

**THE IMPLEMENTATION AND
ENFORCEMENT OF THE
OBLIGATION UNDER THE
INTERNATIONAL LAW OF
ARMED CONFLICT TO TAKE
PRECAUTIONS IN ATTACK
(1980-2005)**

Charlotte Anstice Harford

**Thesis submitted for the degree of Doctor of
Philosophy of Laws (Ph.D)**

**London School of Economics and Political Science,
March 2006.**

UMI Number: U615364

All rights reserved

INFORMATION TO ALL USERS

The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if material had to be removed, a note will indicate the deletion.



UMI U615364

Published by ProQuest LLC 2014. Copyright in the Dissertation held by the Author.
Microform Edition © ProQuest LLC.

All rights reserved. This work is protected against
unauthorized copying under Title 17, United States Code.



ProQuest LLC
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106-1346

ABSTRACT

Existing international legal literature recognizes that parties to armed conflicts and individual combatants are legally required not only to refrain from deliberately attacking non-combatants and civilian objects, but also to take care to ensure (to the extent feasible) that such persons are not killed or injured, and such objects not destroyed or damaged, by accident or incidentally during military operations. This thesis looks at the practical application of this latter principle during a twenty-five year period following the entry into force of Protocol I Additional to the Geneva Conventions of 1949. It contends that although the rules in this area are not easily susceptible to judicial enforcement, they are nevertheless sufficiently flexible and realistic to be capable of effective implementation without detriment to military effectiveness. Examination of the practice of parties to various conflicts during the period under review suggests that if and to the extent that belligerents are ready to devote time and resources to training, leadership, internal accountability procedures, and to the provision of appropriate military equipment, they can, so long as they are not too impatient for quick results, comply with the Protocol I rules on precaution in attack without the need for combatants to take unreasonable risks for the sake of enemy non-combatants. Efforts to enforce the law externally have, however, met with mixed results, revealing more about the selectivity of international justice than about its effectiveness as a tool for ensuring fair treatment for victims and alleged violators of the rules on precautions in attack. The most potentially effective form of enforcement of these rules appears set to remain, for the time being at least, the influence over belligerents which some third party states and other international actors retain, but are perhaps sometimes hesitant to exercise in the interests of promoting respect for the law of armed conflict.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS.....	7
ACRONYMS AND ABBREVIATIONS.....	8
INTRODUCTION.....	10
1. SOURCES OF LAW AND LEGAL REGIMES.....	17
1.1. Sources of law	18
a) <i>Treaty law</i>	18
b) <i>Customary law</i>	20
c) <i>General principles of law, judicial decisions and writings of publicists</i>	22
1.2. Naval warfare and aerial warfare.....	23
a) <i>Naval warfare</i>	23
b) <i>Aerial bombardment</i>	24
c) <i>Attacks on airborne objects</i>	25
1.3. Non-international conflicts	25
a) <i>Preliminary remarks</i>	25
b) <i>Treaty law and non-international conflicts</i>	25
c) <i>Customary law and non-international conflicts</i>	28
d) <i>Ad hoc agreements</i>	31
1.4. 'Military operations other than war'	33
a) <i>Preliminary remarks</i>	33
b) <i>Military occupation</i>	34
c) <i>Military aid to the civil power</i>	35
d) <i>Peace support operations</i>	37
1.5. Conclusions	37
2. THE OBLIGATION UNDER THE INTERNATIONAL LAW OF ARMED	
CONFLICT TO TAKE PRECAUTIONS IN ATTACK	40
2.1. Legitimate and illegitimate targets – the principle of distinction.....	41
a) <i>Elements of law in relation to legitimate and illegitimate targets</i>	41
b) <i>The prohibition of attacks on non-combatants</i>	42
c) <i>Objects legally protected from attack</i>	45
d) <i>The concept of the legitimate military objective</i>	48
e) <i>Target verification</i>	55
f) <i>Discrimination in attack</i>	59

2.2.	The proportionality principle.....	64
a)	<i>The concept of collateral damage – immediate and deferred effects.....</i>	64
b)	<i>Proportionality in the jus in bello vs proportionality in the jus ad bellum.....</i>	66
c)	<i>The obligation to call off attacks expected to cause excessive collateral damage.....</i>	69
d)	<i>Proportionality in ‘military operations other than war’</i>	72
2.3.	Human shields and warnings of attack	73
a)	<i>Human shields and the obligation of defending parties to protect non-combatants ..</i>	73
b)	<i>Warnings</i>	75
2.4.	Conclusions	76
3.	TARGET SELECTION AND STRATEGIC AIMS.....	81
3.1	Interdiction	82
3.2	Occupation and liberation of territory	83
3.3.	Coercion	84
3.4.	Defensive target selection.....	86
4.	IMPLEMENTING THE RULES: GOOD PRACTICE	87
4.1.	The obligation to verify that objects to be attacked are military objectives	88
a)	<i>Preliminary remarks</i>	88
b)	<i>Forward observers and human reconnaissance.....</i>	89
c)	<i>Unmanned aerial vehicles.....</i>	92
d)	<i>Counter-battery fire systems</i>	94
e)	<i>Laser designation</i>	95
f)	<i>Mobile phones</i>	96
g)	<i>Remote imagery and radio intercepts</i>	97
h)	<i>Identification Friend or Foe systems.....</i>	98
i)	<i>Naval exclusion zones.....</i>	100
j)	<i>Naval security zones.....</i>	102
4.2.	Taking precautions in the choice of means and methods of attack - weaponry....	105
a)	<i>Preliminary remarks</i>	105
b)	<i>Line-of-sight weapons.....</i>	106
c)	<i>Land-based artillery and mortars – the case for an ‘800 metre rule’</i>	108
d)	<i>Naval artillery.....</i>	111
e)	<i>Cluster munitions.....</i>	112
f)	<i>Laser-guided missiles</i>	117
g)	<i>GPS-guided weapons.....</i>	118
h)	<i>Gravity bombs – the case for a ‘1000 metre rule’</i>	120
i)	<i>Hand grenades</i>	122
j)	<i>Non-explosive warheads</i>	123
k)	<i>Non-lethal weaponry.....</i>	124
l)	<i>Electronic warfare.....</i>	126
4.3.	Taking precautions in the choice of means and methods of attack – timing and techniques	126
a)	<i>Timing.....</i>	126
b)	<i>Methods of attack.....</i>	129
c)	<i>Force security.....</i>	131

4.4.	The proportionality calculation	133
4.5.	Taking the decision to abort.....	137
4.6.	The obligation to give warnings of attack unless circumstances do not permit....	139
a)	<i>Situations in which warnings of attack may be impossible.....</i>	139
b)	<i>Warnings for authorities.....</i>	141
c)	<i>Warnings for the civilian population.....</i>	141
d)	<i>Warnings in relation to booby traps and mines.....</i>	142
e)	<i>Warnings for ships and aircraft.....</i>	143
f)	<i>Effective warnings.....</i>	143
4.7.	The duty of constant care	145
a)	<i>Preliminary remarks</i>	145
b)	<i>Mines and unexploded ordnance.....</i>	146
c)	<i>Civilian liaison</i>	150
4.8.	Conclusions	152
5.	INTERNAL PROCEDURES FOR PROMOTING COMPLIANCE	155
5.1.	Domestic legislation.....	156
a)	<i>Preliminary remarks</i>	156
b)	<i>Monist systems.....</i>	157
c)	<i>Dualist systems</i>	158
d)	<i>Compliance orders issued by commanders.....</i>	158
5.2.	Rules of Engagement.....	160
a)	<i>Preliminary remarks</i>	160
b)	<i>ROE and pocket cards.....</i>	161
c)	<i>ROE content</i>	161
d)	<i>Enforcement of ROE.....</i>	164
e)	<i>ROE and legal inter-operability.....</i>	168
5.3.	The role of the military legal adviser.....	169
a)	<i>Military legal advisers</i>	169
b)	<i>Military manuals</i>	170
c)	<i>Weapons review and defence procurement</i>	170
5.4.	Training for compliance	171
a)	<i>Preliminary remarks</i>	171
b)	<i>Instruction on the law of armed conflict</i>	172
c)	<i>Practical training on taking precautions.....</i>	173
5.5.	Conclusions	176
6.	INDIVIDUAL CRIMINAL RESPONSIBILITY FOR VIOLATIONS OF THE OBLIGATION UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT TO TAKE PRECAUTIONS IN ATTACK.....	178
6.1.	Crime, intention and combat.....	180
a)	<i>Crime, mens rea, and degrees of intention.....</i>	180
b)	<i>Mens rea and 'combat crimes'.....</i>	188

6.2.	Command responsibility and criminal liability for negligence in combat	194
a)	<i>Historical antecedents of the command responsibility doctrine</i>	194
b)	<i>Command responsibility and the ad hoc tribunals</i>	198
c)	<i>Command responsibility and the International Criminal Court</i>	200
6.3.	Criminal responsibility and failure to take precautions in attack – the ICTY	
case law	202
a)	<i>Preliminary remarks</i>	202
b)	<i>The siege of Sarajevo – the Galic case</i>	203
c)	<i>The Dubrovnik cases – Jokic and Strugar</i>	206
6.4.	Conclusions	216
7.	STATE RESPONSIBILITY FOR VIOLATIONS OF THE OBLIGATION UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT TO TAKE PRECAUTIONS IN ATTACK	219
7.1.	State responsibility and individual responsibility	221
a)	<i>The International Law Commission's Articles of 2001</i>	221
b)	<i>Implications for states of individual prosecutions for war crimes</i>	223
c)	<i>Accountability for violations of the law of armed conflict which are not war crimes</i>	224
d)	<i>Joint state responsibility</i>	226
7.2.	Legal consequences of violations of the rules on precautions in attack	227
a)	<i>Cessation and non-repetition</i>	227
b)	<i>Compensation</i>	230
c)	<i>Satisfaction</i>	231
d)	<i>Redress for states and redress for individuals</i>	232
7.3.	Judicial enforcement of state responsibility	233
a)	<i>The International Court of Justice</i>	233
b)	<i>The European Court of Human Rights</i>	234
c)	<i>Other human rights tribunals</i>	244
d)	<i>Claims commissions</i>	244
e)	<i>Alien suits in domestic courts</i>	246
7.4.	Non-judicial enforcement of state responsibility	247
7.5.	Responsibility for violations of the law of armed conflict by armed opposition groups	249
7.6.	Conclusions	251
	CONCLUSION	253
	TABLE OF TREATIES, STATUTES AND OTHER INTERNATIONAL LEGAL CODES	257
	TABLE OF CASES.....	262
	BIBLIOGRAPHY	269

ACKNOWLEDGEMENTS

I would like to thank my supervisor, Christopher Greenwood, for his support and advice at all stages of the preparation of this thesis. Others who gave generously of their time and wisdom in reading and commenting on drafts at various stages, and to whom I would like to express heartfelt thanks are Bill Bowring, Andrew Brookes, Steve Cook, Rob de Ferry Foster, Hyacinthe Harford, Stephanie Harrison, Reziya Harrison, David Lloyd Roberts, Michael Meyer, Angus Ramsay, Anthony Rix, David Robertson, and Gerry Simpson. I would also like in particular to thank the Commandant and instructors of the Royal School of Artillery at Larkhill for their time and patience.

ACRONYMS AND ABBREVIATIONS

ACHR	American Convention on Human Rights
AJIL	American Journal of International Law
APC	Armoured Personnel Carrier
BYIL	British Yearbook of International Law
CBU	Cluster bomb unit
CEP	Circular error probable
CIMIC	Civil-military co-operation
DoD	Department of Defense (US)
ECHR	1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
EECC	Eritrea-Ethiopia Claims Commission
EJIL	European Journal of International Law
EOD	Explosive ordnance disposal
ERW	Explosive remnants of war
FRY	Federal Republic of Yugoslavia
GPS	Global Positioning System
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant of Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDF	Israel Defence Forces
IFF	Identification Friend or Foe
IHL	International humanitarian law
ILC	International Law Commission
IRRC	International Review of the Red Cross

JCSL	Journal of Conflict and Security Law
JDAM	Joint Direct Attack Munition
JNA	Yugoslav National Army
JSTARS	Joint Surveillance and Target Attack Radar System
KLA	Kosovo Liberation Army
LOAC	Law of armed conflict
MoD	Ministry of Defence (UK)
MOOTW	Military operations other than war
NATO	North Atlantic Treaty Organization
NCO	Non-commissioned officer
NGO	Non-governmental organisation
NOTAM	Notice to Airmen and Mariners
PKK	Workers' Party of Kurdistan
RAF	Royal Air Force (UK)
ROE	Rules of Engagement
RPG	Rocket propelled grenade
RSA	Royal School of Artillery (UK)
SFOR	Stabilization force (Bosnia-Herzegovina)
UAV	Unmanned aerial vehicle
UNCC	United Nations Compensation Commission
UNGA	United Nations General Assembly
UNIFIL	United Nations Forces in Lebanon
UNPROFOR	United Nations Protection Force (Bosnia-Herzegovina)
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
USAF	United States Air Force
UXO	Unexploded ordnance
VCLT	1969 Vienna Convention on the Law of Treaties

INTRODUCTION

During modern armed conflict, non-combatants are sometimes killed or injured because of mistakes in target identification by attacking forces or, more commonly, as an unintended consequence of attacks on military objectives. ‘Collateral damage’¹ of this latter nature may be foreseen, but considered by the attacking force to be acceptable in scale and nature; or unforeseen, for instance on account of a freak accident, or a military objective being put to unusual use, unknown to the attacking force.

But in contrast to modern international law prohibiting deliberate attacks on civilians and civilian objects, which is relatively clear and, now, relatively vigorously enforced on the international legal plane, international law determining the precise degree of care which parties to a conflict must take to eliminate or reduce collateral damage, and to avoid hitting the wrong target altogether by mistake, appears at first blush unsatisfactorily imprecise - and virtually impossible in practice to enforce.

This thesis examines the implementation and enforcement between 1980 and 2005 of the obligation under the international law of armed conflict to take precautions in attack. It addresses three questions:

- What does modern international law require of belligerents² in terms of taking precautions to minimize collateral damage when planning and executing attacks?

¹ NATO defines ‘collateral damage’ as ‘damage to surrounding resources, either military or non-military, as the result of actions or strikes directed specifically against enemy forces or military facilities’ (US Intelligence Targeting Guide (Air Force Pamphlet 14-210 (1998) (hereinafter ‘AFP14-210’)). The concept includes death and injury of non-combatants as well as damage to buildings etc.

² The words ‘belligerent’ and ‘combatant’ have technical meanings in international law. For the sake of convenience, they are often used in this thesis to mean, respectively, ‘a party engaged in an armed conflict’ and ‘a person who takes direct part in combat’, without intending to imply anything about the legality of the initial resort to force, the status of the person taking part in combat or the ‘statehood’ or otherwise of an entity waging war.

- What does the evidence of actual practice during conflicts between 1980 and 2005 suggest can reasonably be expected of modern belligerents (and individual combatants) in terms of taking precautions in attack?
- What may the consequences be on the international plane for individuals and states if the law is violated?

The period looked at is interesting on account of developments in the law as well as military technology and doctrine. On the legal side, it sees the first attempts by states party to the 1977 Protocol I Additional to the Geneva Conventions to apply this treaty in actual combat. The resultant publicly available evidence of state practice in terms of implementing the obligation under the international law of armed conflict to take precautions in attack permits an examination of this area of ‘applied law’ which would have been difficult, if not impossible, until very recently. The period sees major developments in the area of international criminal law, notably the establishment of the International Criminal Court (ICC) and the emergence of new case law relating to the criminal enforcement of the international law of armed conflict from the two *ad hoc* international criminal tribunals set up by the UN Security Council: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).³ It also sees the beginnings (and subsequent development) of a certain amount of cross-fertilization between the law of armed conflict and international human rights law. Finally, it sees the completion, in 2001, by the International Law Commission of its *Articles on the Responsibility of States for Internationally Wrongful Acts*, enshrining an important and in some respects new doctrine for holding states to account for violations of international law.

On the military side, technology which became available (to some belligerents at least) during this period transformed the way wars could be fought. Satellite

³ Other *ad hoc* criminal tribunals were established to hear cases of alleged violations of international law in Sierra Leone and East Timor. The case law of these tribunals is minimal at the time of writing (January 2006).

global positioning systems, unmanned aerial vehicles, terminal guidance weaponry and computer networks meant enemy territory and assets could be remotely mapped and interpreted, and destructive power projected from great distances with unprecedented precision. Novel non-lethal weapons offered new ways of using military force to disable rather than to kill or destroy. The military doctrine and training of many developed states meanwhile had to accommodate frequent deployment of the armed forces in 'military operations other than war' as well as international armed conflicts, typically (in both contexts) within coalitions. These experiences exposed servicemen and women to the legal perils of having to conduct military operations in situations in which rules of law other than those of the law of armed conflict often applied. They also exposed states to the problems of participating in military operations with allies with legal obligations, or understandings of their legal obligations, rather different from their own.

The obligation under the international law of armed conflict to take precautions in attack consists largely of treaty and customary law rules which are hortatory rather than justiciable: they encourage good practice, rather than setting clear standards of conduct, failure to meet which will be penalized. Their language, typically, is subjective. They use words and terms such as 'feasible', 'all in his power', 'all reasonable precautions', or 'excessive'. They do not thus lend themselves very easily to external judicial enforcement, although egregious cases of violation may sometimes have adverse legal consequences for individuals or for states. A parallel can perhaps be drawn with the principles underlying the law of professional negligence as understood in some common law jurisdictions: the rules are not so permissive as to rule out the possibility of legal proceedings ever being successfully brought against a person responsible for a mistake or error of judgement leading to innocent death or injury; but they accept that people acting in good faith and in a professionally competent manner can nonetheless sometimes make mistakes (or simply suffer bad luck) with tragic results for which they cannot reasonably be held criminally responsible in law.⁴

⁴ See e.g. *Whitehouse v. Jordan* (1980), House of Lords (UK).

The main value of the hortatory rules lies not in their limited role in helping tribunals to prosecute violations of the law of armed conflict, however. It lies in the formal confirmation they provide that the law of armed conflict, as currently understood, requires considerably more of combatants and commanders than the mere avoidance of conduct that is plainly criminal. Their role is to point towards the ideal, rather than simply to prohibit the outrageous. Hortatory rules are of value not least precisely *because* it is seldom appropriate for them to be enforced judicially from the outside: they are flexible enough to accommodate the fact that during armed conflict, combatants operate in conditions of extreme stress, with imperfect equipment and intelligence, and will inevitably sometimes make mistakes or misjudgements. They also accommodate the fact that in some situations where a combatant has to weigh military and humanitarian considerations, there simply is no right answer: all that can be expected is that he weigh military and humanitarian considerations against each other in good faith.⁵

For this reason, the longest chapter in this thesis consists of an attempt to identify, on the basis of material in the public domain, good practice on the modern battlefield in terms of implementing the legal obligation to take precautions in attack, without it being implied that failure to take these or equivalent precautions could necessarily be properly considered criminal in international law. That is not to say states may not choose to use their own criminal law for enforcing adherence by their armed forces to certain rules and procedures concerning the precautions to be taken in attack; on the contrary, the establishment of appropriate procedures for promoting compliance with international law, backed up if necessary by criminal sanctions, is an important means by which a state implements its international obligations in this area.

When states fail to implement their obligations concerning precautions in attack, the question arises of how the rules may be enforced externally. There are two ways in which this may be done: prosecution of individuals before

⁵ 'The provisions contained in Additional Protocol I are not always as clear and precise as one might wish, but it seemed and still seems to be necessary to leave some margin of appreciation to those who have to apply the rules. Thus their effectiveness depends to a large extent on the good faith of the belligerents and on their wish to conform to the requirements of humanity.' (Knut Dormann in *Protecting Civilians in 21st Century Warfare*, (Nijmegen, 2001) eds. Mireille Hector and Martine Jellema, 99).

international criminal tribunals; and enforcement action against states taken on the international plane within the framework of the law of state responsibility. The two approaches are not mutually exclusive.

Since the object of this thesis is to cover the obligation to take precautions in attack, not the separate question of the obligation to avoid deliberate attacks on non-combatants and civilian objects, its emphasis is on the conduct and procedures of belligerents which have tried in good faith to minimize collateral damage, not the conduct of those whose overt purpose has been to kill or intimidate non-combatants. The thesis will not, thus, cover armed violence during the period under review in which non-combatants were systematically attacked on purpose. There is little or no coverage, for this reason, of certain major conflicts of this period, such as those occurring in the Great Lakes region of Africa and the Sudan.

