be accomplished only by injuring civilians or damaging a civilian object. Is it mandatory to abort the attack under these circumstances?

In the past, once an attack was directed at an indisputable military objective, any unavoidable injury or damage caused to civilians or civilian objects was accepted as 'collateral damage'.[46] This is no longer the

[42] See T. Voon, 'Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict', 16 *AUILR* 1083, 1103 (2000–1).

[43] See A. Roberts, 'The Laws of War after Kosovo', 31 *IYHR* 79, 93 (2001).

[44] S. D. Murphy, 'Contemporary Practice of the United States Relating to International Law', 96 *AJIL* 237, 247 (2002).

[45] For sure, 'if weapons malfunction or malfunctions of a particular type of weapon occur in a significant percentage of cases and result in substantial civilian casualties', certain conclusions must be drawn. W. J. Fenrick, 'The Law Applicable to Targeting and Proportionality after Operation Allied Force: A View from the Outside', 3 *YIHL* 53, 77 (2000).

[46] See Oeter, *supra* note 22, at 173.

case under contemporary LOIAC. Nowadays, customary international law recognizes the principle of proportionality.[47] In the words of Judge Higgins, in her Dissenting Opinion in the *Nuclear Weapons* Advisory Opinion:

> The principle of proportionality, even if finding no specific mention, is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.[48]

It must be appreciated that a military objective does not cease being a military objective on account of the disproportionate collateral civilian casualties. The principle of proportionality provides 'a further restriction' by disallowing attacks against impeccable military objectives owing to anticipated disproportionate injury and damage to civilians or civilian objects.[49]

Protocol I does not use the phrase 'disproportionate', preferring the term 'excessive'. Article 51(5)(b) of the Protocol forbids as an indiscriminate attack

> an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[50]

The obligation to refrain from mounting an attack expected to cause 'excessive' damage to civilians (in relation to the concrete and direct military advantage anticipated) is reiterated in Article 57(2)(a)(iii) of the Protocol.[51] Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court brands such an attack as a war crime.[52]

'Excessive' means that the disproportion is clearly discernible: the adverb 'clearly' is explicitly added in the Rome Statute. However, there is no reason to exaggerate: the view that 'excessive' applies 'only when the disproportion is unbearably large'[53] goes too far. On the other hand, some commentators confuse the term 'excessive' with 'extensive'.[54] This is a

[47] C. Greenwood, 'Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict', *The Gulf War 1990–91 in International and English Law*, *supra* note 34, at 63, 76–9. See also C. Greenwood, 'Customary Law Status of the 1977 Geneva Protocols', *Humanitarian Law of Armed Conflict: Challenges Ahead (Essays in Honour of Frits Kalshoven)* 93, 109 (A. J. M. Delissen and G. J. Tanja eds., 1991).

[48] Advisory Opinion on *Nuclear Weapons*, *supra* note 16, at 587.

[49] E. Rauch, 'Conduct of Combat and Risks Run by the Civilian Population', 21 *RDMDG* 66, 67 (1982).

[50] Protocol I, *supra* note 1, at 651.

[51] *Ibid.*, 655.

[52] Rome Statute, *supra* note 19, at 1006.

[53] A. Randelzhofer, 'Civilian Objects', 1 *EPIL* 603, 606.

[54] See Pilloud and Pictet, *supra* note 26, at 626.

misreading of the text.[55] Even extensive civilian casualties may be acceptable, if they are not excessive in light of the concrete and direct military advantage anticipated. The bombing of an important army or naval installation (like a naval shipyard) where there are hundreds or even thousands of civilian employees need not be abandoned merely because of the risk to those civilians.[56] It is sometimes even maintained that civilians working in military bases should be excluded altogether from the calculation of excessive collateral damage.[57] Indeed, it is the duty of a Party to the conflict, to the maximum extent feasible, to remove civilian objects and individuals from the vicinity of military objectives (see *infra*, VII).

Much depends on the factual situation and the circumstances in which an attack is conducted. Some military bases are huge, including residential areas for civilian employees and dependents. If a facility such as a children's day care centre, located on a military base (serving civilian employees and dependents), is struck by a 'smart bomb' released by a low-altitude aircraft in perfect weather and in conditions of unlimited visibility, the pinpoint attack – assuming that the aviator is (or ought to be) able to identify the centre for what it is – would be illicit. However, if the military base is subjected to high-altitude bombing, knowledge on the part of the aviator that a children's day care centre is situated somewhere on base need not stop him from releasing the bombload: the fate of the centre may then be determined by its location within a military objective (see *supra*, Chapter 4, II, D).

Since the Protocol brings the prohibition of excessive attacks under the heading of indiscriminate attacks, it follows that a proportionate attack can never be regarded as indiscriminate.[58] The Protocol refers to expected injury to civilians and to anticipated military advantage. From this one can deduce that what ultimately counts, in appraising whether an attack which engenders incidental loss of civilian life or damage to civilian objects is 'excessive', is not the actual outcome of the attack but the initial expectation and anticipation.[59] A good example would be that of an air attack against a railway bridge – i.e., a military objective – while a passenger train is crossing it. If it is known that the passengers on the

[55] C. Greenwood, 'A Critique of the Additional Protocols to the Geneva Conventions of 1949', *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* 3, 11 n. 29 (H. Durham and T. L. H. McCormack eds., 1999).

[56] See Parks, *supra* note 23, at 110.

[57] See W. H. Parks, 'Air War and the Law of War', 32 *AFLR* 1, 174 (1990).

[58] See F. Krüger-Sprengel, 'Le Concept de Proportionnalité dans le Droit de la Guerre', 19 *RDMDG* 177, 192 (1980).

[59] See F. Kalshoven, 'Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974–1977, Part II', 9 *NYIL* 107, 117–18 (1978).

train are civilians, the legality of the attack is a function of balancing in advance the expected civilian casualties as against the anticipated military advantage[60] (see *supra*, Chapter 4, III, (viii)).

The formulation of the principle of proportionality in the Protocol has been criticized by some commentators (without denying the validity of the principle as such).[61] Thus, the expression 'may be expected to' – indicating a mere possibility – is occasionally looked upon as an exceedingly difficult standard to be complied with.[62] The whole assessment of what is 'excessive' in the circumstances entails a mental process of pondering dissimilar considerations – to wit, civilian losses and military advantage – and is not an exact science.[63] There is no objective possibility of 'quantifying the factors of the equation',[64] and the process 'necessarily contains a large subjective element'.[65] This 'subjective evaluation' of proportionality is viewed with a jaundiced eye by certain scholars,[66] but there is no serious alternative. Undeniably, the attacker must act in good faith,[67] and not 'simply turn a blind eye on the facts of the situation; on the contrary, he is obliged to evaluate all available information'.[68] Nevertheless, the standpoints of the adversary Parties are likely to be irreconcilable, for instance in addressing the question: '[t]o what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?'.[69]

An obvious breach of the principle of proportionality would be the destruction of a whole village – with hundreds of civilian casualties – in

[60] See N. Ronzitti, 'Is the *Non Liquet* of the Final Report by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia Acceptable?', 82 *IRRC* 1017, 1025 (2000).

[61] See especially Parks, *supra* note 57, at 171–4.

[62] See A. D. McClintock, 'The Law of War: Coalition Attacks on Iraqi Chemical and Biological Weapon Storage and Production Facilities', 7 *EILR* 633, 658 (1993).

[63] See W. J. Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare', 98 *Mil.LR* 91, 102 (1982).

[64] Solf, *supra* note 20, at 310.

[65] H. Blix, 'Means and Methods of Combat', *International Dimensions of Humanitarian Law* 135, 148 (UNESCO, 1988).

[66] A. Cassese, 'The Prohibition of Indiscriminate Means of Warfare', *Declarations on Principles: A Quest for Universal Peace* 171, 184 (R. Akkerman et al. eds, 1977); A. Cassese, 'Means of Warfare: The Traditional and the New Law', 1 *The New Humanitarian Law of Armed Conflict* 161, 175–6 (A. Cassese ed., 1979).

[67] It has been suggested that 'the standard to be applied must operate in good faith and not in accordance with subjectivity'. L. C. Green, 'Aerial Considerations in the Law of Armed Conflict', 5 *AASL* 89, 104 (1980). But these two factors are not mutually exclusive. The attacker must act in good faith, yet subjectivity inevitably colours judgment.

[68] F. Kalshoven, 'Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity', 86 *PASIL* 39, 44 (1992).

[69] International Criminal Tribunal for the Former Yugoslavia (ICTY): Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 2000, 39 *ILM* 1257, 1271 (2000).

order to eliminate a single enemy sniper.[70] In contrast, if – instead of a single enemy sniper – an artillery battery would operate from within the village, such destruction may be warranted.[71] A representative case relating to sea warfare would be that of an enemy passenger liner. Such a vessel is a civilian object, provided that it is engaged only in carrying civilian passengers.[72] If it were to carry also a run-of-the-mill military cargo (like the *Lusitania* in World War I) – although becoming a military objective – its sinking with all passengers on board would be unlawful, for the act would generate excessive civilian losses compared to the military advantage anticipated.[73] The position may be different only if the military cargo consists of, say, a nuclear device.

Proportionality has to be calculated in relation to a given attack, rather than on an ongoing cumulative footing[74] (the most extreme, and incongruous, way of conducting a cumulative evaluation being predicated on the war taken as a whole). Nevertheless, an attack need not be limited to an individual soldier, tank or aircraft. If an extensive air campaign is undertaken, it would be mistaken to focus on the outcome of an isolated sortie.[75] It has been rightly emphasized that, pursuant to Article 8(2)(b)(iv) of the Rome Statute, assessment of what is excessive is to be based on the 'overall' military advantage anticipated.[76] By introducing the word 'overall', the Statute 'somewhat broadens the scope of military advantages which may be taken into account': it permits looking at the larger operational picture and not merely at the particular point under attack.[77]

V. Legitimate collateral damage

Even after the endorsement of the principle of proportionality by modern LOIAC, the danger of incidental injury to civilians – as a collateral damage resulting from attacks against military objectives – cannot be

[70] See Parks, *supra* note 57, at 168.
[71] See W. M. Reisman, 'The Lessons of Qana', 22 *YJIL* 381, 395–6 (1997).
[72] See *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* 132 (L. Doswald-Beck ed., 1995).
[73] See L. Doswald-Beck, 'Vessels, Aircraft and Persons Entitled to Protection during Armed Conflicts at Sea', 65 *BYBIL* 211, 249 (1994).
[74] J. G. Gardam, 'Proportionality and Force in International Law', 87 *AJIL* 391, 407 (1993).
[75] See Fenrick, *supra* note 63, at 107, 111–12.
[76] See R. Wedgwood, 'Proportionality, Cyberwar, and the Law of War', 76 *ILS* 219, 225 (*Computer Network Attack and International Law*, M. N. Schmitt and B. T. O'Donnell eds., 2002).
[77] M. Bothe, 'War Crimes', 1 *The Rome Statute of the International Criminal Court: A Commentary* 379, 399 (A. Cassese, P. Gaeta and J. R. W. D. Jones eds., 2002).

lightly dismissed. Apart from overt risks assumed by civilians when they are accompanying the armed forces or working as employees in military bases, and cases in which civilians get injured by accident, the following situations bristle with difficulties for civilians:

(i) Attacks against industrial plants constituting military objectives. Factories manufacturing armaments and munitions (let alone other products indispensable to the war effort) generally employ civilians as labourers. These civilians enjoy no immunity while at work. If the industrial plants are important enough (munitions factories being the paradigm), civilian casualties – even in large numbers – would usually come under the rubric of an acceptable collateral damage. This is not to say that presence at a dangerous working place leads to loss of civilian status. The notion has been advanced that civilians working in munitions factories assume the status of so-called 'quasi-combatants' and, inasmuch as they may be legitimately bombed when on site in the factories, they may as well be bombed before having reached the factories and after having left them.[78] However, the concept of a 'quasi-combatant' workforce is completely spurious.[79] When civilian labourers are killed or wounded in air raids against munitions factories, the human losses are sustained not because the victims are 'quasi-combatants', but (notwithstanding their civilian status) because they are present within military objectives. That presence does not permanently contaminate the labourers, turning them *ipso facto* into 'quasi-combatants'. Upon leaving the factories, civilian labourers shed the risk of being subject to attack. The attacker is forbidden to follow the workforce home and hit civilians there.[80]

(ii) 'Target area' bombing (see *supra*, Chapter 4, VI, C) is by its very nature perilous to civilians living in the affected zone. This can become a predicament of vast magnitude, considering that large-scale munitions factories are often 'located in or near industrial conurbations, if only for the convenience of the workforce'.[81] Should the workforce live within the 'target area', civilian labourers are not protected in their homes. Granted, the enemy is generally not entitled to pursue them beyond the bounds of the military objective in which they

[78] See J. Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Dispute – and War – Law* 629 (2nd edn, 1959).

[79] See M. Sassòli and A. A. Bouvier, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law* 163 (ICRC, 1999).

[80] See D. Bindschedler-Robert, 'Problems of the Law of Armed Conflict', 1 *A Treatise on International Criminal Law* 295, 318 (C. M. Bassiouni and V. P. Nanda eds., 1973).

[81] H. McCoubrey and N. D. White, *International Law and Armed Conflict* 232 (1992).

are employed. All the same, if the civilian labourers live inside the 'target area', they remain vulnerable to attack, since by going home they have not left the danger zone.

(iii) When civilians are travelling in wartime on a major motorway, taking a mainline train, going to an airport, etc., they are running a discernible risk in case of an air raid (see *supra*, Chapter 4, II, A). Nowhere is the risk more conspicuous than when civilians happen to cross a bridge – or to be present nearby – at the fateful moment when the enemy chooses to attack it. A suggestion has been made that, to reduce the risk to neighbouring civilian habitations, the attacker must 'target the center of the bridge, even though it could then be more easily repaired'.[82] In the opinion of the present writer, this is wrong.[83] Given the significant military advantage that can generally be gained from the destruction of a strategically located bridge (see *supra*, Chapter 4, II, E), relatively high civilian casualties would ordinarily be deemed a reasonable collateral damage.[84] Of course, it is disallowed to level an entire urban area (as distinct from a few houses) merely in order to hit a bridge.[85]

VI. Precautions in attack

To ensure that civilians and civilian objects are spared, Article 57(2)(a) of Protocol I obligates those who plan or decide upon an attack to take certain active precautions.[86] In a nutshell these are:

(i) Doing everything feasible to verify that the objectives to be attacked are military objectives;

(ii) Choosing means and methods of attack with a view to avoiding – or, at least, minimizing – incidental injury to civilians and civilian objects;

(iii) Refraining from launching an attack expected to be in breach of the principle of proportionality.

[82] F. Hampson, 'Proportionality and Necessity in the Gulf Conflict', 86 *PASIL* 45, 48 (1992).

[83] See a comment by the present writer, *ibid.*, 55.

[84] 'If, for example, the destruction of a bridge has a crucial importance for the success of a particular campaign, higher [civilian] casualties will be tolerable to achieve this than, for example, the destruction of a munitions factory of secondary importance.' L. Doswald-Beck, 'The Value of the 1977 Geneva Protocols for the Protection of Civilians', *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* 137, 156 (M. A. Meyer ed., 1989).

[85] See C. Pilloud and J. Pictet, 'Article 57', *Commentary on the Additional Protocols* 677, 684.

[86] Protocol I, *supra* note 1, at 654–5.

Palpably, no absolute certainty can be guaranteed in the process of ascertaining the military character of an objective selected for attack, but there is an obligation of due diligence and acting in good faith.[87] Article 57(2)(b) enjoins that an attack be cancelled or suspended if it becomes apparent that the objective is not military or that the principle of proportionality cannot be observed.[88]

The primary obligation of verification that an object to be attacked constitutes a military objective devolves on relatively high echelons, it being understood that junior officers will not normally have the requisite 'overview of the military situation'.[89] But for their part, senior commanders are not prone to act intuitively: they rely on military intelligence and information gathering done by lower ranks.[90] Despite all the impressive strides made by high technology, the information available may be inaccurate or wrongly interpreted.

The issue of avoiding or minimizing collateral damage to civilians and civilian objects underlies the task of 'targeting' – namely, the selection of appropriate targets from a list of military objectives – as well as that of the choice of weapons and ordnance.[91] If it is planned to attack a small military objective surrounded by densely populated civilian areas, the only legitimate *modus operandi* may be to resort to a surgical raid with precision-guided munitions. This is not to endorse claims, made by some commentators, that (i) there is a duty to use precision-guided munitions in urban settings;[92] or that (ii) countries with arsenals of 'smart bombs' are compelled to use them everywhere.[93] Such claims would introduce an inadmissible discriminatory bias either in favour of, or against, more developed belligerent States equipped with expensive ordnance at the cutting edge of modern technology.[94] Legally speaking, the position is fairly simple. LOIAC instructs the planners of an attack to take whatever steps that are necessary, in order to avoid or minimize collateral damage to

[87] See M. Bothe, 'Legal Restraints on Targeting: Protection of Civilian Population and the Changing Faces of Modern Conflicts', 31 *IYHR* 35, 45 (2001).
[88] Protocol I, *supra* note 1, at 655.
[89] See Oeter, *supra* note 22, at 181–2.
[90] See B. L. Brown, 'The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification', 10 *CILJ* 134, 145–6 (1976–7).
[91] See Oeter, *supra* note 22, at 183.
[92] See S. W. Belt, 'Missiles over Kosovo: Emergence, *Lex Lata*, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas', 47 *NLR* 115, 174 (2000).
[93] See D. L. Infeld, 'Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But Is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?', 26 *GWJILE* 109, 110–11 (1992–3).
[94] See J. F. Murphy, 'Some Legal (and a Few Ethical) Dimensions of the Collateral Damage Resulting from NATO's Kosovo Campaign', 31 *IYHR* 51, 63 (2001).

civilians (in urban settings and elsewhere). If the attack against a specific military objective can be embarked upon within these parameters, it is perfectly legitimate. Otherwise, it must be recoiled from. The availability of precision-guided munitions by no means forecloses alternative precautionary options. It must also be borne in mind that, should the attacker actually employ precision-guided munitions, while more options in targeting are bound to open up, the attack would be susceptible to much closer scrutiny by any impartial observer.

The obligation of minimizing collateral damage to civilians may require a nuanced decision-making process in planning an attack. Timing of the attack may be critical. Thus, if feasible, attacks against factories constituting legitimate military objectives may have to be carried out over the weekend or at night – when the facilities are presumed to be shut down – thereby minimizing injury to the civilian workforce.[95] However, when such factories are operating around the clock, as is often the case in wartime, their destruction cannot be accomplished at any temporal point without causing severe civilian losses.

This is true not only of industrial plants. Some critics have argued that 'a bombardment of a television centre in a case such as that of Kosovo should be undertaken at a time when it is likely to be least populated with [civilian] personnel'.[96] Yet, speculation as to when a TV and radio station is least populated with civilians in wartime may be idle. Actually, the particular bombing of the Belgrade Television and Radio Station during the Kosovo air campaign occurred around 2 a.m. Other critics, therefore, fault it on the ground that '[t]he loss of a few pre-dawn hours of broadcasting hardly seems to justify the loss of ten or more human lives'.[97] When combined, the upshot of these two lines of adverse comments is incongruous: on the one hand, attacks against the projected objective must be conducted in the wee hours of the morning, but, on the other, there is no point to the entire exercise if conducted in that timeframe!

Article 57(2)(c) of Protocol I prescribes that effective advance warning must be given of attacks affecting the civilian population, 'unless circumstances do not permit'.[98] This is another version of a well-established rule, encapsulated in two different provisions in the Hague Conventions of 1907: Article 26 of the Regulations Annexed to Hague Convention (IV), whereby the commander of an attacking force must do all

[95] See Pilloud and Pictet, *supra* note 85, at 682.
[96] H. McCoubrey, 'Kosovo, NATO and International Law', 14(5) *Int.Rel.* 29, 40 (1999).
[97] A. Schwabach, 'NATO's War in Kosovo and the Final Report to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia', 9 *TJICL* 167, 181 (2001).
[98] Protocol I, *supra* note 1, at 655.

in his power to warn the authorities before commencing a bombardment, except in cases of assault;[99] and Article 6 of Hague Convention (IX), according to which – if the military situation permits – the commander of an attacking naval force must do his utmost to warn the coastal authorities before commencing a bombardment.[100] Warnings are designed 'to allow, as far as possible, civilians to leave a locality before it is attacked'.[101] Hence, warnings must not be misleading or deceptive: no ruses of war are acceptable in this context (see *infra*, Chapter 8, I).[102]

The distinction in Hague Regulation 26 between bombardment and assault is apparently due to the assumption that an assault postulates surprise.[103] But surprise is a weighty element in all types of warfare, not only when an assault is contemplated. The practice of States shows that the desire to achieve surprise may frequently preclude warnings in non-assault situations or instigate warnings which are too vague to alert the civilian population to the impending peril.[104] It is not easy to determine what kind of advance notice would constitute an effective warning, nor is it clear how specific and direct the warning has to be. The aforementioned case of the bombing of the Belgrade TV and Radio Station serves as a good illustration of a controversy over the adequacy of what the attacking Party (NATO) deemed sufficient warning.[105]

Article 57(3) of the Protocol sets forth:

> When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.[106]

Of course, the implementation of this provision calls for the exercise of subjective judgment, as to whether two or more potential targets for attack actually offer a similar military advantage.[107]

[99] Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, *Laws of Armed Conflicts* 63, 75, 84.

[100] Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, 1907, *Laws of Armed Conflicts* 811, 813.

[101] A. Cassese, 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law', 3 *UCLAPBLJ* 55, 84 (1984).

[102] See Pilloud and Pictet, *supra* note 85, at 687.

[103] See T. E. Holland, *The Laws of War on Land (Written and Unwritten)* 46 (1908).

[104] See W. A. Solf, 'Article 57', *New Rules* 357, 367.

[105] See M. Cottier, 'Did NATO Forces Commit War Crimes during the Kosovo Conflict? Reflections on the Prosecutor's Report of 13 June 2000', *International and National Prosecution of Crimes under International Law: Current Developments* 505, 524 (H. Fischer, C. Kress and S. R. Lüder eds., 2001).

[106] Protocol I, *supra* note 1, at 655.

[107] See Solf, *supra* note 104, at 368.

VII. Cessation of protection and 'human shields'

Article 51(3) of Protocol I stipulates that civilians enjoy the protection afforded to them 'unless and for such time as they take a direct part in hostilities'.[108] Article 8(2)(b)(i) of the Rome Statute, in defining as a war crime the intentional direction of an attack against civilians, specifically relates only to those civilians 'not taking direct part in hostilities'.[109] In fact, those taking a direct (or active) part in hostilities are no longer civilians (see *supra*, Chapter 2, I).

As indicated, civilians cannot enjoy protection from attack when they enter military objectives (e.g., by working in a military base or in a munitions factory) or accompany military units. The protection is diminished even when civilians merely live near – or pass by – a military objective, by dint of the very tangible danger of a legitimate collateral damage in case of attack.

The LOIAC obligation to protect civilians and civilian objects – in implementation of the principle of distinction – is shared by all belligerents on both sides of the aisle.[110] Simultaneously with the prohibition of attacking enemy civilians directly or indiscriminately, Protocol I establishes an obligation to take precautions (sometimes called 'passive' precautions[111]) against the effects of attacks by the other side. Parties to the conflict are required by Article 58, 'to the maximum extent feasible', (i) to endeavour to remove civilians and civilian objects under their control from the vicinity of military objectives; (ii) to avoid locating military objectives within or near densely populated areas; and (iii) otherwise to protect civilians and civilian objects against the dangers resulting from military operations.[112] Admittedly, considering that these obligations devolve on every belligerent only 'to the maximum extent feasible', they are often viewed by commentators as more in the nature of recommendations than strict duties.[113]

At times, the intermingling of civilians (and civilian objects) with combatants (and military objectives) can scarcely be eliminated. For instance, sprawling metropolitan areas are only rarely bereft of military objectives. Nevertheless, the deliberate intermingling of civilians and combatants – designed to create a situation in which any attack against combatants would necessarily entail an excessive number of civilian casualties – is a flagrant breach of LOIAC. Article 51(7) of Protocol I sets forth:

[108] Protocol I, *supra* note 1, at 651. [109] Rome Statute, *supra* note 19, at 1006.
[110] See W. A. Solf, 'Article 58', *New Rules* 370, 371.
[111] C. Pilloud and J. Pictet, 'Article 58', *Commentary on the Additional Protocols* 691, 692.
[112] Protocol I, *supra* note 1, at 655.
[113] See P. Bretton, 'Le Problème des "Méthodes et Moyens de Guerre ou de Combat" dans les Protocoles Additionnels aux Conventions de Genève du 12 Août 1949', 82 *RGDIP* 32, 69 (1978).

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations.[114]

The concept lying at the root of the prohibition appears already in Article 28 of Geneva Convention (IV):

The presence of a protected person may not be used to render certain points or areas immune from military operations.[115]

Irrefutably, this norm mirrors customary international law.[116] Utilizing the presence of civilians or other protected persons to render certain points, areas or military forces immune from military operations is recognized as a war crime by Article 8(2)(b)(xxiii) of the Rome Statute.[117] The reference to other protected persons extends – beyond civilians – to prisoners of war, military medical personnel, etc.[118]

There are three ways in which the shielding of military objectives by civilians can be effected:

(i) One scenario is where civilians choose voluntarily to serve as human shields, with a view to deterring an enemy attack against combatants or military objectives. Such conduct would amount to an active participation in the hostilities on the part of the civilian volunteers, who would consequently become (unlawful) combatants.

(ii) The second scenario is when combatants compel civilians (either enemy civilians or their own) to move out and join them in military operations. The civilians in question may be obliged to serve as a screen to marching combatants, sit on locomotives of military trains in transit, etc. Acting as they do under duress, these civilians do not become combatants. Those who coerce the civilians to act in such a manner assume full criminal responsibility for their conduct.

(iii) The third scenario is a variation of the second. The only difference is that, instead of the civilians being constrained to join the combatants, the combatants (or military objectives) join the civilians. That is done, e.g., by combatants emplacing tanks or artillery pieces in the courtyard of a functioning school or in the middle of a dense civilian residential area. Likewise, military units may infiltrate columns of civilian refugees (as happened during the Korean War) in order to

[114] Protocol I, *supra* note 1, at 651.
[115] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, *Laws of Armed Conflicts* 495, 511.
[116] See J. G. Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law* 153 (1993).
[117] Rome Statute, *supra* note 19, at 1008.
[118] See W. J. Fenrick, 'Article 8(2)(b)(xxiii)', *Commentary on the Rome Statute of the International Criminal Court* 253, *id.* (O. Triffterer ed., 1999).

mask a military operation.[119] Once more, the civilians do not become combatants as a result of the military action taken.

All three types of attempts to protect combatants or military objectives with human shields are equally unlawful.

The crucial question is whether the brazen act of shielding a military objective with civilians (albeit a war crime) can effectively tie the hands of the enemy by barring an attack. Article 51(8) of Protocol I states that a violation of the prohibition of shielding military objectives with civilians does not release a belligerent from its legal obligations vis-à-vis the civilians.[120] What this means is that the principle of proportionality remains prevalent. However, even if that is the case, the actual test of excessive injury to civilians must be relaxed. That is to say, the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that – if an attempt is made to shield military objectives with civilians – civilian casualties will be higher than usual. To quote L. Doswald-Beck, '[t]he Israeli bombardment of Beirut in June and July of 1982 resulted in high civilian casualties, but not necessarily excessively so given the fact that the military targets were placed amongst the civilian population'.[121]

Customary international law is certainly more rigorous than the Protocol on this point. It has traditionally been perceived that, should civilian casualties ensue from an illegal attempt to shield combatants or a military objective, the ultimate responsibility lies with the belligerent State placing innocent civilians at risk.[122] A belligerent State is not vested by LOIAC with the power to block an otherwise legitimate attack against combatants (or military objectives) by deliberately placing civilians in harm's way.[123]

VIII. Starvation of civilians

A. General

Article 54 of Protocol I asseverates:

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas

[119] See C. D. Booth, 'Prosecuting the "Fog of War?": Examining the Legal Implications of an Alleged Massacre of South Korean Civilians by US Forces during the Opening Days of the Korean War in the Village of No Gun Ri', 33 *VJTL* 933, 972 n. 301 (2000).
[120] Protocol I, *supra* note 1, at 652.
[121] See L. Doswald-Beck, 'The Civilian in the Crossfire', 24 *JPR* 251, 257 (1987).
[122] See Parks, *supra* note 57, at 162–3.
[123] See McClintock, *supra* note 62, at 663–4.

for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:

(a) as sustenance solely for the members of its armed forces; or
(b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.[124]

This provision 'establishes a substantially new principle which is not yet customary international law'.[125] Its thrust is clear: foodstuffs, drinking water and other objects indispensable to the survival of the civilian population must not be attacked. The list of protected objects enumerated in Article 54 is 'merely illustrative', and it may include also shelter and clothing indispensable to survival.[126] Attack against the itemized objects is prohibited only for the 'specific purpose of denying them for their sustenance value to the civilian population'.[127] An attack against the same objects would be lawful if they are used exclusively for the sustenance of members of the armed forces or in direct support of military action. Therefore:

(i) Drinking water installations located in an enemy military base may be demolished.[128]
(ii) An irrigation canal used as part of a defensive line, or a water tower serving as an observation post, can be destroyed.[129]
(iii) A food-producing area may be bombarded, if the purpose is to forestall the advance of enemy troops rather than to prevent the enemy from growing food for civilian consumption.[130]
(iv) A railway line – which is a military objective – can be razed even if it serves 'to transport food needed to supply the population of a city'.[131]

Article 54(5) permits derogation from the prohibitions contained in Paragraph (2) only by a Party to the conflict in defence of its national territory against invasion (within that part of the national territory which is

[124] Protocol I, *supra* note 1, at 652–3.
[125] W. A. Solf, 'Protection of Civilians against the Effects of Hostilities under Customary International Law and under Protocol I', 1 *AUJILP* 117, 133 (1986).
[126] See C. Pilloud and J. Pictet, 'Article 54', *Commentary on the Additional Protocols* 651, 655.
[127] On the meaning of the additional words 'or to the adverse Party', see *ibid.*, 656.
[128] See Kalshoven, *supra* note 59, at 127.
[129] See Solf, *supra* note 8, at 341.
[130] See Kalshoven, *supra* note 59, at 127.
[131] Solf, *supra* note 8, at 339.

under its own control), if motivated by 'imperative military necessity'.[132] The issue arising here is that of the legality of a 'scorched earth' policy. Such a policy was employed as a screening tactic during massive retreats in the course of World War II.[133] The Protocol condones recourse to 'scorched earth' measures – regardless of the effects on the civilian population – only when the area affected belongs to the belligerent Party and is under its control (in contradistinction to enemy territory or even part of the national territory which is under the enemy's control).[134] Moreover, the 'scorched earth' policy can be invoked by that belligerent solely in retreat, and not when the area is being liberated from the enemy.[135]

The significance of the strictures of Article 54 must be examined in the context of siege warfare. It is also necessary to inquire whether scarcity of supplies to civilians (particularly in conditions of blockade) gives rise to a right to obtain humanitarian assistance from the outside.

B. Siege warfare

Siege warfare is conducted by encircling an enemy military concentration, a strategic fortress or any other location defended by the enemy, cutting it off from channels of support and supply. The essence of siege warfare lies in an attempt to capture the invested location through starvation. When siege warfare is directed against a military stronghold, enemy combatants may be the only ones suffering from its effects. But in many instances there would be a substantial civilian population in the surrounded area. This is especially the case when siege is laid to a defended town. While actual resistance to the investing force may be offered exclusively by the military garrison manning the fortifications, the civilian inhabitants of the town – possibly joined by refugees from the adjacent countryside – will naturally share in the privations of a prolonged siege. In fact, they are likely to be the first victims of any resultant famine.[136]

The legality of siege warfare has not been questioned in customary international law.[137] Accordingly, the diversion of the channel of a river

[132] Protocol I, *supra* note 1, at 653. [133] See Stone, *supra* note 78, at 558–9 n. 71.
[134] See Pilloud and Pictet, *supra* note 126, at 658–9.
[135] See L. C. Green, *The Contemporary Law of Armed Conflict* 144 (2nd edn, 2000).
[136] An 'examination of past wars and famines makes it clear that the food shortage will strike first and hardest at children, the elderly, and pregnant and lactating women; last and least at adult males, and least of all at soldiers'. J. Mayer, 'Starvation as a Weapon', *Chemical and Biological Warfare* 76, 83 (S. Rose ed., 1968).
[137] C. C. Hyde, 3 *International Law Chiefly as Interpreted and Applied by the United States* 1803 (2nd edn, 1945). See also L. Nurick, 'The Distinction between Combatant and Noncombatant in the Law of War', 39 *AJIL* 680, 686 (1945).

supplying drinking water to the besieged used to be permitted.[138] Siege was deemed a legitimate method of warfare even when most of the victims of starvation emanating from lack of adequate supplies were civilians rather than combatants.[139]

When shortages of food and water in an invested town become intolerable, and no relief is in sight, civilians will usually try to escape. Generally speaking, the military authorities of the besieged area will 'be in favour of evacuating civilians so as to avoid feeding "useless mouths" '.[140] For the very same reason, the besieging force may be disinclined to permit the evacuation of civilians, lest this might ease the drain on the limited resources of the invested town. The customary rule was that 'it is lawful, though an extreme measure, to drive them back so as to hasten the surrender'.[141]

The classical harsh rule was confirmed by an American Military Tribunal, in the 'Subsequent Proceedings' at Nuremberg, in the *High Command* case. The principal defendant in this trial, Field Marshal von Leeb, had issued an order to German artillery to fire on Russian civilians attempting to flee through the German lines during the siege of Leningrad.[142] In its Judgment of 1948, the Tribunal held that von Leeb's order was not unlawful, adding:

> We might wish the law were otherwise but we must administer it as we find it.[143]

Geneva Convention (IV) deals with siege warfare in a peripheral way. Article 17 sets forth:

> The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.[144]

Plainly, only limited categories of civilians benefit from this stipulation and, moreover, '[t]he words "The Parties to the conflict shall endeavour" show that under the Convention evacuation is not compulsory': Article 17 merely amounts to a strong recommendation to belligerents to conclude

[138] See L. Oppenheim, 2 *International Law* 419 (H. Lauterpacht ed., 7th edn, 1952).
[139] See M. C. Waxman, 'Siegecraft and Surrender: The Law and Strategy of Cities as Targets', 39 *VJIL* 353, 408–9 (1998–9).
[140] E. Rosenblad, *International Humanitarian Law of Armed Conflict* 109 (1979).
[141] Hyde, *supra* note 137, at 1803. See also Nurick, *supra* note 137, at 686.
[142] *High Command* case (*USA* v. *von Leeb et al.*) (American Military Tribunal, Nuremberg, 1948), 11 *NMT* 462, 563.
[143] *Ibid.* [144] Geneva Convention (IV), *supra* note 115, at 507.

an agreement bringing about the removal of the civilians belonging to the categories listed.[145]

The legal position is radically changed in Article 54 of Protocol I, in so far as contracting Parties are concerned. A new legal regime has come into force: a siege laid to a defended town inhabited by civilians must be differentiated from one encircling a military fortress. In the latter case, inasmuch as only the sustenance of combatants is at stake, starvation is a legitimate method of warfare, and it is permissible to destroy systematically all foodstuffs and drinking water installations which can be of use to the besieged. Contrariwise, in the former case, by virtue of the direct impact on civilians, starvation and the destruction of foodstuffs (and drinking water installations) are interdicted. Pursuant to the Protocol,

> A food supply needed by the civilian population does not lose its protection simply because it is also used by the armed forces and may technically qualify as a military objective. It has to be used exclusively by them to lose its immunity.[146]

The foregoing analysis leads to a far-reaching conclusion. If the destruction of foodstuffs (and drinking water installations) sustaining the civilian population in a besieged town is excluded, how can a siege be a siege? To be fully effective, siege warfare must posit the deprivation of nourishment to the besieged. If no such deprivation is warranted by law, a siege becomes devoid of its central hallmark. What we are actually told by the framers of the Protocol, then, is that 'a true siege would no longer be feasible' if civilians are affected.[147] In short, siege 'in the old meaning and function of the term' is prohibited.[148]

The broad injunction against sieges involving civilians is unrealistic, in view of the fact that there may be no other method of warfare to bring about the capture of a defended town with a tenacious garrison and impregnable fortifications. This is not to say that the complete freedom of action vouchsafed to a besieging force by customary international law is entirely justified. It is a sensible 'reversal of customary law' to deny the besieging force the right to compel civilians to remain in an invested town from which they are trying to escape.[149] To that extent, the concept rooted in Article 54 is bound to leave its imprint on the future evolution

[145] See *Commentary, IV Geneva Convention* 138–9 (ICRC, O. M. Uhler and H. Coursier eds., 1958).
[146] Blix, *supra* note 65, at 143.
[147] G. B. Roberts, 'The New Rules for Waging War: The Case against Ratification of Additional Protocol I', 26 *VJIL* 109, 153 (1985–6).
[148] I. Detter, *The Law of War* 298 (2nd edn, 2000).
[149] G. H. Aldrich, 'The Laws of War on Land', 94 *AJIL* 42, 53 (2000).

of LOIAC.[150] Still, if civilians in a besieged town are offered safe passage out of an encircled area but choose to stay *in situ*, what legitimate claim do they have for special protection from the hardships of starvation? Similarly, if the civilians are coerced to stay where they are by edict of the military commander of the garrison of the besieged town, why should the enemy be barred from destroying the foodstuffs and drinking water installations sustaining them? A refusal by the garrison's commander to permit civilians to evacuate the town is liable to be based on a desire to use them as 'human shields' (a method of warfare specifically proscribed: see *supra*, VII). Surely, no besieging force can be expected to raise a siege or avoid sealing hermetically an enveloped town as long as it presents civilians with the option of withdrawal from the danger zone.