The rules looked at are those designed to apply to the use of force in armed conflict.⁶ The thesis will not cover regular, peacetime law enforcement or counter-terrorism, nor spasmodic acts of violence, though it includes some examination of 'military operations other than war'.⁷ The law of weaponry is considered, but not treaty regimes the primary purpose of which is arms control and disarmament, such as those relating to the production and stockpiling of weapons of mass destruction, although it should be noted that rules of

⁶ The ICRC Commentary to the Geneva Conventions defines 'armed conflict' as 'any difference arising between States and leading to the intervention of members of the armed forces' (*Commentary on the Geneva Conventions of 12 August 1949* (Geneva, 1952), ed. Jean Pictet, (Vol I), 29 (hereinafter '*ICRC Commentary (Geneva Conventions)*'). The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) determined an 'armed conflict' to exist 'whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.' (*Prosecutor v. Tadic, (Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (1995), ICTY para.70 (hereinafter '*Tadic (Jurisdiction Appeals Decision)*').

⁷ The term used in US military doctrine 'to describe the broad range of military operations which fall outside the traditional definition of 'armed conflict''. (See the US manual *Operational Law 2005* (available via the website of the US Center for Law and Military Operations), 57). The UK also uses the concept of 'Operations Other than War' in its military doctrine (see JWP 3-50 *Peace Support Operations*, (2nd Edition) (available via MoD website), 2-5).

international law which apply to the use of conventional weapons apply also to the use of nuclear weapons.⁸

This thesis is intended to be historical, focusing on a discrete twenty-five year period beginning shortly after the entry into force of Protocol I Additional to the Geneva Conventions of 1949, when military and legal developments in relation to the implementation and enforcement of the obligation to take precautions in attack proved particularly interesting. But the thesis also aims to examine the law as it stands at the time of writing, and to draw out some of the lessons of military practice during this period for at least the short term future.

Structure and methodology

Chapters 1 and 2 look at the origins and substance of the obligation under the international law of armed conflict to take precautions in attack, taking into consideration relevant international agreements, specialized legal literature, and official military manuals.⁹ Chapters 3 and 4 look at implementation of the law in practice between 1980 and 2005. This period includes five international armed conflicts in which NATO member states have participated: the Falklands conflict of 1982; the 1991 Gulf war; the 1999 Kosovo war; and the campaigns in Afghanistan and Iraq which began in 2001 and 2003 respectively. The participation of the United Kingdom in all five of these conflicts, and of the United States in four of them, has generated a substantial body of well-reported state practice in relation to the rules on precautions in attack, on which this thesis draws heavily. An effort has been made to include examples of practice of other belligerents in other conflicts during this period, but the examples are intended to be illustrative only and do not constitute an exhaustive review. Materials relied on include first-hand accounts of armed conflict, contemporary media reports, expert reports of humanitarian organizations, and parliamentary reports. The focus is mainly on what various belligerents do to promote respect, in both letter

⁸ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996), ICJ (hereinafter '*Nuclear Weapons*') paras.85-87.

⁹ Military manuals are not themselves authoritative sources of law, but often indicate how the customary international law of armed conflict is understood by certain states.

and spirit, for the legal obligation to take precautions in attack, but this part of the thesis also looks at where things can go wrong. Chapter 5 examines how compliance with the rules is promoted internally. Chapters 6 and 7 look at the actual and possible consequences on the international plane of violations of this body of law by individuals and states respectively.

All documentary materials relied upon have been found in the public domain. Technical information has sometimes been supplied by informal briefings given by serving or retired military personnel with direct experience of military operations during the period under review.

Throughout this thesis the words 'he', 'his' etc. should be understood where appropriate as meaning 'he or she', 'his or her' etc.

Full references for cases and works cited are given in the table of cases and bibliography at the end of the thesis.

Except where indicated specifically to the contrary, number references are for page numbers, not paragraph numbers.

1. SOURCES OF LAW AND LEGAL REGIMES

What is this Hague Conference? Was there a representative of Mexico there? Was there a representative of the Constitutionalists there? It seems to me a funny thing to make rules about war. It's not a game. What is the difference between civilized war and any other kind of war? If you and I are having a fight in a cantina we are not going to pull a little book out of our pockets and read over the rules.

*Francisco Villa*¹⁰

Before the substance of the obligation under the international law of armed conflict to take precautions in attack is examined, the question of when and by what authority the various rules apply needs to be considered. The rules come from several sources, and not all the detailed rules of international law in relation to precautions in attack apply to all situations where force may be used.

There is plenty of authoritative writing on sources of international law in general.¹¹ And substantial research has been carried out recently on the legal regime governing the conduct of hostilities in internal armed conflicts.¹² This chapter will not attempt to summarize or revisit all this material, though it will often rely on it. It will focus instead on the following issues:

- the implications of the failure of many treaties on the law of armed conflict to secure universal (or even near universal) adherence;
- the effect on treaty rules on precautions in attack of reservations and statements of understanding;

¹⁰ Quoted in John Reed, *Insurgent Mexico* (New York, 1969), 142-143.

¹¹ See for instance Ian Brownlie, *Principles of Public International Law* (5th Edition) (Oxford, 1998); Rosalyn Higgins *Problems and Process: International Law and How We Use it* (Oxford, 1998) and Akehurst's *Modern Introduction to International Law* (7th Edition) (London, 1997) ed. Peter Malanczuk.

¹² See Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge, 2002); Liesbeth Zegveld, *Armed Opposition Groups in International Law: The Quest for Accountability* (Rotterdam, 2000); Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford, 1988) and *Customary International Humanitarian Law* (Cambridge, 2005), eds. Jean-Marie Henckaerts and Louise Doswald-Beck. See also Rein Mullerson, 'International Humanitarian Law in internal conflicts' (1997), *Journal of Armed Conflict Law*; Sonja Boelaert-Suominen, 'Grave breaches, universal jurisdiction and internal armed conflict: is customary law moving towards a uniform enforcement mechanism for all armed conflicts?' (2000), *JCSL*; and James Stewart, 'Towards a single definition of armed conflict in international humanitarian law: a critique of internationalized armed conflict' (2003), *IRRC*.

- the ‘chilling’ effect on customary law in this area which may be caused by premature attempts to codify it by treaty;
- the extent to which the rules and principles which apply to land warfare can be extended to naval warfare and to attacks against airborne objects;
- the degree to which rules of law strictly speaking applicable only to international armed conflicts may nonetheless be relevant to internal conflicts and may even be acceptable to those taking part in them;
- the problem of identifying the law applicable to the use of force in ‘military operations other than war’.

1.1. Sources of law

a) Treaty law

The main international treaties containing rules on precautions to be taken in attack by states parties during armed conflict are the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and annexed Regulations,¹³ the 1977 Protocol I Additional to the Geneva Conventions of 12 August 1949¹⁴ and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict¹⁵ and its two protocols. There are also several treaties restricting or prohibiting altogether the use of certain types of weapon.¹⁶ Finally, there are treaties intended mainly for application in peacetime which may have

¹³ Hereinafter ‘Hague Regulations’.

¹⁴ Hereinafter ‘Additional Protocol I’.

¹⁵ Hereinafter ‘Cultural Convention’.

¹⁶ E.g. the 1907 Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines (hereinafter ‘Hague Convention VIII’); the 1980 UN 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 (hereinafter ‘Conventional Weapons Convention’) and its five Protocols; and the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (hereinafter ‘Ottawa Convention’).

implications for the way in which attacks may be carried out by states parties during armed conflict, for instance human rights treaties and certain treaties designed to protect the environment and natural resources. Some provide explicitly for derogations to be made in emergency situations, while making clear that certain core provisions must be understood as continuing to subsist even in wartime.¹⁷ Others imply that they will not apply (or at least, will not apply in full) in time of war.¹⁸ Where there is no specific mention of the effect on a treaty of a state of war or armed conflict, the extent to which it will remain applicable should a state party become engaged in armed hostilities will be a moot question.¹⁹

Caution is needed, however, in looking to treaties for the law on taking precautions in attack. The first problem is that apart from the Geneva Conventions of 1949, few international treaties on the law of armed conflict have even come close to universal adherence.²⁰ Often the states whose names are missing from the most numerically impressive lists of states parties are precisely those states with the largest and best equipped armed forces.²¹ Thus in international armed conflicts, separate participants, including those fighting in alliances, may have different treaty commitments governing what targets they may select and what precautions they must take to minimize collateral damage.

¹⁷ See e.g. the 1966 International Covenant on Civil and Political Rights (hereinafter 'ICCPR'), article 4; the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'ECHR'), article 15; and the 1969 American Convention on Human Rights (hereinafter 'ACHR'), article 27.

¹⁸ E.g. the 1944 Chicago Convention on International Civil Aviation, article 89 of which provides that 'in case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals'.

¹⁹ On this point, see Christopher Greenwood, 'Scope and Application of International Humanitarian Law' in *The Handbook of Humanitarian Law of Armed Conflict* (Oxford, 1995), ed. Dieter Fleck (hereinafter '*Handbook of Humanitarian Law*') (para.201 and commentary); Anthony Aust, *Modern Treaty Law and Practice* (New York, 2000) 243-244; and *The Iran-Iraq War (1980-1988) and the Law of Naval Warfare* (Cambridge, 1993), eds. Andrea de Guttry and Natalino Ronzitti, (76-79 and notes).

²⁰ The four Geneva Conventions of 1949 have been ratified by all UN members except Nauru and Niue; Additional Protocol I has 163 states parties and Additional Protocol II has 159; the Ottawa Convention has 147 states parties; the 1998 Rome Statute of the International Criminal Court (hereinafter 'Rome Statute') has 100 states parties; the Cultural Convention has 114 and its Second Protocol, with several detailed provisions on precautions in attack, has 37 (January 2006).

²¹ For instance, China, India, Iran, Israel, Pakistan, Russia and the US, none of which has ratified the Ottawa Convention or the Rome Statute. Additional Protocol I has not been ratified by, *inter alia*, India, Iran, Iraq, Israel, Pakistan or the US. The Cultural Convention has not been ratified by China, the UK or the US.

A second problem is the vexed question of reservations. Reservations, which can be made by states on signing or ratifying treaties, unless objected to within twelve months, modify for the reserving state the provisions to which the reservation refers. They also modify for other states parties those same provisions, to the same extent, in their relations with the reserving state.²² This means a simple reading of a treaty text relating to the law on precautions in attack is seldom sufficient to learn the actual legal obligations of states parties. Not only can reservations affect the practical impact of a treaty, but ‘statements of understanding’, in which a state gives notice of its intention to understand a provision of a treaty in a certain way (which may or may not have much in common with the plain meaning of the text) can also affect the way the treaty will in practice be understood and its rules be implemented.²³

So treaty law will only take us so far. For an understanding of those principles of international law concerning precautions in attack applicable to states and individuals involved in international armed conflict irrespective of ratifications and reservations, other sources of law must be examined.

b) Customary law

Customary international law applies to all states and, in some circumstances, to armed opposition groups.²⁴ As it usually takes the form of general principles rather than precise rules, it also has the advantage over treaty law of often being flexible enough to accommodate technological developments and different physical environments (i.e. land, sea, air or space). Whereas treaties concluded to

²² See the 1969 Vienna Convention on the Law of Treaties (VCLT), articles 19, 20 and 21. Article 2(d) defines a reservation as ‘a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’.

²³ Australia, Belgium, Canada, France, Germany, Italy, the Netherlands, Switzerland and the UK have all entered reservations or made ‘statements of understanding’ in relation to the provisions of Additional Protocol I on precautions in attack.

²⁴ Some writers maintain that some treaties, or provisions thereof, may also apply directly to armed opposition groups. (See e.g. Moir, *The Law of Internal Armed Conflict*, 52-58 and 96-99).

regulate new methods and means of warfare tend to date quickly,²⁵ principles of customary law are less prone to obsolescence.

The problem with customary law is how to identify it. The traditional two criteria for identifying principles and rules of customary international law are that they should reflect widespread state practice, including that of the states ‘specially affected’ (*usus*),²⁶ and that this practice should be considered by states to be required by law (*opinio juris sive necessitatis*),²⁷ rather than being simple convention or courtesy. But it is not obvious in the context of the law of armed conflict which states are those ‘specially affected’ and which states’ views need to be considered most relevant where *opinio juris* is concerned.²⁸ Those who wage war most regularly? Those on whose territories wars occur? Those who can form a majority in the United Nations? Or the most influential military powers? In reality, the customary rules of armed conflict normally recognized by tribunals and academic writers tend to reflect, to a large extent, the practice and views of the major military powers. It is not for the major military powers alone to dictate the law of armed conflict, nor does the rejection of an alleged rule of customary international law by a major military power necessarily invalidate it, but if customary international law in relation to armed conflict is to be of practical protective value, it must necessarily coincide to a substantial degree with what the major military powers consider acceptable practice.²⁹

²⁵ The 1936 Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22 1930 (the ‘London Protocol’) prohibiting submarines, as well as other warships, from sinking merchant vessels refusing to submit to visit and search procedures unless crew, passengers and ship’s papers had first been placed in a place of safety was considered obsolete by Germany (by August 1940) and by the US (on entering the war in December 1941) (see Ann Tusa and John Tusa, *The Nuremberg Trial* (London, 1995), 360. See also Karl Donitz, *Memoirs: Ten Years and Twenty Days* (London, 2000), 58-59). Likewise, the 1907 Hague Declaration XIV Prohibiting the Discharge of Projectiles and Explosives from Balloons, became in effect obsolete that same year, when the Wright brothers offered patents on their newly invented aeroplanes to the British Admiralty.

²⁶ *North Sea Continental Shelf* cases (1969), ICJ, para.73. See also American Law Institute, *Restatement (Third) of the Foreign Relations Law of the US* (Washington, 1987), para.102(2).

²⁷ *North Sea Continental Shelf* cases, para.77. See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits)* (1986), ICJ paras.186 and 207. See also Higgins, *Problems and Process*, 18-22, on the role of *opinio juris*.

²⁸ Sassoli and Bouvier even imply that the traditional criteria for identifying rules of customary law may not be appropriate where the law of armed conflict is concerned (Marco Sassoli and Antoine Bouvier, *Un Droit dans la Guerre?* (Geneva, 2003), 140-142).

²⁹ Extensive research with a view to providing authoritative guidance on those rules of the law of armed conflict which can be considered customary international law has been conducted by the ICRC, responding to a formal request made to the organization by the 26th International

One way customary law can be clarified is through codification in treaty form, if the treaty subsequently secures sufficient acceptance, formally and in practice, to meet the *opinio juris* and *usus* requirements. The provisions of the four Geneva Conventions of 1949 and of the 1907 Hague Convention IV and annexed Regulations are considered customary law by virtue of passing both tests,³⁰ as are many provisions of Additional Protocol I and of the Cultural Convention. But the other side of this coin is that if a putative rule, or set of rules, drafted in treaty form fails over time to command the assent of more than a few states, this may actually have the ‘chilling’ effect of confirming that the proposed rule or rules in question do *not* constitute customary law. For instance, the failure of the 1923 Hague Draft Rules of Aerial Warfare to enter into force can be seen with hindsight to have had the opposite effect to that intended by making it painfully clear that states did not agree that its provisions could and should be seen as constituting legally binding rules.³¹ There is, in short, always a risk that new treaties may backfire and instead of confirming the *lex lata* status of putative principles of customary law, simply confirm (by failing to attract enough support) that the so-called principles are, at most, *lex ferenda*.

c) *General principles of law, judicial decisions and writings of publicists*

As with international law in general, rules of international law on precautions in attack may be inferred from general principles of law recognized in national legal systems, and, to some extent, from judicial decisions and the writings of publicists.³² However, as with peacetime treaty law, peacetime common law principles and civil law rules do not necessarily persist in time of war in such a

Conference of the Red Cross and Red Crescent in 1995. The results are presented in the three volume study *Customary International Humanitarian Law* (Cambridge, 2005), eds. Jean-Marie Henckaerts and Louise Doswald-Beck.

³⁰ ‘These fundamental rules [of the 1949 Geneva Conventions and Hague Regulations] are to be observed by all States whether or not they have ratified the conventions that contain them, because they contain intransgressible principles of international law’ *Nuclear Weapons*, para.79. See also *Trial of the Major War Criminals Before the International Military Tribunal (IMT)* (1947) XXII, 467-497.

³¹ See W. Hays Parks, ‘Air War and the Law of War’ (1990), *Air Force Law Review*.

³² See Statute of the International Court of Justice, article 38.1.

way that, in the parody offered by the High Court of Australia in 1940, ‘whether the combat be by sea, land or air...men go into action accompanied by the law of civil negligence, warning them to be mindful of the person and property of civilians’.³³

1.2. Naval warfare and aerial warfare

a) *Naval warfare*

The difficulty during naval warfare of identifying vessels and aircraft with certainty and the fact that the use of force against a vessel or aircraft tends, necessarily, to be an all or nothing affair, mean that detailed targeting rules applicable to armed conflict on land can seldom simply be extended to the conduct of hostilities at sea, even if the same underlying principles of customary law may apply.³⁴ Treaties on the conduct of hostilities have tended, therefore, either to exclude naval warfare almost entirely,³⁵ or to be focussed on it solely.³⁶ This thesis will thus look at the substance and application of the rules on precautions in attack applicable to naval warfare separately from those applicable to the conduct of hostilities on land.

³³ *Shaw Savill and Albion Company Ltd v. The Commonwealth* (1940), High Court of Australia.

³⁴ See the UK’s *Manual on the Law of Armed Conflict* (Oxford, 2004), paras.13.24-13.32 (hereinafter ‘*UK Manual 2004*’). See also the 1994 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Oxford, 1995), ed. Louise Doswald-Beck, (hereinafter ‘*San Remo Manual*’) (especially paras.38-43 and 46) on principles of customary law applicable to naval warfare.

³⁵ The Hague Regulations are not intended to cover naval warfare, although articles 25 and 26, concerning the bombardment of land-based objects, apply to naval and aerial forces. Likewise, the provisions of Additional Protocol I on ‘General Protection Against Effects of Hostilities’ apply to attacks from sea and air on land-based objects, but ‘do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air’ (article 49.3), although article 57.4 requires that ‘in the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.’

³⁶ See for instance the 1907 Hague Conventions VII, VIII, IX and XI.

b) *Aerial bombardment*

Similar considerations might be thought to apply to aerial bombardment. Though air power can be used tactically in close support of military operations on land, historically its major value has been seen in terms of the means it offers of attacking strategic targets deep in enemy territory with the object of knocking an enemy swiftly out of a war, or compelling him to concede, without the need for extended attritive combat in the field or even for ground forces to be deployed at all, although the view that strategic air power used in isolation can be sufficient to achieve military or even political aims is challenged at least as often as it is advanced.³⁷ The typical targets of long-range strategic air campaigns are industrial complexes, fuel supplies, command and control centres, transport nodes, communications facilities and occasionally economic and political objects.³⁸ This type of warfare, inevitably putting civilians and civilian assets directly in the line of fire, puts the traditional rules of targeting under immense strain.³⁹ But unlike naval warfare, aerial bombardment does not have its own treaty regime.⁴⁰ Where aerial bombardment is concerned, the treaty rules which apply depend on whether the object being bombarded is on land or at sea.⁴¹

³⁷ See e.g. Paul Forage, 'Bombs for peace: a comparative study of the use of air power in the Balkans' (2002), *Armed Forces and Society*. See also Robert Pape, *Bombing to Win: Air Power and Coercion in War* (New York, 1996). For the opposite view, a seminal article is John Warden's 'The Enemy as a System' (1995), *Airpower Journal*.

³⁸ See for instance the 12 'target sets' chosen for strategic air attack during the Gulf War of 1991, quoted in Horace Robertson, 'The Principle of the Military Objective in the Law of Armed Conflict' (1998), *US Naval War College International Law Studies*.

³⁹ Between the First and Second World Wars, three influential airmen, William Mitchell in the US, Giulio Douhet in Italy and Hugh Trenchard in the UK, argued forcefully that air power should be used *deliberately* to put civilians under pressure (see Pape, *Bombing to Win*, 59-66). Had this approach been unequivocally accepted, it would have required either a new legal regime for aerial bombardment, or agreement that the traditional rules of armed conflict prohibiting attacks on civilians and civilian objects did not apply to this form of warfare.