One must be cognizant of the purpose of siege warfare, which is not to kill civilians with hunger and thirst, but to induce the encircled town to surrender.[151] The text of Article 54 fails to take into account the inherent nature of siege: starvation of those within the invested location continues only as long as the besieged garrison persists in waging warfare. Once the town surrenders, foodstuffs and drinking water must certainly be made available to all (civilians as well as those *hors de combat*).

The Protocol compounds the problem by the direct ban in Article 54(2) on using starvation as a method of forcing civilians to move away. Had it not been for this clause, one might have contended that siege warfare (with attendant starvation) is legitimate, provided that the besieging force is prepared to allow civilians to depart from the encircled town. However, since this would amount to an attempt by the besieging force to employ starvation as a means of removing civilians from their place of habitation (if only temporarily), it is apparently proscribed by the wording of Article 54.

A. P. V. Rogers comes up with a number of arguments why siege warfare can be conducted, despite the prohibition of the starvation of civilians in Article 54.[152] He maintains, e.g., that turning back supplies bound for a besieged area does not equal their being subject to attack and destruction.[153] He also points out that starvation of civilians is not a grave breach of the Protocol.[154] But in the meantime, Article 8(2)(b)(xxv) of the 1998 Rome Statute has turned into a war crime the intentional use of starvation of civilians as a method of warfare (by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for by the Geneva Conventions).[155]

[150] See Solf, *supra* note 8, at 338.
[151] See G. A. Mudge, 'Starvation as a Means of Warfare', 4 *Int.Law.* 228, 246 (1969–70).
[152] A. P. V. Rogers, *Law on the Battlefield* 62–3 (1996).
[153] *Ibid.*, 63. [154] *Ibid.*, 62. [155] Rome Statute, *supra* note 19, at 1008.

It stands to reason that the practice of States will not confirm the sweeping abolition of siege warfare affecting civilians. Possibly, a construction of the language of Article 54 will be arrived at, whereby siege warfare will continue to be acquiesced with – notwithstanding civilian privations – at least in those circumstances when the besieging force is willing to assure civilians a safe passage out.

C. Humanitarian assistance

In time of international armed conflict – owing to scarcity of foodstuffs, medications and the like – civilians (irrespective of siege warfare) may face tremendous difficulties in acquiring nutritious comestibles and withstanding disease. Civilian refugees may also need clothing, bedding and means of shelter. The plight of civilians is exacerbated if the area in which they live – or the entire country – is subject to a blockade (*supra*, Chapter 4, V, F), interdicting any ingress of vessels or aircraft to the enemy coast or a part thereof. Over a period of time, an effective blockade can resemble a siege in precipitating starvation.[156] Indeed, while a siege can be confined to a military garrison in a small fortress, a blockade – if extended to large areas – would almost invariably hurt also the civilian population. Civilians are most susceptible to the dire consequences of a lengthy blockade, 'since they may have the lowest priority in the distribution of food supplies'.[157] The prolonged blockade of Germany during World War I brought about a situation in which an entire country was 'experiencing the uncontrolled effects of a rapidly accelerating famine'.[158] It has often been called a 'hunger blockade'.[159]

In prohibiting the starvation of civilians as a method of warfare, Article 54 of Protocol I does not render blockade unlawful as a method of warfare. This follows from the language of Article 49(3) of the Protocol:

> The provisions of this Section [Articles 48–67] apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.[160]

[156] See W. Heintschel von Heinegg, 'Naval Blockade', 75 *ILS* 203, 216 (*International Law across the Spectrum of Conflict, Essays in Honour of Professor L. C. Green*, M. N. Schmitt ed., 2000).

[157] P. Macalister-Smith, 'Protection of the Civilian Population and the Prohibition of Starvation as a Method of Warfare', 31 *IRRC* 440, 445 (1991).

[158] See C. P. Vincent, *The Politics of Hunger: The Allied Blockade of Germany, 1915–1919* 124 (1985).

[159] See Heintschel von Heinegg, *supra* note 156, at 216.

[160] Protocol I, *supra* note 1, at 650.

As the ICRC Commentary on the Protocol explains the Paragraph:

> In general the delegates at the Diplomatic Conference were guided by a concern not to undertake a revision of the rules applicable to armed conflict at sea or in the air. This is why the words 'on land' were retained and a second sentence clearly indicating that the Protocol did not change international law applicable in such situations was added.[161]

Even those scholars who advocate the illegality of a blockade giving rise to starvation of civilians are forced to concede that their thesis is inconsistent with the original intention of the Diplomatic Conference to leave no impact on the law of blockades.[162] All that can be said on the basis of existing law is that, in accordance with the general (customary law) principle of proportionality, the expected injury to civilians in the wake of a blockade must not be excessive in relation to the military advantage anticipated (and, consequently, that a blockade must not have the starvation of civilians as its sole purpose).[163]

When the civilian population is deprived of essentials – whether due to blockade or otherwise – the question is whether humanitarian assistance can be shipped from the outside with a view to alleviating the suffering. The only airtight provision to that effect appears in Article 59 of Geneva Convention (IV) in the context of occupied territories:

> If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.
>
> Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.
>
> All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.
>
> A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.[164]

The obligation imposed on the Occupying Power to let such relief consignments reach the civilian population 'is unconditional'.[165] The third

[161] C. Pilloud and J. Pictet, 'Article 49', *Commentary on the Additional Protocols* 601, 606.
[162] See W. Heintschel von Heinegg, 'The Law of Armed Conflict at Sea', *Handbook* 405, 471.
[163] See *San Remo Manual*, *supra* note 72, at 179.
[164] Geneva Convention (IV), *supra* note 115, at 519.
[165] *Commentary*, *supra* note 145, at 320.

Paragraph is viewed by the ICRC Commentary as 'the keystone of the whole system'; its thrust is that relief consignments to occupied territories must be permitted to cross even a blockade line (subject to verification and supervision).[166]

Unfortunately, no similar obligation exists outside of occupied territories. True, Article 23(1) of Geneva Convention (IV) enunciates:

> Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.[167]

This stipulation – which applies also (and particularly) in areas in the grip of blockade[168] – is drastically limited in scope. Apart from being subjected to various conditions spelt out in other Paragraphs of Article 23,[169] free passage of consignments for all civilians is confined to medications, whereas other items (food and clothing) are circumscribed to certain segments of the population deemed singularly vulnerable. There is patently no requirement of letting through supplies of food and clothing to the civilian population in general.[170]

Article 70(1) of Additional Protocol I pronounces that if the civilian population of any territory under the control of a Party to the conflict (other than occupied territory) is not adequately provided with rudimentary supplies, humanitarian and impartial relief actions from the outside 'shall be undertaken', but this is 'subject to the agreement of the Parties concerned in such relief actions'.[171] Unlike Article 23 of Geneva Convention (IV), Article 70(1) of the Protocol 'expands relief entitlement to the whole population and not only to vulnerable segments' thereof.[172] Furthermore, Article 70(1) employs the phrase 'shall be undertaken', which – when taken alone – 'clearly implies an obligation to accept relief offers meeting the requirements mentioned in the article'.[173] However, one cannot ignore the glaring fact that implementation of the implied obligation is explicitly subject to an agreement between the Parties concerned.

[166] *Ibid.*, 321–2. [167] Geneva Convention (IV), *supra* note 115, at 508–9.
[168] See *Commentary*, *supra* note 145, at 178–9.
[169] Geneva Convention (IV), *supra* note 115, at 509.
[170] E. Rosenblad, 'Starvation as a Method of Warfare – Conditions for Regulation by Convention', 7 *Int.Law.* 252, 261–2 (1973).
[171] Protocol I, *supra* note 1, at 663.
[172] R. Provost, 'Starvation as a Weapon: Legal Implications of the United Nations Food Blockade against Iraq and Kuwait', 30 *CJTL* 577, 612 (1992).
[173] M. Bothe, 'Relief Actions', 4 *EPIL* 168, 1771.

'Consent – the expression of sovereignty – is hence a basic principle in the exercise of the right to humanitarian assistance in armed conflicts'.[174]

As long as relief actions are predicated on an agreement by all concerned, one cannot speak of a genuine obligation to enable free passage of humanitarian assistance to civilians. At best, Article 70(1) may be construed as precluding refusal of agreement to relief for arbitrary or capricious reasons.[175] Even so, there are a host of non-arbitrary and practical reasons that can be invoked by a belligerent Party in an international armed conflict if it chooses to withhold its consent from the delivery of relief supplies to civilians. The upshot is that the framers of Article 70(1) created 'the impression of an ironclad obligation, and at the same time took the bite out of that rule'.[176]

[174] M. Torrelli, 'From Humanitarian Assistance to "Intervention on Humanitarian Grounds" ', 32 *IRRC* 228, 232 (1992).

[175] See *ibid.*; and C. A. Allen, 'Civilian Starvation and Relief during Armed Conflict: The Modern Humanitarian Law', 19 *GJICL* 1, 72 (1989).

[176] 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 Sea: Repercussions on the Law of Naval Warfare* 91–2 (1984).

6 Measures of special protection

I. Persons entitled to special protection

The previous chapter examined the general protection of civilians from exposure to enemy attack. This section will deal with the special protection afforded by LOIAC to certain categories of persons, both civilians and combatants. It must be perceived that the special protection granted to selected subsets of civilians (e.g., women and children, or wounded and sick) does not detract from the general protection embracing all civilians. That is to say, it is unlawful to attack civilians even when they are male, healthy and in the prime of their life.

A. The different categories of beneficiaries

(i) *Women and children*: A host of provisions are included in the Geneva Conventions of 1949 and in Additional Protocol I of 1977, with a view to safeguarding the rights of women[1] and children.[2] Thus, Article 27 (second Paragraph) of Geneva Convention (IV) offers women special protection against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault.[3] This rule is reiterated in Article 76(1) of the Protocol.[4] But whereas the former clause applies only to civilian women who are 'protected persons' in the sense of the Geneva Convention (IV) – thereby excluding, pre-eminently, the State Party's own nationals – the latter text covers all women without exception.[5]

[1] See J. Gardam and H. Charlesworth, 'Protection of Women in Armed Conflict', 22 *HRQ* 148, 159 (2000).

[2] Geneva Convention (IV) 'incorporates 17 articles of specific concern to children' – in both occupied and unoccupied territories – listed by G. Van Bueren, 'The International Legal Protection of Children in Armed Conflicts', 43 *ICLQ* 809, 811 (1994).

[3] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, *Laws of Armed Conflicts* 495, 510.

[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, *Laws of Armed Conflicts* 621, 667.

[5] See W. A. Solf, 'Article 76', *New Rules* 467, 469–70.

Children, too, are protected against any form of indecent assault in accordance with Article 77(1) of the Protocol.[6] The prohibition of indecent assault encompasses rape and other sexual attacks against children (particularly, albeit not exclusively, girls).[7]

Committing rape, sexual slavery, enforced prostitution and related acts constitutes a war crime, as defined by Article 8(2)(b)(xxii) of the Rome Statute of the International Criminal Court.[8]

Of course, women can be – and increasingly are – full-fledged members of the armed forces, namely, combatants. As for children, even at relatively early ages, they can be used in various capacities in wartime.[9] Hence, the principal question is the minimum age of recruitment to the armed forces. Article 77(2) of Protocol I obligates Parties to a conflict not to recruit children under the age of fifteen years, and to take all feasible measures to ensure that such children 'do not take a direct part in hostilities'.[10] This undertaking is reaffirmed[11] in Article 38(2) of the 1989 Convention on the Rights of the Child (adopted by the UN General Assembly),[12] and it may be considered a reflection of current customary international law.[13] Consistent with Article 8(2)(b)(xxvi) of the Rome Statute, conscripting or enlisting 'children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities'[14] is a war crime.

In conformity with an Optional Protocol to the Convention on the Rights of the Child, formulated by the General Assembly in 2000, States Parties undertake to ensure that children under the age of eighteen years shall not be 'compulsorily recruited into their armed forces'.[15] Thus, the bar of compulsory recruitment has been raised from fifteen to eighteen years, although voluntary recruitment under the age of eighteen is still permissible (subject to certain

[6] Protocol I, *supra* note 4, at 667.
[7] See J. Kuper, *International Law Concerning Child Civilians in Armed Conflict* 79 (1997).
[8] Rome Statute of the International Criminal Court, 1998, 37 *ILM* 999, 1008 (1998).
[9] See H. Mann, 'International Law and the Child Soldier', 36 *ICLQ* 32, 35 (1987).
[10] Protocol I, *supra* note 4, at 667.
[11] On the interaction between the two texts, see A. J. M. Delissen, 'Legal Protection of Child-Combatants after the Protocols: Reaffirmation, Development or a Step Backwards?', *Humanitarian Law of Armed Conflict: Challenges Ahead (Essays in Honour of Frits Kalshoven)* 153–64 (A. J. M. Delissen and G. J. Tanja eds., 1991).
[12] Convention on the Rights of the Child, 1989, 28 *ILM* 1448, 1470 (1989).
[13] See M. Happold, 'Child Soldiers in International Law: The Legal Regulation of Children's Participation in Hostilities', 47 *NILR* 27, 47 (2000).
[14] Rome Statute, *supra* note 8, at 1008.
[15] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000, 39 *ILM* 1286, 1287 (2000) (Article 2).

safeguards).[16] In addition, States Parties are obligated to take all feasible measures to ensure that members of the armed forces below the age of eighteen 'do not take a direct part in hostilities'.[17]

(ii) *Wounded and sick*: Article 12 of Geneva Convention (I) lends special protection in all circumstances – without any discrimination – to wounded and sick members of the armed forces in land warfare, and bans not only their murder or torture (acts of commission) but also wilfully leaving them without medical attention (an act of omission).[18] A concomitant protection in maritime warfare is warranted in Article 12 of Geneva Convention (II).[19] Geneva Convention (IV) confers protection on civilian wounded and sick, the infirm, maternity cases, aged persons and children (Articles 16–18).[20] Article 10 of Protocol I guarantees protection to all wounded and sick, 'whether military or civilian'.[21] Article 8(a) of the Protocol defines 'wounded' and 'sick' in a broad way: the definition covers all persons, whether military or civilian, who are in need of medical care because of trauma, disease or other physical or mental disorder or disability; and in addition maternity cases, expectant mothers, newborn babies and the infirm who come within the ambit of the protection.[22] It is obvious from this text that some of those enjoying the status of 'wounded' and 'sick' are neither wounded nor sick (e.g., newborn babies).[23]

Under Geneva Convention (I), it is incumbent on Parties to the conflict to take all possible measures – at all times, but particularly after an engagement – to search for and collect the wounded and sick; if necessary, a ceasefire should be arranged for that purpose (Article 15).[24] Geneva Convention (II) also imposes an obligation on Parties to the conflict, after each engagement, to take all possible measures to search for and collect the wounded and sick (Article 18, first Paragraph).[25] However, it must be understood that if such humanitarian efforts at sea should subject a vessel – especially a submarine – to undue hazard, it may be absolved from discharging

[16] *Ibid.*, 1287–8 (Article 3). [17] *Ibid.*, 1287 (Article 1).
[18] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, *Laws of Armed Conflicts* 373, 379.
[19] Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, *Laws of Armed Conflicts* 401, 407–8.
[20] Geneva Convention (IV), *supra* note 3, at 506–7.
[21] Protocol I, *supra* note 4, at 633. [22] *Ibid.*, 631.
[23] See Y. Sandoz, 'Article 8', *Commentary on the Additional Protocols* 113, 118.
[24] Geneva Convention (I), *supra* note 18, at 380–1.
[25] Geneva Convention (II), *supra* note 19, at 409.

the duty (passing the information to others better capable of rendering assistance).[26]

(iii) *Shipwrecked*: The protection granted in Geneva Convention (II) and in Article 10 of Protocol I is not confined to the wounded and sick: it is extended to 'shipwrecked' persons (members of the armed forces in the case of the Convention, and also civilians under the Protocol). The first Paragraph of Article 12 of Geneva Convention (II) makes it clear that a 'shipwreck' can be derived 'from any cause', including forced landings at sea by or from aircraft.[27] 'Shipwrecked' persons need not be floating on the water but may be on rafts or in lifeboats; they may even remain aboard a disabled vessel.[28] It is irrelevant that 'shipwrecked' persons are in fit condition, namely, neither wounded nor sick.[29]

Article 8(b) of Protocol I defines 'shipwrecked' as meaning 'persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them'.[30] It follows that no ship has to be wrecked – and no aircraft need be disabled – for a person to become 'shipwrecked': he may merely fall into the water from a vessel that sails on.[31]

(iv) *Parachutists from aircraft in distress*: Article 42 of Protocol I states that '[n]o person parachuting from an aircraft in distress shall be made the object of attack during his descent' (and, should he reach the ground in enemy-controlled territory, he must 'be given an opportunity to surrender before being made the object of attack'), while explicitly barring airborne troops from enjoying this privilege.[32] The protection (confirmed in Article 20 of the 1923 Hague Rules of Air Warfare[33]) is overtly applicable only to air crews and passengers saving themselves from a disabled aircraft by abandoning it. Excluded from the scope of the protection are (aa) those remaining on board in anticipation of a forced landing; and (bb) those descending by parachute for reasons other than distress (not only airborne troops, but spies too).[34] As indicated, if parachutists

[26] See J. A. Roach, 'Legal Aspects of Modern Submarine Warfare', 6 *MPYUNL* 367, 378–9 (2002).
[27] Geneva Convention (II), *supra* note 19, at 407.
[28] See *Commentary, II Geneva Convention* 89 (ICRC, J. S. Pictet ed., 1960).
[29] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* 136 (L. Doswald-Beck ed., 1995).
[30] Protocol I, *supra* note 4, at 631.
[31] See M. Bothe, 'Article 8', *New Rules* 92, 96.
[32] Protocol I, *supra* note 4, at 646.
[33] Hague Rules of Air Warfare, 1923, *Laws of Armed Conflicts* 207, 210.
[34] See W.A. Solf, 'Article 42', *New Rules* 224, 226.

from an aircraft in distress alight on water, they come within the definition of 'shipwrecked'.[35]

(v) *Surrendering members of armed forces*: Pursuant to Article 23(c) of the Hague Regulations, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, it is not allowed to kill or wound an enemy combatant who lays down his arms – or no longer has any means of defence – and surrenders.[36] 'Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion', is a war crime embedded in Article 8(2)(b)(vi) of the Rome Statute.[37]

Article 41(1) of Protocol I promulgates that a person who is recognized (or who, in the circumstances, should be recognized) as *hors de combat* must not be made the object of attack.[38] Article 41(2) sets forth:

> A person is *hors de combat* if:
> (a) he is in the power of an adverse Party;
> (b) he clearly expresses an intention to surrender; or
> (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself.[39]

A surrender may be effected by an individual combatant (usually by raising his hands or by hoisting a white flag) or by entire units, sometimes on a massive scale. Customary international law unambiguously decrees that 'combatants have the obligation to desist from hostile acts against enemy military persons or units that manifest an unconditional intent to surrender'.[40]

Article 23(d) of the Hague Regulations prohibits the issuance of a declaration that no quarter will be given.[41] 'Declaring that no quarter will be given' is a war crime under Article 8(2)(b)(xii) of the Rome Statute.[42] Article 40 of Protocol I correctly forbids both conducting hostilities on the basis of a no-survivors policy and threatening the enemy that there shall be no survivors.[43] The point is that a no-quarter guideline is interdicted irrespective of actual

[35] See E. Roucounas, 'Some Issues Relating to War Crimes in Air and Sea Warfare', 24 *IYHR* 223, 232 (1994).
[36] Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, *Laws of Armed Conflicts* 63, 75, 83.
[37] Rome Statute, *supra* note 8, at 1007.
[38] Protocol I, *supra* note 4, at 646. [39] *Ibid.*
[40] H. B. Robertson, 'The Obligation to Accept Surrender', 68 *ILS* 541, 547 (J. N. Moore and R. F. Turner eds., 1995).
[41] Hague Regulations, *supra* note 36, at 83. [42] Rome Statute, *supra* note 8, at 1007.
[43] Protocol I, *supra* note 4, at 646.

results or of implementation of the threat.[44] As experience shows, the danger of a no-quarter policy is most acute with respect to commandos, political commissars attached to military units, irregular troops and the like.[45]

(vi) *Parlementaires*: Article 32 of the Hague Regulations pronounces that a 'parlementaire' – i.e., an envoy conducting negotiations between commanders of adversary units, in order to arrive at terms of surrender, effect a ceasefire, collect casualties from the battlefield, etc. – is entitled to inviolability from attack (an inviolability which cloaks any trumpeter, bugler, drummer, flag-bearer or interpreter who may accompany him).[46]

(vii) *Medical personnel*: Article 24 of Geneva Convention (I) secures protection in all circumstances to medical personnel exclusively engaged in the search for – or the collection, transport or treatment of – the wounded and sick; in disease prevention; or in administration of medical units.[47] The expression 'medical personnel' means the medical service of the armed forces, and it comprises comprehensively doctors, surgeons, dentists, chemists, orderlies, nurses, stretcher-bearers, ambulance drivers, and even cooks and cleaners forming part of that service.[48] Article 37 of Geneva Convention (II) mandates protection of medical and hospital personnel assigned to the medical care of members of armed forces at sea, if they fall into the hands of the enemy.[49]

Article 25 of Geneva Convention (I) affords a more limited protection – applicable as long as they are carrying out the protected mission – to soldiers specially trained for partial (as distinct from exclusive) employment as orderlies, nurses or stretcher-bearers, in the search for or the collection, transport or the treatment of the wounded and sick.[50]

Article 26 of Geneva Convention (I) grants the full protection – as per Article 24 – to the staff of National Red Cross Societies and that of other voluntary aid societies, duly recognized and authorized by their Governments; provided that they are tasked with the same duties as the medical personnel, they are subject to military laws

[44] See K. Dörmann, 'Preparatory Commission for the International Criminal Court: The Elements of War Crimes – Part II', 83 *IRRC* 461, 465 (2001).
[45] See J. de Preux, 'Article 40', *Commentary on the Additional Protocols* 473, 476.
[46] Hague Regulations, *supra* note 36, at 85–6.
[47] Geneva Convention (I), *supra* note 18, at 384.
[48] See *Commentary, I Geneva Convention* 218–19 (ICRC, J. S. Pictet ed., 1952).
[49] Geneva Convention (II), *supra* note 19, at 414.
[50] Geneva Convention (I), *supra* note 18, at 384.

and regulations, and prior notification of the name of the authorized society is conveyed to the enemy.[51] Article 20 of Geneva Convention (IV) imparts a similar protection to persons regularly and solely engaged in the operation and administration of civilian hospitals; including the personnel engaged in the search for, removal and transport of, or care for, wounded and sick civilians, the infirm and maternity cases.[52]

Article 15(1) of Protocol I broadens the protection to civilian medical personnel.[53] Article 8(c) of the Protocol defines 'medical personnel' as meaning those persons assigned by a belligerent on an exclusive (permanent or temporary) basis to medical purposes or to the administration of medical units or the operation of medical transports.[54] The medical purposes alluded to cover a wide spectrum of activities, such as midwifery.[55] Whatever their function, medical personnel – whether military or civilian – must belong to a Party to the conflict. It ensues that the protection does not cover every physician, but only personnel operating in a recognized and authorized manner on behalf of a belligerent State.

Geneva Convention (I) (Articles 40–1)[56] and Geneva Convention (IV) (Article 20)[57] proclaim that members of the medical personnel who are entitled to protection must wear, affixed to their left arm, an armlet bearing the distinctive emblem of the Red Cross or its equivalent (see *infra*, III, A) and carry a special identity card. More details are expounded in the Protocol (Article 18 and Annex I, Articles 1–4).[58]

As affirmed by Article 43(2) of Protocol I, members of the medical personnel of the armed forces are not combatants.[59] Under Article 33 of Geneva Convention (III), they cannot be taken prisoners of war, but may be retained by the Detaining Power with a view to assisting prisoners of war.[60]

Members of a veterinary personnel do not enjoy the protection of medical personnel, although their presence does not deprive a medical establishment of its special protection.[61] When veterinary

[51] *Ibid.* [52] Geneva Convention (IV), *supra* note 3, at 507–8.
[53] Protocol I, *supra* note 4, at 635. [54] *Ibid.*, 631.
[55] See Bothe, *supra* note 31, at 99.
[56] Geneva Convention (I), *supra* note 18, at 389.
[57] Geneva Convention (IV), *supra* note 3, at 507–8.
[58] Protocol I, *supra* note 4, at 636–7, 679–81. [59] *Ibid.*, 647.
[60] Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, *Laws of Armed Conflicts* 442–3.
[61] See Geneva Convention (I), *supra* note 18, at 383 (Article 22(4)).

personnel belong to the armed forces, they may be considered combatants.[62]

(viii) *Religious personnel*: Article 24 of Geneva Convention (I) protects (side by side with medical personnel) 'chaplains attached to the armed forces',[63] and Article 37 of Geneva Convention (II) refers to religious personnel assigned to the spiritual needs of members of the armed forces at sea.[64] Article 15(5) of Protocol I enlarges the scope of the protection to civilian religious personnel.[65] Article 8(d) defines 'religious personnel' to mean 'military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry' and attached to the armed forces or to medical units, medical transports or civil defence organizations of a Party to the conflict.[66] As a result of this definition, (aa) religious personnel are not exclusively chaplains; (bb) the religion to which members of the personnel adhere is immaterial; but (cc) the members of the personnel can fulfil no functions other than religious (and possibly also medical) ones; and (dd) they must be attached to certain units or organizations (the assignment can be either permanent or temporary).[67] Religious personnel, like medical personnel, must wear the distinctive emblem of the Red Cross and carry a special identity card.[68]

Members of religious personnel of the armed forces – like medical personnel – are not combatants (Article 43(2) of Protocol I),[69] and cannot be taken prisoners of war, but can be retained with a view to assisting prisoners of war (Article 33 of Geneva Convention (III)).[70]

(ix) *Civil defence personnel*: Article 62 of Protocol I prohibits an attack against civilian civil defence organizations and their personnel.[71] Under Article 65, the protection is not lifted should service in civil defence organizations be compulsory (along military lines).[72] Article 67 accords the protection even to members of the armed forces assigned to civil defence organizations, provided that the assignment is permanent and the persons concerned are exclusively devoted to the performance of civil defence tasks.[73] Civil

[62] See A. P. V. Rogers and P. Malherbe, *Model Manual on the Law of Armed Conflict* 88 (ICRC, 1999).
[63] Geneva Convention (I), *supra* note 18, at 384.
[64] Geneva Convention (II), *supra* note 19, at 414.
[65] Protocol I, *supra* note 4, at 635. [66] *Ibid.*, 631–2.
[67] See Sandoz, *supra* note 23, at 127–8.
[68] See especially Protocol I, *supra* note 4, at 636–7, 679–81 (Article 18 and Annex I, Articles 1–4).
[69] *Ibid.*, 647. [70] Geneva Convention (III), *supra* note 60, at 442–3.
[71] Protocol I, *supra* note 4, at 659. [72] *Ibid.*, 660–1. [73] *Ibid.*, 661–2.

defence tasks are designed to protect the civilian population: they are enumerated in Article 61(1)(a), and include warning, evacuation and rescue, management of shelters and blackout measures, fire-fighting, etc.[74] It is noteworthy that blackout measures and the like may enhance the military effort; nevertheless, they constitute legitimate civil defence tasks when undertaken for the benefit of the civilian population.[75] An international distinctive sign of civil defence is devised in the Protocol.[76]

(x) *Relief personnel*: In keeping with Article 71(2) of Protocol I, personnel participating in the transportation and distribution of relief consignments must be protected.[77] However, Article 71(1) underscores that the participation of such personnel in the relief action is subject to the approval of the Party in whose territory they carry out their duties.[78] This should be interpreted to mean the Party actually exercising control over the territory.[79]

(xi) *Journalists*: Article 79 of Protocol I enunciates that journalists engaged in dangerous professional missions in areas of armed conflict are to be considered and protected as civilians.[80] They may obtain an identity card attesting to their status as journalists.[81]

References to accredited war correspondents (who follow the armed forces without directly belonging to them) appear already in Article 13 of the Hague Regulations,[82] as well as Article 4(A)(4) of Geneva Convention (III),[83] in the context of their entitlement to prisoners of war status.

Whether or not accredited, journalists are civilians: they do not lose that status by accompanying armed forces.[84] This applies to all members of the media, including photographers, TV cameramen, sound technicians, and so on.[85]

B. Cessation of protection

The protection – especially, albeit not exclusively – of women and children against sexual attack, just like the overall protection against torture

[74] *Ibid.*, 658.
[75] See B. Jakovlevic, *New International Status of Civil Defence as an Instrument for Strengthening the Protection of Human Rights* 35–6 (1982).
[76] Protocol I, *supra* note 4, at 661, 684–6 (Article 66 and Articles 14–15 of Annex I).
[77] *Ibid.*, 664. [78] *Ibid.*, 663–4.
[79] See Y. Sandoz, 'Article 71', *Commentary on the Additional Protocols* 831, 833.
[80] Protocol I, *supra* note 4, at 669. [81] *Ibid.*, 669, 687 (Article 79(3) and Annex II).
[82] Hague Regulations, *supra* note 36, at 79.
[83] Geneva Convention (III), *supra* note 60, at 423, 431.
[84] See H.-P. Gasser, 'Article 79', *Commentary on the Additional Protocols* 473, 476.
[85] See H.-P. Gasser, 'Protection of the Civilian Population', *Handbook* 209, 228.

(see *supra*, Chapter 1, V), is absolute. Conversely, other types of attack (which may cause death, injury and suffering) are banned only on condition that the persons concerned do not abuse their exempt status. When persons belonging to one of the categories selected for special protection – for instance, women and children – take an active part in hostilities, no immunity from an ordinary attack can be invoked.

The conduct giving rise to a cessation of protection is characterized in the texts in more than one manner. Thus, protection is bestowed by Article 51(3) of Protocol I on civilians, 'unless and for such time as they take a direct part in hostilities'.[86] In compliance with Article 8(a) and (b) of the Protocol, the wounded, sick and shipwrecked are by definition persons 'who refrain from any act of hostility'[87] (meaning that a person may be physically wounded, but he is not deemed 'wounded' in the sense of the Protocol if he continues to shoot[88]). Article 41(2) requires that a person who is *hors de combat* 'abstains from any hostile act'.[89] And Article 42(2) sets forth that a parachutist from an aircraft in distress, reaching the ground in enemy-controlled territory, must be given an opportunity to surrender 'unless it is apparent that he is engaging in a hostile act'.[90] These are all variations on the same theme of abstention from active participation in hostilities (see also *supra*, Chapter 2, I).

In other connections, the formula used is different. Relief personnel 'must not exceed the terms of their mission' (under Article 71(4)).[91] With journalists, Article 79(2) of the Protocol's stricture is that they must 'take no action adversely affecting their status as civilians'.[92] Still, the most common phraseology – other than prohibition of the commission of acts of hostility – is the exclusion of 'acts harmful to the enemy'. Thus, Article 21 of Geneva Convention (I) elucidates that the protection of military medical units ceases – after warning is given – if they commit, outside their humanitarian duties, 'acts harmful to the enemy'.[93] The same language is employed, as regards the cessation of the protection of civilian medical personnel, in Article 13(1) of the Protocol.[94] Equally, Article 65(1) stipulates that the protection of civil defence organizations and their personnel ceases (after warning has been given) if 'acts harmful to the enemy' are committed outside their proper tasks.[95]

Plainly, the coinage 'acts harmful to the enemy' goes beyond the commission of acts of hostility:

[86] Protocol I, *supra* note 4, at 651. [87] *Ibid.*, 631.
[88] See Sandoz, *supra* note 23, at 118. [89] Protocol I, *supra* note 4, at 646.
[90] *Ibid.* [91] *Ibid.*, 664. [92] *Ibid.*, 669.
[93] Geneva Convention (I), *supra* note 18, at 383.
[94] Protocol I, *supra* note 4, at 634. [95] *Ibid.*, 660.

the definition of *harmful* is very broad. It refers not only to direct harm inflicted on the enemy, for example, by firing at him, but also to any attempts at deliberately hindering his military operations in any way whatsoever.[96]

No wonder that the instruments cited enumerate several modes of activity which must not be considered harmful to the enemy. A roster of non-harmful activities is spelt out by Article 22 of Geneva Convention (I),[97] and somewhat revised by Articles 13(2) of the Protocol, with respect to medical personnel: (i) the possession of light individual weapons for defence of the personnel or that of the wounded and sick in their charge; (ii) the possession of small arms and ammunition taken from the wounded and sick, prior to transfer to the proper service; (iii) being guarded by sentries or escort; and (iv) the presence of combatants in the unit for medical reasons.[98] A different catalogue of acts not considered harmful to the enemy appears in Article 65(2)–(3) of the Protocol dealing with civilian civil defence organizations: (i) carrying out civil defence tasks under the direction or control of military authorities; (ii) cooperation with military personnel; (iii) performing tasks which may incidentally benefit military victims; and (iv) bearing light individual weapons for the maintenance of order or self-defence.[99]The expression 'light individual weapons', featuring in both Article 13(2) and Article 65(3), denotes 'weapons which are generally carried and used by a single individual', including sub-machine guns (but excluding heavier weapons like machine guns).[100] Interestingly enough, the right to bear arms is given here (*inter alia*) to civilian personnel.[101]

As for being engaged in hostile acts, the exact permutation of impermissible conduct depends on circumstances and on the nature of the group benefiting from protection. Persons *hors de combat* commit a hostile act when they are 'still participating in the battle, or directly supporting battle action'.[102] Moreover, as ordained in Article 41(2), they must not attempt to escape.[103] Where civilians are concerned:

> It seems that the word 'hostilities' covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon.[104]

[96] Y. Sandoz, 'Article 13', *Commentary on the Additional Protocols* 173, 175.
[97] Geneva Convention (I), *supra* note 18, at 383.
[98] Protocol I, *supra* note 4, at 634–5. [99] *Ibid.*, 660.
[100] See Sandoz, *supra* note 96, at 178. [101] See *ibid.*, 177.
[102] See W. A. Solf, 'Article 41', *New Rules* 218, 223.
[103] Protocol I, *supra* note 4, at 646.
[104] C. Pilloud and J. Pictet, 'Article 51', *Commentary on the Additional Protocols* 613, 618–19.