⁴⁰ After the First World War, efforts were made to codify the law on aerial warfare, culminating in the 1923 Hague Draft Rules of Aerial Warfare, where it was proposed that aerial bombardment should be limited to certain designated military objects (article 24(2)). The Draft Rules were never adopted in treaty form and their provisions were flagrantly disregarded in both the Spanish Civil War and the Second World War. (See Heinz Hanke, 'The 1923 Hague Rules of Air Warfare' (1993), *IRRC* for a history of these negotiations).

⁴¹ See Additional Protocol I, article 49.3.

c) *Attacks on airborne objects*

Apart from some provisions in Additional Protocol I relating to the legal protection, in tightly defined circumstances, of medical aircraft, and the general requirement for states parties to take ‘all reasonable precautions to avoid losses of civilian lives and damage to civilian objects’ during military operations at sea and in the air,⁴² there is no treaty law to dictate specifically the circumstances in which airborne objects may or may not be attacked, though as with naval warfare, the underlying principles of customary law on the conduct of hostilities, such as the principles of distinction and proportionality,⁴³ apply.

1.3. Non-international conflicts

a) *Preliminary remarks*

Non-international armed conflicts are often just as intense as international conflicts and fought with similar weaponry. Sometimes participants on all sides use traditional military tactics and observe traditional military conventions. But few treaties on the law of armed conflict apply in their entirety to non-international conflicts,⁴⁴ although the rules enshrined in their provisions may sometimes apply to internal conflicts by virtue of customary international law.

b) *Treaty law and non-international conflicts*

The two treaty texts regarded as the twin pillars of the regime applicable to internal conflicts are article 3 common to the four Geneva Conventions of 1949,

⁴² See article 57.4.

⁴³ E.g. the ‘basic rules’ set out in paras.38-43 and 46 of the *San Remo Manual*. See also *UK Manual 2004*, paras.12.18-12.26.

⁴⁴ The first comprehensive codification of the laws of war was nevertheless drawn up in the context of a civil war (Francis Lieber’s *Instructions for the Government of Armies of the US in the Field* of 1863). Vattel considered on pragmatic grounds that the parties to a civil war should be considered as equal subjects of international law (Emmerich de Vattel, *Le Droit des Gens* (Amsterdam, 1775), Book III, Chapter 18 ‘La Guerre Civile’).

which applies to armed conflicts ‘not of an international character’ occurring in the territory of a state party, and the 1977 Protocol II Additional to the Geneva Conventions of 1949,⁴⁵ drafted specifically to apply to internal conflicts.⁴⁶ These texts are of limited usefulness in practice. While the criteria for their application are too exigent for their formal applicability often to be acknowledged,⁴⁷ they are too general to be of much service to those seeking evidence of an international legal requirement to take certain specific precautions in attack during internal conflicts.⁴⁸ As a military manual published in 2004 observed, the rather general provisions of Additional Protocol II have, anyway, ‘to some extent been overtaken by the now higher standards of customary law’.⁴⁹

Additional Protocol I, containing detailed rules in relation to the obligation to take precautions in attack, normally applies only to conflicts between states, but may in theory apply to wars of self-determination occurring within the territory of a state party if certain elaborate criteria are met.⁵⁰

Several human rights treaties have provisions on the right to life which have implications for the conduct of hostilities within the jurisdiction of states parties.⁵¹

⁴⁵ Hereinafter ‘Additional Protocol II’.

⁴⁶ Other treaties partially or wholly applicable to internal conflicts, though not designed *per se* to regulate them, are the Cultural Convention (see article 19) and its Second Protocol (see article 22), Amended Protocol II to the 1980 Conventional Weapons Convention and (arguably) the 1997 Ottawa Convention.

⁴⁷ Few states have been prepared formally to acknowledge the existence on their territory of an armed conflict triggering the application of common article 3, although sometimes third states have held, in their national courts, such a conflict to exist (see e.g. *The Government of the Russian Federation v. Akhmed Zakaev* (2003), Bow Street Magistrates Court (UK)). Additional Protocol II has been deemed by the International Criminal Tribunal for Rwanda to have been applicable to the 1994 conflict in that country (see *Prosecutor v. Akayesu (Trial Judgement)* (1998), ICTR, para.627). It has also been held by bodies such as the Inter-American Commission on Human Rights and the UN Commission on Human Rights to be (or to have been) applicable to conflicts in El Salvador, the Sudan and Colombia (see Zegveld, *Armed Opposition Groups in International Law*, 162). A notable exception to the unwillingness of states to recognize the existence of an armed conflict within their own territory was the finding of the Russian Constitutional Court in 1995 that Additional Protocol II should in principle be considered applicable to the conflict in Chechnya (see Paola Gaeta, ‘The armed conflict in Chechnya before the Russian Constitutional Court’ (1996), *EJIL*).

⁴⁸ Common article 3 requires that all persons not taking an active part in hostilities ‘be treated humanely’, as does Additional Protocol II (article 4.1). Additional Protocol II prohibits making civilians the object of attack (article 13), but contains no provisions on precautions to be taken to avoid or minimize collateral damage.

⁴⁹ *UK Manual 2004*, para.15.49.2.

⁵⁰ Article 1.4. See also article 96, paragraphs 2 and 3.

⁵¹ See for instance ECHR articles 2 and 15; ICCPR article 6; African Charter on Human and Peoples’ Rights, article 4; and ACHR article 4. The ICJ held in *Nuclear Weapons* that ‘In

The right to life enshrined in the European Convention on Human Rights has been construed as obliging states parties, when carrying out attacks within their jurisdiction, not to expose innocent third parties to unnecessary danger.⁵² It has also recently been interpreted as obliging states parties to carry out effective and independent official investigations when their agents use lethal force within their jurisdiction.⁵³ The right to life enshrined in the American Convention on Human Rights has even been interpreted by the Inter-American Commission on Human Rights as allowing it to apply the international law of armed conflict directly to the actions of a state party to the Convention engaged in armed confrontation with its own citizens.⁵⁴ Human rights treaty provisions are not of course reciprocal where the parties to internal conflicts are concerned. Their rules apply only to states and their agents, not to private individuals or non-state actors, although the state may be found to be in breach of its obligations if it fails to prevent the latter from carrying out acts of violence, or fails to investigate properly when they do so.⁵⁵ Private individuals and non-state actors engaged in an internal conflict will, however, be subject in principle to the law of the land, meaning that if captured, they risk prosecution simply for participation in hostilities.

One of the problems with treaty rules purporting to govern internal conflicts is that such conflicts are almost by definition fought between parties at least one of which will not be party to, nor have played a part in negotiating, any treaties at all.⁵⁶ The texts may not even exist in the language spoken by one or more of the parties. In such circumstances, to impose treaty rules on the participants might

principle the [ICCPR] right not to be arbitrarily deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict...' (para.25). The ICJ did not, however, expand on what aspects of this law it considered to be applicable in internal as well as international armed conflicts.

⁵² See e.g. *Ergi v. Turkey* (1998), ECtHR.

⁵³ See *McKerr v. UK* (2001), ECtHR, paras.111-112. See also *Kaya v. Turkey* (1998), ECtHR, (particularly paras.41 and 89-90, suggesting a high standard of scene-of-crime and autopsy work is normally required of ECHR states parties for compliance with their article 2 obligations).

⁵⁴ See *Abella v. Argentina* (1997), IACHR, paras.157-171. See also Liesbeth Zegveld, 'The Inter-American Commission on Human Rights and international humanitarian law: a comment on the Tablada Case' (1998), *IRRC* for a critical review of this case.

⁵⁵ See for instance *Shanagan v. UK* (2001), ECtHR, paras.111 and 119. See also *Velasquez Rodriguez v. Honduras* (1988), IACtHR.

⁵⁶ In 1965 the South Vietnamese FNL, responding to the ICRC's appeal for respect of the Geneva Conventions of 1949, declared it did not consider itself bound by international treaties signed by others, although it would ensure that prisoners and the wounded in its power were treated humanely (Michel Veuthey, *Guérilla et Droit Humanitaire* (Geneva, 1983), 57).

seem to violate the principle that treaties are binding only on states, and only on those states which have voluntarily accepted their provisions.⁵⁷

c) Customary law and non-international conflicts

Customary law applicable to internal conflicts has long been a grey area. The need for it to be clarified became urgent with the establishment, between 1993 and 2003, of four new international criminal tribunals with jurisdiction over violations of the law applicable to internal armed conflicts: the International Criminal Tribunal for the former Yugoslavia (1993); the International Criminal Tribunal for Rwanda (1994); the International Criminal Court (1998) and the Special Court for Sierra Leone (2002).

The statutes of these tribunals are a useful guide to what the international community, or at least, a section of it,⁵⁸ considered customary law applicable to internal conflicts when the statutes were drafted.⁵⁹ It is clear from the statutes of the International Criminal Tribunal for Rwanda, the International Criminal Court and the Special Court for Sierra Leone that it was not expected that these tribunals would regard more than a selection of the rules applicable to international armed conflict as applicable to internal conflict. The statute for the International Criminal Court adverts clearly to two distinct legal regimes: that applicable to international armed conflicts, the rules of which are set out in paragraphs (a) and (b) of its article 8.2; and that applicable to internal conflicts, the rules of which are set out in paragraphs (c) and (e) of the same article.⁶⁰

⁵⁷ See VCLT articles 34-35.

⁵⁸ The ICC's Rome Statute was the product of extensive multilateral negotiations involving delegations from 160 states. The ICTY and ICTR Statutes were drawn up by the UN Secretary General's office, after consultation with selected states and organizations, and were adopted as UNSC Resolutions. The Statute of the Special Court for Sierra Leone was established by an agreement between the Government of Sierra Leone and the United Nations, pursuant to UNSCR 1315.

⁵⁹ See articles 3 and 4, ICTR Statute; article 5, ICTY Statute; articles 2,3 and 4, Statute of the Special Court for Sierra Leone, and article 8.2 (c) and (e), Rome Statute.

⁶⁰ The customary law regime applicable to internal conflicts indicated in Rome Statute, article 8.2, paragraphs (c) and (e) consists of customary rules enshrined in article 3 common to the 1949 Geneva Conventions and in Additional Protocol II and rules considered by the Statute drafters to reflect customary law applicable to internal conflicts.

The statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) is more flexible. As it does not indicate clearly which rules of law should be considered applicable to internal conflicts as well as international ones,⁶¹ decisions on which rules to apply in which situations have been left for the tribunal judges to deal with on a case-by-case basis.⁶²

This flexibility has been used by the ICTY to take account of the dynamic nature of customary international law applicable to internal armed conflicts, the rules of which continue to emerge in line with state practice and the pronouncements of governments, national tribunals and international bodies, such as the UN Security Council and the UN General Assembly.⁶³ UN Security Council and General Assembly statements have been seen by the ICTY as 'clearly articulating the view that there exists a corpus of general principles and norms on internal armed conflict embracing common Article 3, but having a much greater scope',⁶⁴ with the caveat that it is as yet only 'the general essence of those rules and not the detailed regulations they may contain', which has become applicable to internal conflicts.⁶⁵

This convergence between the rules applicable to international conflict and those applicable to internal conflict is also reflected in the attitude of states. Internal conflicts are increasingly being treated in official military manuals, by

⁶¹ Article 5 of the Statute applies explicitly to internal conflicts; articles 2 and 3 contain no mention of whether and if so to what extent they were intended, when drafted, to apply to internal conflict.

⁶² According to the Commission of Experts established by the UNSC to investigate allegations of war crimes in the former Yugoslavia, 'the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia'. (Interim Report of the Commission of Experts established pursuant to UNSCR 780 (1992) (26.01.93), para.45).

⁶³ Both organs have regularly called on parties to internal conflicts to comply with 'international humanitarian law' without qualification (see e.g. UNSCRs 788 (Liberia, 1992); 794 and 814 (Somalia, 1992-1993); 993 (Georgia, 1993); 1214 (Afghanistan, 1998); 1270 (Sierra Leone, 1999); 1464 (Cote d'Ivoire, 2003); 1556 (Sudan, 2004); and UN General Assembly Resolution 54/182 (Sudan, 1999). See also UNSG report S/2001/789 (Afghanistan, 2001)).

⁶⁴ *Tadic (Jurisdiction Appeals Decision)*, para.116.

⁶⁵ *Ibid.*, para.126.

national tribunals and in legislation as being governed by a large number of the same principles and rules as those which govern international armed conflicts.⁶⁶

Not only are third parties showing a tendency to regard internal conflicts as governed by many of the same rules as those applicable to international conflicts, but there are many public statements on record made by participants in internal conflicts indicating their willingness in principle to apply the rules of international armed conflict. The sincerity of these statements is sometimes open to doubt, given the conduct of the groups in question, but the number of occasions on which participants have sought to pay lip-service to international law is striking.⁶⁷ And

⁶⁶ The military manual for use by the German armed forces states: 'German soldiers like their Allies are required to comply with the rules of international humanitarian law in the conduct of military operations *in all armed conflicts however such conflicts are characterized*' (*Handbook of Humanitarian Law*, para.211, emphasis added). In 1994, a Danish court passed judgement on a defendant accused of violations in an internal conflict of certain of the 'grave breaches' provisions of the Geneva Conventions - traditionally considered applicable only in international armed conflicts (*Prosecution v. Refik Saric*, quoted in *Tadic (Jurisdiction Appeals Decision)*, para.83). See also the UK's 2001 International Criminal Court Act, which criminalizes the violation in internal conflicts of certain rules of the international law of armed conflict going beyond Additional Protocol II and common article 3. See also Stewart, 'Towards a single definition of armed conflict in international humanitarian law'. William Abresch takes a more conservative view, citing the *travaux préparatoires* of Additional Protocol II as evidence that states such as Canada did not, at least in 1977, consider the detailed rules on the conduct of hostilities enshrined in Additional Protocol I as appropriate to the conduct of hostilities in non-international conflicts and that even to this day 'humanitarian law leaves the planning and execution of attacks essentially unregulated in internal conflicts' ('A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005), *EJIL*).

⁶⁷ The Algerian National Liberation Front (FLN) in April 1958 issued instructions for the strict observance of the laws of war and in particular the provisions of the Geneva Conventions of 1949, and in June 1960, the provisional Algerian government (GPRA) informed the ICRC officially of its decision to accede to all four Geneva Conventions of 1949 (Moir, *The Law of Internal Armed Conflict*, 73 and Veuthey, *Guérilla*, 49). In 1971, a representative of the government of the People's Republic of Bangladesh, engaged in conflict with the central government of Pakistan, gave formal assurances to the ICRC of its readiness to respect the Geneva Conventions (Veuthey, *Guérilla*, 50). The African National Congress informed the ICRC in 1980 of its intention 'to respect and be guided by the general principles of humanitarian law applicable in armed conflicts' (George Aldrich, 'New Life for the Laws of War' (1981), *AJIL*). The Liberation Tigers of Tamil Eelam (LTTE) publicly announced in February 1988 that they would abide by the provisions of the Geneva Conventions and its two Protocols (Amnesty International, *Sri Lanka: An Assessment of the Human Rights Situation* (1993)). In 1988, FMLN rebels in El Salvador made a statement undertaking to 'ensure that its combat methods comply with the provisions of common Article 3 of the Geneva Conventions and Additional Protocol II' (*Tadic, (Jurisdiction Appeals Decision)*, para 107). The Rwandan Patriotic Front (RPF) in 1992 told the ICRC that it considered itself bound by 'the rules of international humanitarian law' (*Prosecutor v. Akayesu (Trial Judgement)* (1998), ICTR, 627). Through a decree issued on 30.05.03, Aslan Maskhadov, President of Chechnya, was reported to have ordered his field commanders 'to abide strictly by the Geneva Conventions' (Radio Free Europe report of 18.06.03). Examples of commitments made by states to observe the international law of armed conflict in internal conflicts include the order given by the Nigerian General Gowon to troops on the governmental side of the Biafran War, prohibiting acts of violence against non-combatants and civilian property, (Sassoli and Bouvier, *Un Droit dans la Guerre*, 986.) and the statement of the Prime Minister of the Democratic Republic of the Congo in

of perhaps even more interest than the routine protestations of commitment to 'international law' made by participants in internal conflicts are their reactions of to specific atrocities attributed to them. Claims and denials of responsibility, attempts to attribute responsibility (and blame) to their opponents, apologies and even silence can all be revealing indicators of what the parties, including armed opposition groups, consider the applicable customary rules to be.

d) Ad hoc agreements

There have been several attempts to summarize principles of the international law of armed conflict considered applicable to all situations of armed violence, including internal conflicts and public emergencies of lesser intensity.⁶⁸ But this approach is problematic, not least because the degree of compliance with the rules of international armed conflict of which participants in internal conflicts are capable (or which is appropriate) will depend on the specific context, as will the degree and nature of the danger to which non-combatants are exposed. To have any chance of providing effective protection for non-combatants during internal conflicts, rules need to take account *inter alia* of whether or not aircraft or artillery are being used and the quality of the knowledge held by parties to the conflict about territory occupied by their opponents. Paradoxically, advocacy of a set of standard 'minimum rules' may have the effect of holding participants in internal conflicts to lower standards of care than those which they can reasonably be expected to meet.

1964, engaged at that time in a civil war, undertaking to respect the Geneva Convention [*sic*] in the expectation that the rebels would do likewise (*Tadic (Jurisdiction Appeals Decision)*, para.105). President Putin of Russia in a media interview given in 1999 stated that in Chechnya Russia was 'strictly complying with its obligations concerning the provisions of international law'. (Moir, *The Law of Internal Armed Conflict*, 128, n.189). Putin's statement is vague, but not compatible with a view that the conduct of Russian troops in Chechnya was not formally subject to international law.
⁶⁸ See for instance the Turku Declaration of Minimum Humanitarian Standards of 1990 (revised in 1994), drawn up under the aegis of the UN Commission on Human Rights, which contains formal rules and prohibitions, but is not legally binding. (See Asborn Eide, Allan Rosas and Theodor Meron, 'Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards' (1995) *AJIL*, for background to the Declaration and the full text). See also *UK Manual 2004*, paras.15.5-15.33.

Partly for this reason, parties to internal conflicts, often at the prompting of a third party, sometimes enter into *ad hoc* agreements, specifically adapted to the conflict, setting out the rules to be observed.⁶⁹ An example is the ICRC-brokered agreement of 22 May 1992, whereby representatives of the Republic of Bosnia-Herzegovina, the Serbian Democratic Party and the Croatian Democratic Community undertook to observe the provisions of articles 35-42 and 48-58 of Additional Protocol I in the conduct of hostilities in Bosnia.⁷⁰ Such agreements need not necessarily be the issue of direct bilateral negotiations; they may be ‘triangular’ agreements, whereby undertakings to observe certain rules are made to a third party, such as the ICRC, by both (or all) sides, rather than directly between the parties to the conflict.⁷¹ Alternatively, tacit agreements on what constitutes acceptable conduct in an internal conflict can emerge through practice, either in the form of combatants behaving with restraint in the expectation that their opponents will do likewise, or in the more negative form of reprisals for violations of the unwritten rules. An example of such a tacit (or at least, unpublished) agreement is the ‘July Understandings’ reportedly brokered by the United States between the Israel Defence Forces/South Lebanese Army and Hezbollah and said to have entered into force in Lebanon in 1993.⁷² The purpose of the agreement appears to have been a bilateral renunciation of attacks on civilians – to be enforced if necessary through retaliation in kind. The ‘July Understandings’ system seems to have lasted until 1996, when it broke down under the weight of reprisals and counter-reprisals, to be replaced by a new set of understandings, which were not much more effective, though may have been better than nothing.

⁶⁹ Article 3 common to the 1949 Geneva Conventions urges parties to conflicts ‘not of an international character’ to ‘endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention’.

⁷⁰ See *Prosecutor v. Galic (Trial Judgement)* (2003), ICTY, paras.22-25.

⁷¹ See Michel Veuthey, ‘Guerilla Warfare and Humanitarian Law’ (1983), *IRRC*, for examples of seven such agreements.