There is 'a clear distinction between direct participation in hostilities and participation in the war effort'.[105] In essence, taking an active part in hostilities (which negates the status of civilians) implies participation in military operations.[106] A civilian working in a munitions factory does not cease to be a civilian – and does not lose his general mantle of protection – although he is patently running a risk while he is present on the premises of what constitutes a military objective[107] (see *supra*, Chapter 5, I).

Can civilians possess light weapons for hunting and other recreational purposes, without losing their civilian protection? The answer is affirmative, as long as these weapons are not used in questionable circumstances. Civilian self-defence against bandits and marauders is one thing. But when civilians in or near areas of military operations flaunt weapons in public or fire them in festivities – as happened during hostilities in Afghanistan – the act is fraught with danger, and combatants cannot be blamed if they misconstrue what is going on. Innocent civilian activities entailing the use of weapons for hunting and other recreational purposes should be postponed until calmer times.

II. Cultural property and places of worship

A. Introduction

Cultural property and places of worship are among the most obvious civilian objects and, as such, must not be the targets of attack in warfare. Article 52(3) of Protocol I expressly refers to schools and places of worship as archetypical civilian objects:

> In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.[108]

Manifestly, the presumption mentioned in this clause is rebuttable: schools and places of worship may become military objectives, if used to make an effective contribution to military operations (see *supra*, Chapter 4, II, C).

Under LOIAC, cultural property and places of worship are entitled to special protection. Not only are they civilian objects, but they may be held in reverence by believers and/or evoke deep-rooted spiritual attachment

[105] *Ibid.*, 619.
[106] See R. W. Gehring, 'Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I', 19 *RDMDG* 9, 19 (1980).
[107] See W. A. Solf, 'Article 51', *New Rules* 296, 303.
[108] Protocol I, *supra* note 4, at 652.

as irreplaceable landmarks in the march of civilization. When damage is deliberately inflicted on cultural property, the attack may seek 'to orphan future generations and destroy their understanding of who they are and from where they come'.[109]

The overall principle of protecting cultural property and places of worship from attack was first affirmed as *lex scripta* in 1899 (see *infra*, B, a). However, the specifics of the protection have developed considerably since then. We shall trace the evolution of the various texts and point out the main differences between them.

B. The legal position until 1954

(a) General protection Before we deal with the protection of cultural property and places of worship under conditions of bombardment – in land, sea and air warfare – it is useful to observe the extent of protection enjoyed by them in occupied territories. The Hague Regulations of 1899 and 1907 confer a wide degree of protection on cultural and religious institutions in occupied territories. Article 56 of the Hague Regulations refers to the property of 'institutions dedicated to religion, charity and education, the arts and sciences', and forbids 'destruction or wilful damage done to institutions of this character, historic monuments, works of art and science'.[110] This is a wide-ranging formula, and – for comparative purposes with the texts to be cited *infra* – it deserves attention that the protection (i) covers not only immovable property, but also works of art and science; and (ii) appears to be unqualified.

(aa) *Land warfare* The protection of cultural property and places of worship in land warfare, under conditions of bombardment, was introduced in Article 27 of the 1899 Hague Regulations, and revised in the more advanced version of 1907, promulgating:

> In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided that they are not being used at the time for military purposes.
>
> It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.[111]

The main discrepancy between the 1899 and the 1907 wordings is that the revision added the phrase 'historic monuments'. The expression

[109] H. Abtahi, 'The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia', 14 *HHRJ* 1, 2 (2001).

[110] Hague Regulations, *supra* note 36, at 91–2. [111] *Ibid.*, 84.

'buildings dedicated to religion' surely includes all places of worship without any discrimination between the various religions (churches, mosques, synagogues, etc.).[112]

The immunity of cultural and religious property from bombardment in land warfare, as compared to the regime applicable to occupied territories, does not cover movable property and is far from absolute. Moreover, when engaged in a bombardment, all that a belligerent is bound to do is take the necessary steps to spare the cultural property and places of worship 'as far as possible'. The protection is subject to the explicit admonition that the objects in question must not be 'used at the time for military purposes'.

(bb) *Sea warfare* Coastal bombardment from the sea is regulated by Article 5 of Hague Convention (IX) of 1907:

> In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.
>
> It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of . . . .[113]

The phraseology in English – with its peculiar reference to 'sacred edifices' – is misleading. In the authentic French original, the reference is to 'édifices consacrés aux cultes, aux arts, aux sciences et à la bienfaisance, les monuments historiques', which is precisely the land warfare formula.[114] '[E]difices consacrés aux cultes' denote churches and other places of worship.

Similarly to land warfare, the immunity from coastal bombardment does not cover movable property, is valid only 'as far as possible', and is subject to the indispensable condition that the protected objects 'are not used at the same time for military purposes'.

Article 4 of Hague Convention (XI) of 1907 reads:

> Vessels charged with religious, scientific, or philanthropic missions are likewise exempt from capture.[115]

[112] See W. I. Hull, *The Two Hague Conferences and Their Contributions to International Law* 253–4 (1908).

[113] Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, 1907, *Laws of Armed Conflicts* 811, 813.

[114] Compare the French texts of Article 27 of the Hague Regulations and Article 5 of Hague Convention (IX): J. B. Brown, 2 *The Hague Peace Conferences of 1899 and 1907 (Documents)* 388, 440 (1909).

[115] Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, 1907, *Laws of Armed Conflicts* 819, 821.

Whereas the text refers to the immunity of these vessels only from capture, there is no doubt that they are *a fortiori* exempt also from attack.[116] The word 'likewise' adverts to Article 3 of the Convention, allowing exemption from capture to fishing vessels and boats in local trade, subject to an express rider: '[t]hey cease to be exempt as soon as they take any part whatever in hostilities'.[117] The rider should, consequently, be 'imported' into Article 4.[118]

The reference in Hague Convention (XI) to scientific vessels must be understood – in keeping with customary international law – as circumscribed to scientific missions of non-military application, and it is so stated in the recent San Remo Manual.[119]

(cc) *Air warfare* Article 25 of the 1923 Hague Rules of Air Warfare states:

> In bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospital ships, hospitals and other places where the sick and wounded are collected, provided that such buildings, objects or places are not at the time used for military purposes. Such buildings, objects and places must by day be indicated by marks visible to aircraft.[120]

The protection, once more, excludes movable property, is binding only 'as far as possible', and is contingent on the objects not being used at the time for military purposes. Special protection is offered in Article 26 to 'important historic monuments', provided that the State concerned is willing 'to refrain from the use of such monuments and a surrounding zone for military purposes': the monuments round which a zone is established have to be notified to other Powers in peacetime and they are subject to inspection.[121]

(b) Regional protection In 1935, the Pan American Union adopted a Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, known as the Roerich Pact (after its initiator,

[116] See L. Doswald-Beck, 'Vessels, Aircraft and Persons Entitled to Protection during Armed Conflicts at Sea', 65 *BYBIL* 211, 251–2 (1994).
[117] Hague Convention (XI), *supra* note 115, at 820.
[118] I. A. Shearer, '1907 Hague Convention XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War', *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* 173, 185–6 (N. Ronzitti ed., 1988).
[119] *San Remo Manual*, *supra* note 29, at 132–3.
[120] Hague Rules of Air Warfare, *supra* note 33, at 211. [121] *Ibid.*, 211–12.

N. Roerich, a Russian-born artist and cultural figure).[122] Article 1 of the Pact declares:

> The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents.
>
> The same respect and protection shall be due to the personnel of the institutions mentioned above.[123]

Article 3 of the Pact introduces a distinctive flag, serving to identify the monuments and institutions entitled to protection.[124] A list of the monuments and institutions for which protection is desired is to be sent by each contracting Party to the Pan American Union, congruent with Article 4.[125] Article 5 clarifies that these monuments and institutions lose their privileges 'in case that they are made use of for military purposes'.[126]

The Pact is still in force among ten American States. As per Article 36(2) of the 1954 Hague Convention, the latter text 'shall be supplementary to the Roerich Pact' in the relations between contracting Parties to both instruments.[127]

The Pact has some indubitable flaws:

(i) It is not germane to places of worship (unless they are also historic monuments).[128]
(ii) It does not apply to movable property (except when that property is located inside protected museums and institutions).[129]
(iii) It does not concretize the scope of respect and protection enjoyed by cultural property.[130] In particular, it does not mention specifically immunity from attack.

On the other hand, the Pact has some marked advantages over the subsequent Hague Cultural Property Convention (see *infra*, C):

(i) It is not confined to monuments and institutions which are necessarily of great importance.
(ii) It endows cultural property with protection that is not subject to considerations of imperative military necessity (although protection is lost when the monuments and institutions are used for military purposes).
(iii) Protection is granted to the personnel of cultural institutions.

[122] Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), 1935, *Laws of Armed Conflicts* 737.
[123] *Ibid.*, 738. [124] *Ibid.* [125] *Ibid.* [126] *Ibid.*
[127] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, *Laws of Armed Conflicts* 745, 757–8.
[128] See K. J. Partsch, 'Protection of Cultural Property', *Handbook* 377, 383.
[129] See K. Dörmann, 'The Protection of Cultural Property as Laid Down in the Roerich-Pact of 15 April 1935', 6 *Hum. V.* 230, *id.* (1993).
[130] *Ibid.*, 231.

C. *The Cultural Property Convention of 1954*

Article 1(a) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted under the auspices of UNESCO, defines cultural property as covering (irrespective of origin or ownership):

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproduction of the property defined above;
(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b) to be known as 'centres containing monuments'.[131]

The definition appears to be very broad in that it covers many categories of cultural property, both movable and immovable, not mentioned in earlier texts. However, it does not embrace places of worship (unless they come under the heading of religious monuments). Even more significantly, the definition does not cover the entire sphere of cultural property, since it is restricted to items of 'great importance' to the cultural heritage. The concept of 'great importance' in this context can be subjective, there being no objective criteria to measure cultural importance (except in outstanding cases).[132]

The Preamble to the Convention explains that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world'.[133] Apparently, what is meant by 'the cultural heritage of every people' is what is 'considered by each respective state to form part of its national cultural heritage'.[134]

The cardinal question is what protection is conferred on any property within the purview of the Convention's definition. A general protection is derived from Article 4(1):

[131] Hague Cultural Property Convention, *supra* note 127, at 747–8.
[132] See J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention* 50 (UNESCO, 1996).
[133] Hague Cultural Property Convention, *supra* note 127, at 747.
[134] See R. O'Keefe, 'The Meaning of "Cultural Property" under the 1954 Hague Convention', 46 *NILR* 26, 36 (1999).

The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.[135]

The most critical part of the protection is to be found in the last dozen words: protection against acts of hostility.

The trouble is that Article 4(2) appreciably attenuates the undertaking assumed by contracting Parties:

The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.[136]

If imperative requirements of military necessity can trump the protection of cultural property, no real progress has been achieved since the days of the 'as far as possible' exhortation, since the attacking force is prone to regard almost any military necessity as 'imperative'.

No doubt, there are occasions when a belligerent Party may decide to forgo an attack after weighing potential damage to cultural property as against minor military necessity. Thus, in the 1991 hostilities the US chose not to attack Iraqi fighter aircraft positioned adjacent to the ancient temple of Ur; but in that case the aircraft (left without servicing equipment or a runway nearby) were deemed out of action and therefore not worth the risk of damaging the temple[137] (the Ur temple seems to have sustained some damage anyhow).[138] The restraint shown might have been overridden by imperative requirements of military necessity had there been an operational runway nearby. The outcome might well have been that irreparable damage to irreplaceable monuments would have occurred by dint of transient perceptions of military necessity.[139]

Article 8(1) of the Convention introduces a special protection regime for some cultural property:

There may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance, provided that they:

[135] Hague Cultural Property Convention, *supra* note 127, at 748.
[136] *Ibid.*
[137] See V. A. Birov, 'Prize or Plunder: The Pillage of Works of Art and the International Law of War', 30 *NYUJILP* 201, 234 (1997–8).
[138] See D. A. Meyer, 'The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law', 11 *BUILJ* 349, 376–7 (1993).
[139] See J. H. Merryman, 'Two Ways of Thinking about Cultural Property', 80 *AJIL* 831, 838–40 (1986).

(a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;
(b) are not used for military purposes.[140]

Palpably, the special protection is accessible only to a 'limited number' of objects of 'very great importance'. The calibration of 'very great importance' (the threshold of Article 8(1)) as opposed to 'great importance' (the idiom employed in the general definition of Article 1(a)) is an arduous venture. But, in any event, the special protection is contingent – under Article 8(6) – on entry of the cultural property in an International Register.[141]

If the cultural property in question is situated in the vicinity of an important military objective, it may continue to benefit from special protection in accordance with Article 8(5), provided that the Party concerned undertakes to make no use of the objective (and in the case of a port, railway station or aerodrome, to divert all traffic therefrom).[142] Article 10 demands that the cultural property be marked with a distinctive emblem (designated in Article 16[143]) and open to international control.[144] Once registered, the special protection ensures immunity of the cultural property from any act of hostility (Article 9).[145]

Lamentably, the special protection is not airtight. Article 11(2) opens the door to withdrawal of immunity in some circumstances:

> immunity shall be withdrawn from cultural property under special protection only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues. Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger. Whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity.[146]

Article 11(2) is more limitative than Article 4(2). The adjectives 'exceptional' and 'unavoidable' supplant the adverb 'imperatively'. The discretion in withdrawing the special protection appears to be narrower than that of waiving the general protection.[147] Still, there is room for scepticism as to whether the semantic difference resonates with practical consequences.[148] Much emphasis was put by the framers of the Convention on

[140] Hague Cultural Property Convention, *supra* note 127, at 749–50.
[141] *Ibid.*, 750. [142] *Ibid.* [143] *Ibid.*, 752. [144] *Ibid.*, 750. [145] *Ibid.*
[146] *Ibid.*, 751. [147] See Toman, *supra* note 132, at 145–6.
[148] See S. E. Nahlik, 'La Protection Internationale des Biens Culturels en Cas de Conflit Armé', 120 *RCADI* 61, 132 (1967).

the relatively high echelon of command required to withdraw special protection (a division commander).[149] But the stark fact is that the status of special protection does not guarantee to any cultural property – not even of the greatest importance – genuine immunity from attack and destruction.[150] It has been asserted that special protection provides 'no specific advantage' in comparison to the general protection.[151] Without going that far, it must be acknowledged that the construct of special protection is only marginally more satisfactory than that of general protection. No wonder that the Register established for cultural property under special protection actually lists only half a dozen items.[152]

D. Protocol I of 1977

When Additional Protocol I was adopted in 1977, it might have been thought that the new instrument – invoking the dichotomy of civilian objects versus military objectives – would expressly eliminate the reliance on military necessity permeating the 1954 Convention. Surprisingly, Article 53 of the Protocol reads:

> Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:
> (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
> (b) to use such objects in support of the military effort.[153]

The 'without prejudice' caveat makes it clear that the legal regime established in the Hague Cultural Property Convention is not invalidated. The continued applicability of every aspect of the Cultural Property Convention – particularly the military necessity waiver – is disturbing, since it is irreconcilable with the protection guaranteed in the Protocol to all civilian objects. The line of reasoning of military necessity as a justification of attack should have been barred to all contracting Parties to the Protocol, who ought to have been bound by the distinction between

[149] See Toman, *supra* note 132, at 146.
[150] See S. E. Nahlik, 'Protection of Cultural Property', *International Dimensions of Humanitarian Law* 203, 209 (UNESCO, 1988).
[151] T. Desch, 'The Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Revision', 11 *Hum.V.* 103, 106 (1998).
[152] See J. Symonides, 'Towards the Amelioration of the Protection of Cultural Property in Times of Armed Conflict: Recent UNESCO Initiatives Concerning the 1954 Hague Convention', 2 *Héctor Gros Espiell Amicorum Liber* 1533, 1534 (1997).
[153] Protocol I, *supra* note 4, at 652.

civilian objects and military objectives. But in consequence of the 'without prejudice' caveat, reliance on military necessity is left open to those contracting Parties to the Protocol who are simultaneously Parties to the Convention.[154]

Article 53 of the Protocol interdicts the direction of any act of hostility against the objects to which it lends protection (without using the Hague Regulations' modifier: 'as far as possible'). However, the protection is not spread over all historic monuments, works of art and places of worship; it is restricted to objects constituting 'the cultural or spiritual heritage of peoples'.[155] This rather enigmatic locution seems to 'cover objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people'.[156] The limitation of the protection in Article 53 raises a vital question with respect to the protection of cultural objects, and especially places of worship, that fail to meet the criterion of 'constituting the cultural or spiritual heritage of peoples'.[157] The matter was debated at length in the Diplomatic Conference which drew up the text.[158] Evidently, all places of worship, historic monuments and works of art constitute civilian objects. What is then the philosophy behind the exclusion of some (perhaps most) of them from the ambit of Article 53? The ICRC official Commentary suggests:

> Article 53 lays down a *special* protection which prohibits the objects concerned from being made into military objectives and prohibits their destruction. This protection is additional to the immunity attached to civilian objects; all places of worship, regardless of their importance, enjoy the protection afforded by Article 52 (*General protection of civilian objects*).[159]

What does the special protection of places of worship, historic monuments and works of art constituting 'the cultural or spiritual heritage of peoples' entail, compared to the ordinary protection accorded to all civilian objects (including places of worship, historic monuments and works of art not meeting the standards of special protection)? Does the special protection emanating from Article 53 (unlike ordinary protection) endure when protected sites are being used 'in support of the military effort', in

[154] See H. Fischer, 'The Protection of Cultural Property in Armed Conflicts: After the Hague Meeting of Experts', 6 *Hum.V* 188, 190 (1993).
[155] See C. F. Wenger, 'Article 53', *Commentary on the Additional Protocols* 639, 640.
[156] *Ibid.*, 646.
[157] See G. M. Mose, 'The Destruction of Churches and Mosques in Bosnia-Herzegovina: Seeking a Rights-Based Approach to the Protection of Religious Cultural Property', 3 *BJIL* 180, 203–4 (1996–7).
[158] See W. A. Solf, 'Article 53', *New Rules* 328, 331–2.
[159] Wenger, *supra* note 155, at 647.

breach of Paragraph (b)? W. A. Solf points out that Article 53 is 'unique' in not providing explicitly for the cessation of protection when abused: other protective clauses of Protocol I, and not only Protocol I, invariably incorporate a qualification to that effect[160] (see *supra*, I, B, and *infra*, III, D). Nonetheless, he interprets the reference – in the 'without prejudice' formula of Article 53 – to 'other relevant international instruments' (beside the Cultural Property Convention) as an implicit endorsement of Hague Regulation 27's warning that loss of protection would ensue from use of the object 'in support of the military effort'.[161]

In the opinion of the present writer, the key to understanding the peculiar feature of the special protection established in Article 53 is loss of immunity solely in case of use of the protected object 'in support of the military effort'. It may be convenient to cite here the example of a 'cultural bridge which is the only means of access across a river for enemy forces'.[162] Under the Cultural Property Convention, a bridge of this nature can be destroyed – notwithstanding its cultural character – on the ground of imperative military necessity.[163] By the same token, the bridge may be attacked – even before the enemy actually uses it – pursuant to Article 52(2) of the Protocol,[164] whereby an ordinary civilian object can become a military objective by mere location[165] (see *supra*, Chapter 4, II, E). In contrast, if the bridge is a historic monument or a work of art forming part of the cultural heritage of peoples – covered by Article 53 – it benefits from special protection. Hence, an attack cannot be launched against the bridge automatically.[166] The site cannot be attacked only because combatants have made use of it in the past, if they no longer do so at present.[167] Furthermore, protection cannot be brushed aside as a preventive measure against future enemy action.[168] Some military measures may be taken in anticipation of prospective enemy action (e.g., laying detonating charges without exploding them as yet), but the bridge can only be destroyed in response to actual use 'in support of the military effort' by the enemy.[169]

[160] W. A. Solf, 'Cultural Property, Protection in Armed Conflict', 1 *EPIL* 892, 896.
[161] See *ibid.*; Solf, *supra* note 158, at 332–3.
[162] A. P. V. Rogers, *Law on the Battlefield* 92 (1996).
[163] See *ibid.*
[164] Protocol I, *supra* note 4, at 652.
[165] On a bridge as a military objective by location, see C. Pilloud and J. Pictet, 'Article 52', *Commentary on the Additional Protocols* 629, 636.
[166] See M. Sersic, 'Protection of Cultural Property in Time of Armed Conflict', 27 *NYIL* 3, 22 (1996).
[167] See Wenger, *supra* note 155, at 648.
[168] See J.-M. Henckaerts, 'New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict', 81 *IRRC* 593, 604 (1999).
[169] See Rogers, *supra* note 162, at 103.

Admittedly, the loss of protection of certain places constituting the cultural or spiritual heritage of mankind – brought about by their brazen use by the enemy – may create an insoluble dilemma. Such a dilemma was faced by Israel, in 2002, upon the takeover of the famous Church of the Nativity in Bethlehem by a group of Palestinian armed combatants. Although the use of the Church by armed combatants in support of a military effort turned it *ipso facto* into a military objective, Israel could not ignore the reverence with which Christians the world over view this shrine. As a result, Israel resorted to siege tactics and refrained from storming the site. There were some sporadic exchanges of fire – and some minor damage was done to outlying buildings – but the basilica itself remained unscathed. The case serves as a reminder that some outstanding cultural and spiritual places cannot be subjected to a mechanical application of the ordinary rules of LOIAC.

E. The war crimes provisions

Article 3(d) of the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia establishes penal jurisdiction over the following violations of the laws and customs of war:

> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.[170]

The text is largely based on Article 27 of the Hague Regulations, but there are variations: (i) 'buildings' are replaced by 'institutions'; (ii) 'education' is added to the list of religion, art, science and charity; (iii) the reference to hospitals, etc., is deleted; and (iv) works of art and science are added (jointly with historic monuments).

Article 8(2)(b)(ix) of the 1998 Rome Statute of the International Criminal Court stigmatizes as a war crime:

> Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.[171]

It is interesting that this version also resurrects the language of Article 27 of the Hague Regulations, except for the addition of education and the

[170] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY), Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 32 *ILM* 1159, 1193 (1993).

[171] Rome Statute, *supra* note 8, at 1007.

substitution of the proviso of 'not being used at the time for military purposes' by the more modern reference to military objectives.[172]

F. The 1999 Second Protocol to the Hague Convention

Only in 1999 was the Cultural Property Convention of 1954 harmonized – through a new Second Protocol – with Protocol I of 1977, and indeed with contemporary customary international law, by pronouncing that an attack against cultural property cannot be launched unless the site has been converted into a military objective.[173] Article 6(a) of the Second Protocol sets forth that 'a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention' can only be invoked when the following two conditions are met:

(i) that cultural property has, by its function, been made into a military objective; and
(ii) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.[174]

The term 'function' replaces here the commonly employed word 'use': 'function' being somewhat wider than 'use', while falling short of mere 'location'.[175] By way of illustration, retreating soldiers may destroy a cultural wall blocking their retreat despite the fact that it is not used by the enemy.[176]

Consonant with Article 6(c)–(d) of the Second Protocol, the decision to invoke the waiver is confined as a rule to the level of battalion commander, and an effective advance notice must be given whenever circumstances permit.[177] Article 7 insists on precautions being taken in attack, primarily to 'do everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention', and to avoid – or minimize – incidental damage to such cultural property (incidental damage which, in any event, must not be excessive in relation to the military advantage anticipated).[178] One significant consequence

[172] See M. H. Arsanjani, 'The Rome Statute of the International Criminal Court', 93 *AJIL* 22, 33–4 (1999).
[173] See Henckaerts, *supra* note 168, at 600; J. Hladik, 'Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, Netherlands (March 15–26, 1999)', 8 *IJCP* 526, 528 (1999).
[174] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 1999, 38 *ILM* 769, 770 (1999).
[175] See Henckaerts, *supra* note 168, at 605. [176] See *ibid.*
[177] Second Protocol, *supra* note 174, at 771. [178] *Ibid.*

is that 'when there is a choice between several military objectives and one of them is a cultural property, the latter shall not be attacked'.[179]

Article 10 of the Second Protocol creates a new category of 'enhanced protection':

> Cultural property may be placed under enhanced protection provided that it meets the following three conditions:
> a. it is cultural heritage of the greatest importance for humanity;
> b. it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;
> c. it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.[180]

Unlike the first and third conditions of eligibility which are indispensable, the second (adequate domestic measures) may be waived in exceptional circumstances.[181] The grant of enhanced protection has to be requested and approved by a special Committee in correspondence with Article 11.[182] The Committee is also empowered by Article 14 to suspend or cancel enhanced protection.[183]

Immunity from attack against cultural property under enhanced protection is guaranteed by Article 12 of the Second Protocol.[184] However, it is accentuated in Article 13(1)(b) that the immunity is lost 'if, and for as long as, the property has, by its use, become a military objective'.[185] Here 'use' was not replaced by 'function'.[186] Even when adverse military use takes place, Article 13(2) prescribes that the property in question may only be the object of attack if:

> a. the attack is the only feasible means of terminating the use of the property referred to in sub-paragraph 1(b);
> b. all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to the cultural property;

and – unless circumstances do not permit – the attack must be ordered by the highest operational level of command, effective advance warning has

[179] Henckaerts, *supra* note 168, at 601. [180] Second Protocol, *supra* note 174, at 772.
[181] See Article 11(8), *ibid*. Cf. T. Desch, 'The Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict', 2 *YIHL* 63, 76 (1999).
[182] Second Protocol, *supra* note 174, at 772–3.
[183] *Ibid.*, 773–4. [184] *Ibid.*, 773. [185] *Ibid.*
[186] See Henckaerts, *supra* note 168, at 609.

to be issued, and reasonable time given to the opposing forces to redress the situation.[187]

Article 2 of the Second Protocol declares that 'it supplements the Convention in relations between the Parties',[188] and the Convention continues to apply between non-Parties to the Second Protocol. Thus, the 1954 special protection regime has not lapsed because of the introduction of enhanced protection in the Second Protocol. Still, under Article 4 of the Second Protocol, 'where cultural property has been granted both special protection and enhanced protection, only the provisions of enhanced protection shall apply'.[189]

III. Medical units

As noted, the 1899/1907 Hague Regulations, the Hague Rules of Air Warfare and the Rome Statute deal with hospitals (in the Rules, also hospital ships) and places where the sick and wounded are collected, jointly with cultural property and places of worship. But medical establishments and units get detailed and special coverage in the Geneva Conventions and in Protocol I. The provisions of these instruments will be examined as they appertain to (i) medical units on land; (ii) hospital ships; and (iii) medical aircraft.

A. Medical units on land

Article 19 of Geneva Convention (I) promulgates in its first sentence:

> Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict.[190]

The distinctive emblem of the Red Cross (or Red Crescent, Red Lion and Sun[191]) on a white ground must be hoisted over medical units and establishments entitled to protection, according to Articles 38 and 42.[192] Article 8(2)(b)(xxiv) of the Rome Statute defines as a war crime the intentional direction of attacks against buildings, material, medical units, transport and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.[193]

[187] Second Protocol, *supra* note 174, at 773. [188] *Ibid.*, 770. [189] *Ibid.*
[190] Geneva Convention (I), *supra* note 18, at 382.
[191] Based on reservations to the Geneva Conventions, Israel is using the distinctive emblem of the Red Shield of David. See S. Rosenne, 'The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David', 5 *IYHR* 9, 41–4 (1975).
[192] Geneva Convention (I), *supra* note 18, at 388–9.
[193] Rome Statute, *supra* note 8, at 1008.

Article 23 of Geneva Convention (II) declares that establishments ashore entitled to protection under Geneva Convention (I) 'shall be protected from bombardment or attack from the sea'.[194] Article 18 of Geneva Convention (IV) forbids attack against civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases.[195]

Article 35 of Geneva Convention (I) confers protection on medical transports or vehicles carrying wounded and sick or medical equipment.[196] Article 21 of Geneva Convention (IV), for its part, lends protection to convoys of vehicles or hospital trains on land, conveying wounded and sick civilians, the infirm and maternity cases.[197]

The regime of protection of medical units is considerably expanded in Protocol I. Article 12(1) of the Protocol affords protection from attack to all 'medical units'.[198] Article 8(e) defines the term 'medical units' comprehensively:

> 'medical units' means establishments and other units, whether military or civilian, organized for military purposes, namely the search for, collection, transportation, diagnosis or treatment – including first-aid treatment – of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary.[199]

This is a sweeping definition. Its most striking effect is that, whereas the protection bestowed by Geneva Convention (I) is limited to fixed establishments and mobile medical units of the Medical Service of the armed forces – and that vouchsafed by Geneva Convention (IV) is restricted to civilian hospitals – the Protocol's protection (by virtue of Article 12(1)) is extended to all types of medical units, whether military or civilian.[200] Article 12(2) adds that civilian units must belong to a Party to the conflict or be recognized by a competent authority thereof.[201]

Article 21 of the Protocol protects 'medical vehicles'.[202] These are defined in Article 8(g)–(h) as medical transports by land, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation under the control of a competent authority of a Party to the conflict.[203] The upshot is that protection from attack is ensured also

[194] Geneva Convention (II), *supra* note 19, at 411.
[195] Geneva Convention (IV), *supra* note 3, at 507.
[196] Geneva Convention (I), *supra* note 18, at 387.
[197] Geneva Convention (IV), *supra* note 3, at 508.
[198] Protocol I, *supra* note 4, at 634. [199] *Ibid.*, 632.
[200] See Y. Sandoz, 'Article 12', *Commentary on the Additional Protocols* 165, 166.
[201] Protocol I, *supra* note 4, at 634. [202] *Ibid.*, 637. [203] *Ibid.*, 632.

to civilian medical vehicles, even when they are proceeding alone (rather than as part of a convoy).[204]

B. Hospital ships

Hospital ships are unique in that they have a dual role of maritime means of transport and floating full-care hospitals.[205] Article 20 of Geneva Convention (I) enunciates that hospital ships entitled to protection under Geneva Convention (II) 'shall not be attacked from the land'.[206] The foremost clause on this subject is Article 22 of Geneva Convention (II), which bestows the protection on military hospital ships – built or equipped solely for that purpose – on condition that their names and descriptions have been notified to the belligerents prior to employment.[207] Article 24 widens the protection to non-military hospital ships utilized by National Red Cross Societies, officially recognized relief societies or private individuals (if they receive an official commission and there has been prior notification to belligerents).[208] Article 25 decrees that neutral hospital ships, too, must place themselves under the control of a belligerent, provided that the previous consent of their own Government has been obtained.[209] Article 26 emphasizes that the protection covers also the lifeboats of hospital ships, but Parties to the conflict must endeavour to utilize only hospital ships of over 2,000 tons gross.[210] The tonnage minimum does not affect small coastal rescue craft, which are encompassed in the regime of protection by Article 27.[211] Article 28 lends protection ('as far as possible') to sick-bays, should fighting occur on board a warship.[212] Of course, in modern conditions of warfare, combat on board a warship is a rare event.[213]

Article 31 subjects hospital ships and coastal rescue craft to control and search.[214] Hospital ships and coastal rescue craft must be distinctively marked by a white exterior and one or more dark red crosses (or red crescent, red lion and sun), in keeping with Articles 41 and 43.[215] Article 33 mandates that merchant ships converted into hospital ships cannot be put to any other use throughout the duration of hostilities.[216]

[204] See Y. Sandoz, 'Article 21', *Commentary on the Additional Protocols* 249, 250.
[205] See J. F. Rezek, 'Protection of the Victims of Armed Conflicts: I – Wounded, Sick and Shipwrecked Persons', *International Dimensions of Humanitarian Law*, *supra* note 150, at 153, 159.
[206] Geneva Convention (I), *supra* note 18, at 383.
[207] Geneva Convention (II), *supra* note 19, at 411.
[208] *Ibid.* [209] *Ibid.* [210] *Ibid.*, 411–12. [211] *Ibid.*, 412. [212] *Ibid.*
[213] See L. C. Green, *The Contemporary Law of Armed Conflict* 224 n. 54 (2nd edn, 2000).
[214] Geneva Convention (II), *supra* note 19, at 412–13.
[215] *Ibid.*, 415–17. [216] *Ibid.*, 413.

Article 38 authorizes ships chartered for that purpose to transport equipment exclusively intended for the treatment of wounded and sick members of armed forces or for the prevention of disease, provided that particulars regarding the voyage have been notified to the adverse Power and approved by it.[217] Article 21 of Geneva Convention (IV) also grants protection to special vessels at sea, conveying wounded and sick civilians, the infirm and maternity cases. Cartel ships (carrying exchanged prisoners of war) are equally protected by customary international law.[218]

Additional Protocol I enlarges the scope of the protection of hospital ships and coastal rescue craft in two respects: (i) to vessels carrying civilian wounded, sick and shipwrecked (Article 22);[219] and (ii) to clearly marked medical ships and craft, other than hospital ships and coastal rescue craft (Article 23).[220] The outcome is that any vessel (including, e.g., a fishing boat requisitioned for medical purposes) is protected from attack, as long as (a) it is exclusively assigned to medical transportation (for the duration of that assignment, which may be brief); and (b) it is placed under the control of a Party to the conflict.[221] The difference between vessels having a permanent status of hospital ships and other medical ships or craft (temporarily assigned for medical purposes but liable to other uses subsequently) lies in the domain of capture by the enemy, but both categories benefit from equal protection from attack.[222]

C. Medical aircraft

Medical aircraft (exclusively employed as such) are protected from attack by the Geneva Conventions – Article 36 of Geneva Convention (I),[223] Article 39 of Geneva Convention (II)[224] and Article 22 of Geneva Convention (IV)[225] – albeit only when they are flying at heights, at times and on routes agreed upon between the Parties to the conflict. Medical aircraft must also be marked by the distinctive Red Cross emblem (or its equivalents) and obey any summons to land for inspection.

Protocol I devotes several clauses to the protection of medical aircraft, a matter of growing practical importance – especially where helicopters are concerned – in the evacuation of battle casualties. The new juridical scheme consists of the following components:

[217] *Ibid.*, 414. [218] See Doswald-Beck, *supra* note 116, at 239–40.
[219] Protocol I, *supra* note 4, at 637–8. [220] *Ibid.*, 638–9.
[221] Y. Sandoz, 'Article 23', *Commentary on the Additional Protocols* 261, 263.
[222] See *ibid.* [223] Geneva Convention (I), *supra* note 18, at 387–8.
[224] Geneva Convention (II), *supra* note 19, at 414–15.
[225] Geneva Convention (IV), *supra* note 3, at 508.

(i) Article 24 proclaims that medical aircraft must be protected, but the protection is subject to the provisions of that Part of the Protocol.[226]

(ii) Article 25 explicates that in and over land areas physically controlled by friendly forces – or in and over sea areas not physically controlled by an adverse Party – the protection of medical aircraft does not depend on any agreement with the adverse Party (for greater safety, notification is advised, in particular when within range of surface-to-air missiles).[227] Here is the main departure from the overall obligation of the Geneva Conventions to obtain such prior agreement. The Conventions' rule was simply deemed 'inappropriate for this situation'.[228]

(iii) However, pursuant to Article 27, prior agreement must still be obtained in and over land or sea areas physically controlled by the adverse Party.[229]

(iv) In and over the contact zone (defined as the area on land where the forward elements of opposing forces are in contact with each other) – even in areas physically controlled by friendly forces, and all the more so where control is contested – Article 26 cautions that medical aircraft 'operate at their own risk' in the absence of agreement, although they must be respected once they have been recognized as such.[230]

(v) Article 30 ordains that medical aircraft flying over areas physically controlled by the adverse Party – or over areas the control of which is not unequivocally established – are obligated to obey an order to land for inspection.[231]

(vi) In addition to the distinctive emblem (Red Cross, etc.), Article 18 introduces special (optional) signals identifying medical aircraft (as detailed in Chapter III of Annex I of the Protocol): flashing blue lights, radio signals and electronic codes, all exclusively reserved for this purpose.[232] The use of such supplementary means of identification is invaluable in practice, since the speed of air warfare defies identification based merely on visual sighting of the distinctive emblem displayed on the aircraft.[233] The new methods of identification of medical aircraft have already been updated (in 1993).[234]

[226] Protocol I, *supra* note 4, at 639. [227] *Ibid.*
[228] See L. Doswald-Beck, 'The Protection of Medical Aircraft in International Law', 27 *IYHR* 151, 168 (1997).
[229] Protocol I, *supra* note 4, at 639.
[230] *Ibid.* [231] *Ibid.*, 641. [232] *Ibid.*, 636–7, 681–4.
[233] See H.-P. Gasser, 'Medical Transportation', 3 *EPIL* 335, 337.
[234] Protocol I, Annex I, Regulations Concerning Identification, as Amended on 30 November 1993, 34 *IRRC* 29, 35–7 (1994).

D. The cessation of protection

Article 21 of Geneva Convention (I) stipulates that the protection of fixed establishments and mobile medical units shall cease (following due warning which remains unheeded after a reasonable time limit) if 'they are used to commit, outside their humanitarian duties, acts harmful to the enemy'[235] (see *supra*, I, B). The formula is reiterated as regards hospital ships in Article 34 of Geneva Convention (II), which adds that hospital ships may not possess or use secret codes for their wireless or other means of communication.[236] The injunction against secret codes (forcing hospital ships to send and especially receive all messages in the clear) has created severe practical problems. Technology has changed since 1949: encryption and decryption are currently an integral part of modern naval communications systems: they are used by warships for all messages, whether classified or unclassified.[237] Above all, the absence of the crypto function effectively precludes hospital ships from getting reports about movements of the fleet or advance notice of military operations likely to require their services.[238] Therefore, the San Remo Manual now moves in the direction of allowing hospital ships to use cryptographic equipment, while prohibiting the transmission of intelligence data.[239]

Article 22 of Geneva Convention (I) details conditions not depriving medical units and establishments of protection[240] (see *supra*, I, B). Article 35 of Geneva Convention (II) includes conditions not depriving hospital ships and sick-bays of protection (like the fact that the crews are armed for the maintenance of order, for their own defence or that of the sick and wounded).[241] Admittedly, there is a new conundrum: attacks against vessels by suicide bombers (moving in speedboats) pose an immense potential peril to hospital ships. How can they be safeguarded against such an external threat in the absence of adequate armament on board? In all probability, the best solution would be to allow light armed naval craft to patrol the waters around hospital ships. But the matter is not currently addressed by Geneva Convention (II) or any other instrument.

Article 12(4) of Protocol I establishes that '[u]nder no circumstances shall medical units be used in an attempt to shield military objectives

[235] Geneva Convention (I), *supra* note 18, at 383.
[236] Geneva Convention (II), *supra* note 19, at 413.
[237] See J. A. Roach, 'The Law of Naval Warfare at the Turn of Two Centuries', 94 *AJIL* 64, 75 (2000).
[238] See Doswald-Beck, *supra* note 116, at 218.
[239] *San Remo Manual*, *supra* note 29, at 236–7.
[240] Geneva Convention (I), *supra* note 18, at 383.
[241] Geneva Convention (II), *supra* note 19, at 413.

from attack'.[242] The prohibition is in line with the overall injunction against attempts to shield military objectives from attack through the presence or movement of civilians[243] (*supra*, Chapter 5, VII). If an entire hospital compound serves as a staging area for combatants, as happened more than once in the hostilities in Iraq in 2003, the hospital becomes a military objective by use (see *supra*, Chapter 4, II, C). But if tanks are stationed next to a hospital, the other side is not entitled to attack the hospital directly: only the tanks can be targeted, thereby obviously exposing the hospital to collateral damage.[244] Whatever the scenario, the central issue is likely to be whether that collateral damage is excessive (see *supra*, Chapter 5, IV). It would all depend on a balancing act between the military advantage to be gained (the severity of any attack launched from the hospital or the threat posed by the tanks), compared to the number of wounded and sick – as well as medical personnel – therein.

Article 13 of the Protocol allows the discontinuance of protection of civilian medical units if 'they are used to commit outside their humanitarian function, acts harmful to the enemy', and specifies when acts shall not be deemed harmful to the enemy[245] (see *supra* I, B). The text of Article 13 is grounded on Articles 21–2 of Geneva Convention (I), and in essence it applies to civilian medical units conditions similar to those established by the Convention for military medical units.[246]

Article 28 of the Protocol forbids using medical aircraft to acquire any military advantage over the adverse Party or (and this corresponds to the more general ban in Article 12(4)) attempt to render military objectives immune from attack; medical aircraft are not to be used to collect or transmit intelligence data; and they must not carry any armament (except small arms taken from the wounded, sick and shipwrecked, not yet handed to the proper service).[247]

IV. Works and installations containing dangerous forces

The following rule of special protection appears in Article 56(1)–(2) of Protocol I:

1. Works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack,

[242] Protocol I, *supra* note 4, at 634.
[243] *Ibid*., 651–2 (Article 51(7)).
[244] See H. McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare* 100 (2nd edn, 1998).
[245] Protocol I, *supra* note 4, at 634.
[246] See Sandoz, *supra* note 96, at 174.
[247] Protocol I, *supra* note 4, at 640.

even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

2. The special protection against attack provided by paragraph 1 shall cease:

(a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
(b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
(c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.[248]

This is an innovative stricture, which cannot be viewed as part of customary international law (unless excessive collateral damage to civilians is anticipated).[249] It is definitely inconsistent with previous practice, exemplified by the famous RAF 'dambusters' raid against the Ruhr during World War II.[250]

The scope of application of Article 56 is circumscribed. It relates only to two categories of works and installations containing dangerous forces – (i) dams and dykes; and (ii) nuclear electrical generating stations – and to no others (e.g., 'factories manufacturing toxic products which, if released as gas, could endanger an entire region').[251] The extraordinary aspect of Article 56 is that the exemption from attack of these two categories of works and installations containing dangerous forces is so drastic. The exemption attaches to them not only where they are civilian objects, but even when they glaringly constitute military objectives: the guiding consideration being the protection of the civilian population from catastrophic collateral damage.[252]

Article 56 rules out an attack against these works and installations if the attack is liable to cause the release of the dangerous forces and 'consequent severe losses among the civilian population'. It is possible

[248] *Ibid.*, 653–4.
[249] See S. Oeter, 'Methods and Means of Combat', *Handbook* 105, 194.
[250] See McCoubrey, *supra* note 244, at 179.
[251] See C. Pilloud and J. Pictet, 'Article 56', *Commentary on the Additional Protocols* 665, 668.
[252] See Oeter, *supra* note 249, at 195.

to envisage an attack against works and installations containing dangerous forces which would be countenanced by Article 56, namely, when they are located far away from civilian habitation.[253] On the other hand, once large-scale civilian losses are at stake, an attack against such works and installations is excluded (by virtue of Article 56) notwithstanding an objective appraisal that these losses are not excessive compared to the military advantage expected.[254]

The immunity from attack spreads to military objectives in the vicinity of the works and installations containing dangerous forces. Article 56(5) goes on to allow special installations being erected for the sole purpose of defending the protected objects from attack: these installations cannot themselves be made the target of attack, as long as they are only used for (and their armament is limited to weapons capable of) repelling hostile action against the protected objects.[255] The Protocol devises a special sign, which can be used to facilitate the identification of the protected objects.[256]

The special protection of works and installations containing dangerous forces ceases under Article 56(2) only in extreme circumstances of 'regular, significant and direct support of military operations'. This mode of expression conspicuously sets a higher standard than, say, 'effective contribution to military action' (an expression forming part of the definition of military objectives in Article 52(2)).[257] Thus, the protected objects – and the military objectives in their vicinity – may make an effective contribution to enemy military action, but they cannot be attacked as long as the higher threshold is not reached. Even then, the attack must be the only feasible way to terminate the (regular, significant and direct) support of military operations. If that is not enough, Article 56(3) requires that should the protection cease – and although it ceases – 'all practical precautions shall be taken to avoid the release of the dangerous forces'.[258]

The acute danger to the civilian population presented by an attack bursting dams and dykes – and, all the more so, by an attack leading to the explosion of a nuclear reactor – is self-evident. The question, however, is whether the direction taken by Article 56 leads to optimal results in

[253] See Green, *supra* note 213, at 158.
[254] Hence, the present writer cannot accept Doswald-Beck's contention that this provision is, in effect, 'a specific application of the proportionality principle': L. Doswald-Beck, 'The Value of the 1977 Geneva Protocols for the Protection of Civilians', *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* 137, 158 (M. A. Meyer ed., 1989).
[255] Protocol I, *supra* note 4, at 654.
[256] *Ibid.*, 654, 686 (Article 56(7), Article 16 of Annex I).
[257] See W. A. Solf, 'Article 56', *New Rules* 348, 355.
[258] Protocol I, *supra* note 4, at 654.

terms of protecting civilians. It might have made more sense to demand 'passive precautions' on the part of a belligerent State responsible for these works and installations, especially to obligate the switching off during hostilities of a nuclear reactor – or of any hydroelectric facility at the foot of a dam – so as to eliminate the military rationale for an attack being launched.[259] Only time will tell whether belligerent States Parties to the Protocol will actually be willing to refrain from attacks against military objectives containing dangerous forces, in compliance with Article 56.

[259] Cf. Oeter, *supra* note 249, at 195, 199.

7 Protection of the environment

I. Introduction

The importance of the environment is universally acknowledged. As the International Court of Justice proclaimed in 1996, in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*:

> the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.[1]

Attacks in wartime against military objectives (as defined *supra*, Chapter 4) often impact upon the environment. Oil facilities as military objectives can serve as a prime example. When an oil refinery is struck, this may give rise to toxic air pollution.[2] When an oil storage facility is demolished, the oil may seep into the ground and poison water resources.[3] When an oil tanker is sunk at sea, the resultant oil spill may be devastating for marine life.[4]

The International Court of Justice, in the *Nuclear Weapons* Advisory Opinion, went on to say:

> States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.[5]

[1] Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, [1996] *ICJ Rep.* 226, 241.

[2] The bombing by NATO of an oil refinery in the vicinity of Belgrade, in 1999, has been criticized by some scholars owing to the release of poisonous gas into the environment. See C. E. Bruch and J. E. Austin, 'The Kosovo Conflict: A Case Study of Unresolved Issues', *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives* 647, 649 (C. E. Bruch and J. E. Austin eds., 2000).

[3] See *ibid.*

[4] In the course of the Iran–Iraq War, hundreds of oil tankers were attacked by both sides in the Persian Gulf. As a result, in 1984 alone more than 2 million tons of oil were spilled into the sea. See P. Antoine, 'International Humanitarian Law and the Protection of the Environment in Time of Armed Conflict', 32 *IRRC* 517, 530 (1992).

[5] Advisory Opinion on *Nuclear Weapons*, *supra* note 1, at 242.

The principle of proportionality has been discussed *supra*, Chapter 5, IV. It follows from the Court's dictum that, in accordance with the principle of proportionality, 'an attack on a military objective must be desisted from if the effect on the environment outweighs the value of the military objective'.[6]

Thus, the legal position consistent with present-day customary LOIAC is that, when an attack is launched, environmental considerations must play a role in the targeting process. Hence, even if an attack is planned in an area with little or no civilian population, it may have to be called off if the harm to the environment is expected to be excessive in relation to the military advantage anticipated.[7] Conversely, 'if the target is sufficiently important, a greater degree of risk to the environment may be justified'.[8] Due regard must be given to environmental considerations, and these are 'not static over time'.[9] Knowledge of the environment is constantly increasing, and there is a growing understanding of long-term risks attendant to disruption of ecosystems. Still, it must be grasped that – once due regard is given to environmental considerations and proportionality is observed – an attack against a military objective is liable to produce legitimate collateral damage to the environment.[10]

These are the general norms pursuant to customary international law. The question to be discussed in this chapter is to what degree treaty law confers upon the natural environment a special protection.

II. The international legal texts

There are two major treaties, and three supplementary texts, which are directly apposite to the protection of the environment in international armed conflict:

A. The ENMOD Convention

Article I(1) of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (adopted

[6] L. Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons', 37 *IRRC* 35, 52 (1997).
[7] See *ibid.*
[8] International Criminal Tribunal for the Former Yugoslavia (ICTY): Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 2000, 39 *ILM* 1257, 1263 (2000).
[9] R. Desgagne, 'The Prevention of Environmental Damage in Time of Armed Conflicts: Proportionality and Precautionary Measures', 3 *YIHL* 109, 116 (2000).
[10] See *Annotated Supplement* 405.

by the UN General Assembly in 1976 and opened for signature in 1977; hereinafter: 'ENMOD Convention') prescribes:

> Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.[11]

Article II of the ENMOD Convention sets forth:

> As used in Article I, the term 'environmental modification techniques' refers to any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.[12]

An Understanding relating to Article II is attached to the ENMOD Convention, listing on an illustrative basis the following phenomena that could be caused by environmental modification techniques: 'earthquakes; tsunamis; an upset in the ecological balance of a region; changes in weather patterns (clouds, precipitation, cyclones of various types and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer; and changes in the state of the ionosphere'.[13]

In conformity with the ENMOD Convention, not every use of an environmental modification technique is forbidden. The combined effect of Articles I and II is that several conditions have to be met:

(i) Only 'military or any other hostile' use of an environmental modification technique is forbidden. It does not matter whether resort to an environmental modification technique is made for offensive or defensive purposes.[14] But the proscribed use must be either military or hostile.[15] Article III(1) of the ENMOD Convention expressly states:

> The provisions of this Convention shall not hinder the use of environmental modification techniques for peaceful purposes and shall be without prejudice to the generally recognized principles and applicable rules of international law concerning such use.[16]

[11] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention), 1976, *Laws of Armed Conflicts* 163, 164.
[12] *Ibid.*, 165. [13] *Ibid.*, 168.
[14] See J. Muntz, 'Environmental Modification', 19 *HILJ* 385, 388 (1978).
[15] 'Military' and 'hostile' do not necessarily overlap. On the difference between the two adjectives, see C. R. Wunsch, 'The Environmental Modification Treaty', 4 *ASILSILJ* 113, 126 (1980).
[16] ENMOD Convention, *supra* note 11, at 165.

It can be perceived that the activities excluded from the prohibition of the ENMOD Convention consist of either:

(a) Benign stimulation of desirable environmental conditions, such as relieving drought-ridden areas or preventing acid rain;[17] or (at the other end of the spectrum):

(b) Measures causing destruction, damage or injury to another State when the use of the environmental modification techniques is non-hostile and non-military.[18] As the last part of Article III(1) clarifies, the ENMOD Convention does not necessarily legitimize such activities (which may be illicit on other international legal grounds),[19] but they do not come within the framework of its prohibition.

(ii) The proscribed action must consist of 'manipulation of natural processes'. The natural process, then, is the instrument manipulated (as a weapon) for wreaking havoc.

(iii) The prohibited conduct must be 'deliberate'. Differently put, the manipulation of natural processes must be intentional, and mere collateral damage resulting from an attack against a military objective is not included.[20] Consequently, a bombing of a chemicals factory leading to toxic air pollution would not count under the ENMOD Convention.[21]

(iv) The interdicted action must have 'widespread, long-lasting or severe' effects (on the meaning of these crucial terms, see *infra*, III). Hence, if such effects are not produced, the use of an environmental modification technique (albeit hostile) would be excluded from the scope of the prohibition.[22] By not forbidding a lower-level manipulation of natural processes for hostile purposes, the ENMOD Convention appears to condone military preparations for such activities.[23]

(v) The banned conduct must cause destruction, damage or injury. Three points should be appreciated:

[17] Cf. H. H. Almond, 'The Use of the Environment as an Instrument of War', 2 *YIEL* 455, 462 (1991).

[18] See M. J. T. Caggiano, 'The Legitimacy of Environmental Destruction in Modern Warfare: Customary Substance over Conventional Form', 20 *BCEALR* 479, 489 (1992–3).

[19] See L. Juda, 'Negotiating a Treaty on Environmental Modification Warfare: The Convention on Environmental Warfare and Its Impact upon Arms Control Negotiations', 32 *Int.Org.* 975, 984 (1978).

[20] See R. G. Tarasofsky, 'Legal Protection of the Environment during International Armed Conflict', 24 *NYIL* 17, 47 (1993).

[21] See A. P. V. Rogers, *Law on the Battlefield* 116 (1996).

[22] See L. I. Sánchez Rodriguez, '1977 United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques', *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* 651, 664 (N. Ronzitti ed., 1988).

[23] See A. H. Westing, 'Environmental Warfare', 15 *Env.L* 645, 663–4 (1984–5).

(a) Not every use of environmental modification techniques for military or hostile purposes must necessarily bring about destruction, damage or injury. For instance, an environmental modification technique employed for the dispersal of fog above critical enemy areas may be harmless as such.[24]
(b) Should there be destruction, damage or injury, the victim of the modification technique need not inevitably be the environment itself (although this would be a plausible outcome).[25] If a tsunami or an earthquake can be induced by human beings in the future, the likely target would be a major industrial complex or a similar non-environmental objective.
(c) The destruction, damage or injury must, of course, be generated by a deliberate manipulation of natural processes; but it may go far beyond what was intended or even foreseen by the acting State.[26] This does not matter, as long as there is a causal nexus between the deliberate act and the result.[27]

(vi) The destruction, damage or injury must be inflicted on another State Party to the ENMOD Convention. It does not matter whether that State is a belligerent or a neutral, provided that it is a contracting Party to the instrument. The destruction, damage or injury does not come within the ambit of the ENMOD Convention if it affects solely:
(a) The territory of the acting State (i.e., when the victim is the State's own population).[28]
(b) The territory of a State not party to the ENMOD Convention. Proposals at the time of drafting to make the text applicable *erga omnes* failed.[29] Similar proposals did not carry the day in a Review Conference held in 1984.[30]

[24] See J. Goldblat, 'The Environmental Modification Convention of 1977: An Analysis', *Environmental Warfare: A Technical, Legal and Policy Appraisal* 53, 54 (A. H. Westing ed., 1984).
[25] See W. D. Verwey, 'Protection of the Environment in Times of Armed Conflict: In Search of a New Legal Perspective', 8 *LJIL* 7, 17 (1995).
[26] See F. J. Yuzon, 'Deliberate Environmental Modification through the Use of Chemical and Biological Weapons: "Greening" the International Laws of Armed Conflict to Establish an Environmentally Protective Regime', 11 *AUJILP* 793, 807 (1995–6).
[27] See A. Leibler, 'Deliberate Wartime Environmental Damage: New Challenges for International Law', 23 *CWILJ* 67, 83 (1992–3).
[28] See S. N. Simonds, 'Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform', 29 *SJIL* 165, 187 (1992–3).
[29] See G. Fischer, 'Le Convention sur l'Interdiction d'Utiliser des Techniques de Modification de l'Environnement à des Fins Hostiles', 23 *AFDI* 820, 830–1 (1977).
[30] See K. Korhonen, 'The ENMOD Review Conference: The First Review Conference of the ENMOD Convention', 8 *Disarmament* 133, 137 (1985).

(c) Areas outside the jurisdiction of all States, like the high seas[31] – unless, of course, the destructive activities on the high seas affect the shipping of a State Party to the ENMOD Convention.[32]

Exceptionally, environmental modification can be spawned by conventional means and methods of warfare. A hypothetical example would be the systematic destruction by fire of the rainforests of the Amazon River Basin, thereby inducing a global climatic change.[33] But by and large, the phenomena catalogued illustratively in Article II (man-induced earthquakes, tsunamis and suchlike measures) can only be accomplished with unconventional weapons. For the most part, these techniques do not even reflect existing capabilities,[34] and they are therefore future-oriented. Weather manipulation through 'cloud seeding' has already been attempted, albeit not with spectacular results.[35]

Since, as indicated, the framers of the ENMOD Convention decided that its application should be circumscribed to the relations between States Parties, it is manifest that they deemed the text innovative (rather than declaratory of customary international law). Nothing has happened since the adoption of the ENMOD Convention to suggest that the legal position has changed in this regard.

B. Protocol I of 1977

Additional Protocol I of 1977 deals with the issue of the environment twice. Article 35(3) proclaims the basic rule:

> It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.[36]

Article 55(1) goes on to state:

> Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected

[31] See W. Heintschel von Heinegg and M. Donner, 'New Developments in the Protection of the Natural Environment in Naval Armed Conflicts', 37 *GYIL* 281, 294–5, 308 (1994).
[32] See G. K. Walker, *The Tanker War, 1980–88: Law and Policy*, 74 *ILS* 514 (2000).
[33] See Rogers, *supra* note 21, at 110.
[34] See W. Heintschel von Heinegg, 'The Law of Armed Conflicts at Sea', *Handbook* 405, 423.
[35] See H. McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare* 229 (2nd edn, 1998).
[36] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, *Laws of Armed Conflicts* 645.

to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.[37]

The first sentence of Article 55(1) reflects the underlying concept, to wit, the need to protect the natural environment in warfare, and it is interesting that the word 'warfare' is retained in the text: ordinarily it was avoided by the framers of the Protocol (who preferred the phrase 'international armed conflict').[38] The second sentence in essence replicates Article 35(3). However, apart from slight stylistic changes, the second sentence adds the verb 'includes' and the rider 'thereby to prejudice the health or survival of the population'. Both additions are problematic. The first may imply that the prohibition incorporated in Article 55(1) is 'just an example for the scope of application and not a definition or interpretation of the foregoing sentence'.[39] Yet, it has never been seriously contended that the protection of the natural environment under Article 55(1) breaks any new ground as compared to Article 35(3).[40] In contrast, the second addition to the second sentence of Article 55(1) appears to restrict its range to environmental damage that specifically prejudices human health or survival. Apparently, the desire of the framers of the Protocol was to reflect two conflicting standpoints: one advocating the notion that the protection of the environment in wartime is an end in itself (cf. Article 35(3)), and the other subscribing to the view that the protection is only designed to guarantee the survival or health of human beings (*vide* Article 55(1)).[41] The present writer believes that the best way to construe the Protocol is to read the two additions to the second sentence of Article 55(1) as interlinked. By bringing to the fore cases in which damage to the natural environment would prejudice human health or survival, the prohibition in Article 55(1) is not reduced to them. The injury to human beings should be regarded not as a condition for the application of the injunction against causing environmental damage, but as the paramount category included within the bounds of a larger injunction.[42]

[37] *Ibid.*, 653.

[38] See P. Bretton, 'Le Problème des "Méthodes et Moyens de Guerre ou de Combat" dans les Protocoles Additionnels aux Conventions de Genève du 12 Août 1949', 82 *RGDIP* 32, 68 (1978).

[39] 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* 140 (1984).

[40] See Verwey, *supra* note 25, at 13.

[41] See G. Herczegh, 'La Protection de l'Environnement Naturel et le Droit Humanitaire', *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* 725, 729 (ICRC, C. Swinarski ed., 1984).

[42] H. Blix, 'Arms Control Treaties Aimed at Reducing the Military Impact on the Environment', *Essays in International Law in Honour of Judge Manfred Lachs* 703, 713 (J. Makarczyk ed., 1984).

Article 55(1) refers to the 'health or survival' of the population. It follows that 'mere survival of the population' is not enough: when the population's health is prejudiced, the ban is applicable.[43] Unlike many other clauses of the Protocol, Article 55(1) employs the expression 'population' unaccompanied by the adjective 'civilian'. This was a purposeful omission underscoring that the whole population, 'without regard to combatant status', is alluded to.[44] In any event, the replication of the same prohibition in Article 35(3) – forming part of a section of the Protocol related to methods and means of warfare – shows that civilians are not the sole beneficiaries of the protection of the natural environment. Moreover, in light of the condition that the environmental damage be 'long-term', its effects are likely to outlast the war, and then any distinction between civilians and combatants becomes anachronistic.[45]

Some commentators criticize the text of Article 55(1) for not elucidating whether the whole population of a country is referred to or only a segment thereof (for instance, those persons who are in the vicinity of a battlefield).[46] But this is not very persuasive. The Protocol's interdiction is phrased in a manner featuring what is 'intended' or 'may be expected' to occur. The '*may* be expected' formula has also been disparaged.[47] Still, what the text does is accentuate prognostication (in the sense of both premeditation and foreseeability) rather than results. Hence:

(i) On the one hand, 'mere inadvertent collateral environmental effect of an attack' does not come within the compass of the prohibition.[48] As long as the damage to the natural environment (and the consequential prejudice to the health and survival of the population) is neither intended nor expected, no breach of the Protocol occurs.

(ii) On the other hand, where such an intention or expectation exists, it is immaterial that in fact only a portion of the population has been adversely affected. Indeed, if the intention or expectation can be established, it does not matter if ultimately there would be no victims at all (although, absent any damage, there may be insuperable

[43] See R. Carruthers, 'International Controls on the Impact on the Environment of Wartime Operations', 10 *EPLJ* 38, 47 (1993).

[44] F. Kalshoven, 'Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974–1977, Part II', 9 *NYIL* 107, 130–1 (1978).

[45] See A. Kiss, 'Les Protocoles Additionnels aux Conventions de Genève et la Protection de Biens de l'Environnement', *Studies and Essays on International Humanitarian Law*, *supra* note 41, at 181, 190.

[46] See G. B. Roberts, 'The New Rules for Waging War: The Case against Ratification of Additional Protocol I', 26 *VJIL* 109, 148 n. 213 (1985–6).

[47] See W. A. Wilcox, 'Environmental Protection in Combat', 17 *SIULJ* 299, 308, 313 (1992–3).

[48] M. Bothe, 'War and Environment', 4 *EPIL* 1342, 1344.

obstacles in proving the intention or the expectation).[49] After all, the text posits 'prejudice' to health or survival of the population, not actual injury.

Although Article 55(1) does not expressly designate the natural environment as a civilian object,[50] it is noteworthy that the clause features in a Chapter of the Protocol entitled 'Civilian Objects'.[51] In comparison to civilian objects in general, the natural environment is granted special protection (jointly with cultural objects and places of worship, objects indispensable to the survival of the civilian population, and works and installations containing dangerous forces). But the point is that, once classified as a civilian object, the natural environment must not be the object of attack.[52]

This general observation is subject to an important caveat. Whereas it is correct to say that the natural environment in its plenitude must not be the object of attack, the legal status of specific elements of the environment would depend on changing circumstances. A forest, for instance, can become a military objective owing to enemy use (especially for concealment purposes) or even due to its strategic location (as in a mountain pass).[53] If so, it would be exposed to attack.

Article 55(1) appears in a Section of the Protocol which affects the civilian population, individual civilians and civilian objects on land only (even if attacked from the sea or from the air).[54] The exclusion of naval and air warfare (not affecting land) from the reach of Article 55(1) is emphasized by some scholars.[55] But considering that Article 35(3) is not similarly circumscribed, it appears clear that the Protocol's protection of the natural environment applies to all types of warfare.

The Protocol does not define the phrase 'natural environment'. The ICRC Commentary suggests that it 'should be understood in the widest sense to cover the biological environment in which a population is living' – i.e., the fauna and flora – as well as 'climatic elements'.[56]

[49] See Rogers, *supra* note 21, at 113.
[50] See B. Baker, 'Legal Protections for the Environment in Times of Armed Conflict', 33 *VJIL* 351, 364 (1992–3).
[51] Protocol I, *supra* note 36, at 652 (Chapter III of Part IV Section I).
[52] See Article 52(1) of Protocol I, *ibid.* The treatment of the environment as a civilian object has been criticized for being too anthropocentric by K. Hulme, 'Armed Conflict, Wanton Ecological Devastation and Scorched Earth Policies: How the 1990–91 Gulf Conflict Revealed the Inadequacies of the Current Laws to Ensure Effective Protection and Preservation of the Natural Environment', 2 *JACL* 45, 59 (1997). But the criticism misses the point: a civilian object is an object which in principle is immune from attack.
[53] Cf. M. Bothe, 'The Protection of the Environment in Times of Armed Conflict', 34 *GYIL* 54, 55 (1991).
[54] Protocol I, *supra* note 36, at 650 (Article 49(3)).
[55] See Walker, *supra* note 32, at 517–18.
[56] C. Pilloud and J. Pictet, 'Article 55', *Commentary on the Additional Protocols* 661, 662.

There is no doubt that Articles 35(3) and 55(1) constituted an innovation in LOIAC at the time of their adoption.[57] It is sometimes alleged that the provisions have in the meantime been accepted as part and parcel of customary international law.[58] But this is wrong. As late as 1996, the International Court of Justice – in the *Nuclear Weapons* Advisory Opinion – enunciated that the provisions of the Protocol 'provide additional protection for the environment' and '[t]hese are powerful constraints for all the States having subscribed to these provisions'.[59] Surely, States which have not subscribed to the provisions (by becoming contracting Parties to the Protocol) are not bound by these constraints.[60] In other words, the relevant Protocol's clauses have not yet crystallized as customary international law. In 2000, the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia opined that Article 55 'may' reflect current customary law, while noting that 'the International Court of Justice appeared to suggest that it does not'.[61]

C. *Supplementary texts*

(a) The Rome Statute Article 8(2)(b)(iv) of the 1998 Rome Statute of the International Criminal Court stigmatizes as a war crime:

> Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to concrete and direct overall military advantage anticipated.[62]

This text is based on the language of the Protocol, but there are two significant disparities as regards the protection of the environment: (i) the Statute requires both intention and knowledge of the outcome, rather than either intention or expectation as set forth in the Protocol; and (ii)

[57] See C. Greenwood, 'Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict', *The Gulf War 1990–91 in International and English Law* 63, 86 (P. Rowe ed., 1993).

[58] See, e.g., S. Gupta, 'Iraq's Environmental Warfare in the Persian Gulf', 6 *GIELR* 251, 260 (1993–4).

[59] Advisory Opinion on *Nuclear Weapons*, *supra* note 1, at 242.

[60] Some scholars, relying on the Court's words that the Protocol's provisions 'embody a general obligation' (*ibid.*), arrive at the conclusion that this is an implied recognition of customary international law (see T. Marauhn, 'Environmental Damage in Times of Armed Conflict – Not "Really" a Matter of Criminal Responsibility', 82 *IRRC* 1029, 1031 (2000)). But such a conclusion misses the pivotal reference to States which have subscribed to these provisions.

[61] Final Report to the Prosecutor by the Committee, *supra* note 8, at 1262.

[62] Rome Statute of the International Criminal Court, 1998, 37 *ILM* 999, 1006 (1998).

for the war crime to crystallize, the damage to the natural environment must be clearly excessive in relation to the military advantage anticipated. The first disparity is warranted by the labelling of the act as a war crime, namely, the establishment of individual criminal responsibility and liability for punishment. Only an individual acting with both knowledge and intent would have the necessary *mens rea* exposing him to penal sanctions.[63] The second disparity is derived from the amalgamation in one Paragraph of the *materia* of the protection of civilians (or civilian objects) and that of the natural environment. The principle of proportionality has already been mentioned (*supra*, I): a balance must be struck between the military advantage anticipated (from an attack against a military objective) and any incidental injury to civilians or civilian objects. This is true also of the natural environment as a civilian object (unless an element of the environment – like a forest – is deemed a military objective in the circumstances prevailing at the time[64]). But the special regime, set up for the protection of the natural environment in Articles 35(3) and 55(1) of the Protocol, brings in the three cumulative conditions of 'widespread, long-term and severe damage' in lieu of proportionality. Under the Protocol, no action in warfare is allowed to reach the threshold of 'widespread, long-term and severe damage' to the natural environment, irrespective of any other considerations.[65] Should the three cumulative criteria be satisfied, the action will be in breach of the Protocol even if it is 'clearly proportional'.[66] This is not the case in the Rome Statute where damage to the environment (however 'widespread, long-term and severe') is explicitly added 'as an element in the proportionality equation'.[67]

(b) Protocol III, annexed to the Weapons Convention The Preamble of the 1980 Conventional Weapons Convention repeats verbatim (by 'recalling') the text of Article 35(3) of Protocol I (without citing the source).[68] Article 2(4) of Protocol III, annexed to the Convention, lays down:

[63] See M. A. Drumbl, 'Waging War against the World: The Need to Move from War Crimes to Environmental Crimes', 22 *FILJ* 122, 126, 130–1 (1998–9).

[64] See D. Fleck, 'Legal and Policy Perspectives', *Effecting Compliance* 143, 146 (H. Fox and M. A. Meyer eds., 1993).

[65] See P. J. Richards and M. N. Schmitt, 'Mars Meets Mother Nature: Protecting the Environment during Armed Conflict', 28 *Ste.LR* 1047, 1061–2 (1998–9).

[66] See M. N. Schmitt, 'The Environmental Law of War: An Invitation to Critical Reexamination', 36 *RDMDG* 11, 35 (1997).

[67] W. J. Fenrick, 'Article 8(2)(b)(iv)', *Commentary on the Rome Statute of the International Court* 197, *id.* (O. Triffterer ed., 1999).