⁷² See David Turns, ‘Some reflections on the conflict in Southern Lebanon: the “Qana incident” and international humanitarian law’ (2000), *JCSL*, 200. See also W. Michael Reisman, ‘The Lessons of Qana’ (1997), *Yale Journal of International Law*, for details of the 1996 understandings (382, n.1).

1.4. 'Military operations other than war'

a) *Preliminary remarks*

The term 'military operations other than war' (MOOTW), has no meaning in international law, but is used as a doctrinal concept by both the United States and the United Kingdom to accommodate the fact that frequently the military personnel of these states (and others) are deployed in situations which are not quite 'war' in the classical sense or 'armed conflict' in the legal sense, but are far indeed from being peaceful.⁷³ The law of international armed conflict applies in full to situations which can be considered objectively to be 'armed conflicts', irrespective of how the belligerents might wish their military activities to be qualified.⁷⁴ But in certain military operations falling short of full scale armed hostilities, rules of law other than those of the law of armed conflict often need to be taken into account. These may derive from the national legislation of a state which contributes forces to a peace enforcement mission, from the laws of the host state, or from branches of international law other than the law of armed conflict, such as human rights law, environmental law or the law of the sea. The applicable rules will depend on the nature of the operation, and are likely to include rules and procedures which form no part of conventional combat training or basic military instruction on the law of war. Members of armed forces deployed abroad will, however, usually be subject to Rules of Engagement (ROE) issued by their national commands and to those criminal and civil laws of their own state which apply extraterritorially to military personnel.⁷⁵ There should not therefore be doubt at the level of the individual combatant or commander about what rules apply in relation to when and how force may be used in MOOTW, so long as the ROE are well drafted and understood.

⁷³ See *Operational Law 2005*, 57, and *Peace Support Operations JWP 3-50* (2nd Edition), 2-5.

⁷⁴ See article 2 common to the Geneva Conventions of 1949 and the *ICRC Commentary (Geneva Conventions)* on this article. See also *Tadic (Jurisdiction Appeals Decision)*, para.70.

⁷⁵ See *R. (Al-Skeini) v. Secretary of State for Defence* (2004), Queen's Bench Division (UK) for details of the domestic legislation which may apply extraterritorially to British troops participating in operations other than war overseas (342).

For some states, compliance with the laws of armed conflict is stated to be a matter of policy, no matter how an armed conflict is characterized.⁷⁶ This is unproblematic so long as the situation is, objectively speaking, an armed conflict. More awkward are declarations that the law of armed conflict will apply in other situations (for instance, a peace support operation where foreign troops play a policing, rather than a combat role, or a maritime security operation), since the law of armed conflict implicitly confers on members of the armed forces the right to use lethal and destructive force in a way which may be quite inappropriate outside an armed conflict.

b) *Military occupation.*

When territory is occupied by a hostile power during an armed conflict, all four Geneva Conventions will apply⁷⁷ plus the Hague Regulations⁷⁸ and customary rules on belligerent occupation. Occupying forces of states party to Additional Protocol I will be bound by this treaty throughout the occupation if it takes place on the territory of another state party to the Protocol (or of a power which accepts and applies its provisions).⁷⁹ Occupying forces are bound by the Hague Regulations to do all in their power ‘to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’.⁸⁰ International human rights law may also apply to some extent to the conduct of occupying forces,⁸¹ though it should be recalled that during a military occupation, the law of armed conflict not only protects civilians in the power of occupying forces, but also gives these forces the right to

⁷⁶ E.g. Germany (see *Handbook of Humanitarian Law*, para.211 and commentary) and the US (see *Operational Law 2005*, 12).

⁷⁷ See article 2 common to the 1949 Geneva Conventions. See also article 6, Geneva Convention IV on the continued application of this Convention in its entirety for one year after the general close of military operations and of certain of its provisions throughout an occupation.

⁷⁸ Articles 42-56, are considered customary international law, like the rest of the Hague Regulations.

⁷⁹ Article 1.3 and article 96.2. See also article 3.

⁸⁰ Hague Regulations, article 43. For an interesting analysis of this rule see Conor McCarthy, ‘The paradox of the international law of military occupation: sovereignty and the reformation of Iraq’ (2005), *JCSL*.

⁸¹ See Theodor Meron, ‘Extraterritoriality of Human Rights Treaties’ (1995), *AJIL*.

take measures unlikely to be considered acceptable in peacetime in a democratic society.⁸²

The difficulty with military occupation (as to a certain, but perhaps lesser, extent with peace support operations) is that the situation may change from a law enforcement situation to a combat situation at very short notice. Likewise, there may be combat operations in one part of a country under occupation while elsewhere troops are engaged in law enforcement.⁸³ In such an environment, laws applicable to international armed conflict and peacetime laws still applicable in emergency situations need to be observed in parallel, rather than one legal regime replacing the other. This is not (quite) to expect the impossible. But it needs to be recognized that during military occupation, although the international law of armed conflict continues to apply to the conduct of hostilities, compliance with these rules may be insufficient for compliance with international (or even national) law where military government and administration, including law enforcement, is concerned.⁸⁴

c) *Military aid to the civil power*

When members of armed forces are deployed in peacetime in support of the civil power, whether in their own country or abroad, the laws of armed conflict do not apply, except for a few rules intended to apply in peacetime, including in the immediate aftermath of an armed conflict, such as the obligation to disseminate knowledge of the Geneva Conventions within the armed forces and rules

⁸² See e.g. Geneva Convention IV articles 5, 27 and 42.

⁸³ In 1999 a US Marine Corps General introduced into western military literature the concept of the 'three block war', typical of the situations in which NATO ground forces were increasingly being deployed, where, in three adjacent blocks in a built-up area, troops might be engaged in, respectively, full scale combat action, peacekeeping and humanitarian relief (Charles Krulak, 'The Strategic Corporal: Leadership in the Three Block War' (1999), *Marines Magazine*).

⁸⁴ See Kenneth Watkin, 'Controlling the Use of Force: a Role for Human Rights Norms in Contemporary Armed Conflict' (2004), *AJIL*. See also Adam Roberts, 'The end of occupation: Iraq 2004' (2005), *JCLQ* for discussion of how the formal end of an occupation is to be determined, and what legal regime should be considered to apply when it is not clear whether or not a territory is under foreign military occupation.

concerning use of the emblem and the repatriation of prisoners.⁸⁵ In peacetime, members of the armed forces are normally ‘citizens in uniform’,⁸⁶ subject in principle to the same laws as civilians, whether their fellow citizens, or those of the country in which they are deployed, though where forces aiding the civil authorities in another country are concerned, some form of limited immunity from the laws of the receiving state is often negotiated in the form of a ‘Status of Forces Agreement’ (‘SOFA’).⁸⁷ ‘Soft’ international law, such as the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, may also need to be taken into account. The UN Basic Principles are not legally binding, but have sometimes been relied on for guidance by human rights tribunals in cases where questions have arisen about whether reasonable force has been used in a situation other than armed conflict.⁸⁸

Some operations in support of the civil authorities, such as counter-terrorism activities or the provision of security for a new administration in the immediate aftermath of an armed conflict, may place members of the armed forces in dangerous and unpredictable situations. However, unless the situation is so intense as to qualify as an armed conflict, peacetime laws on the use of force (either those of the host nation or of the sending state) will still normally apply.⁸⁹ A state of emergency may modify a peacetime regime to a certain extent and may affect a state’s policy in relation to bringing prosecutions when questions arise of whether lethal force has been used lawfully. But ‘combatant rights’ to attack military objectives and to use lethal force against enemy combatants not necessarily posing an immediate threat accrue to members of the armed forces only in time of armed conflict.

⁸⁵ See Geneva Convention I, articles 44 and 47; Geneva Convention II, article 48; Geneva Convention III, articles 118 and 127; Geneva Convention IV, articles 14 and 144.

⁸⁶ See the approach set out in *Attorney General for Northern Ireland’s Reference (No. 1 of 1975)* (1977), House of Lords (UK), paras.136-137. As Lord Lloyd of Berwick said in the House of Lords, ‘in a free country there is not and cannot be one law for soldiers and another for citizens’ (*Hansard*, 14.07.05, Column 1251).

⁸⁷ For detailed treatment of the history and typical scope of SOFAs, see *The Handbook of the Law of Visiting Forces* (Oxford, 2001), ed. Deiter Fleck.

⁸⁸ See e.g. *McCann v. UK* (1995), (ECtHR), paras.138-139.

⁸⁹ See *Mohammed Bici and Skender Bici v. Ministry of Defence* (2004), Queen’s Bench Division (UK), where an English court ruled there could be no ‘combat immunity’ when force was not being used ‘out of pressing necessity in the wider public interest arising out of combat’, but by troops ‘carrying out essentially a policing and peacekeeping function’ (paras.101-104). See also *R. v. Clegg* (1995), House of Lords (UK).

d) *Peace support operations.*

Troops deployed abroad under United Nations authority are normally considered automatically immune from host country laws to the extent necessary for the fulfilment of the UN mission.⁹⁰ They remain bound, however, by their own state's international legal obligations concerning the conduct of hostilities. Thus if they are engaged in armed conflict with the forces of another state, the rules of international armed conflict apply even if they are acting under UN authority.⁹¹ Whether or not the operation meets this threshold, the general rules of the UN Secretary General's bulletin *Observance by United Nations Peacekeeping Forces of International Humanitarian Law*, issued in 1999 and binding throughout the UN organization, apply.⁹²

If foreign military forces assist in the overall administration of territory under UN authority, the applicable rules will normally be set out in a UN Security Council Resolution.⁹³ UNSCRs sometimes themselves create a legal regime in miniature applicable to UN forces and civil administrations. These rules may sometimes need to be supplemented by further special agreements or the application of other rules of international law.

1.5. Conclusions

Although many of the rules in relation to precautions in attack are to be found in international treaties, the legal order created by treaties is fragmented. Different states have different treaty obligations and even within a treaty regime,

⁹⁰ See *Operational Law 2005*, 231.

⁹¹ See *Handbook of Humanitarian Law*, para.208 and commentary. As the British doctrine pamphlet JWP 3-50, *Peace Support Operations* (2nd Edition) puts it: 'The existence of a mandate and the absence of any form of consent on behalf of the local population does not remove the obligations of commanders and service personnel to act responsibly within all aspects of international law, such as the law of armed conflict.' (3-2 (para.304)).

⁹² See *Documents on the Laws of War* (3rd Edition) (Oxford, 2004) eds. Adam Roberts and Richard Guelff, 721-730 for text and prefatory note.

⁹³ See e.g. UNSCRs 940 (Haiti), 1031 (Bosnia) and 1244 (Kosovo)).

reservations may mean that states parties do not all have the same obligations as each other. Although it has been observed that ‘the novelty of a weapon does not by itself carry with it a legitimate claim to a change in the existing rules of war’,⁹⁴ weapons-specific treaties can quickly become out of date and new treaties cannot always be concluded rapidly enough to keep up with developments in military technology. Against this background, the rules of customary international law on the obligation to take precautions in attack take on vital importance.

Treaty and customary rules on precautions in attack which apply to international conflicts seldom apply formally and unquestionably to internal conflicts. But evidence suggests that parties to such conflicts are often willing to accept in principle not only those rules enshrined in Additional Protocol II and common article 3 of the Geneva Conventions, but also many of the more detailed and far-reaching rules of Additional Protocol I, even if their observance of these rules is spasmodic and self-serving. In internal conflicts it may thus often make sense for many of the rules of the international law of armed conflict to be advocated, irrespective of their formal applicability. And the parties may in some circumstances see it as in their interests to observe them, either in search of the rewards of the moral high ground or to avoid the inconvenience of obloquy.

Meanwhile, the law continues to move. There is a growing tendency on the part of international bodies, at least, and in particular the ICTY, to regard customary rules governing international conflicts as equally applicable to non-international ones. That said, there remains for the time being an important difference between those rules applicable to internal conflict which an international tribunal can without controversy apply in a criminal trial (which remain quite limited, as the Rome Statute makes clear) and the much broader range of rules which can reasonably be advocated in the field as generally accepted practice and possibly even as emerging rules of customary international law.

⁹⁴ Oppenheim’s *International Law* Vol II (7th Edition) (London, 1952), ed. Hersch Lauterpacht, 469.

The greatest difficulties in relation to the identification of the applicable rules on the precautions to be taken in attack are presented not by internal conflict, but by military operations which fall short of full scale armed hostilities, in which exquisite attention will need to be paid to the precise nature of the operation in order for the applicable law to be correctly identified, and reassessment may frequently be necessary. Members of regular armed forces will need to be provided not only with appropriate Rules of Engagement for compliance with all the relevant provisions of international law in these situations (and, possibly, with the law of the host country as well as their own domestic civil and criminal law), but also with the relevant equipment and training.

The next chapter looks at the substance of international rules on precautions in attack.

2. THE OBLIGATION UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT TO TAKE PRECAUTIONS IN ATTACK

He who...allows a projectile to fire without knowing exactly who will be hit bears perhaps sometimes a heavier responsibility than a one-to-one face-to-face crime. It's the distance, the sanitisation, that perhaps adds a dimension of horror to the crime.

*Prosecuting Counsel in the case of Prosecutor v. Jokic.*⁹⁵

Where the substance of the legal requirement to take precautions in attack in armed conflict is concerned, there are three major points of difficulty. First, just how certain does a belligerent need to be about a potential target, in terms both of its nature and the presence or absence of non-combatants, before it can legitimately be attacked? Secondly, to what extent does the obligation to avoid excessive collateral damage confer a commensurate right to cause collateral damage which can reasonably be considered *not* excessive? Thirdly, to what extent may combatants be legally obliged to put their own lives at risk for the sake of reducing collateral damage?

Not surprisingly, there can be disparity in the way these issues are approached by legal advisers attached to armed forces and ministries of defence on the one hand and human rights lawyers and activists on the other. This chapter seeks to demonstrate that whereas states party to the 1977 Protocol I Additional to the Geneva Conventions of 1949 have voluntarily assumed obligations setting a very high standard indeed in terms of the protection of non-combatants from the effects of attacks, which cannot necessarily be assumed to bind other belligerents, the obligations of customary law do not lag far behind. It also seeks to make clear that unlike the rules of human rights law, the rules of the law of armed conflict on taking precautions in attack are specifically designed for a context in which responsibility for the safety and welfare of the population of a territory is shared by the conflicting parties, and, to some extent, non-combatants themselves.

In an effort to keep matters relatively simple, the relevant principles and rules are presented thematically. When they are limited in scope to a particular form of

⁹⁵ *Prosecutor v. Jokic (Sentencing Judgement)* (2004), ICTY para.39.

warfare, this is indicated. Where the rules appear not to be universally considered by states to represent customary law, this too is indicated.

2.1. Legitimate and illegitimate targets – the principle of distinction

a) Elements of law in relation to legitimate and illegitimate targets

The law defining legitimate targets of attack in international armed conflicts consists of three interlocking elements:

- rules to indicate those people who may not normally be lawfully attacked and rules to indicate the exceptional circumstances in which this legal protection ceases;
- rules to indicate those buildings, vehicles and other objects which may not normally be lawfully attacked and rules to indicate the exceptional circumstances in which this legal protection ceases;
- rules to indicate those people and objects who or which *may* lawfully be the object of attack, unless such an attack would be prohibited by a rule in one of the above categories.

Attempts to summarize these rules risk either giving the false impression that anyone and anything other than civilians or civilian objects may lawfully be made the object of attack or the equally false impression that civilians and typically civilian objects, such as schools and places of worship, may never lawfully be made the object of attack. In an effort to avoid such over-simplification, this section looks first at the principle of legal protection for non-combatants and civilian objects. It then looks at the modern concept of the legitimate military objective. Finally, it looks at the obligation to verify that an object to be attacked is a legitimate target.

b) *The prohibition of attacks on non-combatants*

Customary law prohibits attacks directed at non-combatants.⁹⁶ Non-combatants may be civilians, members of the armed forces no longer able or willing to fight (*hors de combat*) or members of the armed forces whose temporary or permanent status denies them a combat role, such as medical or dedicated religious personnel or parlementaires bearing a flag of truce.⁹⁷ But although it may be simple enough to say that non-combatants should not be deliberately attacked, it is less simple to say how a non-combatant (or combatant) is to be recognized in circumstances where a person's status or intentions may be unclear from his appearance.

International law provides no precise guidance on the exact point at which an enemy combatant must be considered *hors de combat*. A wounded enemy encountered in the course of an engagement may still be able and willing to carry on fighting. An apparently unconscious enemy combatant may be gravely ill and incapable of resistance, or may be sleeping, intoxicated or simply shamming. The law allows combatants some discretion where borderline cases are concerned in which quick decisions need to be taken in dangerous circumstances.⁹⁸ Borderline cases, however, cannot detract from the clarity and compelling nature of the prohibition on attacking an enemy who is clearly no longer a threat, which admits of no exception.

As far as civilians are concerned, a basic principle of customary and treaty law is that they may not be targeted unless they take a direct part in hostilities.⁹⁹

⁹⁶ The ICJ in 1996 affirmed the establishment of the distinction between combatants and non-combatants as one of two cardinal principles constituting the fabric of humanitarian law (*Nuclear Weapons*, para.78). The four Geneva Conventions of 1949, containing explicit prohibitions of attacks directed against specific categories of non-combatants, are also considered customary law by the ICJ (*ibid.*, paras.79-82).

⁹⁷ See Additional Protocol I, articles 41.2, 42 and 51; Geneva Convention I, articles 12 and 24; Geneva Convention II, articles 12, 27, 28 and 47; Geneva Convention III, article 13. See also Hague Regulations, article 32.

⁹⁸ The US *Commanders' Handbook on the Law of Naval Operations* (NWP1-14M), recognizing that there may be circumstances in which an attempt to surrender may be difficult either to communicate or to receive, regards the issue as 'one of reasonableness' (para.11.7).

⁹⁹ See Additional Protocol I, articles 48 and 51 (paragraphs 2 and 3) which can be considered customary rules (see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol. I), 3). See also US Field Manual FM27-10 (Change No.1 (1976), para.40). Civilians need

It is not legally permissible to attack them deliberately simply because of their presence in a particular location, e.g. a military security zone or a zone of active military operations. It has been suggested that an individual civilian who takes part in hostilities loses his protected civilian status permanently and cannot simply reassume it on completion of a military operation,¹⁰⁰ and at least one state is on record publicly as regarding people considered responsible for hostile acts, but who live as civilians when not taking part in hostilities, as legitimate targets of attack at any moment under customary international law.¹⁰¹ Such an approach would not be admissible for a state party to Additional Protocol I, which provides that ‘Civilians shall enjoy the protection afforded by this Section unless *and for such time as* they take a direct part in hostilities’ (emphasis added).¹⁰² For a state not party to Additional Protocol I, it may not be incontrovertibly unlawful in theory, although it carries the risk both that genuinely innocent civilians will be killed in error and that combatants will become confused about whether or not orders they may receive to kill apparent civilians can lawfully be carried out.

For states party to Additional Protocol I, in case of doubt whether a person is a civilian he must be considered to be a civilian.¹⁰³ Both France and the United Kingdom, on ratifying the Protocol, made almost identical statements of understanding to the effect that for them this provision would not be understood as ‘over-riding a commander’s duty to protect the safety of troops under his command or to preserve his military situation in accordance with other provisions of the Protocol’. For the United Kingdom, the provision would be understood as

not necessarily be armed to be considered to be taking a direct part in hostilities; under customary law they may lose their immunity if they commit ‘hostile acts’ such as sabotage (see e.g. FM27-10 para.81 and also *Prosecutor v. Musema (Trial Judgement)* (2000), ICTR, para.279). See also R. Gehring, ‘Protection of Civilian Infrastructures’ (1978), *Law and Contemporary Problems, School of Law, Duke University* for detailed examination of the extent to which civilians need to be involved in hostilities to lose their protected status.

¹⁰⁰ Parks, ‘Air War and the Law of War’. See also Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge, 2004), 28-29.

¹⁰¹ ‘International law in general and the law of armed conflict in particular recognize that individuals who directly take part in hostilities cannot then claim immunity. By initiating and participating in armed attack, such individuals have designated themselves as combatants and have forfeited such legal protection...an individual who becomes a combatant is considered to remain a combatant until hostilities come to an end and not merely during that exact instant when the individual is carrying out an attack.’ (website of Israeli Ministry of Foreign Affairs, Answers to Frequently Asked Questions: Israel – the Conflict and Peace (05.11.03)).