[68] 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, *Laws of Armed Conflicts* 179, *id.*

It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.[69]

This provision is, of course, very limited in scope. It relates to only a small part of the natural environment: forests or other kinds of plant cover. In addition, it grants protection not against attacks in general, but only against attacks by specific (incendiary) weapons. And the protection ceases when the enemy is using the forests for cover, concealment or camouflage; or when they constitute military objectives. In reality, 'plant cover is most likely to be attacked precisely when it is being used as cover or camouflage'.[70] It has therefore been contended that the provision has little or no practical significance.[71] But the protection of civilians or civilian objects in general is contingent on non-abuse, and there is no reason to protect a forest from attack when the enemy is conducting military operations under cover. The reference in the text to forests as military objectives presumably relates either to their actual use by the enemy or to their strategic location (see *supra*, B).

Protocol III is not accepted as customary international law.[72]

(c) The Chemical Weapons Convention The use of herbicides (chemical defoliants) for military purposes – primarily, in order to deny the enemy sanctuary and freedom of movement in dense forests – caught wide attention during the Vietnam War, owing to the magnitude of American herbicide operations and the fact that they stretched over a long period of time.[73] The United States conceded that resort to herbicides can come within the purview of the prohibition of the ENMOD Convention, but only if it upsets the ecological balance of a region.[74] Even this proposition has been challenged on the ground that recourse to herbicides,

[69] Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 1980, *ibid.*, 190, 191.

[70] J. Goldblat, 'Legal Protection of the Environment against the Effects of Military Activities', 22 *BPP* 399, 403 (1991).

[71] See F. Kalshoven and L. Zegveld, *Constraints on the Waging of War* 164 (ICRC, 3rd edn, 2001).

[72] B. A. Harlow and M. E. McGregor, 'International Environmental Law Considerations during Military Operations Other than War', 69 *ILS* 315, 318 (*Protection of the Environment during Armed Conflict*, R. J. Grunawalt *et al.* eds., 1996).

[73] See A. H. Westing, 'Herbicides in War: Past and Present', *Herbicides in War: The Long-Term Ecological and Human Consequences* 3, 5 (A. H. Westing ed., 1984).

[74] See J. Goldblat, 'The Environmental Modification Convention: A Critical Review', 6 *Hum. V.* 81, 82 (1993).

albeit destructive of an element of the environment, does not amount to a 'manipulation of natural processes'.[75] However, the interpretation that the use of herbicides can under certain conditions 'be equated with environmental modification techniques under Article II of the Convention' was authoritatively reaffirmed in a Review Conference in 1992.[76] Evidently, the conditions listed in Article I(1) of the ENMOD Convention must not be ignored. In particular, 'widespread, long-lasting or severe' environmental damage is a prerequisite. A sporadic spread of herbicides might not cause environmental damage that is 'widespread, long-lasting or severe', in which case it would not be in breach of the ENMOD Convention.

It is therefore desirable to recall (see *supra*, Chapter 3, III, B, a) the seventh Preambular Paragraph of the 1993 Chemical Weapons Convention:

> *Recognizing* the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare.[77]

Although herbicides were simultaneously omitted from the definition of banned chemical weapons in the operative clauses of the Convention – as part of a 'compromise package'[78] – the United States (which insisted on that omission) 'has formally renounced the first use of herbicides in time of armed conflict', except within US installations or around their defensive perimeters.[79]

The allusion in the Preamble of the Chemical Weapons Convention to 'the pertinent agreements' is somewhat vague, but it seems that the framers had in mind both the ENMOD Convention and Protocol I.[80] Of greater weight is the reference to the 'relevant principles of international law' and the use of the expression '[r]ecognizing'. The inescapable connotation is that the prohibition is now predicated on customary international law.

[75] See J. G. Dalton, 'The Environmental Modification Convention: An Unassuming but Focused and Useful Convention', 6 *Hum.V.* 140, 142 (1993).
[76] A. Bouvier, 'Recent Studies on the Protection of the Environment in Time of Armed Conflict', 32 *IRRC* 554, 563 (1992).
[77] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993, 32 *ILM* 800, 804 (1993).
[78] W. Krutzsch and R. Trapp, *A Commentary on the Chemical Weapons Convention* 8, 30 (1994).
[79] *Annotated Supplement* 477.
[80] See A. Gioia, 'The Chemical Weapons Convention and Its Application in Time of Armed Conflict', *The New Chemical Weapons Convention – Implementation and Prospects* 379, 387 (M. Bothe, N. Ronzitti and A. Rosas eds., 1998).

III. The dissimilarities between the ENMOD Convention and Protocol I

It is well worth recalling that the ENMOD Convention and Protocol I – although negotiated separately (the former in the context of the UN and the other as part of the process of updating the Geneva Conventions) – were both signed in 1977. Needless to say, the framers of each text were fully cognizant of the other. The two instruments were designed to achieve different purposes, and there is no overlap in substance.

In its temporal sphere of application, Protocol I is narrower in scope than the ENMOD Convention. Although Protocol I draws no distinction between enemy territory and the territory of the belligerent causing the environmental damage,[81] the instrument applies only to international armed conflicts.[82] The counterpart instrument governing non-international armed conflicts – Protocol II[83] – does not incorporate a provision parallel to Articles 35(3) and 55(1).[84] For its part, the ENMOD Convention is germane to any situation in which an environmental modification technique is deliberately resorted to for military or hostile purposes and inflicts sufficient injury on another State Party. The phraseology would cover the case of a hostile use of an environmental modification technique in the course of a non-international armed conflict, where the weapon is wielded intentionally against a domestic foe but causes cross-border environmental damage to another State Party.[85]

Where weaponry is concerned, the Protocol has a wider scope than the ENMOD Convention. Whereas the ENMOD Convention is confined to one single type of weaponry, i.e., an environmental modification technique, the Protocol protects the natural environment (within prescribed circumstances) – and the population – against damage inflicted by any weapon whatsoever.[86] This can be looked at from an additional angle. In its thrust, the Protocol protects the environment ('the environment as victim'), whereas the ENMOD Convention protects from manipulation of the environment ('the environment as weapon').[87]

[81] See C. Stannard, 'Legal Protection of the Environment in Wartime', 14 *Syd.LR* 373, 375 (1992).
[82] See Article 1(3) of Protocol I, *supra* note 36, at 628. But see also Article 1(4), *ibid.*
[83] 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, *Laws of Armed Conflicts* 689.
[84] See M. Sassòli and A. A. Bouvier, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law* 437 (ICRC, 1999).
[85] See Fischer, *supra* note 29, at 830.
[86] J. de Preux, 'Article 35', *Commentary on the Additional Protocols* 389, 414–15.
[87] Bothe, *supra* note 53, at 57.

The Protocol goes much further than the ENMOD Convention in protecting the natural environment not only against intentional (or 'deliberate') infliction of damage in the course of warfare, but also against 'purely unintentional and incidental damage' which, however, can be 'expected'.[88] The Protocol accordingly provides protection also against 'non-intentional ecological war', provided that the consequences for the natural environment are foreseeable.[89]

Neither the Protocol nor the ENMOD Convention applies in every case of destruction or damage. A threshold is set up in the two instruments, and remarkably both use the same (or virtually the same) qualifying adjectives: 'widespread', 'long-term' (or 'long-lasting') and 'severe'. This ostensible resemblance between the two texts is deceptive for the following reasons:

(i) In the ENMOD Convention the three terms are enumerated alternatively ('widespread, long-lasting *or* severe effects'), whereas in the Protocol they are listed cumulatively ('widespread, long-term *and* severe'). Thus, under the ENMOD Convention suffice it for one of the three yardsticks to be met, but under the Protocol all three conditions must be satisfied concurrently.[90] Since environmental damage often meets one or even two of the conditions yet not the third, the Protocol sets a bar which may prove too high[91] (see *infra*, IV).

(ii) The three conditions, whether conjunctive or disjunctive, govern the scope of area affected, duration and degree of damage.[92] But the ENMOD Convention and the Protocol 'attribute different meanings to identical terms'.[93] In conformity with an Understanding relating to Article I, attached to the ENMOD Convention, 'widespread' encompasses 'an area on the scale of several hundred square kilometres'; 'long-lasting' endures 'for a period of months, or approximately a season'; and 'severe' involves 'serious or significant disruption or harm to human life, natural and economic resources or other assets'.[94] The first two criteria, defined in quantitative terms, are clear enough; the third is more ambiguous.[95] In any event, the Understanding explicitly

[88] See S. Oeter, 'Methods and Means of Combat', *Handbook* 105, 117.
[89] De Preux, *supra* note 86, at 419.
[90] See *ibid.*, 418.
[91] Schmitt gives as an example of 'the destruction of all members of a species which occupies a limited region': this would be long-term and severe (since it is irreversible) but perhaps not widespread. M. N. Schmitt, 'War and the Environment: Fault Lines in the Prescriptive Landscape', 37 *Ar. V.* 25, 43–4 (1999).
[92] See W. A. Solf, 'Article 55', *New Rules* 343, 346.
[93] A. Bouvier, 'Protection of the Natural Environment in Time of Armed Conflict', 31 *IRRC* 567, 575–6 (1991).
[94] ENMOD Convention, *supra* note 11, at 168.
[95] See A. S. Krass, 'The Environmental Modification Convention of 1977: The Question of Verification', *Environmental Warfare*, *supra* note 24, at 65, 67.

states that its definitions are intended 'exclusively' for the ENMOD Convention and they do not 'prejudice the interpretation of the same or similar terms' when used in any other agreement.[96] The Understanding's definitions are therefore inapplicable to the Protocol where the position is radically divergent.[97] The meaning of the adjective 'severe' in the Protocol is not sufficiently clear.[98] However, it is accepted that the extent of 'widespread' may well be less than several hundred square kilometres.[99] Above all, 'the time scales are not the same': while in the ENMOD Convention 'long-lasting' effects are counted in months, 'for the Protocol "long-term" was interpreted as a matter of decades'.[100] Where injury to the health of the population is concerned, it is discerned that – since short-term effects are beyond the ambit of the prohibition – what is meant is acts causing, e.g., 'congenital defects, degenerations or deformities'.[101] The trouble is that it is impracticable to calculate in advance the likely durability of environmental damage.[102]

IV. A case study: setting fire to oil wells in the Gulf War

During the Gulf War, Iraq maliciously released large quantities of oil into the Persian Gulf by opening the valves of oil terminals, causing 'the largest oil spill ever'.[103] Above all, in February 1991, it set on fire more than 600 Kuwaiti oil wells (damaging numerous others), casting a huge smoke plume over an immense area.[104] The smoke had serious cross-border effects regionally (although not globally, as initially feared), and the heavy atmospheric pollution in Kuwait had adverse effects for a long

[96] ENMOD Convention, *supra* note 11, at 168.
[97] Some commentators hold that the definitions in the Understanding attached to the ENMOD Convention are applicable also to the Protocol. See, e.g., B. K. Schafer, 'The Relationship between the International Laws of Armed Conflict and Environmental Protection: The Need to Reevaluate What Types of Conduct are Permissible during Hostilities', 19 *CWILJ* 287, 309 n. 110 (1988–9). But the claim is untenable.
[98] It has been suggested that 'severe' in the Protocol means 'causing death, ill-health or loss of sustenance to thousands of people, at present or in the future'. Leibler, *supra* note 27, at 111.
[99] See Antoine, *supra* note 4, at 526. [100] De Preux, *supra* note 86, at 416–17.
[101] Pilloud and Pictet, *supra* note 56, at 663–4.
[102] See G. Plant, 'Environmental Damage and the Laws of War: Points Addressed to Military Lawyers', *Effecting Compliance*, *supra* note 64, at 159, 169.
[103] A. Roberts, 'Environmental Issues in International Armed Conflict: The Experience of the 1991 Gulf War', 69 *ILS*, *supra* note 72, at 222, 247. For a legal analysis of the Iraqi action, see C. C. Joyner and J. T. Kirkhope, 'The Persian Gulf War Oil Spill: Reassessing the Law of Environmental Protection and the Law of Armed Conflict', 24 *CWRJIL* 29–62 (1992).
[104] See Roberts, *supra* note 103, at 248.

time.[105] The oil wells continued to blaze for months, and the last fire was extinguished only in November 1991.

As a rule, oil wells may be regarded as military objectives, the use of which can legitimately be denied to the enemy[106] (see *supra*, Chapter 4, III, (v)). Still, considering that the oil wells set on fire by Iraq were located in an occupied country (Kuwait) being evacuated by a defeated army, their systematic destruction – which could not possibly affect the progress of the war – did not offer a definite military advantage in the circumstances ruling at the time. The only possible military advantage to Iraq (on a purely tactical level) was the creation of thick smoke obscuring its ground forces from view by Coalition aviators, but the measure had little impact on military operations.[107] Even if the oil wells constituted military objectives in the circumstances prevailing at the time, and there was a limited military advantage in the smoke screen reducing visibility, the Iraqi action was subject to the application of the principle of proportionality.[108] The monstrous air pollution throughout Kuwait was tantamount to excessive injury to the environment and to the civilian population in breach of that principle. On balance, the Iraqis appear to have been motivated not by military considerations but by sheer vindictiveness.[109]

Absent a military rationale, the Iraqi conduct was in violation of several LOIAC norms of general application. As will be shown *infra* (Chapter 8, III, D), the destruction of enemy property is prohibited when not 'imperatively demanded by the necessities of war'.[110] It may be added that Article 53 of Geneva Convention (IV) of 1949 forbids the destruction by an Occupying Power of (private or public) property in an occupied territory, 'except where such destruction is rendered absolutely necessary by military operations'.[111] Under Article 147 of the same Convention,

[105] See *ibid.*, 250.

[106] See L. C. Green, 'The Environment and the Law of Conventional Warfare', 29 *CYIL* 222, 233 (1991).

[107] See J. P. Edwards, 'The Iraqi Oil "Weapon" in the 1991 Gulf War: A Law of Armed Conflict Analysis', 40 *NLR* 105, 121 (1992).

[108] See J. H. McNeill, 'Protection of the Environment in Time of Armed Conflict: Environmental Protection in Military Practice', 69 *ILS*, *supra* note 72, at 536, 541.

[109] See *ibid.*

[110] Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, *Laws of Armed Conflicts* 63, 83.

[111] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, *Laws of Armed Conflicts* 495, 517. On the linguistic difference between 'the necessities of war' (the Hague wording) and 'military operations' (the Geneva version), see R. J. Zedalis, 'Burning of the Kuwaiti Oilfields and the Laws of War', 24 *VJTL* 711, 749–50 (1991).

an 'extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly' is defined as a grave breach.[112] If a grave breach was perpetrated, it constituted a war crime under Article 8(2)(a)(iv) of the (subsequently crafted) Rome Statute of the International Criminal Court.[113] It should also be recalled that a 'scorched earth' policy is permitted to retreating troops only when the area affected belongs to the belligerent Party, and not to the enemy (see *supra*, Chapter 5, VIII).

In 1992, the UN General Assembly adopted without vote Resolution 47/37 on the 'Protection of the Environment in Times of Armed Conflict', where it is stressed that

> destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law.[114]

In its *Nuclear Weapons* Advisory Opinion, the International Court of Justice cited this passage.[115] The Court noted that General Assembly resolutions are not binding as such, but added that they can 'provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*'.[116] The prohibition of damage or destruction to the natural environment, 'not justified by military necessity and carried out wantonly', is reiterated in the San Remo Manual of 1995.[117] This is an accurate reflection of customary international law today.[118]

The most intriguing question is whether – by setting fire to the Kuwaiti oil wells – Iraq acted in breach of Protocol I and the ENMOD Convention. The simple answer is negative, since Iraq was not a contracting Party to the two instruments and they do not reflect customary international law. It is nevertheless worthwhile to raise the issue of principle whether (had Iraq been a contracting Party) the action taken would have run counter to the strictures imposed by the two instruments.

As far as the Protocol is concerned, the pivotal problem is the requirement to fulfil the three cumulative conditions of 'widespread, long-term and severe damage' to the natural environment. In the immediate aftermath of the Iraqi action, it was almost taken for granted that all three

[112] Geneva Convention (IV), *supra* note 111, at 547.
[113] Rome Statute, *supra* note 62, at 1006.
[114] UN General Assembly Resolution 47/37, 46 *YUN* 991, *id.* (1992).
[115] Advisory Opinion on *Nuclear Weapons*, *supra* note 1, at 242.
[116] *Ibid.*, 254–5.
[117] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* 119 (L. Doswald-Beck ed., 1995).
[118] See D. Momtaz, 'Le Recours à l'Arme Nucléaire et la Protection de l'Environnement: L'Apport de la Cour Internationale de Justice', *International Law, the International Court of Justice and Nuclear Weapons* 355, 364–5 (L. Boisson de Chazournes and P. Sands eds., 1999).

conditions were actually met in this catastrophe.[119] But since then many scholars have adhered to the view that – while the damage caused by Iraq was undeniably widespread and severe – the 'long-term' test (measured in decades) was not satisfied.[120] This was also the conclusion arrived at officially by the US Department of Defense in reviewing the 1991 phase of the Gulf War.[121]

The position may be different as regards the ENMOD Convention. Although not required to be satisfied cumulatively, all three conditions of 'widespread, long-lasting or severe effects' (as construed in the Understanding accompanying Article I) have been met, bearing in mind that even 'long-lasting' is measured here only in months.[122] As for the Understanding attached to Article II (apart from the fact that the catalogue of phenomena listed there is not exhaustive), it covers changes in weather patterns, which definitely occurred in Kuwait.[123]

The relative primitiveness of the means employed by Iraq should not by itself rule out the applicability of the ENMOD Convention. After all, 'arson falls within Article II's notion of "any technique"',[124] and, as pointed out (*supra*, II, A), setting fire to the tropical rainforests would qualify as such a technique. It has been maintained that, inasmuch as Iraq exploded man-made installations (the well-heads) to produce the results, there was no 'deliberate manipulation of natural processes'.[125] The rationale is that '[t]he direct cause of the environmental destruction was the detonation of explosives on the well-heads, and the fact that those well-heads have been constantly supplied with inflammable oil to feed the fire triggered by those explosions by virtue of the pressures in the strata below them is a secondary, not a causative, matter. Explosives, not oil pressure, were manipulated'.[126] That is to say, this was an instance

[119] P. Fauteux, 'L'Utilisation de l'Environnement comme Instrument de Guerre au Koweit Occupé', *Les Aspects Juridiques de la Crise et de la Guerre du Golfe* 227, 260–2 (B. Stern ed., 1991); D. Momtaz, 'Les Règles relatives à la Protection de l'Environnement au cours des Conflits Armés à l'Epreuve du Conflit entre l'Irak et le Koweit', 37 *AFDI* 203, 209–11 (1991).

[120] See Rogers, *supra* note 21, at 124.

[121] United States: Department of Defense Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War, 31 *ILM* 612, 636–7 (1992).

[122] See M. A. Ross, 'Environmental Warfare and the Persian Gulf War: Possible Remedies to Combat Intentional Destruction of the Environment', 10 *DJIL* 515, 531 (1991–2).

[123] See M. T. Okorodudu-Fubara, 'Oil in the Persian Gulf War: Legal Appraisal of an Environmental Warfare', 23 *SMLJ* 123, 176 (1991–2).

[124] L. Lijnzaad and G. J. Tanja, 'Protection of the Environment in Times of Armed Conflict: The Iraq–Kuwait War', 40 *NILR* 169, 196 (1993).

[125] See L. Edgerton, 'Eco-Terrorist Acts during the Persian Gulf War: Is International Law Sufficient to Hold Iraq Liable?', 22 *GJICL* 151, 172 (1992).

[126] G. Plant, 'Introduction', *Environmental Protection and the Law of War: The "Fifth Geneva" Convention on the Protection of the Environment in Time of Armed Conflict* 3, 24 n. 69 (G. Plant ed., 1992).

'of damage *to* the environment, but not necessarily damage *by* the forces of the environment'.[127] Yet, the matter is by no means free of doubt. The manipulation of natural forces is frequently brought about through the use of man-made implements. Not surprisingly, a commentator denying that setting the oil wells ablaze is covered by the ENMOD Convention is apt to acknowledge that recourse to incendiary herbicides (such as napalm) is.[128] Incontestably, Iraq did manipulate the natural pressure of the crude oil underground.[129] The Iraqis actually 'blasted the valves that could normally choke the oil flow to the wellhead'.[130] The sabotage of man-made installations does not detract from the fact that, had it not been for that natural flow under pressure, the 'darkness at noon' calamity could not have been contrived by the Iraqis.

The lack of clarity of the language of the ENMOD Convention generated much criticism in 1991, against the background of the Iraqi conduct in the Gulf War. The principal complaint was that the ENMOD Convention highlights unconventional futuristic techniques and ignores damage caused by conventional methods of warfare.[131] However, proposals to revise the text were not adopted in a Review Conference convened in 1992.[132]

Security Council Resolution 687 (1991) – which set out conditions to a ceasefire in the Gulf War – reaffirmed that Iraq 'is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'.[133] A Compensation Fund (generated by revenues from Iraqi petroleum exports) and a Compensation Commission were established by the Security Council in Resolution 692 (1991).[134] The Compensation Commission later awarded Kuwaiti authorities hundreds of millions of dollars for the cost of extinguishing the well-head fires.[135]

The legal validity of Resolution 687 cannot be refuted, despite the triple consideration that (i) Iraq was not a contracting Party to Protocol I or to the ENMOD Convention; (ii) the ENMOD Convention does not

[127] Roberts, *supra* note 103, at 250.
[128] See, e.g., N. A. F. Popovic, 'Humanitarian Law, Protection of the Environment, and Human Rights', 8 *GIELR* 67, 81 (1995–6).
[129] See N. A. Robinson, 'International Law and the Destruction of Nature in the Gulf War', 21 *EPL* 216, 220 (1991).
[130] J. E. Seacor, 'Environmental Terrorism: Lessons from the Oil Fires of Kuwait', 10 *AUJILP* 481, 489 (1994–5).
[131] See Bouvier, *supra* note 76, at 561.
[132] See *ibid.*, 562–3.
[133] Security Council Resolution 687 (1991), 30 *ILM* 847, 852 (1991).
[134] Security Council Resolution 692 (1991), 30 *ILM* 864, 865 (1991).
[135] See R. P. Alford, 'Well Blowout Control Claim', 92 *AJIL* 287, 288 (1998). The decision is reproduced in 36 *ILM* 1343 (1997).

reflect customary international law, nor do the environmental protection provisions of the Protocol; and (iii) even had the two instruments applied to Iraq, there is no consensus about their legal repercussions. Resolution 687 had a binding effect on Iraq, having been adopted under Chapter VII of the UN Charter.[136] As for its substance, Resolution 687 predicates 'the wrongful act which has engaged Iraq's State responsibility under international law' for any environmental damage on the illegal invasion of Kuwait in breach of the UN Charter and customary international law, rather than on LOIAC.[137] In other words, Iraq's obligation to pay compensation for environmental damage (in conformity with Resolution 687) was derived from a flagrant violation of the *jus ad bellum* and not from any possible breach of the *jus in bello*.[138]

V. Conclusion

It is a regrettable fact that customary international law has not yet developed to the point where an adequate protection is provided for the environment in wartime. The treaty law is more advanced, but (as demonstrated by the case study of the Gulf War) the threshold set up by Protocol I is too high – especially where durability of the environmental damage is concerned – and the ENMOD Convention lends itself to restrictive interpretations. There is no doubt that some intentional and direct damage to the environment is not covered by either the ENMOD Convention or the Protocol, and is consequently still permissible.[139]

A number of scholars have called for a completely new convention, devoted exclusively to the subject and addressing it systematically.[140] However, such a dramatic metamorphosis of the *lex scripta* is not likely at the present juncture. One well-versed commentator, inclined to believe at first blush that the formulation of such a treaty was timely,[141] had to concede upon reflection that 'governments are not at present ready to

[136] Security Council Resolution 687, *supra* note 133, at 849.
[137] C. Greenwood, 'State Responsibility and Civil Liability for Environmental Damage Caused by Military Operations', 69 *ILS*, *supra* note 72, at 397, 406.
[138] See L. Low and D. Hodgkinson, 'Compensation for Wartime Environmental Damage: Challenges to International Law after the Gulf War', 35 *VJIL* 405, 456 (1994–5).
[139] See M. D. Diederich, '"Law of War" and Ecology – A Proposal for a Workable Approach to Protecting the Environment through the Law of War', 136 *Mil.LR* 137, 152 (1992).
[140] See G. Plant, 'Elements of a "Fifth Geneva" Convention on the Protection of the Environment in Time of Armed Conflict', *Environmental Protection and the Law of War*, *supra* note 126, at 37–61.
[141] See P. C. Szasz, 'Environmental Destruction as a Method of Warfare: International Law Applicable to the Gulf War', 15 *Disarmament* 128, 151–3 (1992).

accept significant new obligations in this field'.[142] Regardless of the advisability of adopting a comprehensive and innovative treaty, what is evidently necessary is putting an end to any current controversy in identifying the threshold of environmental damage amounting to a breach of international law.[143]

[142] P. C. Szasz, 'Comment: The Existing Legal Framework, Protecting the Environment during International Armed Conflict', 69 *ILS*, *supra* note 72, at 278, 280.

[143] See R. J. Parsons, 'The Fight to Save the Planet: US Armed Forces, "Greenkeeping", and Enforcement of the Law Pertaining to Environmental Protection during Armed Conflict', 10 *GIELR* 441, 460 (1997–8).

8 Other methods and means of warfare

Article 22 of the Hague Regulations of 1899/1907 proclaims:

> The right of belligerents to adopt means of injuring the enemy is not unlimited.[1]

Article 35(1) of Additional Protocol I of 1977 reiterates the same concept under the heading '[b]asic rules':

> In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.[2]

This basic rule resonates across the whole spectrum of LOIAC. In the present chapter we shall address the concrete issues of (i) perfidy versus ruses of war; (ii) espionage; (iii) seizure and destruction of enemy property; and (iv) belligerent reprisals.

I. Perfidy and ruses of war

Perfidy and ruses of war share a common ground: both categories stem from deception and stratagem. Yet, perfidy is largely a violation of LOIAC, whereas ruses of war are perfectly legitimate. The question is how to tell them apart, and the answer depends on a modicum of mutual trust which must exist even between enemies, if LOIAC is to be fully complied with.

A. The Hague Regulations of 1899/1907

Under Article 23 of the Hague Regulations (in the 1907 wording), it is forbidden:

[1] Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, *Laws of Armed Conflicts* 63, 75, 82.

[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, *Laws of Armed Conflicts* 621, 644.

(b) To kill or wound treacherously individuals belonging to the hostile nation or army;

. . .

(f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention.[3]

Article 24 promulgates:

Ruses of war and the employment of measures necessary for obtaining information about the enemy are considered permissible.[4]

These norms plainly reflect customary international law, although the text 'fails to provide any criteria that would permit a distinction' between (lawful) ruses of war and (illicit) treacherous or improper conduct.[5]

The prohibition against treacherous killing of enemy individuals includes any offer of bounty (or reward) for assassination.[6] However, there is nothing treacherous in singling out an individual enemy combatant (usually, a senior officer) as a target for a lethal attack conducted by combatants distinguishing themselves as such[7] (see *supra*, Chapter 4, III, (ii)). The attack can be carried out by sniper fire, an ambush, a commando raid behind the lines[8] or even an air strike.

A flag of truce is a white flag used for parley between local commanders of opposing belligerent forces, with a view to discussing a short-term ceasefire or negotiating conditions of surrender.[9] The flag of truce is carried by an envoy – 'parlementaire' is the French term kept in the English translation of the Hague Regulations – who is authorized to enter into communication ('entrer en pourparlers' in the original French[10]) with the enemy, and enjoys inviolability pursuant to Article 32[11] (see *supra*, Chapter 6, I, A, (vi)). But under Article 34, the envoy loses his inviolability if he 'has taken advantage of his privileged position to provoke or commit an act of treason'.[12] In the original French text, Article 23(b) employs the phrase 'par trahison' (rendered in English as 'treacherously'), and

[3] Hague Regulations, *supra* note 1, at 82–3. [4] *Ibid.*, 83.
[5] See D. Fleck, 'Ruses of War and Prohibition of Perfidy', 13 *RDMDG* 269, 277 (1974).
[6] See M. N. Schmitt, 'State-Sponsored Assassination in International and Domestic Law', 17 *YJIL* 609, 635 (1992).
[7] A. P. V. Rogers and P. Malherbe, *Model Manual on the Law of Armed Conflict* 62 (ICRC, 1999).
[8] On the legality of a commando raid (in uniform) behind the lines, with a view to killing an enemy commander, see P. Rowe, 'The Use of Special Forces and the Laws of War', 33 *RDMDG* 207, 222–3 (1994).
[9] See Y. Dinstein, 'Flag of Truce', 2 *EPIL* 401, *id.*
[10] J. B. Scott, 2 *The Hague Peace Conferences of 1899 and 1907 (Documents)* 110, 116, 130; 368, 376, 392 (1909).
[11] Hague Regulations, *supra* note 1, at 85–6. [12] *Ibid.*, 86.

Article 34 refers to 'un acte de trahison' (translated literally as 'act of treason').[13] In English, 'treachery' would be the more accurate locution in the latter provision as well.

The theme of Article 23(f) is the 'improper use' ('user indûment' in French[14]) of the flag of truce. Unlike Article 23(b), treachery is not a required component in action counter to Article 23(f), and any improper use of the flag of truce will suffice. The International Military Tribunal at Nuremberg, in its Judgment of 1946, stated that the Hague prohibition of the improper use of flags of truce had been enforced long before the date of the Regulations and had become a punishable offence against the laws of war since 1907.[15] The ban is admittedly formulated too narrowly. It has always been understood to cover any improper use of the white flag: not only when it serves as a flag of truce but also when it evinces a desire to surrender.[16]

Article 23(f) equally forbids the improper use of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention (nowadays, Conventions in the plural).

B. Protocol I of 1977

(a) The relevant provisions Article 37 of Additional Protocol I sets forth:

> 1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
> (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
> (b) the feigning of an incapacitation by wounds or sickness;
> (c) the feigning of civilian, non-combatant status; and
> (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.
> 2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.[17]

[13] Scott, *supra* note 10, at 126, 130; 386, 392.
[14] *Ibid.*, 126, 388.
[15] International Military Tribunal (Nuremberg), Judgment and Sentences (1946), 41 *AJIL* 172, 218 (1947).
[16] See T. E. Holland, *The Laws of War on Land (Written and Unwritten)* 45 (1908).
[17] Protocol I, *supra* note 2, at 645.

Article 38 lays down:

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.
2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.[18]

Article 39 adds:

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.
2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.
3. Nothing in this Article or in Article 37, paragraph 1(d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.[19]

(b) Analysis: unlawful acts of perfidy

(aa) *Article 37* In keeping with Article 37, the term 'perfidy' (preferred by the framers of Protocol I over 'treachery') consists of three cumulative elements: (i) the existence of a norm of international law granting in certain circumstances protection (which the enemy is entitled to or is obligated to accord); (ii) inducing the enemy to trust that such circumstances have arisen; and (iii) an intent to breach that trust. Whereas a combatant can lawfully attempt to deceive the enemy by resorting to cunning stratagems, he is not allowed to create the false impression of legal entitlement (on either side) to immunity from attack. The rationale is that foul play in this instance is liable to erode respect for the immunity in future cases.

Article 37 does not ban all acts of perfidy in a comprehensive manner.[20] The text emulates Article 23(b) of the Hague Regulations by confining unlawful perfidy to a scenario resulting in the killing or injuring of an adversary: the contours of the proscribed acts are only expanded to include capture.[21] Thus, perfidy leading to the destruction of property is not covered.[22] Nor is a case in which there is a perfidious intent to kill, injure or capture an adversary, but – for whatever reason – the intent is

[18] *Ibid.* [19] *Ibid.*, 645–6.
[20] See J. de Preux, 'Article 37', *Commentary on the Additional Protocols* 429, 432.
[21] See W. A. Solf, 'Article 37', *New Rules* 201, 203. [22] See *ibid.*, 204.

not carried out.[23] There is 'a sort of grey area of perfidy' when execution of the intent is attempted unsuccessfully, failing to produce the outcome of killing, injuring or capturing an adversary.[24]

As regards the killing of an adversary, Article 37's reach seems to be narrower than that of Article 23(b) of the Hague Regulations. An illustration offered by W. A. Solf concerns bribing an enemy soldier to assassinate his commander: this would come within the ambit of Article 23(b) but would be excluded from Article 37, since the act 'would not involve any reliance by the victim on confidence that international law protects him against the acts of his own troops'.[25] It is, therefore, important to note that Article 37 'does not supersede the provisions of the Hague Regulations to the extent that the latter are broader'.[26]

Article 37 offers four examples of perfidy:

(i) Feigning of an intent to negotiate under a flag of truce or of a surrender. There are two dissimilarities compared to the text of Article 23(f) of the Hague Regulations: (aa) Article 37 mentions expressly the feigning of an intent to surrender (which may be done by hoisting the white flag); (bb) as pointed out, Article 37 is circumscribed to perfidious acts resulting in the killing, injuring or capturing of an adversary, whereas Article 23(f) disallows any 'improper use' of the flag of truce for whatever purpose.

The killing, injuring or capture of an adversary, and the perfidious resort to feigning of an intent to surrender, need not be committed by the same person or persons. Should combatants hoisting the white flag of surrender be in collusion with their companions (who are lying in wait), perfidy is consummated once the latter open fire upon enemy soldiers stepping forward to take the former as prisoners of war. Still, collusion is the key to such manifestation of perfidy. In many combat situations, some individuals (or even units) surrender while others continue to fight. Absent collusion, the fact that John Doe persists in shooting does not mean that Richard Roe is feigning when raising the white flag. To be on the safe side, the adverse Party's troops need not expose themselves to unnecessary risks, and they may demand that Richard Roe step forward unarmed.[27]

(ii) Feigning of an incapacitation by wounds or sickness, i.e., the state of being *hors de combat*. Once more, the indispensable setting is the killing, injuring or capturing of an adversary. It is not enough that

[23] See F. Kalshoven and L. Zegveld, *Constraints on the Waging of War* 94 (ICRC, 3rd edn, 2001). *Per contra*, see K. Ipsen, 'Perfidy', 3 *EPIL* 978, 980.
[24] De Preux, *supra* note 20, at 432–3. [25] Solf, *supra* note 21, at 204. [26] *Ibid.*
[27] See *Law of War Workshop* 7-30-7-31 (US Army Judge Advocate General, 1999).

a combatant feigns death in order to save his life.[28] Perfidy is perpetrated only if the act is performed with the intent to kill, injure or capture an enemy whose guard is down, and the intent is carried out.[29]

(iii) Feigning of civilian, non-combatant status. This is a curious and in some respects misleading provision. On the face of it, a radical change is brought about in the status of combatants who feign civilian status by removing their uniforms (or any other fixed distinctive emblem) and wear ordinary clothing. Under customary international law, a combatant doing that becomes an unlawful combatant, i.e., he is denied the privileges of a prisoner of war status and exposed to the full rigour of the domestic penal system for any act of violence perpetrated by him in civilian clothes (see *supra*, Chapter 2, III). Yet, the removal of the uniform *per se* is not considered a violation of LOIAC. Article 37 of the Protocol appears to alter all that. In conformity with Article 37(1)(c), if the perfidious removal of a uniform leads to the killing, injury or capture of an adversary – betrayed to believe that he is facing a civilian – the act constitutes a direct breach of LOIAC itself. This, to say the least, is surprising inasmuch as the Protocol in general – far from imposing more stringent constraints on combatants taking off their uniforms – actually relaxes in a controversial way the standards of customary international law in this context (see *supra*, Chapter 2, IV). How can one account for the singular thrust of the new stricture? The answer is that Article 37(1)(c) does not amount to much more than lip-service. Any lingering doubt is dispelled by a rider in Article 44(3) (where much of the controversial relaxation of unlawful combatancy occurs):

> Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).[30]

Even the ICRC Commentary concedes that '[t]here is a certain contradiction in terms' between the provisions of Article 37(1)(c) and Article 44(3).[31]

(iv) Feigning of protected status by the use of emblems or uniforms of the United Nations or of neutral States. Here, too, the interdiction relates to an attempt to acquire protection in order to kill, injure or

[28] See R. R. Baxter, 'The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)', *International Dimensions of Humanitarian Law* 93, 123 (UNESCO, 1988).
[29] See Kalshoven and Zegveld, *supra* note 23, at 94.
[30] Protocol I, *supra* note 2, at 647.
[31] J. de Preux, 'Article 44', *Commentary on the Additional Protocols* 519, 537.

capture an adversary. The underlying premise with respect to the UN is that it is above the fray.[32] Should a UN force participate in an armed conflict, Article 37 will not apply (although Article 39, pertaining to misuse of enemy emblems and uniforms, will).[33]

(bb) *Article 38* There are three categories of prohibitions in Article 38:

(i) Making improper use of the Geneva emblems, signs or signals. This is an elaboration of the injunction in Article 23(f) of the Hague Regulations against the improper use of the Geneva badges. The linchpin of Article 38 (like that of Article 23(f)) is the expression 'improper use'. Thereby, the application of Article 38 is not contingent on any perfidious killing, injury or capture of an adversary.[34] Here lies the critical dividing line between Article 38 and Article 37 of the Protocol.

(ii) Deliberate misuse of other internationally recognized protective emblems, signs or signals, including the flag of truce and the protective emblem of cultural property. Once more, the stricture is in place independently of perfidious killing, injury or capture of an adversary; hence the new reference to a flag of truce. As indicated, Article 37(1)(a) forbids the feigning of an intent to negotiate under a flag of truce, but only in the context of perfidious use resulting in killing, injury or capture of an adversary. Article 38 essentially reverts to the broad prohibition of Article 23(f) of the Hague Regulations in alluding to any 'deliberate misuse' of a flag of truce. The sole linguistic divergence is that the original expression 'improper use', appearing in Article 23(f), is substituted in Article 38 by 'deliberate misuse'. The practical difference between these two phrases is not pellucid.[35] An example of a deliberate misuse of the flag of truce which would be a violation of Article 38 as well as of Article 23(f), but not of Article 37(1)(a), is the use of a flag of truce solely 'to gain time for retreats or reinforcements'.[36]

Article 38's stigmatization of the deliberate misuse of internationally recognized protective emblems, signs or signals is open-ended. The scope is wide enough to include deliberate misuse both of existing protective emblems and signs (e.g., distress signals), and of ones to be adopted in the future.[37] There is also every reason to believe

[32] See de Preux, *supra* note 20, at 439. [33] See Solf, *supra* note 21, at 206.
[34] See J. de Preux, 'Article 38', *Commentary on the Additional Protocols* 445, 448.
[35] See *ibid.*, 456–8.
[36] *Operational Law Handbook* 20 (US Army Judge Advocate General School, 2003).
[37] See de Preux, *supra* note 34, at 456, 458.

that the distinctive protective emblem used by Israel (the Red Shield of David) comes within the purview of Article 38.[38]

(iii) Making unauthorized use of the distinctive emblem of the United Nations. Again, the UN emblem is mentioned already in Article 37(1)(d), but only in the setting of perfidious use resulting in killing, injury or capture of an adversary. In Article 38, the repudiation of unauthorized use is absolute. Nevertheless, the protection of the UN emblem in Article 38 – no less than in Article 37(1)(d) – must be understood as confined to circumstances in which the UN is not itself taking part in the armed conflict.[39]

(cc) *Article 39* Article 39 prohibits:

(i) The use of flags, military emblems, insignia or uniforms of neutral States. This ban is unqualified.

(ii) The use of enemy flags, military emblems, insignia or uniforms, but only when engaging in attacks or in order to shield, protect or impede military operations. This is an obvious attempt to define what amounts to an 'improper use' of enemy flags, insignia and uniforms (disallowed in Article 23(f) of the Hague Regulations).[40] The issue was sharpened by the controversial *Skorzeny* trial of 1947, in which a US Military Court acquitted German soldiers who, in the course of the Battle of the Bulge in December 1944, had worn American uniforms prior to engaging in combat.[41] Contrary to that decision, Article 39 delegitimizes the use of the enemy uniform and insignia not only during an attack but in all situations directly related to military operations, including preparatory stages preceding an attack.[42] That is not to say that all use of enemy uniform is necessarily improper. It has always been acknowledged that members of the armed forces who don enemy uniforms as a result of shortage of supplies – and without intention to deceive – do not act in breach of LOIAC, provided that alterations are made in those uniforms (and enemy insignia are removed) so as to avoid confusion as to which belligerent State they belong.[43] Captured enemy vehicles, tanks, etc., can be turned around and used in battle, but only after effacing the enemy national markings.[44] Moreover, escaping prisoners of war are allowed to wear enemy uniforms – to conceal their true identity – even without taking off the enemy insignia[45] (provided that they do

[38] See W. A. Solf, 'Article 38', *New Rules* 207, 211.
[39] See de Preux, *supra* note 34, at 459.
[40] See J. de Preux, 'Article 39', *Commentary on the Additional Protocols* 461, 466.
[41] Trial of *Skorzeny et al.* (US Military Court, Germany, 1947), 11 *LRTWC* 90, 93.
[42] See de Preux, *supra* note 40, at 466, 471.
[43] See Holland, *supra* note 16, at 45.
[44] See W. A. Solf, 'Article 39', *New Rules* 211, 214.
[45] See de Preux, *supra* note 40, at 467.

not commit an attack while in disguise[46]). A special dispensation exists with respect to spies (see *infra*, II, B).

As stated explicitly in Article 39(3), neither Article 37(1)(d) nor Article 39(1)–(2) applies to the use of flags in the conduct of armed conflict at sea. Warships have traditionally been conceded the right to disguise themselves – *inter alia*, by flying false neutral colours – except when going into action.[47] The 1995 San Remo Manual, without departure from the classical rule allowing the use of a false neutral flag, specifically forbids warships to simulate the status of hospital ships, cartel ships, passenger liners, vessels protected by the UN flag, etc.[48] The use of false colours (which can serve a deceptive purpose only upon visual contact with the enemy) has lately diminished in importance because much of modern naval warfare entails over-the-horizon targeting. However, it is still an effective ruse in some close-waters encounters where 'visual identification remains the most reliable means of distinguishing friend from foe'.[49] The most effective (and, of course, lawful) measure for concealing the presence of a warship today would consist of discontinuance of all electronic emissions emanating from it.[50]

(c) Legitimate ruses of war Ruses of war are warranted by both Article 24 of the Hague Regulations and Article 37(2) of Protocol I. As Article 37(2) explains, ruses of war are intended to mislead the enemy – or to induce him to act recklessly – but they (i) do not infringe any rule of LOIAC; and (ii) are not perfidious, because they do not invite the enemy's confidence with respect to protection under LOIAC.

Article 37 lists only four examples of ruses of war: camouflage, decoys, mock operations and misinformation. Evidently, there are countless other acceptable ruses of war. For instance, a Party to the conflict is allowed to use misleading electronic, optical, acoustic or other means to implant illusory images in the mind of the enemy.[51] It is permissible to alter data in the enemy's computer databases, and to pass to enemy subordinate units false instructions that appear to come from their headquarters.[52] A belligerent State may set up surprise attacks and ambushes, place in

[46] See S. Oeter, 'Methods and Means of Combat', *Handbook* 105, 202.
[47] See, e.g., *Annotated Supplement* 511.
[48] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* 184–5 (L. Doswald-Beck ed., 1995).
[49] M. T. Hall, 'False Colors and Dummy Ships: The Use of Ruse in Naval Warfare', 68 *ILS* 491, 497–8 (J. N. Moore and R. F. Turner eds., 1995).
[50] See *San Remo Manual*, *supra* note 48, at 184.
[51] See de Preux, *supra* note 20, at 441.
[52] See M. N. Schmitt, 'Wired Warfare: Computer Network Attack and the *Jus in Bello*', 76 *ILS* 187, 206 (*Computer Network Attack and International Law*, M. N. Schmitt and B. T. O'Donnell eds., 2002).

position dummy constructions and weapons, use false codes, and so forth.[53] It is a lawful ruse for tanks to advance with their turrets pointed aft, turning them forward when action begins, because reversed turrets are not a recognized symbol of surrender.[54]

It may as well be added that psychological warfare is lawful, not only through spreading misinformation (or disinformation), but also through inciting enemy combatants to rebel, mutiny or desert.[55] A belligerent is further allowed to counterfeit the enemy's currency, in order to undermine its monetary system and credits.[56]

C. *Other texts relating to perfidy and ruses of war*

The distinction between perfidy and ruses of war is dealt with not only in Protocol I. The dichotomy is addressed also in other instruments:

(i) In accordance with Article 21 of the (non-binding) 1923 Hague Rules of Air Warfare, aircraft can be used for the purpose of disseminating propaganda.[57] This entitlement covers the dropping of defeatist and even subversive leaflets inciting revolt and encouraging desertions.[58]

(ii) Following Article 10 of the (equally non-binding) 1923 Hague Rules for the Control of Radio in Time of War (formulated by the same Commission of Jurists), the abuse of radio distress signals for other than their normal and legitimate purposes amounts to a violation of LOIAC.[59] In a note adjoining the text, the Commission explained that the Article is designed to prevent the employment of signals and messages of distress as a ruse of war.[60]

(iii) Article 6 of a Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II), Annexed to the 1980 Conventional Weapons Convention, refers to 'the rules of international law applicable in armed conflict relating to treachery and perfidy' in the context of the use of booby-traps (see *supra*, Chapter 3, III, A, d).[61]

[53] See de Preux, *supra* note 20, at 443.
[54] See *Law of War Workshop*, *supra* note 27, at 7–31.
[55] See Oeter, *supra* note 46, at 203.
[56] See F. A. Mann, *The Legal Aspect of Money* 481 (5th edn, 1992).
[57] Hague Rules of Air Warfare, 1923, *Laws of Armed Conflicts* 207, 210.
[58] See K. J. Madders,'War, Use of Propaganda in', 4 *EPIL* 1394, *id.*
[59] Hague Rules for the Control of Radio in Time of War, 1923, 32 *AJIL*, Supp., 1, 2, 10 (1938).
[60] Commission of Jurists, Commentary on the Hague Rules for the Control of Radio in Time of War, *ibid.*
[61] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II), Annexed to Convention on Prohibitions or Restrictions on the

(iv) Article 8(2)(b) of the Rome Statute of the International Criminal Court brings the following acts within the definition of war crimes:

> (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
> . . .
> (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army.[62]

Article 8(2)(b)(xi) is identical to Hague Regulation 23(b), not even changing the original mention of a 'hostile nation or army' (which in current parlance means civilians or combatants of the adverse Party[63]). Article 8(2)(b)(vii) is clearly derived from Hague Regulation 23(f).[64] Yet, like Article 37 of Protocol I, it requires that the result would be killing or personal injury (except that the injury has to be serious, and capture is not mentioned). A reference to the flag, military insignia or uniform of the UN – but not of neutral States – has also been added.

II. Espionage

A. The definition of espionage

As noted (*supra*, I, A), Article 24 of the Hague Regulations does not impede 'the employment of measures necessary for obtaining information about the enemy'. It ensues that a belligerent may resort to any intelligence-gathering method, including (in the modern age) the use of electronic devices, wire tapping, code breaking and aerial or satellite photography. Despite the advances in technology, there is no substitute – even in our era – for the employment of human resources on the ground behind enemy lines, namely, spies.

Espionage is defined in Article 29 of the Hague Regulations (in the language of the 1907 text):

Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 1980, *Laws of Armed Conflicts* 179, 185, 187.

[62] Rome Statute of the International Criminal Court, 1998, 37 *ILM* 999, 1007 (1998).

[63] See M. Cottier, 'Article 8(2)(b)(xi)', *Commentary on the Rome Statute of the International Criminal Court* 217, 224 (O. Triffterer ed., 1999).

[64] See M. Cottier, 'Article 8(2)(b)(vii)', *ibid.*, 202, 203.

A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.[65]

Article 27 of the 1923 Hague Rules of Air Warfare similarly reads:

Any person on board a belligerent or neutral aircraft is to be deemed a spy only if acting clandestinely or on false pretences he obtains or seeks to obtain, while in the air, information within belligerent jurisdiction or in the zone of operations of a belligerent with the intention of communicating it to the hostile party.[66]

As freely conceded by the Commission of Jurists which drafted this provision, it merely offers a 'verbal adaptation' of Article 29 of the Hague Regulations.[67] It has been argued that Article 27 of the Air Warfare Rules does not address 'aerial observation', but only 'acts of personal espionage by individuals while aboard an aircraft'.[68] However, such an interpretation of the text seems contrived.

The definition of espionage in Article 29 of the Hague Regulations has three cumulative ingredients: the act must (i) be committed in the zone of operations of a belligerent; (ii) consist of obtaining or delivering information (or dispatches) for the enemy; and (iii) be carried out clandestinely or under false pretences. A few comments about each of the three conditions follow:

(i) The term 'zone of operations' of a hostile army is not very satisfactory, inasmuch as spies can actually operate in the interior of the enemy's territory. There is no need for limiting the zone of operations across the front line. What needs to be highlighted is that espionage can only be committed on the enemy's side of that line. A person stationed on his own State's side of the front line – say, clandestinely monitoring or deciphering enemy radio signals – is not a spy. A spy must be physically located in an area controlled by the enemy.

[65] Hague Regulations, *supra* note 1, at 84–5.
[66] Hague Rules of Air Warfare, *supra* note 57, at 212.
[67] Commission of Jurists, Commentary on the Hague Rules of Air Warfare, 32 *AJIL*, Supp., 1, 12, 28 (1938).
[68] G. B. Demarest, 'Espionage in International Law', 24 *DJILP* 321, 335 (1995–6).

(ii) Espionage is confined to the collation or transmission of information or messages, for the benefit of the opposing belligerent, and it excludes acts of sabotage. Espionage may be committed in three ways: the spy may (a) gather information himself; (b) deliver information obtained by others; or (c) deliver a dispatch – irrespective of its contents, and even if it contains no information – through enemy territory (for instance, from or to a besieged area or a group of partisans).

(iii) Most significantly, an act of espionage must be carried out clandestinely or under false pretences. Espionage is linked to action under disguise, e.g., a combatant assuming the false identity of a civilian or that of a member of the enemy armed forces. A combatant may be sent behind enemy lines as a courier or on a reconnaissance mission. The mission would not be deemed espionage if carried out openly, without any attempt to hide the true identity of the person concerned as a combatant (other than the use of camouflage). In an explanatory note attached to Article 27 of the Hague Rules of Air Warfare, the Commission of Jurists stated that 'reconnaissance work openly done behind the enemy lines by aircraft should not be treated as spying'.[69]

B. The penal prosecution of spies

When a spy is captured by the enemy, he can be prosecuted and punished. The need for a trial (precluding summary execution) is underscored in Article 30 of the Hague Regulations:

> A spy taken in the act shall not be punished without previous trial.[70]

The question is what will be the gravamen of the penal prosecution of espionage. It is indisputable that espionage does not constitute a violation of LOIAC on the part of the State engaging in it. But what is the status of the person perpetrating the act of espionage on behalf of his country? It used to be maintained that, even though LOIAC permits the belligerent State to employ spies, the spy himself may be considered a war criminal.[71] Yet, this is certainly not the law at the present time.[72] The contemporary analysis of what has been called 'the dialectics of espionage'[73] is different. Espionage is not a violation of LOIAC either by the State employing the

[69] Commission of Jurists, *supra* note 67, at 28.
[70] Hague Regulations, *supra* note 1, at 85.
[71] See L. Oppenheim, 2 *International Law* 422 (H. Lauterpacht ed., 7th edn, 1952).
[72] See E. Rauch, 'Espionage', 2 *EPIL* 114, 115.
[73] J. de Preux, 'Article 46', *Commentary on the Additional Protocols* 561, 563.

spy or by the person thus employed.[74] A spy is not a war criminal. Instead, given the clandestine nature of his activities, he is an unlawful combatant, and as such he is deprived of the status of a prisoner of war (*supra*, Chapter 2, II). In the words of the Dutch Special Court of Cassation in the *Flesche* case of 1949:

> espionage . . . is a recognized means of warfare and therefore is neither an international delinquency on the part of the State employing the spy nor a war crime proper on the part of the individual concerned.[75]

Thus, should a spy be captured, he may be prosecuted and punished, but only on the basis of the national criminal legislation of the belligerent State against whose interests he acted.[76] As a rule, the charge will be espionage *per se* (assuming that espionage is an offence under the penal code of the prosecuting State). But if the spy owes allegiance (as a national or otherwise) to the prosecuting State, he is liable to be indicted for treason.

Article 30 refers to a 'spy taken in the act'. What happens if a former spy is apprehended at a later stage? The situation is governed by Article 31:

> A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.[77]

This is an extraordinary stipulation accentuating the status of spies as unlawful combatants (rather than war criminals who can be prosecuted at any time). The rule is explicitly limited to combatants for whom espionage is like other dangerous missions: upon the conclusion of the mission, the danger is over. No similar dispensation exists for civilian spies. Light was shed on the point by the aforementioned *Flesche* case, in which a German civilian had engaged in espionage on behalf of Nazi Germany in the Netherlands. The man was captured on the eve of the Nazi invasion of Holland, in 1940, to be later released by the invading armies. When put on trial after the end of World War II, he relied on Article 31. However, this line of defence was rejected by the Dutch Special Court of Cassation:

> Though Article 29 covers civilians also, Article 31 applies only to those in military service, as clearly appears from its text and as is expressly stated by several writers.[78]

[74] See R. R. Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs', 28 *BYBIL* 323, 330–1 (1951).
[75] *Flesche* case (Holland, Special Court of Cassation, 1949), [1949] *AD* 266, 272.
[76] See *ibid.* [77] Hague Regulations, *supra* note 1, at 85.
[78] *Flesche* case, *supra* note 75, at 272.

Article 31 applies to all spies who are combatants, even if they had made use of enemy (or, for that matter, neutral or UN) uniforms and insignia. Ordinarily, such use would be deemed a war crime. Yet, spies – even in enemy uniform – remain merely unlawful combatants. The position is made clear in the above-cited Article 39(3) of Protocol I, whereby nothing in this provision – or, for that matter, in Article 37(1)(d) – 'shall affect the existing generally recognized rules of international law applicable to espionage'. It follows that a spy wearing enemy uniform, having terminated his mission but captured subsequently, does not incur any criminal responsibility for his act of espionage.[79]

The subject of espionage is also dealt with in Article 46 of Protocol I:

> 1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.
>
> 2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.
>
> 3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.
>
> 4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.[80]

In essence, the text reaffirms the traditional rules of espionage as laid down in the Hague Regulations.[81] Still, there are some variations with respect to certain aspects of the law:

(i) The Protocol alludes only to members of the armed forces, whereas the Hague Regulations relate both to soldiers and to civilians as possible spies.[82]

[79] See de Preux, *supra* note 40, at 469.
[80] Protocol I, *supra* note 2, at 649.
[81] See de Preux, *supra* note 73, at 563.
[82] On civilians as spies, see K. Ipsen, 'Combatants and Non-Combatants', *Handbook* 65, 98–9.

(ii) In the Protocol, the coinage 'territory controlled by an adverse Party' replaces the more restrictive 'zone of operations of a belligerent'. This is as it should be. Spies can act – and usually do – close to the cores of the decision-making process and the centres of population in the rear, rather than in the actual zone of military operations. Indeed, even legitimate reconnaissance missions – openly undertaken by combatants – may be carried out in the interior of the enemy country.[83]

(iii) The Protocol relates only to the gathering of information and does not refer to the separate issue of carrying messages, which has of course decreased in significance in the era of modern telecommunications.

(iv) The Protocol elucidates the meaning of 'false pretences' and 'clandestine' by specifying that a combatant cannot be considered a spy if he is wearing the uniform of his armed forces during the operation. Presumably, the word 'uniform' here applies to all fixed distinctive signs (see *supra*, Chapter 2, III) indicating that there is nothing clandestine about the activity in question.[84]

(v) In occupied territories, a resident combatant cannot be treated as a spy unless he is caught in the act. In other words, responsibility for former acts of espionage will be extinguished – as far as a resident combatant is concerned – even if he does not rejoin the armed forces to which he belongs. As for non-resident combatants in occupied territories, they do have to rejoin their armed forces in order to benefit from the exemption. But it should be pointed out that the act of rejoining is feasible even within an occupied territory, e.g., when a long-range commando raid takes place.[85]

III. Seizure and destruction of enemy property

The issues of seizure and destruction of enemy property have strenuous consequences in occupied territories, and are accordingly dealt with by multiple provisions of the 1899/1907 Hague Regulations[86] and Geneva Convention (IV) of 1949.[87] That must not divert attention from the poignant effects on property generated by the conduct of hostilities.

[83] See W. A. Solf, 'Article 46', *New Rules* 263, 265.
[84] See de Preux, *supra* note 73, at 566.
[85] See *ibid.*, 570.
[86] Hague Regulations, *supra* note 1, at 89–92. See especially Regulations 46 (second Paragraph), 47, 52, 53, 55, 56.
[87] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, *Laws of Armed Conflicts* 495, 517 (Article 53).

It is necessary to distinguish here between (i) pillage, (ii) booty of war, (iii) prize, and (iv) destruction or seizure of enemy property.

A. Pillage

The Hague Regulations of 1899/1907 proscribe pillage of towns and other places, even in assault (Article 28),[88] and pillage in occupied territories (Article 47).[89] The interdiction against pillage of a town or place, even when taken by storm, is replicated in the context of coastal attacks by naval units in Hague Convention (IX) (Article 7).[90] 'Pillaging a town or place, even when taken by assault', is a war crime under Article 8(2)(b)(xvi) of the Rome Statute of the International Criminal Court.[91] The 1954 Hague Cultural Property Convention bans pillage – as well as theft, misappropriation and any acts of vandalism – directed against cultural property (Article 4(3)).[92]

Protection against pillage is granted to military wounded and sick by Geneva Conventions (I) (Article 15)[93] and (II) (Article 18),[94] which also forbid despoiling the dead. Pillage of civilian wounded and sick is equally disallowed by Geneva Convention (IV) (Article 16),[95] which adds a more general prohibition against pillage (Article 33):[96] both stipulations appear in Parts of the instrument dealing with the protection of civilian population anywhere (not necessarily in occupied territories).

Pillage means looting (or plundering) of enemy, public or private, property by individuals for private ends.[97] The end is private – and the act constitutes pillage – even if the perpetrator does not take the property for himself, but hands it over to friends or relatives, or contributes it to a charitable institution.[98] Pillage is usually committed by combatants, but the injunction embraces also civilians.[99] As amply demonstrated by

[88] Hague Regulations, *supra* note 1, at 84. [89] *Ibid.*, 89.
[90] Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, 1907, *Laws of Armed Conflicts* 811, 813.
[91] Rome Statute, *supra* note 62, at 1007.
[92] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, *Laws of Armed Conflicts* 745, 748.
[93] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, *Laws of Armed Conflicts* 373, 380–1.
[94] Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, *Laws of Armed Conflicts* 401, 409.
[95] Geneva Convention (IV), *supra* note 87, at 506–7.
[96] *Ibid.*, 511.
[97] Cf. A. A. Steinkamm, 'Pillage', 3 *EPIL* 1029, *id.*
[98] See E. H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* 30 (1942).
[99] See A. Zimmermann, 'Article 8(2)(b)(xvi)', *Commentary on the Rome Statute of the International Criminal Court*, *supra* note 63, at 237, 238.

events following the overthrow of the Saddam Hussein regime in Iraq, in 2003, the looters may actually be enemy civilians.

B. Booty of war

In conformity with customary international law, title to any movable public property belonging to the enemy State and captured on the battlefield is acquired automatically by the belligerent State whose armed forces have seized it, irrespective of the military character of the property (not only weapons and ammunition, but also money and food stores).[100] Even medical transports and supplies are liable to capture – on condition that the care of the wounded and sick is safeguarded – under Geneva Convention (I) (Articles 33 and 35).[101]

Booty of war consists principally of governmental enemy property. Private enemy property is immune from capture on the battlefield, except for selected items: it is permissible to seize on the battlefield as booty of war weapons and ammunition, military equipment, military papers and the like, although they constitute private property.[102]

Since the law regulating booty of war is basically uncodified in treaty form, the term 'battlefield' (which is commonly used) need not be taken literally. The Supreme Court of Israel held, in 1985, that the entire theatre of operations may be regarded as a battlefield for the purposes of the law of booty in land warfare.[103]

In all cases of seizure of booty of war, it becomes the property of the captor State, as distinct from the unit or individual seizing it.[104] If an individual soldier attempts to keep booty for himself (e.g., as a 'war trophy'), the act would be deemed pillage (*supra*, A).

C. Prize and contraband

Governmental enemy property – like warships – can be seized as booty of war in maritime hostilities (as much as in land warfare), and title is transferred automatically.[105] But the most striking aspect of sea warfare is that private enemy vessels and cargoes are subject to capture and

[100] See Y. Dinstein, 'Booty in Land Warfare', 1 *EPIL* 432, *id.*
[101] Geneva Convention (I), *supra* note 93, at 387.
[102] See W. G. Downey, 'Captured Enemy Property: Booty of War and Seized Enemy Property', 44 *AJIL* 488, 494–5 (1950).
[103] H.C. 574/82, *Al Nawar* v. *Minister of Defence et al.*, 39(3) *Piskei Din* 449, 471. (The Judgment is excerpted in English in 16 *IYHR* 321 (1986).)
[104] Downey, *supra* note 102, at 500.
[105] See W. Rabus, 'Booty in Sea Warfare', 1 *EPIL* 434, *id.*

condemnation as prize, following adjudication.[106] Prize differs from booty of war in two important aspects: (i) prize relates to private, as distinct from public, property; (ii) title to prize is transferred only after judicial proceedings.[107] These proceedings are carried out by the domestic courts of the belligerent State that captured the prize.[108] An attempt to establish an international prize court in Hague Convention (XII) of 1907 failed, the Convention never coming into force.[109] Like booty of war, prize belongs to the belligerent State and not to the individual or unit capturing it.

All private enemy vessels are subject to capture and condemnation as prize, including yachts, but excluding hospital ships and similar categories of protected vessels.[110] Problems arise only as regards determination of the enemy character of the vessel. The rules that have emerged are as follows: (i) when a vessel is flying the enemy flag, this is conclusive evidence of enemy character; (ii) when a vessel is flying a neutral flag, this is only *prima facie* evidence of neutral character; (iii) if the commander of a belligerent warship suspects that a vessel flying a neutral flag is in fact an enemy vessel, he is entitled to exercise the right of visit and search (and if weather conditions render visit and search at sea hazardous, to divert the ship to port for that purpose).[111] Enemy character of a vessel can be determined on the basis of several criteria, including registration, ownership and control.[112]

Private enemy cargoes, if on board a private enemy merchant vessel, can always be captured as prize together with the vessel, regardless of destination.[113] There is a rebuttable presumption that cargoes on board enemy vessels have enemy character, but this is a matter to be resolved by the prize court rather than by the naval commander at sea.[114]

Private enemy cargoes on board a neutral merchant vessel can also be captured and condemned as prize, outside neutral waters, but only in three alternative situations: if (i) the vessel is breaching a blockade (see *supra*, Chapter 4, V, F); (ii) the vessel resists visit and search; or (iii) the cargo constitutes contraband.[115] 'Contraband is defined as goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict'.[116] The destination of the cargo to enemy-controlled territory is crucial for the definition of contraband. But when the cargo is destined there, it 'is immaterial whether

[106] See D. H. N. Johnson, 'Prize Law', 3 *EPIL* 1122, 1122–3.
[107] See Rabus, *supra* note 105, at 434–5. [108] See Johnson, *supra* note 106, at 1125.
[109] Hague Convention (XII) Relative to the Creation of an International Prize Court, 1907, *Laws of Armed Conflicts* 825. See Introductory Note, *id.*
[110] See *San Remo Manual*, *supra* note 48, at 205–8.
[111] See *ibid.*, 187–91. [112] See *ibid.*, 193–4. [113] See *ibid.*, 205.
[114] See *ibid.*, 195. [115] See *ibid.* [116] *Ibid.*, 215.

the carriage of contraband is direct, involves transshipment, or requires overland transport'.[117]

Certain items obviously intended for military use (such as weapons and munitions) constitute 'absolute contraband'.[118] In contrast, some items (like medications) are 'free goods' which can never be considered contraband.[119] A belligerent wishing to capture as contraband items not patently prone to military use must publish in advance specific contraband lists[120] (usually known as 'conditional contraband'[121]).

Since contraband must be destined for territory controlled by the enemy, *ex hypothesi* it does not encompass goods exported from enemy territory.[122] Differently put, enemy exports (as distinct from imports) at sea can never be captured as contraband. Enemy exports at sea can still be captured and condemned as prize, but only if (i) they are carried by enemy merchant vessels; or (ii) they are carried by neutral merchant vessels that breach a blockade or resist visit and search.

Consonant with the Hague Rules of Air Warfare, enemy civil aircraft and their cargoes are subject to the same legal regime as private enemy vessels: they are subject to capture and condemnation as prize following adjudication.[123] The San Remo Manual confirms this rule as customary law (with the exception of medical aircraft).[124]

Neutral merchant vessels outside neutral waters are subject to visit and search by belligerent warships, with a view to verifying the neutral character of the ship and to checking the cargo for contraband, unless they are travelling under convoy of neutral warships.[125] Neutral merchant vessels (and civilian aircraft), as well as neutral cargoes, are liable to capture and condemnation as prize if: (i) the vessels or aircraft carry, or the cargoes constitute, contraband; (ii) the vessels or aircraft breach a blockade; (iii) they are irregularly or fraudulently documented; (iv) they operate directly under enemy control; (v) they violate regulations within the immediate area of naval operations; or (vi) they transport enemy troops.[126]

[117] *Annotated Supplement* 383.
[118] For a classical definition of 'absolute contraband', see Article 22 of the (unratified) London Declaration Concerning the Laws of Naval Warfare, 1909, *Laws of Armed Conflicts* 843, 847–8.
[119] See *San Remo Manual*, *supra* note 48, at 217.
[120] See *ibid.*, 216.
[121] For a classical definition of 'conditional contraband', see Article 24 of the London Declaration, *supra* note 118, at 848.
[122] See *San Remo Manual*, *supra* note 48, at 216.
[123] Hague Rules of Air Warfare, *supra* note 57, at 215–16 (Chapter VII).
[124] *San Remo Manual*, *supra* note 48, at 211.
[125] See W. Heintschel von Heinegg, 'Visit, Search, Diversion, and Capture in Naval Warfare': 'Part I, The Traditional Law', 29 *CYIL* 283, 299 (1991); 'Part II, Developments since 1945', 30 *ibid.*, 89, 115 (1992).
[126] See *San Remo Manual*, *supra* note 48, at 212–16, 219–20.

D. Other destruction and seizure of enemy property

Other than in circumstances of booty of war and prize, enemy property is exempt from destruction and seizure unless this is required by military operations. Under Article 23(g) of the Hague Regulations, it is prohibited:

> (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.[127]

The exception here is necessarily broad. Destruction of enemy property is an inevitable feature of warfare. Every assault and bombardment – and especially combat in built-up areas – causes much destruction. But wartime is no excuse for destruction of enemy property at random. The cardinal question is whether the destruction is required by 'the necessities of war'. As highlighted by an American Military Tribunal in the *Hostage* case of 1948 (in the course of the 'Subsequent Proceedings' at Nuremberg), destruction of enemy property 'as an end in itself' in wartime is a violation of international law.[128] 'There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces'.[129] Such a 'reasonable connection', justifying the destruction of enemy property, may be established in a variety of circumstances: in attack (e.g., firing upon a building in which an enemy unit is taking cover), in defence (e.g., demolishing houses in the preparation of a line of fortifications), and even by the sheer movement of tanks and heavy equipment. In the absence of that 'reasonable connection', the destruction of enemy property would be deemed wanton and, as such, a breach of LOIAC.

A good modern example of wanton (hence, illicit) destruction of enemy property in wartime is the setting on fire by retreating Iraqi troops of hundreds of Kuwaiti oil wells, in 1991, without gaining any commensurate military advantage from the huge conflagration (see *supra*, Chapter 7, IV). It should also be recalled that a 'scorched earth' strategy may be implemented by retreating troops only when the area affected belongs to the belligerent Party, and not to the enemy (see *supra*, Chapter 5, VIII).

Destruction of houses as a (legitimate) integral part of military operations must be distinguished from demolitions of residential buildings carried out as a post-combat punitive measure. Israel has resorted to such measures in its fight against terrorism in occupied territories. In support of the Israeli policy it has been maintained that if hand grenades are hurled

[127] Hague Regulations, *supra* note 1, at 83.
[128] *Hostage* case (*USA* v. *List et al.*) (American Military Tribunal, Nuremberg, 1948), 11 *NMT* 757, 1230, 1253.
[129] *Ibid.*, 1253–4.

out of a house (or if terrorists use the premises to prepare an attack), that house becomes a military base, so there is no difference between immediate military reaction leading to its destruction and later demolition as a punitive measure.[130] However, it is wrong to believe that, once used for combat purposes, a civilian object (like a residential building) is tainted permanently as a military objective. As long as combat is in progress, the destruction of property – even in occupied territories – is permissible, if rendered necessary by military operations.[131] Yet, subsequent to the military operations, destruction of property is no longer compatible with modern LOIAC.[132]

Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly,[133] constitutes a grave breach of Geneva Convention (IV).[134] As such, it is a crime under Article 2(d) of the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia,[135] and a war crime pursuant to Article 8(2)(a)(iv) of the 1998 Rome Statute.[136] In fact, both instruments create separate and independent crimes with respect to the same *materia*. The ICTY Statute, in listing prosecutable violations of the laws and customs of war, includes in Article 3(b) 'wanton destruction of cities, towns or villages, or devastation not justified by military necessity',[137] and in Article 3(e) 'plunder of public or private property'.[138] Article 8(2)(b)(xiii) of the Rome Statute enumerates as a war crime '[d]estroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war'.[139] Obviously, this is a reproduction of the language of Hague Article 23(g). Since Article 8(2)(b)(xiii) of the Rome Statute is 'quite similar in nature' to Article 8(2)(a)(iv),[140] the difference between the two war crimes is not clear.