¹⁰² Article 51.3.

¹⁰³ Article 50.1.

applicable only in cases of *substantial* doubt. No other state party objected formally to these statements, which can be considered a legitimate interpretation of the article.¹⁰⁴ The customary law position on cases of doubt is less clear, but in parts of the world where it is commonplace for ordinary civilians to carry weapons openly the fact of a civilian bearing arms cannot in itself be considered sufficient to deprive him of his civilian status and make him a legitimate target for attack, though it may put him in grave danger of being targeted by mistake in an armed conflict. Nor is a person's protected status as a civilian under customary law affected by his contribution to the war effort. His participation in hostilities has to be direct before he can become a legitimate target.¹⁰⁵

In some conflicts during the period under review, particularly internal conflicts or conflicts with an internal dimension such as those which occurred in the Balkans in the 1990s, police officers were heavily armed and took part in military operations. There appears to have been seldom any doubt that such persons could be considered combatants.¹⁰⁶

¹⁰⁴ In *Korad Kalid Omar c. Soldat para-commando* (1995), Military Court (Belgium), where a Belgian peacekeeper faced a court martial after opening fire at night on a suspicious figure near a military perimeter fence who turned out to be a civilian child, the court took note of the facts that '...la tache qui incombait à l'accusé au moment des faits était difficile et dangereuse...il a dû prendre une décision en une fraction de seconde...sa propre sécurité et celle de son unité pouvaient dépendre de cette décision...il serait injuste de juger sa conduite cette nuit-là à l'aune d'une situation confortable, éloignée dans le temps et dans l'espace du contexte des faits...' quoted in Sassoli and Bouvier, *Un Droit dans la Guerre?*, 1322.

¹⁰⁵ See *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Dordrecht, 1987), eds. Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (hereinafter '*ICRC Commentary (Additional Protocols)*'), 1942-1945. Although the commentary relates to article 51.3 of the Protocol, the requirement for a civilian's participation in hostilities to be direct before he loses his immunity from attack can probably be considered a rule of customary law (see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol. I), 19-24.)

¹⁰⁶ Peter Rowe argues that to be legitimate objects of attack in an armed conflict, police officers need to be 'members of a force that has been incorporated into the armed forces of a State, or civilians who have taken a direct part in hostilities' ('Kosovo 1999: The air campaign – have the provisions of Additional Protocol I withstood the test?' (2000), *IRRC*). Neither treaty law (see Geneva Convention III, article 4.A.2 and Additional Protocol I, article 43.3), nor customary law applicable to internal armed conflicts seem, on the face of it, to point compellingly to this interpretation. Henckaerts and Doswald-Beck offer the seemingly better view that 'In the absence of formal incorporation, the status of such groups will be judged on the facts... When [paramilitary or armed law enforcement] units take part in hostilities and fulfil the criteria of armed forces, they are considered combatants... While notification [in accordance with Additional Protocol I, article 43.3] is not constitutive of the status of the units concerned, it does serve to avoid confusion...' (Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol. I), 17). More problematic is the question of the status in an internal conflict of civilians who have been armed, ostensibly for their own protection, by governmental security forces.

c) Objects legally protected from attack

For non-combatants to be protected against the effects of hostilities with any effectiveness, legal protection needs to be conferred on the buildings in which they tend to be concentrated and the vehicles in which they tend to travel. Treaty and customary law is well developed in this area.¹⁰⁷ Treaty and customary law provisions also exist to protect cultural property,¹⁰⁸ objects which if destroyed could jeopardize the safety or survival of non-combatants, and the environment.¹⁰⁹

Additional Protocol I provides that in case of doubt as to whether an object on land normally devoted to civilian purposes is being used to make an effective contribution to military action, it must be presumed not to be so used.¹¹⁰ The customary law status of this rule has been questioned by the United States.¹¹¹ However, the US Department of the Army Manual, *Operational Law 2005*, states that ‘presumption of civilian property attaches to objects traditionally associated

¹⁰⁷ See Rome Statute article 8.2(b) (ii), (iii) (v), (ix) and article 8.2(e) (ii), (iii), (iv); ICTY Statute article 3 (b) (c) and (d); Additional Protocol I, article 52.1; Geneva Convention I, article 19; Geneva Convention II, article 22; Geneva Convention IV, article 18; Hague Regulations, article 25; and 1907 Hague Convention IX Concerning Bombardment by Naval Forces in Time of War, articles 1, 4 and 5. The provisions of the Geneva Conventions and the Hague Regulations protecting certain civilian and medical buildings, vehicles and vessels from attack constitute customary law. No state has suggested that the general prohibition on attacks against civilian objects contained in Additional Protocol I, article 52.1 is not also a binding principle of customary law, but contrary state practice has been commonplace.

¹⁰⁸ See Hague Regulations, article 27, the Cultural Convention, and article 53 of Additional Protocol I. These provisions can be considered customary law, except for articles 8-11 of the Cultural Convention establishing a ‘special protection’ regime for certain objects or buildings. The Second Protocol to the Cultural Convention, providing a level of protection for cultural property similar to that provided for civilians by the 1977 Additional Protocol I, has at the time of writing (January 2006) only 37 states parties and cannot be considered customary law.

¹⁰⁹ See Additional Protocol I, articles 35.3, 54, 55 and 56. The customary law status of articles 35, 55 and 56 is contested (see remarks of Michael Matheson in ‘The US Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions’ (1987) in *American University Journal of International Law and Policy*, 424, 427 and 436. See also Dinstein *The Conduct of Hostilities*, writing more recently, but sustaining the view that articles 35.3, 55 and 56 of Additional Protocol I (and, implicitly, even article 54) still do not constitute customary law (93-94, 132, 185)). See also Henckaerts and Doswald-Beck, who identify rules of customary law similar, but not identical, to the Protocol’s articles 54, 55 and 56, while considering the article 35.3 rule a norm of customary law to which the US is a ‘persistent objector’ (*Customary International Humanitarian Law* (Vol. I), 139, 151, 189-193).

¹¹⁰ Additional Protocol I, article 52.3.

¹¹¹ See *Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O* (US Department of Defense, 1992), 616 (hereinafter ‘*Final Report to Congress*’).

with civilian use (dwellings, schools etc.),' citing article 52 of Additional Protocol I explicitly as authority.¹¹²

Where objects at sea and airborne objects are concerned, there is no treaty law equivalent to this presumption of civilian status, though under treaty and customary law, medical aircraft may not be attacked if they are recognized as such and not engaging in acts indicating or giving rise to suspicion of hostility.¹¹³ However the customary law requirements that belligerents must at all times distinguish between combatants and non-combatants,¹¹⁴ and that reasonable efforts be made to spare non-combatants from the effects of hostilities,¹¹⁵ can be considered to apply to attacks on airborne objects and objects at sea as well as those on land.¹¹⁶

The protected status of buildings, vehicles, vessels and aircraft dedicated to medical purposes is normally indicated by the display of the emblem of the Geneva Conventions (a red cross or crescent on a white background),¹¹⁷ or, in the case of Israel, a red Star of David, but does not depend on this. The protected status of objects derives from their nature and function, not from the fact of their

¹¹² *Operational Law 2005*, 23. It has been suggested that if attacking forces would be put in immediate danger by failure to prosecute an attack, then the legal requirement for certainty about the nature of the target may be lessened. (Anthony Rogers, 'Zero-casualty warfare' (2000), *IRRC*, 181). According to another writer '...the law of armed conflict's concept of self-defense would have allowed resort to actions in defense of a beleaguered unit – in terms of weapons used, ordnance selected, and intensity of fire – that might otherwise have been prohibited. But this does not mean that commanders could conclude that self-defense gives them a general waiver from limitations of the law of war' (Reisman, 'The Lessons of Qana', 387, n.30).

¹¹³ Additional Protocol I, articles 24-27, *San Remo Manual* paras.53-54. These provisions, describing rules to which no state has formally objected and which are generally respected in practice, can be considered customary law.

¹¹⁴ See *Nuclear Weapons*, para.78.

¹¹⁵ See e.g. Additional Protocol I, article 57.4 and UNGA Resolution 2444.

¹¹⁶ The *San Remo Manual* proposes a rule that in case of doubt as to whether a vessel or aircraft exempt from attack is being used to make an effective contribution to military action it shall be presumed not to be so used (para.58), but it is doubtful whether this provision reflects customary law.

¹¹⁷ On 08.12.05, a Third Additional Protocol to the Geneva Conventions was adopted by a Diplomatic Conference in Geneva with the object of creating an additional emblem, in the form of a red square on a white background, to be known as the red crystal and to enjoy equal status with the red cross and the red crescent ('Additional emblem for the international Red Cross and Red Crescent Movement', ICRC press release 05/73). The red lion and sun, recognized by the Geneva Conventions of 1949 as an official emblem and used in Iran before 1979, is no longer in use. Contrary to the startling claim of Ingrid Detter (*The Law of War* (2nd Edition) (Cambridge, 2000), 293), the 'red sun' of the national flag of Japan is not an alternative emblem of the Geneva Conventions, but may lawfully be used to indicate Japanese military assets.

bearing an emblem. Thus a building used exclusively for the care of the wounded or sick has protected status whether or not it bears an emblem (and a vehicle bearing an emblem which is being used to transport armed combatants may be attacked).

The protected status of hospital ships depends additionally on their having been notified to the adverse party at least ten days before employment.¹¹⁸

Legal protection for civilian and medical objects is never unqualified. Buildings and vehicles such as schools and ambulances lose their protection and become legitimate targets for attack if they are used to carry out hostile acts, though hospitals, civil defence buildings, hospital ships and ambulances which engage in acts harmful to the enemy may only be attacked after due warning to desist from such acts has been given and remained unheeded.¹¹⁹ So long as non-medical civilian buildings are not being used by civilians at the time and are not 'historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples',¹²⁰ it is not normally unlawful to use them for military purposes, nor is it unlawful to attack them if it is clear that they are being so used.¹²¹ The use for hostile purposes of a vehicle or building bearing the emblem of the Geneva Conventions, however, is an act of perfidy,¹²²

¹¹⁸ Geneva Convention II, article 22.

¹¹⁹ See Geneva Convention I, article 21 and Geneva Convention II, article 34. See also Additional Protocol I, article 65, which can probably be considered a customary rule, and *San Remo Manual* paras.48 and 49. The US manual *Operational Law 2005* states, however, that 'when receiving fire from a hospital, there is no duty to warn before returning fire in self-defense' (23). So long as the notion of 'self-defense' is not too broadly construed and the fire returned is proportionate, this seems a reasonable interpretation of the rule. But it should be noted that in *Galic*, the ICTY considered artillery fire launched at Kosevo hospital in Sarajevo by Bosnian Serb forces to have been evidence of a campaign of deliberate attacks on civilians, despite the fact, recognized by the judges and the Prosecution, that enemy mortar fire had originated from the hospital grounds or from its vicinity (*Galic (Trial Judgement)*, paras.504-509).

¹²⁰ See Additional Protocol I, article 53. See also Cultural Convention articles 1 and 4. N.b. the Cultural Convention does not prohibit outright the use of cultural property for military purposes (see article 4.2), other than objects subject to 'special protection' registered with UNESCO and marked with the emblem of the Convention (*ibid.* articles 8-11 and annexed Regulations).

¹²¹ An attack on a building being used for military purposes, but also being used by civilians, would in many circumstances constitute a violation of Additional Protocol I, article 51.8 in unlawful response to a violation of article 51.7. States party to the Second Protocol to the Cultural Convention are subject to strict and detailed rules concerning the very limited circumstances in which they can attack cultural property or use it for military purposes (see articles 6 and 13).

¹²² Hague Regulations, article 23(f); Additional Protocol I, articles 37, 38 and 85.3(f).

designated as a war crime in the Statute of the International Criminal Court if the perfidy leads to death or serious injury.¹²³

d) *The concept of the legitimate military objective*

Many of the rules conferring legal protection from attack on specific categories of persons and objects go back a long way, even if respect for them has often been patchy.¹²⁴ But it can be awkward to approach the question of what is a legitimate target by trying to say what is *not* a legitimate target. Legal protection from attack is never absolute. The modern approach to the law of targeting is to seek to define what is a legitimate military objective and rule out attacks on anything which is not.

Early efforts to determine what could be considered a legitimate military objective focussed on lists.¹²⁵ The problem with this approach was not only the difficulty of reaching agreement, but also the fact that lists could take no account of the role played by circumstances in determining the real military importance of an object. An object might be in a category of legitimate military objectives, while in reality serving no military purpose, such as a bridge of no tactical

¹²³ Article 8.2(b)(vii).

¹²⁴ By the time of the first Crusades, the view was widespread among western European knights that in principle non-combatants such as priests, merchants, labourers, old men, women and children should be spared (for the sake of Christian charity) and prisoners should be spared (for the sake of good business), though both principles were routinely violated on all sides once the Crusades got underway and during the European wars of the Middle Ages and early modern period. (See Steven Runciman, *A History of the Crusades* (Cambridge, 1951-1954) (Vols. I-III). See also Honor Bonet *The Tree of Battles* (Liverpool, 1949) (trans. and ed. G. Coupland); Maurice Keen, *Chivalry* (Yale, 1984) and *Laws of War in the Late Middle Ages* (Chatham, 1965); Jonathan Sumption, *The Hundred Years War* (London, 1999) (Vols. I and II); Theodor Meron, *Henry's Wars and Shakespeare's Laws* (Oxford, 1993); and C. Veronica Wedgwood *The Thirty Years War* (London, 1992)).

¹²⁵ See for instance the 1907 Hague Convention IX on Naval Bombardment, article 2; the 1954 Hague Cultural Convention, article 8.1(a); the 1923 Hague Draft Rules on Aerial Warfare, article 24.2; *ICRC Commentary (Additional Protocols)* para.2002, n.3 (containing the text of the proposed annex to the ICRC's 1956 Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War). See also Parks, 'Air War and the Law of War', on efforts by the British Foreign Office at the beginning of the Second World War to draw up a list of legitimate military objectives, to which it was hoped Germany could subscribe. For an attempt to produce a modern illustrative list of military objectives, see Dinstein, *The Conduct of Hostilities*, 88.

significance.¹²⁶ Conversely, an object such as a steeple or minaret, which would normally be considered a civilian object, might be a key component of the temporary military infrastructure, for instance when being used as an observation post for directing artillery or for a sniper.

In 1928, the British Chief of the Air Staff, Sir Hugh Trenchard, proposed that legitimate military objectives for air attack could be defined functionally as:

...any objectives [the destruction of which] will contribute effectively towards the destruction of the enemy's means of resistance and the lowering of his determination to fight.¹²⁷

This broad definition never attained general acceptance.¹²⁸ But in contrast to the 'list' approach to military objectives adopted in the 1923 Hague Draft Rules on Air Warfare a few years previously, it had the merit of connecting the legitimacy of an object as a target to its actual function in relation to the military operations of the enemy.

The real breakthrough came with international agreement in the 1970s, in the course of negotiations on the text of Additional Protocol I, that legitimate military objectives could be defined functionally as 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.¹²⁹

Negotiators agreed that attacks directed at anything else (on land) should be considered unlawful. This rule, allowing attacks even on objects normally dedicated to civilian purposes if – and only if – certain conditions are met, can now be considered part of customary law.¹³⁰

¹²⁶ Though see Dinstein, who argues that even 'non-arterial' bridges not leading directly to the front will often be legitimate military objectives (*ibid.*, 92-93).

¹²⁷ 'Memorandum by the Chief of the Air Staff for the Chiefs of Staff Sub-Committee on the War Object of an Air Force, 2nd May 1928' published in Charles Webster and Noble Frankland, *The Strategic Air Offensive Against Germany 1939-1945* (London, 1961) (Vol. IV), 74.

¹²⁸ See *ibid.*, 76-83 for the distinctly chilly reception given to Trenchard's proposed doctrine by his own military colleagues.

¹²⁹ Additional Protocol I, article 52.2.

¹³⁰ The definition is widely used in military manuals, including recent US manuals (See e.g. US Field Manual 27-10, Change No.1 (para.40.c); *Operational Law 2005* Chapter 2, 12; AFP 14-210,

The definition applies only to objects and not to persons. Where people are concerned, it is not enough that they should ‘make an effective contribution to military action’ to become legitimate targets. Similarly, medical facilities and ambulances do not become legitimate targets simply by virtue of making an effective contribution to military action (e.g. by treating wounded soldiers so they can be sent back to the field). Only if such facilities are used ‘to commit, outside their humanitarian duties, acts harmful to the enemy’, may they lose their legal protection.¹³¹

The Additional Protocol I definition appears to rule out altogether attacks on objects which do not offer a military advantage in the circumstances ruling at the time. It can be argued that under customary law, objects such as enemy military aircraft and warships (as well as combatants who are not *hors de combat*) will always be legitimate targets in a conflict, irrespective of what they are doing at the time.¹³² But even if not incontrovertibly unlawful, attacks on enemy troops which offer no military advantage would appear not only pointlessly savage, but also out of harmony with modern international law on the resort to force, which tends to regard armed force as legitimate only to the extent it is necessary to achieve a legitimate aim.¹³³

para.A4.2.2; *UK Manual 2004*, para.5.4.1 and *Handbook of Humanitarian Law*, para.442). US ambivalence about the Additional Protocol I language can however be seen in Instruction No. 2 of the Military Commission Instructions issued by the Department of Defense in 2003, where military objectives are defined more loosely as ‘those potential targets during an armed conflict which, by their nature, location, purpose or use, effectively contribute to the opposing force’s war-fighting or war-sustaining capability and whose total or partial destruction, capture or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack’. (For discussion of the significance of the difference between this wording and that of article 52 of Protocol I, see Anthony Rogers, *Law on the Battlefield* (2nd Edition) (Manchester, 2004), 81).

¹³¹ Geneva Convention I, article 21.

¹³² See e.g. *Handbook of Humanitarian Law*, paras.442-443. See also *San Remo Manual*, para.65.

¹³³ Since the adoption of the UN Charter in 1946, modern law governing both the resort to force and the conduct of hostilities can be seen as requiring that a state should never use force, even against a conventional military target in the course of an armed conflict, if it exceeds what is required to repel an armed attack or to restore its security. (See e.g. *San Remo Manual*, para.4). During the Napoleonic Wars, the Duke of Wellington reportedly remarked: ‘the killing of a poor fellow of a vedette or carrying off a post could not influence the battle and I always when I was going to attack sent to tell them to get out of the way’ (quoted in Michael Glover, *The Peninsular War* (London, 2001), 303). Napoleon, similarly, is said to have taken the view that force used when not absolutely necessary, even against the enemy, should be regarded as criminal (see Geoffrey Best, *Humanity in Warfare* (London, 1980), 49).

Naval warfare

The Additional Protocol I definition of a legitimate military objective applies formally only to attacks against objects on land.¹³⁴ There are no treaty provisions indicating what may be considered a legitimate target at sea, though there are several to say what may not.¹³⁵ Nor is customary law on this question settled, as became clear from the controversy generated by some of the targeting decisions taken during the 1980-1988 Iran-Iraq war.¹³⁶

Against this background, international lawyers and naval experts from several states held a series of meetings between 1988 and 1994 seeking to pin down the current state of the law in relation to armed conflict at sea. The set of proposed rules agreed on, the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*,¹³⁷ was acknowledged to be a combination of rules declaratory of customary international law and proposed new rules which participants thought that states might, at some future point, want to consider enshrining in treaty form.

Drafters of the *San Remo Manual* agreed on the applicability to naval warfare of the principle unanimously affirmed by the United Nations General Assembly in 1968 that: 'Distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible'.¹³⁸ The question was how distinction could be made in practice in a context in which the activities of civilian vessels were often critical to the enemy's military operations, or possibly a direct part of them. The

¹³⁴ Additional Protocol I, article 49.3.

¹³⁵ Vessels made exempt from attack or capture by treaty rules are hospital ships and coastal rescue vessels (Geneva Convention II, articles 22, 24, 25 and 27), as well as coastal fishing and trading vessels and 'vessels charged with religious, scientific or philanthropic missions', so long as they do not take part in hostilities (1907 Hague Convention XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, articles 3 and 4).

¹³⁶ For instance, attacks by both Iran and Iraq on commercial and neutral shipping. (See de Guttry and Ronzitti, *The Iran-Iraq War*. See UNSCRs 552 and 582 for international condemnation of such attacks.)