[130] See M. Shamgar, 'The Observance of International Law in the Administered Territories', 1 *IYHR* 262, 274 (1971).
[131] See Article 53 of Geneva Convention (IV), *supra* note 87, at 517.
[132] See Y. Dinstein, 'The Israel Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing Off of Houses', 29 *IYHR* 285, 290, 293–5 (1999).
[133] The two adverbs, unlawfully and wantonly, are obviously a 'surplusage' (W. J. Fenrick, 'Article 8(2)(a)(iv)', *Commentary on the Rome Statute of the International Criminal Court*, *supra* note 63, at 183, *id.*).
[134] Geneva Convention (IV), *supra* note 87, at 547 (Article 147).
[135] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY), Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 32 *ILM* 1159, 1192 (1993).
[136] Rome Statute, *supra* note 62, at 1006.
[137] ICTY Statute, *supra* note 135, at 1192.
[138] *Ibid.*, 1193.
[139] Rome Statute, *supra* note 62, at 1007.
[140] A. Zimmermann, 'Article 8(2)(b)(xiii)', *Commentary on the Rome Statute of the International Criminal Court*, *supra* note 63, at 227, 228.

IV. Belligerent reprisals

A. The concept of belligerent reprisals

When LOIAC is breached by the enemy during hostilities, the aggrieved belligerent State would be interested less in any possible future remedy for the harm already done (e.g., financial reparation to be paid after the hostilities are over) – or even in the ultimate punishment of individuals accountable for war crimes (see *infra*, Chapter 9) – and more in ensuring that the enemy would not continue with the breach or renew it in the course of the armed conflict. The conundrum is how to deter the enemy from further breaches and impel compliance with LOIAC. A 'classic' tool – which has developed in customary international law, in order 'to induce a law-breaking state to abide by the law in the future' – is recourse to belligerent reprisals.[141]

Belligerent reprisals are not to be confused with armed reprisals in peacetime.[142] 'A belligerent reprisal consists of action which would normally be contrary to the laws governing the conduct of armed conflict (the *ius in bello*) but which is justified because it is taken by one party to an armed conflict against another party in response to the latter's violation of the *ius in bello*'.[143] The underlying concept is that, in appropriate circumstances, the original breach of LOIAC by one belligerent State vindicates a counter-breach in response by the adversary – the counter-breach being purged of any trace of illegality – with a view not to retribution but to forestalling recurrence of the original breach.[144]

Empirically, the apprehension of a 'tit for tat' is the paramount means of deterrence against breaches of LOIAC. Many laws of warfare (usually formulated or accepted in peacetime, when the exigencies of war do not loom on the horizon) prove onerous once put to the test of an actual international armed conflict. If belligerent States refrain from contravening them, notwithstanding a perception that these norms tie their hands militarily and strategically, it is above all due to the knowledge that any deviation is likely to entail painful reciprocity.

[141] Oeter, *supra* note 46, at 204.

[142] On the subject of armed reprisals in peacetime, see Y. Dinstein, *War, Aggression and Self-Defence* 194–203 (3rd edn, 2001).

[143] C. Greenwood, 'The Twilight of the Law of Belligerent Reprisals', 20 *NYIL* 35, 38 (1989).

[144] The term 'countermeasures', popularized by the International Law Commission, 'covers that part of the subject of reprisals not associated with armed conflict', and therefore does not replace belligerent reprisals. *Report of the International Law Commission, 53rd Session* 325 (2001) (Commentary on Draft Articles on Responsibility of States for Internationally Wrongful Acts).

Customary international law regulates belligerent reprisals by subjecting their exercise to five conditions:[145]

(i) Protests or other attempts to secure compliance of the enemy with LOIAC must be undertaken first (unless their fruitlessness 'is apparent from the outset'[146]).
(ii) A warning must generally be issued before resort to belligerent reprisals.
(iii) Belligerent reprisals must always be proportionate to the original breach of LOIAC.
(iv) The decision to launch belligerent reprisals cannot be taken by an individual combatant, and must be left to higher authority.
(v) Once the enemy desists from its breach of LOIAC, belligerent reprisals must be terminated.

The main purpose of preliminary protests and warnings (the first two conditions) is to establish that the enemy's breach of LOIAC is deliberate rather than 'accidental'.[147] If it remains impervious to those protests and warnings, the enemy shows that the breach is likely to be repeated. Since assessment of breaches and counter-breaches is not a simple matter, the fourth condition is introduced. It is designed to ensure deliberation on the part of higher echelons of the aggrieved State before a belligerent reprisal is carried out. The fifth condition highlights the nature of a belligerent reprisal as a deterrent measure. But the most significant condition is the third, relating to proportionality. Proportionality does not mean equivalence: it means that the response must not be excessive, although in practice a belligerent reprisal is usually somewhat harsher than the original breach.[148]

Belligerent reprisals need not be in kind. If State A bombs civilian objects in State B, State B is not bound to respond by bombing civilian objects in State A. Sometimes there is no direct counterpart in State A for the object struck in State B. It is also possible that State B lacks the technical capability of meting out to State A measure for measure in the same field. State B is therefore allowed to respond with a belligerent reprisal of a different kind, provided that proportionality is observed. Naturally, when a belligerent reprisal is not in kind, the degree of proportionality to the original breach may be harder to evaluate accurately.[149]

[145] See W. A. Solf, 'Article 51', *New Rules* 296, 312.
[146] See F. Kalshoven, *Belligerent Reprisals* 340 (1971).
[147] On 'accidental' breaches in this context, see F. J. Hampson, 'Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949', 37 *ICLQ* 818, 840 (1988).
[148] See *Annotated Supplement* 339–40 n. 43.
[149] See G. Schwarzenberger, 2 *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* 453 (1968).

Generally, belligerent reprisals have to be carried out by the State which was the victim of the original breach, and be directed against the State responsible for that breach. But in the setting of coalition warfare, a breach of LOIAC by State A against State B may give rise to a belligerent reprisal by State C (an ally of State B) against State A – or perhaps even against State D (an ally of State A) – in view of the commonality of interests of the allies on either side of the aisle.[150] Yet, belligerent reprisals must be confined to the relations between belligerent States. They must not be directed by or against neutrals.[151]

There is a need to distinguish between three different classes of action labelled as belligerent reprisals:

(i) Genuine and legitimate belligerent reprisals designed to ensure that LOIAC (having been breached first by the enemy and now by the aggrieved State) be reinstated in the future. They are literally the exception that proves, and safeguards, the rule.

(ii) So-called belligerent reprisals, constituting merely 'a pretext for justifying the illegitimate conduct' of a State.[152] These are not genuine exceptions to the rule, but violations thereof.

(iii) Extended reciprocal belligerent reprisals, which ultimately become entrenched in the practice of States (in one form or another). At the outset, these actions constitute genuine belligerent reprisals, but in time they are grafted onto the norms of LOIAC as new law. The upshot is that the exception to the rule becomes the rule. As an illustration, it is possible to refer to the practice of 'target area' bombings (see *supra*, Chapter 4, VI, C), which originally started in World War II in a spiral of belligerent reprisals and counter-reprisals (with constant escalation).[153] Whatever the legal position was at the time, it is a matter of record that 'target area' bombing (subject to prescribed parameters) is currently compatible with Article 51(5)(a) of Protocol I.[154]

B. Prohibitions of specific belligerent reprisals

Not every belligerent reprisal may be unleashed, even if it meets the five conditions set out above. Certain belligerent reprisals are specifically

[150] See M. Akehurst, 'Reprisals by Third States', 44 *BYBIL* 1, 15–18 (1970).
[151] See R. Leckow, 'The Iran–Iraq Conflict in the Gulf: The Law of War Zones', 37 *ICLQ* 629, 639–40 (1988).
[152] R. Bierzanek, 'Reprisals as a Means of Enforcing the Laws of Warfare: The Old and the New Law', *The New Humanitarian Law of Armed Conflict* 232, 237 (A. Cassese ed., 1979).
[153] See E. Rosenblad, 'Area Bombing and International Law', 15 *RDMDG* 53, 66 (1976).
[154] Protocol I, *supra* note 2, at 651.

dismissed by the Geneva Conventions. Article 46 of Geneva Convention (I) proclaims:

> Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited.[155]

Article 47 of Geneva Convention (II) reiterates the same notion, appending shipwrecked persons to the list and supplanting buildings by vessels.[156] Geneva Convention (III) sets forth in Article 13 (third Paragraph):

> Measures of reprisal against prisoners of war are prohibited.[157]

For its part, Geneva Convention (IV) states in Article 33 (third Paragraph):

> Reprisals against protected persons and their property are prohibited.[158]

Similarly, Article 4(4) of the Hague Cultural Property Convention lays down that High Contracting Parties

> shall refrain from any act directed by way of reprisals against cultural property.[159]

The exclusions of specific belligerent reprisals are considerably extended in Protocol I, which interdicts them in seven different contexts:

(i) Article 20 bans reprisals against persons and objects protected in Part II (dealing with wounded, sick, shipwrecked, medical and religious personnel, medical units and transportation, etc.).[160] The principal purpose of this provision was to cover persons and objects not protected from reprisals by Geneva Conventions (I) and (II), especially civilian wounded and sick as well as civilian medical objects.[161]
(ii) Article 51(6) does not permit attacks against the civilian population or civilians by way of reprisals.[162]
(iii) Article 52(1) states that civilian objects shall not be the object of reprisals.[163]

[155] Geneva Convention (I), *supra* note 93, at 391.
[156] Geneva Convention (II), *supra* note 94, at 417.
[157] Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, *Laws of Armed Conflicts* 423, 435.
[158] Geneva Convention (IV), *supra* note 87, at 511.
[159] Hague Cultural Property Convention, *supra* note 92, at 748.
[160] Protocol I, *supra* note 2, at 637.
[161] See M. Bothe, 'Article 20', *New Rules* 137, 140.
[162] Protocol I, *supra* note 2, at 651. [163] *Ibid.*, 652.

(iv) Article 53(c) forbids making historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples the object of reprisals.[164]
(v) Article 54(4) protects objects indispensable to the survival of the civilian population from being made the object of reprisals.[165]
(vi) Article 55(2) pronounces that attacks against the natural environment by way of reprisals are prohibited.[166]
(vii) Article 56(4) denies the right of making works or installations containing dangerous forces (namely, dams, dykes and nuclear electrical generating stations) – even where they are military objectives – the object of reprisals.[167]

Additionally, Article 3(2) of Protocol II, Annexed to the 1980 Conventional Weapons Convention, proscribes directing mines, booby-traps and other devices against civilians by way of reprisals.[168]

These sweeping injunctions do not eliminate belligerent reprisals *in toto*, but they are most comprehensive.[169] Some belligerent reprisals are still untrammelled, but they are few in number. Above all, no specific treaty provision dispels the possibility of employing prohibited weapons against enemy combatants by way of belligerent reprisals.[170] This is especially true where the belligerent reprisal is in kind, viz. when enemy reliance on unlawful weapons prompts their counter-use as belligerent reprisal.

In the domain of prohibited weapons, the introduction of belligerent reprisals is not necessarily the harshest response to breaches. Thus, the text of the 1925 Geneva Gas Warfare Protocol drew a spate of formal reservations, whereby contracting Parties would cease altogether to be bound by their obligations towards any enemy whose armed forces (or whose allies) do not respect the Protocol.[171] These reservations are far-reaching, going beyond the response generally authorized by the law of treaties in case of 'material breach'.[172] Their net result is that of rendering the Protocol 'a no-first-use agreement, rather than a no-use

[164] *Ibid.* [165] *Ibid.*, 653. [166] *Ibid.* [167] *Ibid.*, 654.
[168] Protocol II, *supra* note 61, at 186.
[169] See G. B. Roberts, 'The New Rules for Waging War: The Case against Ratification of Additional Protocol I', 26 *VJIL* 109, 142 (1985–6).
[170] See C. Pilloud and J. Pictet, 'Article 51', *Commentary on the Additional Protocols* 613, 627.
[171] Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925, *Laws of Armed Conflicts* 115, 121–7.
[172] See R. R. Baxter and T. Buergenthal, 'Legal Aspects of the Geneva Protocol of 1925', 64 *AJIL* 853, 869–73 (1970).

agreement'.[173] Proportionate belligerent reprisals (limited in duration) would prove more humane than a total abrogation of the aggrieved State's obligations towards an enemy acting in breach of the Protocol.[174]

In many respects, the notion of curtailing the age-old freedom of belligerent reprisals is attractive in a modern setting. Reciprocity or mutual deterrence, forming the foundation of the LOIAC construct of belligerent reprisals, is utterly alien to the contemporary law of human rights.[175] When individuals are directly vested by international law with human rights, these rights cannot possibly be abolished or suspended by dint of any misconduct on the part of the State of nationality. Consequently, the human right of a lawful combatant to the protection of his life when captured by the enemy (a human right existing independently of any right to the same effect devolving on the belligerent State in whose armed forces he serves) cannot be denied only because that State has acted in breach of LOIAC.[176] If members of the armed forces of State A murder prisoners of war from State B, State B (as ordained in Geneva Convention (III)) is disallowed to resort to belligerent reprisals in kind against prisoners of war from State A.[177] The same principle militates against the suffering of innocent civilians solely on account of infringements of LOIAC committed by combatants belonging to the same State of nationality.[178] Belligerent reprisals against innocent civilians are 'antithetical to the notion of individual responsibility so fundamental to human rights'.[179]

In similar vein, the interest in preserving the natural environment (or outstanding historic monuments) is shared by the whole of mankind. The fact that one belligerent State has already caused damage to the natural environment cannot possibly justify compounding of the injury by the other side. Deterring the perpetration of any further damage to the natural environment is important, but there is a certain incongruity in any attempt to accomplish it by additional acts of destruction (belligerent reprisals in kind). These would be akin to the proverbial cutting off of one's nose to spite one's face.

[173] P. H. Oppenheimer, 'A Chemical Weapons Regime for the 1990s: Satisfying Seven Critical Criteria', 11 *WILJ* 1, 23 (1992–3).
[174] See F. Kalshoven, 'Belligerent Reprisals Revisited', 21 *NYIL* 43, 74 (1990).
[175] See T. Meron, 'Convergence of International Humanitarian Law and Human Rights Law', *Human Rights and Humanitarian Law: The Quest for Universality* 97, 100 (D. Warner ed., 1997).
[176] Cf. Q. Wright, 'The Outlawry of War and the Law of War', 47 *AJIL* 365, 373 (1953).
[177] See A. R. Albrecht, 'War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949', 47 *AJIL* 590, 612 (1953).
[178] See Kalshoven, *supra* note 146, at 43.
[179] T. Meron, 'The Humanization of Humanitarian Law', 94 *AJIL* 239, 250 (2000).

Nevertheless, it need not be concluded that the aggrieved State is barred altogether from setting in motion belligerent reprisals against an enemy acting in blatant disregard of LOIAC. The only stricture is that, should the aggrieved State mount belligerent reprisals, these must not detrimentally affect human rights, the natural environment, historic monuments, and the like. There is no reason why every inanimate civilian object must be shielded from belligerent reprisals.[180] If the civilian population of State B is bombed on a massive scale by State A, why is it vital – as mandated by Protocol I – to shield all of State A's civilian objects from belligerent reprisals by State B? The Protocol is premised on the unreasonable expectation that, when struck in contravention of LOIAC, the aggrieved State would turn the other cheek to its opponent. This sounds more like an exercise in theology than in the laws of war.

A Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia held in 2000, in the *Kupreskic* case, that the prohibition of belligerent reprisals against civilians has emerged as customary international law subsequent to the adoption of Protocol I in 1977.[181] However, this extravagant assertion is not particularly convincing.[182] State practice has certainly not yet endorsed the Protocol's provisions. It is well worth mentioning that, upon ratification of Protocol I in 1998, the United Kingdom made an explicit and detailed declaration–reservation, whereby – if an adverse Party carries out serious and deliberate attacks in violation of Articles 51 through 55 of the Protocol – the UK would regard itself as 'entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those articles' (subject to proportionality and to the issuance of a prior warning).[183] It has been authoritatively observed that the UK declaration–reservation (which has not elicited any objections) 'is an accurate formulation of the requirements international law traditionally sets for recourse to belligerent reprisals'.[184]

[180] See Kalshoven and Zegveld, *supra* note 23, at 144–5.

[181] International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor* v. *Kupreskic et al.* (2000), Case IT-95-16-T, paras. 527–33.

[182] See C. J. Greenwood, 'Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', *International and National Prosecution of Crimes under International Law* 539, 550–6 (H. Fischer, C. Kress and S. R. Lüder eds., 2001).

[183] Ratification of the Additional Protocols by the United Kingdom of Great Britain and Northern Ireland, 1998, 38 *IRRC* 186, 189–90 (1998).

[184] Kalshoven and Zegveld, *supra* note 23, at 146.

C. *The taking of hostages*

A theme closely associated in the past with belligerent reprisals was the practice of holding civilians as hostages (sometimes called 'reprisal prisoners'), 'taken into custody for the purpose of guaranteeing with their lives the future good conduct of the population of the community from which they were taken'.[185] As late as 1948, an American Military Tribunal in the *Hostage* case pronounced that 'the shooting of hostages or reprisal prisoners may under certain circumstances be justified as a last resort'.[186] The Judgment was criticized even at the time of its delivery.[187] But whatever the legal position was during World War II, Article 34 of Geneva Convention (IV) declares that '[t]he taking of hostages is prohibited',[188] subject to no qualifications or exceptions. No doubt, this is customary international law today.

The rule against the 'taking' of hostages is broader than an interdiction of their execution. It follows that, despite suggestions to the contrary,[189] the taking of hostages can never be excused even if ultimately they are not killed.

The taking of hostages constitutes a grave breach of Geneva Convention (IV).[190] As such, it is specifically listed as a prosecutable crime (referring specifically to civilians) in Article 2(h) of the ICTY Statute,[191] and a war crime (without an explicit reference to civilians) in Article 8(2)(a)(viii) of the Rome Statute.[192] Although in practice the victims of hostage-taking in wartime are usually civilians, there is no reason to regard them as the sole beneficiaries of the norm. No hostages can be taken, whether civilians, combatants (especially, prisoners of war), or even neutrals.[193]

[185] *Hostage* case, *supra* note 128, at 1249. [186] *Ibid.*, 1253.
[187] See Lord Wright, 'The Killing of Hostages as a War Crime', 25 *BYBIL* 296, 299–310 (1948).
[188] Geneva Convention (IV), *supra* note 87, at 511.
[189] See N. Keijzer, 'Introductory Observations', 39 *RDMDG* 69, 78 (2000).
[190] Geneva Convention (IV), *supra* note 87, at 547 (Article 147).
[191] Statute of the ICTY, *supra* note 135, at 1192.
[192] Rome Statute, *supra* note 62, at 1006.
[193] See W. D. Verwey, 'The International Hostages Convention and National Liberation Movements', 75 *AJIL* 69, 79–80 (1981).

9 War crimes, command responsibility and defences

I. The definition of war crimes

Each belligerent Party bears State responsibility under international law for the conduct of all members of its armed forces: the State is obligated to maintain discipline, law and order at all times. All members of the armed forces are subject to the military and criminal codes of the State whom they serve, and in case of infraction they are liable to be prosecuted before military or civil courts of that State. As the four Geneva Conventions of 1949 for the Protection of War Victims lay down, contracting Parties 'undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches' defined in the Conventions.[1]

However, self-discipline by a belligerent Party is not enough. Since time immemorial, international law has allowed other States – in particular, enemy States – to prosecute persons (especially, albeit not exclusively, members of the armed forces) for war crimes. Subsequent to the termination of World War II, war crimes committed in international armed conflicts have also been prosecuted before three international tribunals: the International Military Tribunal (IMT) at Nuremberg;[2] the International Military Tribunal for the Far East (IMTFE) at Tokyo;[3] and the

[1] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, *Laws of Armed Conflicts* 373, 391 (Article 49, first Paragraph); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, *ibid.*, 401, 418 (Article 50, first Paragraph); Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, *ibid.*, 423, 475–6 (Article 129, first Paragraph); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, *ibid.*, 495, 546–7 (Article 146, first Paragraph).

[2] The proceedings were held under the Charter of the International Military Tribunal, Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 1945, *Laws of Armed Conflicts* 911, 913.

[3] The proceedings were based on the Charter of the International Military Tribunal for the Far East, issued by General D. MacArthur in his capacity as Supreme Commander of the Allied Powers in the region, 1946, 14 *DSB* 361 (1946).

International Tribunal for the Former Yugoslavia (ICTY).[4] The IMT and the IMTFE concluded their operations in the 1940s, whereas the activities of the ICTY (established in 1993) are accelerating at the time of writing. The common denominator of the three tribunals is their *ad hoc* nature: the IMT was limited to the major war criminals of Nazi Germany, the IMTFE was confined to those of Imperial Japan, and the ICTY is restricted to the former Yugoslavia. A permanent International Criminal Court (ICC) of a more general jurisdiction came into being in 2002, based on a Statute formulated in Rome in 1998.[5] Prospects of its success are still a matter of conjecture.

War crimes constitute acts contrary to LOIAC entailing penal accountability of the individuals who perpetrated the proscribed acts. In the past, it was frequently contended that '[e]very violation of the law of war is a war crime'.[6] But such an assertion has never had support in actual State practice. As pointed out by H. Lauterpacht, 'textbook writers and, occasionally, military manuals and official pronouncements have erred on the side of comprehensiveness' in making 'no attempt to distinguish between violations of the rules of warfare and war crimes'.[7]

There is no single binding definition of war crimes. The *locus classicus* for such a definition used to be Article 6(b) of the 1945 Charter of the IMT, which reads:

> *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.[8]

In its Judgment of 1946, the IMT at Nuremberg declared:

> With respect to War Crimes . . . the crimes defined by Article 6, Section (b), of the Charter were already recognized as War Crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That

[4] The ICTY was established by the UN Security Council in Resolution 827 (1993), 48 *RDSC* 29 (1993). The ICTY is acting in keeping with the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 32 *ILM* 1159 (1993).

[5] Rome Statute of the International Criminal Court, 1998, 37 *ILM* 999 (1998).

[6] US Department of the Army, *Field Manual: The Law of Land Warfare* 178 (FM 27–10, 1956).

[7] H. Lauterpacht, 'The Law of Nations and the Punishment of War Crimes', 21 *BYBIL* 58, 77 (1944).

[8] Charter of the International Military Tribunal, *supra* note 2, at 914.

violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.[9]

It is manifest that Article 6(b)'s definition of war crimes is not exhaustive. In the words of the IMT:

The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention.[10]

The most recent – and most detailed – definition of war crimes appears in Article 8(2) of the 1998 Rome Statute of the ICC:

For the purpose of this Statute, 'war crimes' means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
  (i) Wilful killing;
  (ii) Torture or inhuman treatment, including biological experiments;
  (iii) Wilfully causing great suffering, or serious injury to body or health;
  (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
  (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
  (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
  (vii) Unlawful deportation or transfer or unlawful confinement;
  (viii) Taking of hostages.
(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
  (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
  (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
  (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping

[9] International Military Tribunal (Nuremberg), Judgment and Sentences, 1946, 41 *AJIL* 172, 248 (1947).
[10] *Ibid.*, 218.

mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing 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;

(xx) 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, provided 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 an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.[11]

Albeit exceedingly detailed, the definition of war crimes in Article 8(2) does not cover every violation of LOIAC. As for the grave breaches of the 1949 Geneva Conventions, listed in Paragraph (a), they are replicated from specific provisions of these Conventions themselves.[12] Incontrovertibly, such grave (as distinct from ordinary) breaches are indeed war crimes.[13] The additional war crimes, enumerated in Paragraph (b), largely match generally accepted norms of customary international law. Still, some parts of the definition do not, and they are therefore binding only on contracting Parties.[14]

Where the definition of war crimes in the Rome Statute corresponds to customary international law, the offences have been cited – in the context of the substantive law – in earlier chapters of the present volume. As for the controversial segments of the definition, a prime example is the reference in Article 8(2)(b)(viii) to the direct or indirect transfer by

[11] Rome Statute, *supra* note 5, at 1006–8.

[12] Geneva Convention (I), *supra* note 1, at 392 (Article 50); Geneva Convention (II), *ibid.*, 418 (Article 51); Geneva Convention (III), *ibid.*, 476 (Article 130); Geneva Convention (IV), *ibid.*, 547 (Article 147).

[13] This is so stated in Article 85(5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, *Laws of Armed Conflicts* 621, 672. The trouble is that Article 85(5) also brands as war crimes grave breaches of Protocol I itself. Some of the grave breaches listed in the Protocol (pre-eminently, practices of apartheid under Article 85(4)(c), *ibid.*) are patently not war crimes *per se*.

[14] See G. Venturini, 'War Crimes', 1 *Essays on the Rome Statute of the International Criminal Court* 171, 172–7 (F. Lattanzi and W. A. Schabas eds., 1999).

the Occupying Power of parts of its own civilian population into the territory it occupies. The prohibition of forcible transfers of population by the Occupying Power is contained in Article 49 of Geneva Convention (IV).[15] Nevertheless, Article 147 of the Convention[16] – while referring to transfers of protected persons out of an occupied territory as a grave breach – does not do so as regards a transfer of the Occupying Power's own population into the occupied territory.[17] The Rome Statute follows here Article 85(4)(a) of Additional Protocol I of 1977, which enumerates as a grave breach of the Protocol a transfer by the Occupying Power of its own civilian population into the territory it occupies.[18] But, apart from the fact that this is already a departure from customary international law, Article 8(2)(b)(viii) injects the phrase 'directly or indirectly' (appearing neither in Geneva Convention (IV) nor in the Protocol). The reason for going beyond the Geneva Conventions was political: to target Israel's settlement policy in the territories occupied by it.[19]

War crimes are not the only crimes against international law that can be committed in wartime. The war itself (if it is waged contrary to the *jus ad bellum*) may constitute a crime against peace.[20] In addition, acts committed in the course of war may amount to crimes against humanity[21] or to genocide.[22] However, these crimes – which can also be committed in peacetime – transcend the compass of LOIAC.

II. The distinction between war criminals and unlawful combatants

War criminals must be distinguished from unlawful combatants (a category examined *supra*, Chapter 2, II). There are eight respects in which the concepts of war crimes and unlawful combatancy diverge sharply:

(i) An unlawful combatant must be a combatant. A civilian, by definition, is a non-combatant and, as such, can be neither a lawful nor an unlawful combatant. On the other hand, a war criminal need not be a combatant. A civilian can also commit war crimes. For instance, a declaration that no quarter shall be given to the enemy

[15] Geneva Convention (IV), *supra* note 1, at 516. [16] *Ibid.*, 547.
[17] See O. Gross, 'The Grave Breaches System and the Armed Conflict in the Former Yugoslavia', 16 *MJIL* 783, 815 (1995).
[18] Protocol I, *supra* note 13, at 671–2 (Article 85(4)(a)).
[19] See M. Bothe, 'War Crimes', 1 *The Rome Statute of the International Criminal Court: A Commentary* 379, 413 (A. Cassese, P. Gaeta and J. R. W. D. Jones eds., 2002).
[20] See Y. Dinstein, 'The Distinctions between War Crimes and Crimes against Peace', 24 *IYHR* 1–17 (1994).
[21] See Y. Dinstein, 'Crimes against Humanity after Tadic', 13 *LJIL* 373–93 (2000).
[22] See Y. Dinstein, 'The Collective Human Rights of Religious Groups: Genocide and Humanitarian Intervention', 30 *IYHR* 227–41 (2000).

(a war crime under Article 8(2)(b)(xii) of the Rome Statute) can be issued by a civilian member of the cabinet.

(ii) As indicated (*supra*, Chapter 2, II), when LOIAC negates the status of lawful combatancy, it exposes the perpetrator to ordinary penal sanctions for acts criminalized by the domestic legal system. In other words, international law merely removes a shield otherwise available to (lawful) combatants as a means of protection. Conversely, when LOIAC directly labels an act a war crime, a sword is provided by international law against the accused. A war criminal is tried by virtue of international law (LOIAC), whereas an unlawful combatant is prosecuted under domestic law.

(iii) An unlawful combatant may simultaneously be a war criminal. That is the case if he intentionally commits a serious breach of LOIAC (in flagrant disregard of condition (iv) of lawful combatancy requiring respect for LOIAC). Since the same person is both an unlawful combatant and a war criminal, the enemy State has an option whether to proceed against him in one way (under international law) or the other (under domestic law).

(iv) As observed (*supra*, Chapter 8, II, B), a spy may be put on trial as an unlawful combatant only if he is captured in the act, before he has had an opportunity to rejoin the armed forces to which he belongs. The same legal regime is possibly applicable to some unlawful combatants other than spies.[23] Be it as it may, that is not the case when a war crime is committed, since the perpetrator is subject to prosecution and punishment at any future time. Once a war criminal, always a war criminal. The non-prescriptive character of war crimes is corroborated by Article 29 of the Rome Statute, whereby '[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations',[24] and by a 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[25] Admittedly, a 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes applies to offences committed before its entry into force only 'in those cases where the statutory limitation period had not expired at that time'.[26] The implication is that – absent an express treaty provision to the contrary – a domestic statute of limitations may cover war crimes. Even if this is

[23] See R. R. Baxter, 'The Municipal and International Law Basis of Jurisdiction over War Crimes', 28 *BYBIL* 382, 392–3 (1951).

[24] Rome Statute, *supra* note 5, at 1018.

[25] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968, [1968] *UNJY* 160, 161 (Article I).

[26] European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, 1974, 13 *ILM* 540, 541 (1974) (Article 2(2)).

the case, it must be appreciated that the prescription of war crimes for purposes of domestic prosecution in a given country does not affect the position within other domestic legal systems. It certainly leaves no impact on the non-prescribed nature of war crimes in compliance with international law.

(v) An unlawful combatant is disentitled to the privileges of a prisoner of war. Article 5 (second Paragraph) of Geneva Convention (III) proclaims that, '[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy,' are entitled to the status of prisoners of war, 'such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal'.[27] The question of when 'doubt' arises is itself not free from doubt.[28] Article 45 of Protocol I creates a presumption in favour of any person who claims a prisoner of war status or appears to be entitled to it.[29] Yet, '[d]espite the precautions taken by the drafters of this article', cases of doubt may arise: 'the doubt may concern the presumption itself', e.g., when an individual's claims are contradicted by his comrades.[30] In any event, the legal opportunity to prosecute an unlawful combatant for crimes under domestic law exists only if the status of a prisoner of war is denied to him.

The position of a war criminal is entirely different. The scenario relates to a combatant, otherwise entitled to a prisoner of war status, who is charged with a serious violation of LOIAC. Of course, culpability can only be determined in (civil or criminal) judicial proceedings. As long as the accused has not been convicted by a court of last resort, his entitlement to a prisoner of war status does not lapse.

What happens after conviction? Article 85 of Geneva Convention (III) enunciates:

> Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.[31]

The meaning of Article 85, in so far as the post-conviction timeframe is concerned, is extremely controversial.[32] The legislative history of this clause unequivocally demonstrates that it pertains to war

[27] Geneva Convention (III), *supra* note 1, at 432.
[28] See R. R. Baxter, 'The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)', *International Dimensions of Humanitarian Law* 93, 108–9 (UNESCO, 1988).
[29] Protocol I, *supra* note 13, at 648.
[30] See J. de Preux, 'Article 45', *Commentary on the Additional Protocols* 543, 550–1.
[31] Geneva Convention (III), *supra* note 1, at 459.
[32] See *Commentary, III Geneva Convention* 415–16, 423–5 (ICRC, J. de Preux ed., 1960).

criminals.[33] But the wording of the text – on the face of it – is apposite to prosecution under the laws of the Detaining Power, hence not to war crimes trials which are conducted in conformity with international law. For that reason, it was held by the Supreme Military Tribunal in Italy, in the *Kappler* case of 1952, that war crimes are excluded from the compass of Article 85.[34]

Even if prisoners of war convicted of war crimes retain the benefits of Geneva Convention (III), they may still be sentenced in a manner commensurate with the gravity of their offences. All that Article 85 seems to connote is that certain due process requirements prescribed in the Convention are to be satisfied.[35] It is clearly stated in Article 119 of the Convention that prisoners of war convicted of indictable offences need not be released at the time of general repatriation of prisoners of war.[36]

(vi) When an unlawful combatant is indicted for having committed a crime under the domestic penal code of the enemy, the prosecuting State must establish jurisdiction over the defendant by showing a legitimate linkage with either the crime or the criminal. In the case of an unlawful combatant, this legitimate linkage is likely to be territoriality, active personality (nationality of the perpetrator), passive personality (the nationality of the victim) or the protective principle.[37] When charges are preferred against a war criminal, the overriding consideration in the matter of jurisdiction is that the crimes at issue are defined by international law itself. The governing principle is then universality: all States are empowered to try and punish war criminals.[38] The upshot is that a belligerent State is allowed to institute penal proceedings against an enemy war criminal, irrespective of the territory where the crime was committed or the nationality of the victim. In all likelihood, a neutral State (despite the fact that it does not take part in the hostilities) can also prosecute war criminals.[39]

(vii) Assuming that an unlawful combatant commits crimes under its domestic penal code, the enemy State is at liberty to indict or not to

[33] See *ibid.*, 416.
[34] *Kappler* case (Italy, Supreme Military Tribunal, 1952), 49 *AJIL* 96, 97 (1955).
[35] See *Commentary*, *supra* note 32, at 423.
[36] Geneva Convention (III), *supra* note 1, at 470–1.
[37] On the protective principle, and its differentiation from the territoriality and passive personality principles, see Y. Dinstein, 'The Extra-Territorial Jurisdiction of States: The Protective Principle', 65 (II) *AIDI* 305, 306–11 (Milan, 1994).
[38] See Y. Dinstein, 'The Universality Principle and War Crimes', 71 *ILS* 17–37 (*The Law of Armed Conflict: Into the Next Millennium*, M. N. Schmitt and L. C. Green eds., 1998).
[39] See Baxter, *supra* note 23, at 392.

indict him. Since the punishable crimes *ex hypothesi* are committed only against its domestic legal system, the prosecutorial discretion of that State is unfettered by international law. As an antithesis, all States are bound by international law to suppress war crimes through prosecution or, alternatively, extradition (in harmony with the postulate of *aut dedere aut judicare*). Regarding grave breaches of the Geneva Conventions – which, as noted, constitute war crimes – the *aut dedere aut judicare* obligation is set out unambiguously in the text of the Conventions.[40] It stands to reason that some prosecutorial discretion is permitted on the merits of the individual case.[41] However, in principle, the duty of States to bring war criminals to justice is categorical.

(viii) As long as unlawful combatants do not commit any crime under international law, their prosecution can only take place before domestic courts. Contrarily, proceedings against war criminals may be conducted before an international tribunal, if vested with jurisdiction (see *supra*, I).

III. Command responsibility

Pursuant to provisions of the Geneva Conventions obligating the imposition of effective penal sanctions against the perpetrators of grave breaches, contracting Parties are required to bring to trial 'persons alleged to have committed, or to have ordered to be committed, such grave breaches'.[42] Similarly, Article 25(3)(b) of the Rome Statute promulgates that a person who orders the commission of any crime within the jurisdiction of the ICC is liable to punishment.[43] Undeniably, when a commander orders a subordinate to commit a war crime, the issuance of the order makes the commander at least equally responsible for the outcome as the perpetrator himself – at least, because, under certain exceptional circumstances, the subordinate may somehow benefit (especially in mitigation of punishment) from the fact of having acted in obedience to superior orders (see *infra*, IV, B, b). But the commander cannot enjoy any similar advantage.

The issuance of the order is an act of commission, and it is easy to perceive the commander's criminal liability for the ensuing war crime

[40] Geneva Convention (I), *supra* note 1, at 391 (Article 49, second Paragraph); Geneva Convention (II), *ibid.*, 418 (Article 50, second Paragraph); Geneva Convention (III), *ibid.*, 476 (Article 129, second Paragraph); Geneva Convention (IV), *ibid.*, 547 (Article 146, second Paragraph).

[41] See Anonymous, 'Punishment for War Crimes: Duty – or Discretion?', 69 *Mich.LR* 1312, 1330–4 (1970–1).

[42] *Supra* note 40. [43] Rome Statute, *supra* note 5, at 1016.

committed (or attempted) by subordinates. The thorniest problems affecting any judicial proceedings taken against the commander for having set the war crime in motion are evidentiary. If the commander denies having issued an order relied upon by the subordinate, and there are no witnesses or paper trail, the existence of the order may have to be inferred circumstantially.[44]

A much more complex scenario is that of command responsibility for war crimes committed by subordinates, irrespective – and perhaps even in breach – of orders issued. Here the commander is answerable for an act of omission: a failure of proper (as distinct from pro forma) supervision and control of the subordinates who are the ones committing the war crimes on their own initiative.[45] Command responsibility arises when the commander passively (i) avoids taking action to prevent the war crimes from being committed; and (ii) refrains from punishing (or at least instigating penal proceedings against[46]) the culprits once the war crimes are carried out. It must be accentuated that command responsibility is all about dereliction of duty. The commander is held accountable for his own act (of omission), rather than incurring 'vicarious liability' for the acts (of commission) of the subordinates.[47]

The core issue is that of knowledge by the commander that war crimes are being committed by his subordinates. In the total absence of knowledge, there is no ground for holding the commander accountable for the subordinates' war crimes. As explained by an American Military Tribunal in the *High Command* case of 1948, criminality does not attach to individuals who are higher in the chain of command merely on the basis of subordination of the perpetrators of the criminal acts.[48] The Tribunal went on to say:

> There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.[49]

[44] See *The Abbaye Ardenne* case *(Trial of K. Meyer)* (Canadian Military Court, Germany, 1945), 4 *LRTWC* 97, 108 (1948).

[45] See K. Ambos, 'Superior Responsibility', 1 *Rome Statute Commentary*, *supra* note 19, at 823, 851.

[46] It has been aptly observed that 'a military commander can direct that a court martial is held, but he can't direct that the accused will be found guilty and will be punished'. W. Fenrick, 'Reaction', 39 *RDMDG* 86, 88 (2000).

[47] See I. Bantekas, 'The Contemporary Law of Superior Responsibility', 93 *AJIL* 573, 577 (1999).

[48] The *High Command* case (*USA* v. *von Leeb et al.*) (American Military Tribunal, Nuremberg, 1948), 11 *NMT* 462, 543.

[49] *Ibid.*, 543–4.

It is sometimes believed that knowledge was not imperative for conviction in accordance with the seminal *Yamashita* ruling of 1946 by the Supreme Court of the United States,[50] but this seems to be a misreading of the Judgment.[51] In that case, the majority of the Court stated:

> it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by 'permitting them to commit' the extensive and widespread atrocities specified.[52]

The last few words must be understood in the context of the commander's knowledge of his subordinates' crimes. As underscored in an earlier analysis of the case by a military Board of Review:

> the atrocities were so numerous, involved so many people, and were so widespread that accused's professed ignorance is incredible.[53]

In these extreme circumstances, lack of actual knowledge could result only from 'criminal negligence' (to use the *High Command* terminology).

The judicially pronounced law is expressed in a nutshell by the 1948 majority Judgment of the IMTFE in Tokyo, whereby the criminal responsibility of commanders is engaged in one of two alternative sets of circumstances:

(1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or
(2) They are at fault in having failed to acquire such knowledge.[54]

It is also possible to advert to the commander's failure to act notwithstanding the possession of actual or constructive knowledge of the commission of the war crimes.[55]

The norms evolving in the post-World War II case law have left their indelible imprint on the more recent treaty law. Article 86(2) of Protocol I sets forth:

[50] *In re Yamashita* (Supreme Court of the United States, 1946), 327 US [Supreme Court Reports] 1. This interpretation of the majority's position is largely derived from the sharp dissent of Justice Murphy, *ibid.*, 28.
[51] See W. H. Parks, 'Command Responsibility for War Crimes', 62 *Mil.LR* 1, 87 (1973).
[52] *In re Yamashita*, *supra* note 50, at 14.
[53] Quoted by F. A. Hart, 'Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised', 25 *NWCR* 19, 24 (1972–3).
[54] International Military Tribunal for the Far East (Tokyo), 1948, [1948] *AD* 356, 367.
[55] See *Trial of Admiral Toyoda* (American Military Tribunal, Tokyo, 1949), quoted by Parks, *supra* note 51, at 72.

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[56]

A key phrase here is 'had information which should have enabled them to conclude'. The French version is 'des informations leur permettant de conclure' meaning 'information enabling them to conclude'. The official ICRC Commentary on the Protocol avers, without any ambivalence, that 'the French version should be given priority'.[57] This does not mean, as occasionally maintained, that '[t]he French version comes closer to requiring actual knowledge' on the part of the commander.[58] The French version is consistent with the notion that knowledge can be imputed to the commander constructively, but any constructive knowledge must be anchored to the information available.

The commander can only be culpable when closing his eyes and ears to information which should have alerted him to the wrongdoing of his subordinates. Obviously, one ought to look at the relevant timeframes: when was the information available and when were the war crimes committed?[59] The information need not be complete: even when fragmentary, it may be alarming enough for the commander (at the very least) to undertake further investigation.[60] Moreover, the information is not confined to official reports, and can be derived from reputable media accounts of war crimes being committed by subordinates.[61] All the same, if media accounts never reach the commander, he cannot be expected to act upon them. Conversely, if information about the commission of war crimes by subordinates was conveyed in reports submitted to the commander, which he failed to act upon, a claim that he never perused them would generally be inadmissible.[62] The temporary absence of a commander from his headquarters is no excuse for inaction either.[63]

Article 7(3) of the ICTY Statute stipulates:

[56] Protocol I, *supra* note 13, at 672.
[57] J. de Preux, 'Article 86', *Commentary on the Additional Protocols* 1005, 1014.
[58] M. L. Smidt, '*Yamashita, Medina*, and Beyond: Command Responsibility in Contemporary Military Operations', 164 *Mil.LR* 155, 203–4 (2000).
[59] See de Preux, *supra* note 57, at 1014.
[60] See B. B. Jia, 'The Doctrine of Command Responsibility: Current Problems', 3 *YIHL* 131, 159–60 (2000).
[61] See C. N. Crowe, 'Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution', 29 *URLR* 191, 226 (1994–5).
[62] See *Hostage* case (*USA* v. *List et al.*) (American Military Tribunal, Nuremberg, 1948), 11 *NMT* 1230, 1260, 1271.
[63] See *ibid.*, 1260.

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[64]

The official commentary (by the UN Secretary-General) on this clause reads:

A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.[65]

Again, we encounter the employment of the *High Command* phrase 'criminal negligence'.

The ICTY Appeals Chamber, in the *Celebici* case of 2001, rendered the ruling that – in resolving issues of command responsibility – what counts is not the formal title of the commander, but the actual possession of 'effective exercise of power or control' over the subordinates committing the war crimes.[66] In the *Blaskic* case of 2000, the Trial Chamber cogently commented:

if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.[67]

The most recent instrument dealing with command responsibility is the Rome Statute, which proclaims in Article 28:

1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective

[64] ICTY Statute, *supra* note 4, at 1194. [65] *Ibid.*, 1175.

[66] International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor* v. *Delalic et al.* ('*Celebici*' case) (2001), Case IT-96-21-A, 40 *ILM* 630, 669 (2001).

[67] International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor* v. *Blaskic* (2000), Case IT-95-14-T, para. 332.

authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
(b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

2. With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and
(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[68]

Plainly, unlike the other instruments, the Rome Statute applies the rules of command responsibility not only to military commanders but to civilian superiors too.[69] When the texts of Paragraphs (1) and (2) of Article 28 are carefully compared, it ensues that in a civilian context (i) a clear nexus must be traced between the crimes committed by subordinates and the effective authority and control of the civilian superior; and (ii) where knowledge is imputed to the civilian superior, there is a strict requirement of conscious disregard of the information available.[70] The first point is due to the special need (non-existent in a military hierarchy) to prove that the civilian accused of a crime committed by another person was actually vested with effective authority and control as a superior.[71] The second point, by raising the bar, seems to limit the liability of civilian superiors compared to military commanders.[72]

[68] Rome Statute, *supra* note 5, at 1017.
[69] See C. K. Hall, 'The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', 92 *AJIL* 125, 130 (1998).
[70] See G. R. Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)', 25 *YJIL* 89, 114–15 (2000).
[71] On the difference between authority and control, see A. D. Mitchell, 'Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes', 22 *Syd.LR* 381, 403 (2000).
[72] See M. Lippman, 'Humanitarian Law: The Uncertain Contours of Command Responsibility', 9 *TJCIL* 1, 89 (2001–2).

Although the Rome Statute is the first text to address the issue expressly, it can safely be stated that – under current customary international law – civilian superiors in positions of effective authority and control are subject to the LOIAC construct of command responsibility.[73] It has always been acknowledged that senior politicians taking an active part in the direction of military affairs – such as Ministers of Defence – may be 'assimilated to a military commander'.[74] Today, the range of civilians affected is broader. In the language of the Appeals Chamber of the ICTY in the *Celebici* case:

> the Appeals Chamber does not consider that the rule is controversial that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control.[75]

IV. Admissible and inadmissible defences

War crimes, like all other international crimes, have two constituent elements: the criminal act (*actus reus*), and a criminal intent or at least a criminal consciousness (*mens rea*).[76] The indispensability of *mens rea* as an intrinsic component of the crimes is enshrined in Article 30 of the Rome Statute:

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
> 2. For the purposes of this article, a person has intent where:
> (a) In relation to conduct, that person means to engage in the conduct;
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
> 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.[77]

Still, as a Trial Chamber of the ICTY articulated in the *Blaskic* case, the degree of *mens rea* required need not amount to an outright guilty intent,

[73] See S. Boelaert-Souminen, 'Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law since the Second World War', 41 *VJIL* 747, 769–70 (2000–1).
[74] L. C. Green, 'War Crimes, Extradition and Command Responsibility', 14 *IYHR* 17, 53 (1984).
[75] *Celebici* case, *supra* note 66, at 668.
[76] See Y. Dinstein, 'Defences', 1 *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* 371, 371–2 (G. K. McDonald and O. Swaak-Goldman eds., 2000).
[77] Rome Statute, *supra* note 5, at 1018.

and it may take the form of 'recklessness which may be likened to serious criminal negligence'.[78]

A. Admissible defences

Lack of *mens rea* can be translated into assorted defences.[79] The principal defences which are relevant to war crimes are:

(a) Mistake of fact The defence of mistake of fact is readily recognized in Article 32(1) of the Rome Statute:

> 1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.[80]

That is to say, an act which would otherwise be a war crime may be excused should the Court be satisfied that the accused committed it under an honest but mistaken belief in the existence of facts which, if true, would have made his conduct legal. The defence of mistake of fact rests on the well-established principle *ignorantia facti excusat*. The ICRC Model Manual offers the following example: an artillery commander opens fire at a building, believing that it is an enemy command post, while it later turns out that – unbeknown to him – the building was a school.[81] Surely, the success of such defence depends entirely on the credibility of the defendant's belief in a mistaken version of the facts.

(b) Mistake of law The defence of mistake of law is also admitted, under certain circumstances, by Article 32(2) of the Rome Statute:

> 2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal

[78] *Prosecutor* v. *Blaskic*, *supra* note 67, para. 152.

[79] Continental lawyers tend to differentiate between two categories of defences – justifications and excuses – and some scholars attempt to introduce the distinction into international criminal law. See A. Cassese, 'Justifications and Excuses in International Criminal Law', 1 *Rome Statute Commentary*, *supra* note 19, at 951, 951–3. However, no such distinction has been drawn in practice so far, either in customary or in treaty law. See *ibid.*, 954–5.

[80] Rome Statute, *supra* note 5, at 1019.

[81] A. P. V. Rogers and P. Malherbe, *Model Manual on the Law of Armed Conflict* 250 (ICRC, 1999).

responsibility if it negates the mental element required by such a crime, or as provided for in article 33.[82]

The implication is that the norm *ignorantia juris non excusat* – widely accepted within national legal systems – does not apply automatically in war crimes trials. As put by the Judge Advocate in the *Peleus* case of 1945, 'no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject'.[83] The Geneva Conventions, as well as Protocol I, obligate the Parties to the conflict to disseminate their texts, both in peacetime and in wartime, so that they become known both to the armed forces and to the civilian population[84] (see *supra*, Chapter 1, VI). But even if fully implemented, no programme of instruction in LOIAC can be widespread, comprehensive and meticulous enough to cover all combatants and all contingencies. In certain conditions there may be no choice but to admit that, as a result of mistake of law, *mens rea* is negated.

Mens rea cannot be negated if the illegality of the war crime is obvious to any reasonable man. When an act is objectively criminal in nature, the accused will not be exculpated on the ground of an alleged subjective belief in the lawfulness of his behaviour. One can say that, when an act is manifestly illegal, an irrebuttable presumption (a *praesumptio juris et de jure*) is created, and no evidence will be allowed as regards the subjective state of mind of the accused.[85]

(c) Duress The defence of duress is incorporated in Article 31(1)(d) of the Rome Statute:

> 1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
>
> . . .
>
> (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

[82] Rome Statute, *supra* note 5, at 1019. Article 33 of the Statute will be examined *infra*.
[83] *In re Eck and Others* (*The Peleus* case), [1946] *AD* 248, 249.
[84] Geneva Convention (I), *supra* note 1, at 391 (Article 47); Geneva Convention (II), *ibid.*, 417 (Article 48); Geneva Convention (III), *ibid.*, 475 (Article 127); Geneva Convention (IV), *ibid.*, 546 (Article 144); Protocol I, *supra* note 13, at 670 (Article 83).
[85] See Y. Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* 29–30 (1965).

(i) Made by other persons; or
(ii) Constituted by other circumstances beyond that person's control.[86]

As the last words denote, the provision draws a distinction between duress by threat and duress by circumstances.[87] In the former scenario (frequently called 'coercion'), the dire consequences that the accused is trying to avert are presented as a threat by another human being. The latter setting (best described as 'necessity') unfolds when the accused tries to avoid fatal results brought about by circumstances beyond anybody's control (for instance, a raging fire).

Whatever its contours, the defence of duress means that the accused will not be held criminally accountable for an act otherwise deemed an international offence, if the Court is satisfied that he committed the act in the absence of moral choice (namely, that the choice available to him was morally nullified by the constraints of the situation). Moral choice, as the 'true test' of criminal responsibility, is highlighted in the 1946 Judgment of the IMT at Nuremberg.[88] Lack of moral choice means that the accused committed the act only because of a reasonable apprehension that failure to do so would bring about death or grievous harm either to himself or to another person close to him.

One must be mindful of three very serious qualifications limiting the applicability of the defence of duress:

(i) If it is to prevail, the defence of duress must be predicated on firm evidence that the accused was genuinely unwilling to perpetrate the war crime with which he is charged, and that he would have avoided action but for the duress.[89]
(ii) As affirmed in the *Einsatzgruppen* case of 1948, the defence of duress cannot prevail if it is proved that the actual harm caused by the crime was disproportionately greater than the potential harm to the accused which would have ensued had he abstained from committing the offence.[90] Concretely, if an accused was threatened with a few days of confinement, and the war crime charged is the killing of another person, the defence of duress would be rejected.[91] The need to weigh the harm caused against the harm sought to be avoided is also stressed in the Rome Statute.

[86] Rome Statute, *supra* note 5, at 1018–19.
[87] See K. Ambos, 'Other Grounds for Excluding Criminal Responsibility', 1 *Rome Statute Commentary*, *supra* note 19, at 1003, 1038.
[88] International Military Tribunal (Nuremberg), *supra* note 9, at 221.
[89] See Dinstein, *supra* note 76, at 374.
[90] *Einsatzgruppen* case (*USA* v. *Ohlendorf et al.*) (American Military Tribunal, Nuremberg, 1948), 4 *NMT* 411, 471.
[91] *Ibid.*

(iii) The crucial question is whether the defence of duress can ever be accepted in case of murder. In the *Einsatzgruppen* case it was stated, in the context of mass killings of Jews by Nazi extermination squads:

> there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns.[92]

Ultimately, the defence of duress was dismissed here on factual grounds,[93] but the whole legal thesis put forward in the quoted passage has been sharply criticized.[94]

In the 1997 Judgment in the *Erdemovic* case, a majority of the Appeals Chamber of the ICTY (whose view was expressed by Judges McDonald and Vohrah) asseverated:

> duress cannot afford a complete defence to a soldier charged with . . . war crimes in international law involving the taking of innocent lives.[95]

The majority found that 'the *Einsatzgruppen* decision is in discord with the preponderant view of international authorities'.[96] The majority surveyed numerous domestic legal systems, showing a divergent approach – mostly (albeit not strictly) along lines of division between 'civil law' and 'common law' countries – the former usually recognizing duress as a general defence to all crimes, and the latter basically excepting murder.[97] Assessing this inconsistent State practice, the majority arrived at the conclusion that no general principle of law has emerged and that no customary rule has crystallized.[98] Only in light of policy considerations, the majority applied the 'common law' exception to war crimes when such crimes involve the taking of innocent lives.[99]

The present writer believes that the correct approach is that an accused cannot be exonerated on the ground of duress if the war crime consisted of murder. This proposition is founded on the simple rationale that neither ethically nor legally can the life of the accused be regarded as more valuable than that of another human being (let alone a number of human beings). Hence, there is no excuse for the deprivation of the victim's life only because the accused felt that he had to act in order to save his own life.

[92] *Ibid.*, 480. [93] *Ibid.*
[94] See L. Oppenheim, 2 *International Law* 571–2 (H. Lauterpacht ed., 7th edn, 1952).
[95] International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor* v. *Erdemovic* (1997), Case IT-96-22-A, 111 *ILR* 298, 373.
[96] *Ibid.*, 338. [97] *Ibid.*, 346–55. [98] *Ibid.*, 344, 363. [99] *Ibid.*, 373–4.

The present writer believes that, in the final analysis, there is almost always choice in the face of duress: even if the choice is between life and death. When it is said that no moral choice exists, what is generally meant is that – from a moral vantage point – the actor is relieved of responsibility for an otherwise punishable act. This is morally intolerable when another human life is at stake. An attempt to circumvent the issue has been made in a dissent in the Judgment on Appeal in the *Erdemovic* case. After quoting the present writer's views on moral choice,[100] Judge Stephen opined:

> It is noteworthy that even this passage, while conceding that in some cases of duress moral choice is eliminated, confines itself to the choice between the victim's life or the life of the actor who is subjected to duress. It does not go to the necessarily stronger case where the victim's fate is sealed and all that remains for the actor is whether or not to join the victim in death.[101]

Yet, the question whether the fate of the victim is really sealed (no matter how the accused responds to the duress), and what in all probability would happen to the accused if he resists duress, can only be speculated upon at the time of action. At that critical moment, the accused is not allowed to play God.

(d) Insanity Article 31(1)(a) of the Rome Statute excludes criminal responsibility if at the time of conduct:

> The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.[102]

Insanity is thus a defence barring prosecution for war crimes. The presumption naturally is that every person is of sound mind.

It is noteworthy that, under Article 31(1)(a), two cumulative elements must be established: (i) the existence of a mental disease or defect from which the accused suffers; and (ii) the destruction – as a result of that disease or defect – of the capacity of the accused to appreciate the unlawfulness of his act or to control his conduct.[103] The second element postulates that such capacity is destroyed, and not merely diminished.[104]

[100] Dinstein, *supra* note 85, at 152.
[101] *Prosecutor* v. *Erdemovic*, *supra* note 95, at 455.
[102] Rome Statute, *supra* note 5, at 1018.
[103] See P. Krug, 'The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation', 94 *AJIL* 317, 322 (2000).
[104] See A. Eser, 'Article 31', *Commentary on the Rome Statute of the International Criminal Court* 537, 546 (O. Triffterer ed., 1999).

(e) Intoxication Article 31(1)(b) of the Rome Statute excludes criminal responsibility if at the time of conduct:

> The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the court.[105]

Intoxication is caused by the consumption of alcohol or drugs, and it is generally self-induced. Subject to an exception applying when the state of incapacity is procured *mala fide* (i.e., intoxication with awareness of the risk of committing war crimes), Article 31(1)(b) allows for exculpation in other instances of voluntary intoxication.[106] A. Eser has suggested that this provision 'borders on the absurd'.[107] It must be added that there is no precedent for the validity of such a defence in any war crimes trial held so far.

(f) Legitimate defence of oneself and others Article 31(1)(c) of the Rome Statute erases criminal responsibility if at the time of conduct:

> The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.[108]

Legitimate defence of oneself and of other persons – and what may be termed in an overarching way, force protection – clearly excludes liability for war crimes. In some specific situations, the defence extends to the protection of property.[109] Whether the action taken is designed to protect body or property, the principal condition for the applicability of the defence is that the person concerned behaves reasonably and in a manner proportionate to the danger.[110] Thus, it is disallowed to 'cause disproportionately greater harm than the one sought to be avoided'.[111]

[105] Rome Statute, *supra* note 5, at 1018.
[106] W. A. Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute (Part III)', 6 *EJCCLCJ* 400, 423 (1998).
[107] See Eser, *supra* note 104, at 547.
[108] Rome Statute, *supra* note 5, at 1018.
[109] See Ambos, *supra* note 87, at 1033.
[110] See Eser, *supra* note 104, at 549.
[111] See Ambos, *supra* note 87, at 1034.

B. Inadmissible defence pleas

There are a number of spurious defence pleas, typical of war crimes trials, which must be dismissed:

(a) Obedience to national law When LOIAC directly imposes obligations on individuals, any provisions of national law which run counter to these obligations are annulled by international law. The American Military Tribunal in the *High Command* case proclaimed:

> International common law must be superior to and, where it conflicts with, take precedence over national law or directives issued by any national governmental authority. A directive to violate international criminal common law is therefore void and can afford no protection to one who violates such law in reliance on such a directive.[112]

In the *Justice* case of 1947, another American Military Tribunal remarked that the defence plea of obedience to national law is founded on a basic misconception: when a national law (like the Nazi German law) obligates the commission of war crimes, the very enactment – or enforcement – of that law amounts to complicity with the crime, and complicity is no defence.[113]

(b) Obedience to superior orders The plea of obedience to superior orders is most characteristic of war crimes trials, but – under Article 8 of the London Charter – the fact that a defendant acted pursuant to orders does not free him from responsibility, although it may be considered in mitigation of punishment.[114] The proper meaning of this provision is that the fact of obedience to superior orders must not play any part at all in the evaluation of criminal responsibility (in connection with any defence whatever), and it is only relevant in the assessment of punishment.[115] The IMT at Nuremberg fully endorsed the provision of Article 8, while introducing in a somewhat improper context the moral choice test.[116]

Article 33(1) of the Rome Statute employs different language:

> 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a government or of a superior, whether military or civilian, shall not relieve that person of responsibility unless:

[112] *High Command* case, *supra* note 48, at 508.
[113] *Justice* case (*USA* v. *Altstoetter et al.)* (American Military Tribunal, Nuremberg, 1947), 3 *NMT* 954, 984.
[114] Charter of the International Military Tribunal, *supra* note 2, at 914–15.
[115] See Dinstein, *supra* note 85, at 117.
[116] International Military Tribunal (Nuremberg), *supra* note 9, at 221.

(a) The person was under a legal obligation to obey orders of the government or the superior in question;
(b) The person did not know that the order was unlawful; and
(c) The order was not manifestly unlawful.[117]

The basic precept of the Rome Statute is the same as that of the London Charter: obedience to superior orders is no defence. All the same, unlike the London Charter, the Statute recognizes an exception related to the defence of mistake of law (defined in Article 32(2)). When three cumulative conditions are met (the existence of a legal obligation to obey the order, the lack of knowledge of the order's illegality, and the fact that the order is not manifestly unlawful), criminal responsibility can be relieved. This text provides a fragmented solution to a wider-ranging problem. There is nothing wrong with looking at obedience to superior orders through the lens of the defence of mistake of law (in the context of knowledge of the law and manifest illegality). At the same time, it is wrong to focus on obedience to superior orders in that exclusive connection. The framers of Article 33(1) disregarded other possible combinations between obedience to superior orders and the defences of mistake of fact and duress.

In the opinion of the present writer, there is no difference in this respect between mistake of law, mistake of fact and duress, which in practice are all often intertwined with the fact of obedience to superior orders. When the evidence shows that the accused in the dock obeyed orders under duress (within the legitimate scope of that defence), or without being aware of the true state of affairs or the illegality of the order (within the permissible bounds of the dual defence of mistake), he ought to be relieved of criminal responsibility.

It is submitted that the correct legal position should be summarized as follows: the fact that a defendant acted in obedience to superior orders cannot constitute a defence *per se*, but is a factual element which may be taken into account – in conjunction with other circumstances – within the compass of an admissible defence based on lack of *mens rea* (specifically, duress or mistake). This statement of the law, first advanced by the present writer,[118] has been subscribed to in the Judgment of the majority of the Appeals Chamber of the ICTY in the *Erdemovic* case.[119]

[117] Rome Statute, *supra* note 5, at 1019.
[118] See Dinstein, *supra* note 85, at 88, 214, 252.
[119] 'We subscribe to the view that obedience to superior orders does not amount to a defence *per se* but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defences of duress or mistake of fact are made out': *Prosecutor* v. *Erdemovic*, *supra* note 95, at 333.

(c) Official position and immunities According to H. Kelsen and others, war crimes are imputed by international law to the State, and no criminal responsibility can be attached to individuals acting in their capacity as organs of that State.[120] However, Article 7 of the London Charter takes the opposite stand: the official position of a defendant does not free him from responsibility, nor will it mitigate his punishment.[121] The IMT at Nuremberg flatly repudiated the thesis of official immunity from responsibility:

> The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.[122]

Article 27(1) of the Rome Statute is even more detailed:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.[123]

Incontrovertibly, as a general rule today, the attribution of an act to the State – albeit engendering State responsibility – does not remove the criminal liability of the individuals acting on behalf of the State.[124]

The existence of individual criminal responsibility for acts of State does not invalidate the possibility of jurisdictional immunity (either *ratione personae* or *ratione materiae*) of some State officials – primarily, diplomats and Heads of State – applicable to war crimes. The significance of the matter gained much attention when the International Court of Justice, in the *Arrest Warrant* case of 2002, pronounced that Belgium must respect the immunity from jurisdiction enjoyed by the incumbent Foreign Minister of Congo, even when the charge is the commission of war crimes.[125]

[120] See H. Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals', 31 *CLR* 530, 549–52 (1942–3).
[121] Charter of the International Military Tribunal, *supra* note 2, at 914.
[122] International Military Tribunal (Nuremberg), *supra* note 9, at 221.
[123] Rome Statute, *supra* note 5, at 1017.
[124] See Article 58 and Commentary, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Report of the International Law Commission, 53rd Session* 363–5 (2001).
[125] *Case Concerning the Arrest Warrant of 11 April 2000* (*Congo* v. *Belgium*), 2002, 41 *ILM* 536, 557 (2002).

Although the Court addressed the subject of jurisdictional immunity only in so far as national courts are concerned,[126] it would be ill-advised to ignore the issue in international criminal proceedings. To be on the safe side, Article 27(2) of the Rome Statute prescribes:

> Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[127]

This provision amounts to a waiver by States Parties of any jurisdictional immunity that might otherwise benefit the accused.[128] Such a waiver is entirely legitimate, since jurisdictional immunity must not be confused with release from criminal responsibility. As the Court in the *Arrest Warrant* case rightly emphasized:

> while jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.[129]

C. Mitigation of punishment

A defence plea held to be inadmissible as a reason for relieving the accused of responsibility may nevertheless be considered in mitigation of punishment, if the circumstances of the case warrant such a conclusion.

As seen, Article 8 of the London Charter – which utterly removes the fact of obedience to superior orders from the purview of any defence whatever – allows weighing that fact in mitigation of punishment, 'if the Tribunal determines that justice so requires'.[130] Evidently, when alleviation of punishment is permitted, it is not mandatory but merely within the discretion of the court. In particular, it should be grasped that obedience to superior orders may be entirely rejected as a mitigating factor. Thus, the IMT at Nuremberg stated categorically:

> Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification.[131]

[126] *Ibid.*
[127] Rome Statute, *supra* note 5, at 1017.
[128] For a detailed examination of the waiver issue in the Rome Statute, see P. Gaeta, 'Official Capacity and Immunities', *Rome Statute Commentary*, *supra* note 19, at 975, 992–5.
[129] *Arrest Warrant* case, *supra* note 125, at 551.
[130] Charter of the International Military Tribunal, *supra* note 2, at 914–15.
[131] International Military Tribunal (Nuremberg), *supra* note 9, at 283.

Still, there are multiple illustrations of lenient sentences imposed on persons acting in obedience to superior orders where the crimes are less egregious.[132]

In the *Erdemovic* case, the Trial Chamber recorded that

> tribunals have tended to show more leniency in cases where the accused arguing a defence of superior orders held a low rank in the military or civilian hierarchy.[133]

The Trial Chamber rightly added, however, that obedience to superior orders may serve in mitigation of punishment only when the orders had an influence on the behaviour of the accused, and not when he was anyhow prepared to carry out the criminal act.[134]

[132] See Dinstein, *supra* note 85, at 188, 205–6.
[133] International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor* v. *Erdemovic*, Sentencing Judgment (1996), Case IT-96-22-T, 108 *ILR* 180, 199.
[134] *Ibid*., 200.

General conclusions

The basic principles of LOIAC are beyond dispute. The principle of distinction (between combatants and civilians), the principle of causing no unnecessary suffering to combatants, the principle of proportionality in attack, etc., are elevated to the pinnacle of the law regulating the conduct of hostilities in international armed conflict. However, as one descends from fundamentals to specifics, consensus shrinks. In the opinion of the present writer, the principal problems confronting LOIAC today are as follows:

(i) Conflicting deep-seated convictions about the direction that LOIAC should take have emerged during the drafting of Additional Protocol I of 1977. The result, after more than a quarter of a century, plagued by intransigent theoretical disagreements and divergent practice (even among nations otherwise like-minded), has been a veritable fault-line separating contracting Parties of the Protocol from some key players in the international arena led by the United States. Although many of the Protocol's provisions are uncontested, it would be folly to underrate the significance of the profound division of opinion regarding topics such as conditions of lawful combatancy or the use of belligerent reprisals against civilians. Nevertheless, there is no apparent desire to re-examine the issues by reopening a Pandora's box of toil and trouble.

(ii) The perennial bone of contention of the post-World War II period has been the legality of nuclear weapons. In the wake of an unsatisfactory Advisory Opinion by the International Court of Justice in 1996, there has been no abatement in the passionate controversy relating to the circumstances in which belligerent States may employ these formidable weapons. The only safe way to ensure that nuclear weapons be banned or restricted is to adopt a multilateral treaty to that effect. It must be borne in mind that, whereas in other fields of LOIAC custom often precedes treaty law, in the domain of prohibited weapons – thus far at least – customary international law has generally moved in the footsteps of existing treaty law.

(iii) There are concerns – which should be allayed – that numerous normative provisions of LOIAC, as it now stands, can barely cope with rapid developments in methods and means of warfare. Successive inter-State armed conflicts in the last few years have disclosed a continuous revolution in weaponry and in delivery systems. This revolution has already forced the international community to consider some futuristic weapons (such as blinding lasers or sci-fi scenarios of environmental modification techniques). Other new phenomena – epitomized by computer network attacks – must be analysed and have light shed on them. Yet, it must be categorically stated that the cutting edge of novel technology cannot affect the irrevocable commitment to basic principles: this is why even nuclear weapons are not beyond the reach of the law.

(iv) The novelty of scientifically induced challenges to pre-existing law must not blind us to a realization that LOIAC is also facing a crisis derived from methods of warfare adopted by those who do not possess the latest additions to the technological arsenal. Lacking access to 'smart' bombs (precision-guided munitions), they have increasingly relied on human bombs and on human shields, threatening thereby to subvert the entire structure of the law. The quintessence of LOIAC is the distinction between combatants and military objectives (exposed to attack) and civilians or civilian objects (immunized from attack). The preservation of this sharp dichotomy is the main bulwark against methods of barbarism in modern warfare. That bulwark is undermined by a deliberate intermingling of civilians and combatants – designed to use the former as human shields for the latter – and the growing tendency to employ civilians as (unlawful) combatants. Precisely because of the desire to confer on civilians in wartime maximum protection, the international community must tenaciously oppose any and all attempts to devitalize the principle of distinction.

(v) For sure, even irrespective of the aforementioned developments, the protection provided by LOIAC to civilians is far from optimal. Notwithstanding significant advances in customary international law since the end of World War II, there are a host of ambiguities embedded in the law as it stands. In particular, the immunity of civilians from attack in wartime is far from satisfactory while they are (a) working in industrial plants supporting the war effort; (b) living or working near indisputable military objectives; (c) staying in defended locations when fighting is under way; or even (d) commuting along main arteries of communication (going through ports or airports, crossing bridges, driving on major motorways, etc.). Moreover, the food

supplies of civilians are likely to be rationed or reduced altogether (especially when their country is under blockade), and lamentably there is no binding law – applicable outside occupied territories – guaranteeing free passage of humanitarian assistance (relief consignments) from the outside. Lacunas, as in the matter of humanitarian assistance, have to be filled. Legal equivocation can be eliminated only if certain abstract formulas are translated into specifics called for by ever-changing conditions of warfare. The devil is in the detail. The main details missing from the present legal picture are, e.g., (a) a user-friendly – composite – definition of military objectives (predicated, of course, on the existing norm pertaining to nature, location, purpose or use), incorporating a non-exhaustive illustrative list of legitimate targets for attack; and (b) an elaboration of concrete yardsticks exemplifying situations in which collateral damage to civilians is – or is not – deemed excessive in relation to the military advantage anticipated.

(vi) Law must not be confused with liturgy. It is not enough to prescribe and reiterate the law: to be meaningful, norms must be adhered to in reality. The nature of LOIAC is such that belligerent States tend to trade reciprocal accusations of breaches and worse. Absent effective mechanisms of supervision and dispute settlement, there is no way to guarantee that LOIAC is actually implemented. No mechanisms established so far have been crowned with much success. There is a growing acknowledgement of the need to ensure individual penal accountability of war criminals for serious breaches of LOIAC, but the future of the International Criminal Court is still shrouded in doubt. The issue of ensuring the proper implementation of LOIAC will patently stay with us in the foreseeable future.

In the twentieth century, a semi-tradition developed of periodic reviews of the Geneva Conventions every quarter of a century or so. In the last decades, an ongoing review process has been taking place in the field of (non-nuclear) weaponry, and irrefutably the envelope of prohibitions of weapons has been pushed in various directions (ranging from chemical weapons to landmines). Tangible advances in this field only serve to spotlight the lethargy in others. The real agenda of LOIAC is by no means confined to issues of weaponry. One can only express the hope that the twenty-first century will revive the tradition of periodic reviews of the main body of LOIAC. The need for such a review is compelling.

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