¹³⁷ *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, (Oxford, 1995) ed. Louise Doswald-Beck.

¹³⁸ UNGA Resolution 2444 (XXIII), para.1(c).

view prevailed that the Additional Protocol I definition of military objectives as 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’, should be extended to naval warfare, but an additional rule should indicate in more detail what should be understood by ‘making an effective contribution to military action’ in this context.¹³⁹ Specific examples are given in the *Manual* of activities considered liable to make enemy merchant vessels legitimate military objectives, or even to make neutral merchant ships liable to attack.¹⁴⁰

In the US Navy’s *Commander’s Handbook*,¹⁴¹ military objectives are defined as:

..combatants and those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy’s war-fighting *or war-sustaining* capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack....Economic targets of the enemy that indirectly but effectively support and sustain the enemy’s war-fighting capability may also be attacked. (Emphasis added).¹⁴²

This approach appears to permit in some circumstances attacks at sea on the commercial exports of an enemy, which would almost certainly be unlawful if the proposed *San Remo Manual* rules¹⁴³ were to be accepted as legally binding in any manner.¹⁴⁴

¹³⁹ This approach is favoured by the UK and Germany (see *UK Manual 2004*, paras.13.40-13.42 and 13.47 and *Handbook of Humanitarian Law*, paras.1025-1026 and commentary).

¹⁴⁰ See *San Remo Manual* paras.40, 59, 60 and 67.

¹⁴¹ *Commander’s Handbook on the Law of Naval Operations* (NWP1-14M) (see *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations* (Newport RI, 1999) (eds. A. Thomas and James Duncan), containing a full text of the *Handbook*, with a commentary).

¹⁴² *Ibid.*, para.8.1.1.

¹⁴³ I.e. paras.40, 59, 60 and 67.

¹⁴⁴ Some US writers would like to go further still, for instance Richard Grunawalt, who suggests: ‘the law ought to recognize that neutral shipping that sustains a belligerent’s war-fighting capability may be subject to interdiction by whatever platforms and weapons systems are available to the other side.’ (‘The Rights of Neutrals and Belligerents’ (1988), *Ocean Development and International Law*). Another US commentator argues that ‘[a]ny standard of military objective in a naval context must allow for the possibility that, under certain circumstances, maritime trade will be a legitimate object of attack.’ (Francis Russo, ‘Targeting Theory in the Law of Armed Conflict at Sea: the Merchant Vessel as Military Objective in the Tanker War’ in *The Gulf War of 1980-1988: the Iran-Iraq War in International Legal Perspective* (Dordrecht, 1992), eds. Ige Dekker and Harry Post, 168). The phrase ‘war-fighting or war-sustaining capability’ caused much debate

The establishment of naval exclusion zones does not exempt belligerents from the obligation, even within such a zone, to direct their attacks only against legitimate military objectives and to refrain from attacking objects such as properly marked and notified hospital ships.¹⁴⁵ The proper function of zones is to reinforce, not replace, the principle of distinction, by creating circumstances which will make it easier for a naval commander to assess whether or not a vessel is hostile. Just as objects which are not military objectives may not be attacked within an exclusion zone, objects outside an exclusion zone may be attacked if they meet the criteria of a military objective.

Aerial bombardment

An attempt was made between the First and Second World Wars to limit legitimate military objectives for aerial bombardment to objects in a short, specific list, against which bombardment would need to be 'directed exclusively'.¹⁴⁶ This proposed rule, though advocated by an eminent group of legal experts and government representatives from the major military powers of the day, was never formally adopted in treaty form. State practice on both sides during the Second World War subsequently eliminated the possibility of it being regarded as a customary rule.

Since Additional Protocol I applies to attacks against objectives on land, its definition of a legitimate military objective applies to aerial bombardment of

during the San Remo discussions. Eventually it was decided to adopt verbatim the language of Additional Protocol I, article 52.2 for the purpose of defining military objectives at sea, the majority of participants in the discussions having felt the phrase 'war-fighting or war-sustaining capability' could 'too easily be interpreted to justify unleashing the type of attacks that annihilated entire cities during the war.' (See Robertson, 'The Principle of the Military Objective in the Law of Armed Conflict'. See also Dinstein, *The Conduct of Hostilities*, 87).

¹⁴⁵ See *San Remo Manual*, paras.105-106 and Geneva Convention II, article 22. See Christopher Michaelson, 'Maritime exclusion zones in times of armed conflict at sea: legal controversies still unresolved', (2003), *JCSL* for a history of naval exclusion zones and a review of their legality. See also J. A. Roach, 'The Law of Naval Warfare at the Turn of the Two Centuries' (2000), *AJIL*, 71-72.

¹⁴⁶ 1923 Draft Hague Rules of Air Warfare, article 24.2.

targets on land where states parties are concerned. Some writers and military strategists have expressed frustration with the constraints of this definition and a less than total conviction that strict adherence to the restrictions it implies is required under customary law where aerial bombardment is concerned.¹⁴⁷ But the definition is widely used in military manuals applicable to aerial bombardment,¹⁴⁸ and can safely be considered to constitute the customary law definition of a legitimate target on land for aerial bombardment as much as any other form of warfare.

Attacks on airborne objects

According to generally recognized principles of customary law, enemy military aircraft (unless specifically exempted from attack by prior agreement, for instance if transporting negotiators) may be attacked. Attacks against enemy missiles and military aerial platforms such as unmanned aircraft are also, obviously, permitted.¹⁴⁹ The provisions of the *San Remo Manual* implying that attacks are legitimate against aircraft engaged in espionage for the enemy, or those which enter areas of military operations and fail to respond to warnings to land or change course given by the belligerents, probably reflect customary law.¹⁵⁰ But there are no treaty rules indicating with precision those airborne objects which may be considered legitimate military objectives and in which circumstances.

¹⁴⁷ See e.g. Jeanne Meyer, 'Tearing down the Façade: a Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine' (2001), *Air Force Law Review*; Parks, 'Air War and the Law of War'; and USAF General Michael Short's comments quoted in the House of Commons Defence Committee's 14th Report, *Lessons of Kosovo* (hereinafter '*Lessons of Kosovo*'), para.94.

¹⁴⁸ See e.g. *Operational Law 2005*, 12; US Air Force Pamphlet 14-210 of 01.02.98, 147; US Field Manual 27-10, Change No.1 (para.40.c); *Handbook of Humanitarian Law*, para.442; *Manuel de Droit des Conflits Armés* (available via the website of the French Ministry of Defence); and *UK Manual 2004*, para.5.4.1.

¹⁴⁹ See Dinstein, *The Conduct of Hostilities*, 108.

¹⁵⁰ See e.g. *San Remo Manual*, paras.40, 62, 63, 65 and 70.

e) *Target verification*

Target verification and the doctrine of double effect

There will sometimes be tension between the strict definition of a military objective under modern international law and a belligerent's desire to select and strike targets in a way that seems likely to subdue the enemy with the least expenditure of blood and treasure.¹⁵¹ In such situations, belligerents may be tempted to launch an attack on a questionable target while claiming the real target to have been a conventional military object nearby, on a conventional military target of no real significance, hoping to damage or destroy collaterally a more interesting but less obviously legitimate subsidiary target, or perhaps on a target the nature of which is not known with confidence. In short, it might be considered that if it can be plausibly maintained after the event that the primary intention of an attack was to strike an incontrovertibly military objective, an attack can be launched and subsequently defended as lawful which is intended in fact to strike a less obviously legitimate target either instead or as well.

This contorted logic, effectively an abuse of the medieval doctrine of double effect,¹⁵² may attract those feeling constrained by the strictures of modern international law on targeting. But the modern law of targeting does not leave much scope for such sophistry.

¹⁵¹ 'The purpose of war...is the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men, resources and money.' (*British Manual of Military Law* (Part III) (London, 1958)).

¹⁵² 'Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now, moral acts take their species according to what is intended and not according to what is beside the intention, since this is accidental....' (*Saint Thomas Aquinas - On Law, Morality and Politics*, eds. William Baumgarth and Richard Regan (Indianapolis, 1988), 226).

Treaty and customary law provisions on the obligation to verify the nature of a target

It is not enough under modern international law simply to intend to hit only military targets. Belligerents have a legal duty to take care to avoid making mistakes. Provisions exist in both treaty and customary law requiring those responsible for planning or deciding on attacks to take positive steps to verify the nature or status of the object or person they plan to attack before the attack may be launched. States party to Additional Protocol I must:

...do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them.¹⁵³

This provision needs to be read with the provisions of Additional Protocol I prohibiting attacks on people or objects in case of doubt about their status.¹⁵⁴ Clearly the Protocol requires a very high degree of confidence indeed about the status or nature of a person or object to be attacked before such an attack by a state party may be considered lawful in an international armed conflict.¹⁵⁵

It has been claimed that under customary international law, reasonable precautions must be taken to verify the nature of a target, but that this requirement is not as demanding as the Additional Protocol I requirement to do 'everything feasible' to verify it is a legitimate military objective.¹⁵⁶ But the texts of military

¹⁵³ Additional Protocol I, article 57.2(a)(i).

¹⁵⁴ *Ibid.*, articles 50.1 and 52.3. Parks argued in 1990 that this obligation 'will not survive the harsh realities of combat' ('Air War and the Law of War', 137) and a similar contention was made in the US DoD's *Final Report to Congress*, 616. But as Dinstein observes, the presumption of civilian status is rebuttable: 'there is no room for doubt once combatants are exposed to direct fire from a supposedly civilian object, although '[t]he degree of doubt that has to exist prior to the emergence of the (rebuttable) presumption is by no means clear' (*The Conduct of Hostilities*, 91). In short, the value of the rule can be accepted without it being necessary to claim it will always be easy to apply.

¹⁵⁵ The Canadian Law of Armed Conflict Manual sums up the rule well thus: 'Commanders, planners and staff officers will not be held to a standard of perfection in reaching their decisions... The test for determining whether the required standard of care has been met is an objective one: Did the commander, planner or staff officer do what a reasonable person would have done in the circumstances?' (quoted in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol II), 359).

¹⁵⁶ Danielle Infeld in 'Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm: But is a Country Obligated to Use Precision Technology to Minimize Collateral

manuals suggest that the customary law rule, too, can probably now be understood as requiring that ‘everything feasible’ should be done to verify the nature of a target before it can legitimately be attacked.¹⁵⁷ The customary law position may not be crystal-clear, but there is no very convincing case for claiming that states party to Additional Protocol I are subject to a significantly higher standard than others in terms of taking precautions to verify the nature of potential targets.

Although international law requires a high degree of confidence about the nature of a target, what can feasibly (or reasonably) be done to verify the status or nature of an object or person to be attacked will inevitably be a subjective judgement, where the safety of the attacking force will be one consideration.¹⁵⁸ Thus, when long-range attacks are launched (other than in self-defence), the rule can perhaps be understood as requiring a degree of certainty about the nature of the target which it may not be reasonable always to expect in the context of defensive action against fast-moving objects. According to a report prepared for the ICTY Prosecutor, ‘the obligation to do everything feasible [to verify that the objectives to be attacked are military objectives] is high but not absolute.’¹⁵⁹ Some indication of what does need to be done is indicated as the report continues: ‘A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets. The commander must also direct his forces to use available technical means to properly identify targets during operations.’¹⁶⁰

Civilian Injury and Damage?’ (1992), *George Washington Journal of International Law and Economy*.

¹⁵⁷ See e.g. US Air Force Pamphlet 110-31 (1976) and AFP 14-210, para.A4.3.1.1. The Additional Protocol I rules contained in article 57.2(a) are cited by Sassoli and Bouvier as an example of a treaty provision which has ‘assemblé, interprété ou précisé des principes ou des règles existantes’ (*Un Droit dans la Guerre?* 141).

¹⁵⁸ ‘Feasible precautions’ are understood in the context of the modern international law of armed conflict to mean ‘those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.’ (See e.g. Amended Protocol II to the Conventional Weapons Convention, article 3.10)).

¹⁵⁹ *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, (hereinafter ‘ICTY Committee Report (NATO)’ para.29.

¹⁶⁰ *Ibid.* See also *Handbook of Humanitarian Law*, commentary at para.457.3 and Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol II), 363-364. See also Leslie Green, who infers from Additional Protocol I, article 57.2(b) an obligation for belligerents to ensure their intelligence is up to date (*The Contemporary Law of Armed Conflict* (2nd Edition), (Manchester, 2000), 156, n.234).

One modern military manual contends that attacking an object on the basis of ‘mere suspicion’ of its nature, rather than knowledge, may constitute a war crime or (in an internal conflict) a crime against humanity.¹⁶¹ This probably goes too far. Attacking on the basis of ‘mere suspicion’ might indeed violate the rule requiring that objects normally dedicated to civilian purposes should not be attacked in case of doubt about the use to which they are being put;¹⁶² but failure to establish with certainty the nature of an object (as opposed to making civilians the object of attack or wilfully launching an attack in the knowledge that it will cause excessive collateral casualties) is not listed as a grave breach of Additional Protocol I,¹⁶³ nor as a war crime under the Rome Statute of the International Criminal Court.¹⁶⁴

Verification of targets before attacks at sea or on airborne objects

The Additional Protocol I provisions on the requirement to verify the nature of an object or person to be attacked concern only attacks on objects on land. As far as the conduct of hostilities at sea or in the air is concerned, states party to Additional Protocol I are obliged, in broad terms, to ‘take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects’.¹⁶⁵ The *San Remo Manual* indicates there may now be a customary rule requiring that those responsible for planning, deciding on or executing an attack should do ‘everything feasible’ to ensure that attacks at sea or against airborne objects are limited to military objects,¹⁶⁶ and proposes rules which, though not customary law, seem well adapted to reducing to a minimum the risks of civilian aircraft being attacked in error during armed conflict, while taking realistic account of the difficulties potentially faced by belligerents in assessing the intentions of

¹⁶¹ *Handbook of Humanitarian Law*, commentary at para.457.3.

¹⁶² Article 52.3, Additional Protocol I. The requirement to do everything feasible to verify the nature of an object to be attacked and to refrain from attacks ‘in case of doubt’ does not mean that attacks can only be launched when there is *total* certainty about the nature of the object to be attacked. But the degree of confidence legally required is clearly considerably higher than ‘mere suspicion’.

¹⁶³ See article 85.

¹⁶⁴ See article 8.2.

¹⁶⁵ Additional Protocol I, article 57.4.

¹⁶⁶ *San Remo Manual*, para.46(b).

unidentified aircraft in zones of military operations.¹⁶⁷ The requirement to take at least 'reasonable' precautions to establish that an object is indeed a military objective before it may be attacked can probably be considered a customary rule governing attacks at sea and attacks on airborne objects as well as attacks on land-based objects.

f) Discrimination in attack

Additional Protocol I prohibits states parties from launching indiscriminate attacks, defined as:

- 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.¹⁶⁸

Also prohibited by the Protocol are attacks which are indiscriminate on account of treating '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'.¹⁶⁹ These rules can be considered customary.¹⁷⁰

In addition to prohibiting (and defining) indiscriminate attacks, the Protocol imposes a positive obligation on states parties to take 'all feasible precautions' in the choice of methods and means of attack with a view to avoiding, or at least

¹⁶⁷ *Ibid.*, paras.72-77.

¹⁶⁸ Article 51.4

¹⁶⁹ Article 51.5 (a).

¹⁷⁰ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol I), 37-45.

The ICJ affirmed in *Nuclear Weapons* that '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.' (para.78). Dinstein goes further, referring to specific prohibitions 'spawned' by the rule against indiscriminate attacks, such as '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' and 'to fire imprecise missiles against military objectives located near or intermingled with, civilian objects' (118).

minimizing, collateral damage.¹⁷¹ Faced with a choice between several military objectives to obtain a similar military advantage, states party to Additional Protocol I must choose that which can be attacked with the least collateral damage.¹⁷² These rules set a rather higher standard for discrimination in attack than the prohibitive rules cited above.

Indiscriminate weapons

Several treaties limit or prohibit the use of certain weapons, ostensibly on account of their potentially indiscriminate effects,¹⁷³ but there are no incontrovertibly established customary law rules prohibiting specific weapons on the grounds that they are intrinsically indiscriminate.¹⁷⁴

Nonetheless, the rule requiring all feasible (or reasonable) precautions to be taken in the choice of methods and means with a view to avoiding, or in any event minimizing, collateral damage means care must be taken about the choice of weapons for particular attacks. This may not mean much for a combatant at the sharp end with only limited means at his disposal. An infantryman can only carry a certain amount of weight if he is to be capable of any movement at all, let alone any kind of speed or agility. He cannot be expected to carry a large number of different kinds of weapons and ammunition, so as to be able to use exactly the degree of force required by military necessity, but no more, in any situation which might arise.¹⁷⁵ But for a senior commander in the armed forces of a sophisticated

¹⁷¹ Article 57.2(a)(ii).

¹⁷² Article 57.3.

¹⁷³ See Hague Convention VIII; Protocols II and III to the Conventional Weapons Convention; and the Ottawa Convention.

¹⁷⁴ This is largely on account of the inability of states (and even ICJ judges) to agree on any specific weapon being inherently indiscriminate. Arguments advanced before the ICJ to the effect that even a nuclear weapon could in some circumstances be used in a discriminating fashion (see for instance written statements submitted by the UK and the US in June 1995) may have helped persuade a majority of the judges that these weapons could not be considered inherently unlawful under either customary or treaty law.

¹⁷⁵ See Frits Kalshoven, 'The soldier and his golf clubs' in *Studies and Essays on International Humanitarian Law in Honour of Jean Pictet*, ed. Christophe Swinarski (1984). See also Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne, 1974, Report (para.27), quoted in *The Banning of Anti-Personnel Landmines* (Cambridge, 2000), eds. Louis Maresca and Stuart Maslen, 48.

military power, with precise but expensive weaponry available in principle, this provision has significant implications.

Although there may be situations where the only way an attack can lawfully be carried out is with precision-guided weaponry,¹⁷⁶ the rule does not go so far as to require belligerents to use the most precise weapons at their disposal whenever there is a risk of collateral damage.¹⁷⁷ This is partly because use of state-of-the-art high precision weaponry is not always the best way of minimizing collateral damage.¹⁷⁸ Furthermore, the cost of high precision weapons means belligerents will normally only have limited supplies, which they may be unable easily to replenish in the course of a campaign: if collateral damage is to be kept to a minimum throughout a campaign, precision weaponry may need to be used with circumspection.¹⁷⁹ That does not mean that it can necessarily be considered lawful to use a weapon which will inevitably strike combatants and non-combatants alike in a situation where no more discriminating weapon is available capable of reaching the target.¹⁸⁰ In many circumstances, the attack will just have to be postponed or cancelled.

¹⁷⁶ Speaking of the NATO air campaign against the Federal Republic of Yugoslavia in 1999, the then Secretary-General of NATO remarked that in the context, 'international law and public opinion' required the use of precision weapons (quoted in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol. II), 382). Iraq's use during the 1991 Gulf war of intermediate-range missiles without precision guidance (and with a targeting error range reported to have been about 2,000 metres) against urban areas in Israel and Saudi Arabia prompted immediate protest by the UK, though in the event, although hundreds of civilians were injured, only two civilians were killed directly by these strikes (see *BYIL* 1991, 60, Lawrence Freedman and Efraim Karsh, *The Gulf Conflict 1990-1991: Diplomacy and War in the New World Order* (London, 1994), 307. See also Rogers, *Law on the Battlefield*, 105).

¹⁷⁷ See *Handbook of Humanitarian Law*, para.447 and commentary. See also Parks, 'Air War and the Law of War', 54 and Françoise Hampson, 'Means and methods of warfare in the conflict in the Gulf', in *The Gulf War, 1990-1991, in International and English Law*, (London, 1993) ed. Peter Rowe, 104. See also Australia's *Defence Force Manual*, para.834, quoted in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol II), 376.

¹⁷⁸ Sometimes, more sophisticated weapons have greater scope for technical failure, with potentially catastrophic results (see Infeld, *Precision Weapons*, 133. See also Tom Boyle, 'Proportionality in Decision Making and Combat Actions' in Hector and Jellema, *Protecting Civilians*, 36-37).

¹⁷⁹ During the 1999 Kosovo war, the British MoD had to initiate procurement action for fresh supplies of precision guided missiles in April 1999, as there was 'a real risk of exhausting stocks within a number of weeks.' (*Lessons of Kosovo* (Vol. I), paras.178 and 182).

¹⁸⁰ Additional Protocol I, article 57.2(a).iii. See also *Prosecutor v. Martić*, (Rule 61 *Proceedings*), (1996) ICTY, para.31, (quoted in Sassoli and Bouvier, *Un Droit dans la Guerre*, 1520) and *Galic* (*Trial Judgement*), paras.644-648.

Weapons malfunction and the law

Weapons not subject to specific restrictions or prohibitions may have indiscriminate effects caused or exacerbated by malfunction. It has been observed that predictable collateral damage caused by weapon malfunction should be taken into account in assessments of whether or not attacks would be proportionate.¹⁸¹ This does not entirely solve the problem: an attack with a weapon liable to have indiscriminate effects on account of its tendency to malfunction might still be judged proportionate by the attacker. Some writers contend that the key issue is whether the *intention* is to launch an indiscriminate attack.¹⁸² In this respect, the approach of the *San Remo Manual*, according to which mines may not be laid at sea 'unless effective neutralisation occurs when they have become detached, or control over them is otherwise lost',¹⁸³ is interesting, suggesting that certain types of weapons should not be used because of their intrinsic tendency to strike civilian and military objects without distinction if and when control over them is lost, irrespective of whether or not they were intended to strike civilians and combatants without distinction. It cannot be stated with certainty at the time of writing that there is either a customary or treaty law obligation to abstain altogether from weapons known to become indiscriminate when they malfunction, even when malfunction of this nature is a virtual certainty. However, if non-combatants are killed as a result of weapons malfunction in situations where such deaths were easily foreseeable and could feasibly have been avoided by another method or means of attack having been adopted, it might in some circumstances be arguable that such an attack could be considered tantamount to a wilful attack on non-combatants.

¹⁸¹ According to an NGO report, 'the US Air Force has said that the dud rate [of cluster bomb submunitions] must be part of the proportionality determination because unexploded bomblets are 'reasonably foreseeable'' (Human Rights Watch, *Off Target; the Conduct of the War and Civilian Casualties in Iraq* (2003), 115). See also Thomas Herthel, 'On the Chopping Block: Cluster Munitions and the Law of War' (2001), *Air Force Law Review*. See also Rogers, *Law on the Battlefield*, 116.

¹⁸² E.g. Herthel, 'On the Chopping Block'.

¹⁸³ *San Remo Manual*, para.81.

Discrimination in attack and force security

As with the obligation to do ‘everything feasible’ to verify the nature of potential targets, the obligation to take ‘all feasible precautions’ in the choice of methods and means of attack with a view to minimizing non-combatant casualties is demanding. But given the way the term ‘feasible precautions’ is understood in international law, it is clear that states party to Additional Protocol I are entitled to take military considerations, including force security, into account in determining what is feasible.¹⁸⁴ What the Protocol does not permit is for attacks to be planned in a way which takes *only* military considerations into account, ignoring the humanitarian element.¹⁸⁵

Where belligerents not party to Additional Protocol I are concerned, the position is less clear. It has been suggested that it is a general principle of law that it is not permissible deliberately to kill an innocent person to save one’s own life.¹⁸⁶ Where the conduct of hostilities is concerned, this principle seems at least as demanding as the Additional Protocol I provisions.

The question of whether or not international law requires combatants to be prepared to accept death rather than deliberately kill an innocent person posing no threat was studied in depth in a recent case heard by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), albeit in a case not concerning a combat situation.¹⁸⁷ The judges were sharply divided and international law can hardly be said to be clear on the matter. But a refusal to take any risk *at all* for the sake of protecting civilian life would be doubtfully compatible with contemporary international law. According to one writer closely connected with the ICTY, if mistakes by an attacking force lead to civilian deaths

¹⁸⁴ ‘Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations’ (Article 3.10, Amended Protocol II to the Conventional Weapons Convention). See also statements of understanding made on ratification of Additional Protocol I by Belgium, Canada, France, Italy and the UK.

¹⁸⁵ See comments by Knut Dormann in Hector and Jellema, *Protecting Civilians*, 100. See also Christopher Greenwood, ‘The Law of Weaponry at the Start of the New Millenium’ (1998), *International Law Studies* (Newport, RI, 1998) (eds. Michael Schmitt and Leslie Green), 200-201.

¹⁸⁶ See *UK Manual 2004*, paras.16.42.2-16.42.3.

¹⁸⁷ *Prosecutor v. Erdemovic (Appeals Chamber)* (1997), ICTY.

but it is determined that the attacking force took risks to limit the dangers to civilians, then '[e]vidence of assumption of risk may mitigate or even eliminate criminal responsibility', in the event of charges being brought.¹⁸⁸ The implication is that criminal responsibility for civilian deaths may sometimes be imputed to attacking combatants if there is no evidence of any degree of risk having been taken for the sake of avoiding such deaths.

The reasonable approach may be to understand the international law of armed conflict as requiring that all feasible precautions be taken in the choice of methods and means with a view to avoiding or at least minimizing collateral damage, irrespective of whether a belligerent is a state party to Additional Protocol I, while accepting that taking 'feasible' precautions allows force security to be taken into account. Obviously combatants must be prepared on occasions to accept some degree of personal risk for the sake of carrying out an attack with discrimination. But it cannot be said that either customary or treaty law obliges them to sacrifice their own lives, or those of the people under their command, for the sake of sparing civilians when the latter are intermingled with enemy combatants in a zone of active military operations. Beyond a certain point, a combatant's readiness to risk his own life for that of a non-combatant will be a personal matter, and no business of lawyers. As a Canadian court observed in 1992, 'La loi n'a pas habituellement pour effet d'ériger l'héroïsme en norme'.¹⁸⁹

2.2. The proportionality principle

a) *The concept of collateral damage – immediate and deferred effects*

International law does not protect from attack non-combatants and civilian objects present within military objectives or their immediate vicinity, though the military objective itself, not the non-combatants or the civilian objects, must be

¹⁸⁸ William Fenrick, 'Attacking the Enemy as a Punishable Offence' (1997), *Duke Journal of Comparative and International Law*.

¹⁸⁹ *Ramirez c. Canada (ministre de l'Emploi et de l'immigration)* (1992), Federal Court of Appeal (Canada), para.31 quoted in Sassoli and Bouvier, *Un Droit dans la Guerre?* 1140-1141.

the true object of the attack.¹⁹⁰ What treaty and customary law requires is that attacks should not be launched if incidental killing or injuring of non-combatants and damage to civilian objects caused by an attack on a military objective is expected to be disproportionate in terms of the military advantage anticipated from the attack in question.

This does not mean that attacks expected to cause collateral damage not considered 'excessive' will necessarily be lawful. It is often observed that collateral damage is an inevitable by-product of military operations.¹⁹¹ Such statements are simply statements of fact; in war, things go wrong. They should not be seen as statements of legal principle, conferring upon belligerents the right to cause a certain amount of collateral damage, so long as it is not excessive. As seen earlier in this chapter, belligerents are legally required to take precautions to avoid or at least minimize collateral damage, not just to ensure it will not exceed a certain 'acceptable' level.

The most obvious form of collateral damage consists of non-combatant deaths and injuries caused at the time when a military objective is attacked. Further non-combatant deaths and injuries may ensue later from the deferred effects of collateral damage caused in particular to facilities for water treatment, sewage disposal and power generation, or from accidents involving unexploded ordnance. Great hardship can also be caused by the incidental destruction of goods, buildings, livestock and crops essential for human survival in contexts where there is no hope of compensation and little social welfare or community support on which victims can rely. A meaningful assessment of whether collateral damage caused by an attack is likely to be disproportionate may need to take into account these deferred and cumulative effects of collateral damage as well as the immediate effects.¹⁹²

¹⁹⁰ Additional Protocol I, article 51.2.

¹⁹¹ See e.g. AFP 14-210 - 'International law does not prohibit attacks against military objectives even though they may cause collateral damage since incidental damage is inevitable during armed conflict: but this damage should not be excessive in relation to the military advantage anticipated' (para.5.3.3.).

¹⁹² See *Prosecutor v. Kupreskic et al. (Trial Judgement)* (2000), ICTY, para.526. See also Greenpeace International *On Impact: Modern Warfare and the Environment: A Case Study of the Gulf War* (1991). Christopher Greenwood observes: 'application of the proportionality test today, at least at the strategic level, requires that less immediate damage [of the kind done to Iraq's

Attacks on legitimate military objectives sometimes cause incidental damage to cultural objects or to the natural environment. The fact that such damage may be long-term (in the case of the natural environment, including agricultural crops) or irreversible (in the case of cultural objects), needs to be borne in mind.

b) *Proportionality in the jus in bello vs proportionality in the jus ad bellum*

Under Additional Protocol I, attacks are prohibited 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.¹⁹³

This is an effort to clarify and confirm one aspect of what is traditionally known in the law of armed conflict as the proportionality principle.¹⁹⁴ It reflects, rather than resolves, the military commander's difficulty in weighing humanitarian considerations against military ones in the fog of war.¹⁹⁵ Conscious of this difficulty, several states on signing the Protocol made clear their understanding

civilian infrastructure during the 1991 Gulf war] must also be taken into account, although the difficulty of doing so is apparent' ('The Law of Weaponry'), though see also Françoise Hampson for the view that there was in 1991 no legal requirement to take into account the cumulative effect of attacks on similar types of target, ('Means and methods of warfare in the conflict in the Gulf', 97-100).

¹⁹³ Articles 51.5(b) and 57.2(a)(iii). This applies, for states parties, to attacks against targets on land. A similar provision is proposed in the (non-binding) *San Remo Manual* to govern attacks against targets on sea (see para.46).

¹⁹⁴ The requirement for use of force during hostilities to be no more than that needed for the successful accomplishment of a task, as opposed to the obligation not to use disproportionate force in responding to an act of aggression.

¹⁹⁵ Notwithstanding the difficulty of the rule, it seems unlikely that many states would go so far as Russia, which recently informed the ICRC with disarming frankness: 'We are sorry to say that we do not know of any occurrence when a party to a conflict complained of the non-respect of the principle of proportionality by the parties. In all probability, this principle is in reality opposed by a practice based on the assumption that the aim to gain military superiority over the enemy can justify any means of warfare, which, in fact, often means the violation of the principle of proportionality. In this connection, we can point out that the large-scale military operations of the federal troops in Chechnya were at the beginning contrary to the principle of proportionality. In the armed forces of the CIS countries there are neither provisions defining the terms of the respect of the principle of proportionality nor provisions envisaging prosecution of individuals who violate this principle' (Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol II), 314-315).

that the assessment would need to be made on the basis of information actually available to the military commander at the time of his decision.¹⁹⁶

According to the ICRC Commentary on Additional Protocol I, anticipated collateral damage must be balanced against the anticipated, and relatively proximate, military advantage of an attack, not against hoped-for advantages likely to materialize only in the long-term.¹⁹⁷ This clearly makes sense: little would remain of the international law of armed conflict if the proportionality articles could be interpreted as permitting the ends of a campaign to be regarded as justifying the means used to attain them.

A US Department of Defense report on the 1991 Persian Gulf war nevertheless declared: ‘the principle of proportionality...prohibits military action in which the negative effects (such as collateral civilian casualties) clearly outweigh the military gain. This balancing may be done on a target-by-target basis...*but also may be weighed in overall terms against campaign objectives*’. (Emphasis added).¹⁹⁸ The report explained that as far as the United States was concerned, ‘military advantage’ for the purposes of proportionality did not need to be restricted to ‘tactical gains’ but could be ‘linked to the full context of a war strategy, in this instance the execution of the Coalition war plan for the liberation of Kuwait’.¹⁹⁹ The same approach is reflected in the US military manual *Operational Law 2005* which states in the section on the proportionality principle ‘“Military advantage” is not restricted to tactical gains, but is linked to the full context of [the] war strategy’.²⁰⁰

This approach is problematic. It seems to confuse the *jus in bello* proportionality principle, requiring that the collateral damage anticipated from an attack should not be disproportionate in relation to the military advantage anticipated from that attack, with the *jus ad bellum* proportionality principle, according to which a state should not resort to disproportionate military force in

¹⁹⁶ Austria, Belgium, Italy, the Netherlands, New Zealand and the UK.

¹⁹⁷ See *ICRC Commentary (Additional Protocols)*, para.2209. See also para.2218.

¹⁹⁸ See *Final Report to Congress*, 611.

¹⁹⁹ *Ibid.*, 613.

²⁰⁰ *Operational Law 2005*, 14-15.

seeking to achieve its aims. As a statement of the *jus ad bellum* proportionality principle, the declaration in the DoD report cited above is valid: before military operations against Iraq in 1991 were launched by the Coalition, a calculation needed to be made of whether or not the negative side-effects of such a campaign (such as collateral damage) could reasonably be seen as proportionate to the benefits of success (the liberation of Kuwait from Iraqi occupation). However, as a statement of the *jus in bello* principle, it seems doubtfully correct. The more orthodox approach to the *jus in bello* proportionality principle is set out in a 1998 US Air Force manual which states:

The principle of proportionality must always be followed, which prohibits an attack when the expected collateral civilian casualties or damage to civilian objects is excessive or disproportionate to the military advantage anticipated *by the attack*.²⁰¹ (Emphasis added).

While there may be disagreement about when ‘an attack’ can be said to start and finish in space and time for the purposes of the *jus in bello* proportionality principle, there can be no escaping the fact that ‘attack’ does not mean ‘campaign’ or ‘war’.²⁰²

The same apparent confusion between the *jus in bello* proportionality principle and the *jus ad bellum* proportionality principle features in a document submitted to the Prosecutor for the International Criminal Tribunal for the former Yugoslavia (ICTY) by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia.²⁰³ In this document, a recent ICTY Tribunal judgement pointing to the need to take into consideration the long-term and overall effects of collateral damage for the civilian population when making proportionality assessments was used to support the otherwise unsupported (and highly questionable) assertion that the overall aims of a

²⁰¹ AFP 14-210, para.A4.3.

²⁰² See Dinstein *The Conduct of Hostilities*, 87, and Hampson, ‘Means and methods of warfare in the conflict in the Gulf’.

²⁰³ *Final Report to the Prosecutor [of the International Criminal Tribunal for the Former Yugoslavia (ICTY)] by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (2000).

campaign can be taken into consideration by commanders when making *jus in bello* proportionality assessments.²⁰⁴

The key to a common position on the *jus in bello* proportionality principle may lie in the statements of understanding made by many states on ratification of Additional Protocol I²⁰⁵ to the effect that for the purposes of the proportionality rule, 'attack' is to be understood as referring to the attack as a whole, not to separate parts of it. This makes good sense: without such an interpretation, subsidiary attacks launched as feints to distract attention from the main attack would be outlawed, yet the interpretation does not go so far as to suggest 'attack' can be understood as referring to an entire campaign for the purposes of assessing proportionality. The interpretation seems consistent with the approach in the 1998 USAF manual.

c) *The obligation to call off attacks expected to cause excessive collateral damage*

As far as customary law is concerned, reasonable precautions must be taken by an attacking belligerent to confirm not only that a selected target on land is in fact a legitimate military objective, but also that excessive collateral damage will not be caused if it is attacked.²⁰⁶

²⁰⁴ *Ibid.*, para.78 cites '...the need for an overall assessment of the totality of civilian victims as against the goals of the military campaign'. There is no proper support in the report for this novel interpretation of the *jus in bello* proportionality principle. The Committee appears to arrive at it by relying on para.526 from *Kupreskic (Trial Judgement)* suggesting that the overall impact of cumulative collateral damage may sometimes need to be anticipated. The Committee's decision to qualify as 'progressive' the ordinary meaning of the *Kupreskic* paragraph, while nonetheless citing it as evidence of a need, when making proportionality calculations, to have regard to 'an overall assessment of the totality of civilian victims as against the goals of the military campaign' (para.52) is puzzling. For detailed criticism of the Committee's report, see Paolo Benvenuti 'The ICTY Prosecutor and the review of the NATO bombing campaign against the Federal Republic of Yugoslavia' (2001) and the milder, but still critical, assessment of Michael Bothe in 'The protection of the civilian population and NATO bombing on Yugoslavia: comments on a report to the Prosecutor of the ICTY' (2001), both in *EJIL*.

²⁰⁵ Australia, Canada, Federal Republic of Germany, Italy, New Zealand, the Netherlands and the UK.

²⁰⁶ See e.g. FM 27-10 (Change No.1), para.41. See also Australia's *Defence Force Manual* (1994) which states: 'All reasonable precautions must be taken to avoid injury, loss or damage to civilians and civilian objects and locations. It is therefore important to obtain accurate intelligence before mounting an attack...accordingly, the best possible intelligence is required concerning:

There is no explicit obligation in Additional Protocol I to do everything feasible to verify that an attack on a legitimate target would not cause excessive collateral damage. If an object or location is obviously a legitimate military objective, it is primarily the responsibility of the defending party to protect non-combatants in the vicinity by moving them away.²⁰⁷ Under the Protocol, only if it is *expected* that an attack will cause excessive damage must it be abstained from,²⁰⁸ and only *if it becomes apparent* that a proposed attack would be likely to cause collateral damage disproportionate to the anticipated military advantage must it be called off.²⁰⁹ Thus although in the framework of the Protocol a commander is obliged to take proper care to establish that the object he plans to attack is in fact a military objective,²¹⁰ must take all feasible precautions in his choice of methods and means of attack in order to avoid or minimize collateral damage,²¹¹ must refrain from deciding to launch any attack which he expects to cause disproportionate damage,²¹² and must abort an attack if it comes to his notice that it is in fact likely to cause disproportionate collateral damage,²¹³ the Protocol does not appear to require him to go to special lengths, e.g. by dangerous, behind-the-lines reconnaissance, to check the object to be attacked is not being put to unusual use. France, on ratifying the Protocol in 2001, submitted a formal interpretative statement to the effect that it would understand article 57.2(b) (the obligation to cancel an attack if it becomes apparent that it is likely to cause disproportionate collateral damage) as requiring no more than

-
- a. concentrations of civilians;
 - b. civilians who may be in the vicinity of military objectives;
 - c. the nature of built-up areas such as towns, communities, shelters, etc.;
 - d. the existence and nature of important civilian objects and specifically protected objects; and
 - e. the environment’.

UNGA Resolution 2675 (1970), requiring that ‘in the conduct of military operations...*all necessary precautions* should be taken to avoid injury, loss or damage to civilian populations’ (emphasis added), is a less helpful indicator of the exact degree of care which customary law requires of parties to a conflict in minimizing collateral damage, but is evidence of a widely held view that significant efforts need to be made to ensure attacks on military objectives either avoid collateral damage altogether or at least keep it to a minimum. See also *Kupreskic (Trial Judgement)*, para.524.

²⁰⁷ Additional Protocol I, article 58(a).

²⁰⁸ *Ibid.*, article 57.2(a)(iii).

²⁰⁹ *Ibid.*, article 57.2(b).

²¹⁰ *Ibid.*, article 57.2(a)(i).

²¹¹ *Ibid.*, article 57.2(a)(ii).

²¹² *Ibid.*, article 57.2(a)(iii).

²¹³ *Ibid.*, article 57.2(b).

‘*diligences normales*’ in obtaining the relevant information. The Protocol requires, however, in general terms, that ‘in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects’.²¹⁴ So the possible presence of civilians in the vicinity of a legitimate military objective must be an object of concern to an attacking belligerent bound by Additional Protocol I.

An alternative reading of Additional Protocol I could be that the requirement to ‘do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects...and that it is not prohibited by the provisions of this Protocol to attack them’²¹⁵ (emphasis added) entails a requirement to do everything feasible to ensure an attack would not cause excessive collateral damage. On this interpretation, the Additional Protocol I rule would be considerably more demanding than the customary law rule.

Naval and aerial warfare

Where naval and aerial warfare are concerned, the rules are similar. Additional Protocol I contains a general rule requiring states parties to take ‘all reasonable precautions to avoid losses of civilian lives and damage to civilian objects’ during military operations at sea or in the air,²¹⁶ and the requirement to avoid excessive collateral damage can be considered a customary rule applicable to naval warfare and attacks on airborne objects as well as war on land.²¹⁷ The *San Remo Manual* proposes that those planning, deciding upon or executing an attack at sea should ‘take all feasible measures’ to find out whether objects which are not military objectives are in the vicinity of an area of attack and ‘in the light of the information available...do everything feasible to ensure that attacks are limited to military objectives.’²¹⁸ The *Manual* further proposes, in Additional Protocol I language, that they should ‘take all feasible precautions in the choice of

²¹⁴ *Ibid.*, article 57.1.

²¹⁵ *Ibid.*, article 57.2(a)(i).

²¹⁶ See article 57.4.

²¹⁷ *San Remo Manual* para.46(d). See also *UK Manual 2004*, paras.5.32, 12.26 and 13.32.

²¹⁸ *San Remo Manual* para.46(a) and (b).

methods and means in order to avoid or minimise collateral casualties or damage'.²¹⁹

d) Proportionality in 'military operations other than war'

The obligation to abstain from disproportionate attacks takes on a particular difficulty in MOOTW, where, almost by definition, military personnel are deployed in dangerous situations to which peacetime law, rather than the law of armed conflict, is likely to apply. The proportionality principle in the law of armed conflict assumes the legality of using lethal force against a legitimate target, while requiring that such force should not cause excessive collateral damage; peacetime laws, on the other hand, whether those of the host state, those of the sending state being applied extraterritorially to its forces or those of international human rights law, normally assume that force will be used only for the purposes of keeping law and order, effecting lawful arrest, or self-defence, and that for these purposes no more than minimum force will be used.²²⁰ The idea of a proportionate attack against a legitimate target (other than for the purposes above) has no place in peacetime law.²²¹

Forces deployed in peace support operations, maritime security operations etc. may thus need to be able to operate in both 'conflict' and 'peacetime' mode for their action to remain effective and lawful. One of the difficulties with this is that training and equipment for the one may be poorly compatible with training

²¹⁹ *San Remo Manual* para.46(c).

²²⁰ '...though [the common law] permits the use of force to prevent crimes, to preserve the public peace and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from, the force used is not disproportionate to the injury or mischief which it is intended to prevent'. (Criminal Code Bill Commissioners in report C2345 (1879) (quoted in *Attorney-General for Northern Ireland's Reference no 1 of 1975*, para.126)). See also section 3 of the Criminal Law Act (Northern Ireland) (1967), subsection 1. See also the 1990 *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* provisions 4, 5, 9, 10 and 11.

²²¹ Human rights bodies have occasionally drawn on principles of the law of armed conflict, such as the proportionality principle, in their judgements or reports (eg the Inter-American Commission on Human Rights in the case of *Abella v. Argentina*). However it is questionable whether this approach is appropriate in relation to contexts other than those which can be considered, objectively speaking, as armed conflicts triggering the application of this body of law.

and equipment for the other.²²² Troops deployed in peace support operations have often been trained primarily for fast-moving and aggressive combat. They are often equipped with nothing but a lethal weapon in situations which do not qualify even as internal, let alone international armed conflicts. It can be expected, however, that such forces will at least observe the proportionality principle as enshrined in the international law of armed conflict.²²³

2.3. Human shields and warnings of attack

a) *Human shields and the obligation of defending parties to protect non-combatants*

Use of civilians or prisoners of war to shield military objectives and operations is prohibited under customary and treaty law.²²⁴ Additional Protocol I goes further, requiring parties to a conflict with control over the civilian population, individual civilians and civilian property to endeavour ‘to the maximum extent feasible’ to remove them from the vicinity of military objectives, to protect them from the dangers of military operations and (again ‘to the maximum extent feasible’) to avoid locating military objectives within or near densely populated areas.²²⁵

The latter provisions represent the ideal situation, rather than the settled and widespread practice required for a rule of customary law: unfortunately civilians have often been killed in recent conflicts while within the vicinity or even the

²²² ‘Modern combat training conditions soldiers to act reflexively to stimuli, such as fire commands, enemy contact, or the sudden appearance of a “target” that maximises soldiers’ lethality....’ (Peter Kilner, ‘Military Leaders’ Obligations to Justify Killing in War’ (2002), *Military Review*). Combat training aimed at developing speed of reaction in use of firearms may make it difficult for soldiers trained this way to adapt to policing roles in which reflexive use of lethal force will usually be inappropriate.

²²³ Forces acting under UN auspices may not launch operations ‘that may be expected to cause incidental loss of life among the civilian population or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated’. See 1999 *UN Secretary General’s Bulletin: Observance by United Nations Forces of International Humanitarian Law*, Section 5.5.

²²⁴ See Additional Protocol I, article 51.7, which can be considered a customary rule. See also Geneva Convention III, article 23 and Geneva Convention IV, article 28. Under article 8.2(b) xxiii of the Rome Statute, the use of human shields is designated a war crime.

²²⁵ See Additional Protocol I, article 58.

confines of military objectives. Although civilians must not be deliberately exposed to the dangers of war, there is no evidence for the existence of a customary rule requiring them to be evacuated from the vicinity of anything and everything which could be perceived as a legitimate military objective. Under customary law, the commander of an attacking force must give warning if possible to the local authorities before beginning a bombardment, except in cases of assault.²²⁶ But if such warnings have been given and are disregarded, an attacking force cannot be held to have violated the law if civilians within the confines, or the immediate vicinity, of a legitimate military objective are killed, unless civilian losses are excessive and could reasonably have been predicted to be so,²²⁷ or there was a failure to take feasible precautions in the choice of means and methods of attack to keep the losses to a minimum. To a certain extent, civilians themselves can be seen as having a responsibility to keep clear of obvious military objectives. Customary law does, however, require the relevant authorities to ensure that civilian hospitals, prisoner of war camps and camps for civilian internees, at least, are located a suitable distance from military objectives. Customary law also suggests they should be clearly marked so as to be visible from the air.²²⁸

Though directed primarily at defending parties, the rules above make assumptions about an attacker's conduct. They assume an attacking force will operate so that it can take account of emblems or signs visibly displayed on buildings and will spare objects displaying certain markings from direct attack, unless it is known that the markings are being used abusively. The Additional Protocol I rules assume an attacking force will restrict attacks to objects which could reasonably be anticipated by the defending state to be military targets. Attacking forces need, therefore, to conform to generally accepted views of what constitutes a legitimate military objective (or failing that, to give specific warnings of impending attacks) for the legal obligations of defending forces under Additional Protocol I to be capable of implementation.

²²⁶ Hague Regulations, article 26.

²²⁷ Additional Protocol I, articles 57.2(a)(iii) and 51.5.(b) and 51.8.

²²⁸ Geneva Convention III, article 23; Geneva Convention IV, articles 18 and 83. See also Hague Regulations, article 27.

If an adversary violates the rule against using civilians or other protected persons as human shields, a state party to Additional Protocol I must still respect the principle of proportionality and take the legally required precautions to minimize collateral damage when attacking legitimate military objectives.²²⁹

Under customary and treaty law, responsibility for protection of the most vulnerable members of the civilian population in conflict zones, such as the sick, the infirm and the elderly, is shared between the parties to the conflict, who must endeavour to conclude local agreements for their removal from besieged or encircled areas.²³⁰

b) Warnings

States are responsible under treaty and customary law for ensuring civilians and other protected persons and objects within their jurisdiction are adequately protected from the hazards of war.²³¹ Conversely, treaty and customary law requires that the commander of an attacking force should do what he can to warn the authorities before beginning a bombardment (unless it is an assault or surprise attack), so they can make the necessary protective arrangements.²³² Additional Protocol I requires of states parties that: 'effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.'²³³ There are similar treaty provisions in relation to cultural property.²³⁴

Requirements also exist for warnings to be given in certain specific situations. Customary law requires that if hospitals are being used abusively in support of military operations, warnings must be given and due time allowed for them to be

²²⁹ Additional Protocol I, article 51.8.

²³⁰ Geneva Convention IV, article 17.

²³¹ See e.g. Geneva Convention IV articles 14, 17, 18 and 83. See also Additional Protocol I, article 58.

²³² 'The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities' Hague Regulations, article 26. 'Assault' in this context should be understood as referring to a surprise attack. (See Rogers, *Law on the Battlefield*, 88).

²³³ Additional Protocol I, article 57.2(c).

²³⁴ See Cultural Convention, article 11.1 and Second Protocol to the Cultural Convention articles 6(d) and 13.2 (c) (ii).

heeded before protection can be deemed to have been lost.²³⁵ There is no ‘unless circumstances do not permit’ or ‘where possible’ qualification to this obligation, though the rule is understood by one state at least as not undermining the right of immediate self-defence without warning if fire is being received from a hospital.²³⁶ Where civil defence installations and civilian shelters are concerned, treaty provisions require, similarly, that due warning should be given and remain unheeded before such objects may become the object of attack, even if they are being used unlawfully in support of military operations.²³⁷ Customary law requires that warning be given in relation to mines laid in international waters, whether in peacetime or wartime.²³⁸

What constitutes effective warning will vary according to circumstances and will be considered in Chapter 4. The phrase ‘unless circumstances do not permit’ is understood as an expression of the customary rule that warnings are not required in cases where surprise is of the essence.²³⁹ In such cases the normal rules on proportionality and discrimination in attack still of course apply.

2.4. Conclusions

Modern international law requires considerably more of those planning and executing attacks than that they should abstain from purposefully targeting non-combatants or civilian objects. This is particularly so for states party to Additional Protocol I, but the rules of customary law are only marginally less demanding. The substance of the legal obligation under the international law of armed conflict to take precautions in attack, whether during conflict on land, at

²³⁵ Geneva Convention I, article 21.

²³⁶ The US. (See *Operational Law 2005*, 23).

²³⁷ Additional Protocol I, article 65.

²³⁸ See *Corfu Channel* case (1949), ICJ, 22.

²³⁹ See *ICRC Commentary (Additional Protocols)*, paras.2222-2225. According to the *Handbook of Humanitarian Law* ‘a general preference for leaving the enemy in doubt’ is not sufficient grounds for dispensing with a warning (para.453 and commentary), though see also B. Carnahan ‘Linebacker II and Additional Protocol I: the Convergence of Law and Professionalism’ (1982), *American University Law Review* for a broader interpretation of the phrase ‘unless circumstances do not permit’. See also Rogers, *Law on the Battlefield* (100-101).

sea, or in relation to attacks against airborne objects, can be summarized in the following six basic rules:

- Attacks must be strictly limited to military objectives as defined in Additional Protocol I and to combatants who are not *hors de combat*.
- At least reasonable precautions must be taken to verify that an object is a legitimate military objective before it may be attacked. Where attacks against land-based objects are concerned, states party to Additional Protocol I must do everything feasible to verify they are legitimate military objectives before attacks against them may be launched. To this end, they must have a system in place for gathering the necessary intelligence for verifying the legitimacy of proposed targets.
- When a military objective is to be attacked, all feasible precautions must be taken to choose methods and means of attack which will avoid or at least minimize collateral damage.
- At least reasonable precautions must be taken before attacks are launched on military objectives to check such attacks will not cause disproportionate collateral damage on account of the presence of non-combatants in the vicinity.
- An attack must be called off if it becomes clear it cannot be launched without causing disproportionate collateral damage.
- Whenever possible, effective warnings must be given before attacks liable to affect the civilian population are launched.

Although a high standard of care is required of attacking forces in terms of minimizing the risks of collateral damage, the rules for attacking forces are framed in such a way that they cannot effectively protect non-combatants unless non-combatants are kept a suitable distance from obvious military objectives, heed specific warnings given by belligerents, and ensure that their non-combatant

status is clearly visible to attacking forces. Failure on the part of non-combatants to take these precautions does not legitimize deliberate attacks on them. But it will increase the risk of their being killed or injured by mistake in circumstances for which the attacking forces cannot reasonably be held responsible. This interdependence in the law of armed conflict between rules applicable to attackers and those applicable to defenders has practical implications for civilian leaders, who have an important role to play in ensuring non-combatants do not harbour unrealistic expectations of the degree of precision with which attacks can be carried out, and proper provision is made for the protection of the civilian population.

Since the 1980s, the gap between customary law and the treaty rules on precautions in attack contained in Additional Protocol I appears to have narrowed. Part of the reason has been the willingness of certain belligerents not party to Additional Protocol I to observe many of the rules enshrined therein as a matter of good practice, if not of binding law.²⁴⁰ Part of the reason has been the manner in which states party to Additional Protocol I have chosen to interpret their obligations. Reservations, or ‘statements of understanding’, made in relation to Additional Protocol I rules on precautions in attack by certain states, generally members of NATO, have had the effect of making the provisions of that treaty less demanding than they might appear on their face. For those who regard the Protocol as a vital tool for enhancing the protection of civilians, this ‘watering down’ of its key provisions might seem regrettable. But such disappointment is probably unwarranted.²⁴¹ For rules of international law on precautions in attack to protect non-combatants effectively, they need to be as widely accepted as possible, particularly by the major military powers: putative rules recognized only

²⁴⁰ See e.g. the US practice of reviewing new weapons systems for lawfulness set out in *Operational Law 2005*, 18-20 and US Air Force Instruction 51-402 (Weapons Review) of 13.05.94.

²⁴¹ Except in the case of the troubling implied reservations made by France and the UK in respect of the provision prohibiting reprisals against civilians. No state party objected formally to the UK’s convoluted statement ‘m’ (see Roberts and Guelff, *Documents on the Laws of War*, 511), nor to the similar French statement made in 2001. This fact might appear to weaken the protective force of article 51.6 of Additional Protocol I at least as much as the UK and French statements themselves. A US commentator has however argued cogently that reservations to article 51.6 would be incompatible with article 60.5 of the Vienna Convention on the Law of Treaties. (See Parks, ‘Air War and the Law of War’. See also Aust, *Modern Treaty Law*, 238). It is possible that other states parties may have refrained from objecting to the British and French statements on the grounds that they cannot be construed as valid reservations to article 51.6.

by a small number of peaceable nations are of little or no protective value. The Additional Protocol I rules on precautions in attack as qualified by those reservations and statements of understanding which are valid under international law have the advantage over the Additional Protocol I rules *pur et dur* of being very close indeed to commonly recognized (and universally applicable) principles of customary international law.

Lest it be objected that the rules on precautions in attack as summarized above are unrealistically demanding in the context of 'asymmetrical warfare' between regular and irregular combatants, it is worth considering who stands to gain most from a more accommodating approach. The US military writer who suggested that the scope of legitimate military targets should be extended to include 'bank accounts, financial institutions, shops, entertainment sites and government buildings',²⁴² may not have reflected sufficiently on the joy that such a relaxation of the now commonly accepted rules on targeting would bring to the hearts of members of armed groups at the more ragged end of the spectrum. A restrictive approach to the question of what is a legitimate military objective and what precautions need to be taken to minimize collateral damage creates greater problems for the ill-resourced and poorly disciplined fighting force than it does for the technologically advanced belligerent with highly trained troops. Thus not only do the new rules afford a high degree of legal protection for non-combatants; they also have the potential to de-legitimize warfare conducted by belligerents (including parties to internal conflicts) unable or unwilling to train and equip their forces for effective compliance with the high standards they set. In this respect, Additional Protocol I, far from providing an international legal umbrella for any armed opposition group or terrorist organization,²⁴³ can be seen as having precisely the reverse effect.

There is nevertheless a danger in trying to make too much of the argument that the dictates of humanity and those of military or political expediency invariably

²⁴² See Meyer, 'Tearing Down the Façade'.

²⁴³ One of the reasons given for the US decision not to ratify the Protocol. (See letter of 29.01.87 from US President Ronald Reagan to the US Senate, reprinted in *AJIL* (1987), 990-912).

coincide. Sometimes they do not.²⁴⁴ Modern international law of armed conflict does not consist uniquely of rules reflecting a happy coincidence of good military practice and humanitarian spirit. Sometimes, the rules require that what makes at least short term military sense will need to be disregarded in favour of common humanity.²⁴⁵ Expectations that this high-minded feature of the new rules would lead to them being jettisoned in actual combat have to some extent been belied by evidence of the conduct of at least some belligerents and individual combatants in conflicts between 1980 and 2005, as will be seen in Chapter 4, which follows after a short chapter on the relationship between target selection and strategic aims.

²⁴⁴ See e.g. Robert Graves, *Goodbye to All That* (London, 1960), 111-112, on practice during the First World War of killing wounded enemy soldiers in order to be able to strip them quickly and silently of badges indicating the unit to which they belonged - considered vital for intelligence purposes, but a war crime under modern international law.

²⁴⁵ See for instance Additional Protocol I, article 41.3, requiring that prisoners captured in unusual circumstances should be set free. As Maresca and Maslen put it, '...the urgent need to improve the protection of the civilian population led...States, in the 1977 Protocols, to go further and agree to take humanitarian factors into account even at the sacrifice of some military advantage'. (*The Banning of Anti-Personnel Landmines*, 95).

3. TARGET SELECTION AND STRATEGIC AIMS

...those skilled in war subdue the enemy's army without battle. They capture the enemy's cities without assaulting them and overthrow his state without protracted operations. Their aim is to take all under heaven intact by strategic considerations.

Sun Tzu, The Art of War, Chapter 3.

Target selection in any given campaign is determined by overall strategic aims. At least four broad categories of campaign aim can be identified:

- i) interdiction;
- ii) occupation/liberation;
- iii) coercion;
- iv) defence of territory.

Often the aims are combined, for instance when a campaign aims to liberate territory and to deny enemy access to it for reinforcement and supply purposes, or to put coercive pressure on an enemy by partially occupying his territory. But clarity about the primary strategic aim is normally essential for effective target selection.²⁴⁶

Target selection can be an elaborate process, involving not only military commanders and their staff, but also civilian political leaders and governmental legal advisers.²⁴⁷ The likelihood of collateral damage is normally one element taken into account during target selection, even by the most disreputable belligerents, but is seldom the overriding consideration. Different levels of priority are accorded to the avoidance of collateral damage in different campaigns,

²⁴⁶ See *Lessons of Kosovo* (Vol. I) para.70, on the difficulties caused for target selection in the 1999 Kosovo war by confusion about the purpose of the NATO intervention.

²⁴⁷ For description of British procedures for target approval during the Kosovo war, see Tom Boyle, 'Proportionality in Decision Making and Combat Actions' in Hector and Jellema, *Protecting Civilians*. High-level approval in Washington was required for many US targets (Wesley Clark, *Waging Modern War* (Oxford, 2001), 203 and 226-228). It has been observed that the extensive consultation which took place within NATO during the Kosovo war in relation to selection of targets for air strikes would not have been practicable in a land campaign (see comments by General Streik in Hector and Jellema, *Protecting Civilians*, 112-113).

and at different stages of the same campaign.²⁴⁸ And in some campaigns, few key targets raise major issues of collateral damage, given their nature and location, while in others, many, or even most, do so. A certain degree of care for the safety of non-combatants can reasonably be expected whatever the nature of a campaign, but the extent to which anticipated collateral damage of an attack can be considered 'excessive' in relation to anticipated military advantage depends greatly on the military aim of the attack. The first stage in examining what can reasonably be expected of belligerents in terms of taking precautions in attack is thus to consider the basic logic underlying the different categories of campaign.

3.1 Interdiction

Interdiction, in military terms, means the denial to an enemy of the use of a particular system (such as a communications network), territory (including airspace and maritime areas) or even a single object (such as a nuclear reactor). A campaign of interdiction is often the first stage of a military operation, even if it subsequently develops into a campaign of occupation/liberation or of coercion. Targets selected for interdiction purposes tend to be uncontroversial: air defence systems, military communication networks, military convoys, contraband (at sea), tactically significant bridges and logistical choke points such as road junctions through which enemy military traffic needs to pass.²⁴⁹

A problem with interdiction campaigns where collateral damage is concerned is that for interdiction to be effective, selected targets will often need to be rendered totally inoperable, not just damaged, and the military advantage of an

²⁴⁸ Concern to avoid civilian casualties may diminish as a conflict progresses, as occurred in the First World War when Germany decided in 1916 to resort to unrestricted submarine warfare as a result of stalemate in the land war (Robert Massie, *Castles of Steel* (London, 2004), 703-704), and in the Second World War, when the Allies decided in January 1943 on the area bombing of Germany, likewise as a perceived means of breaking the deadlock (Denis Richards, *RAF Bomber Command in the Second World War: the Hardest Victory* (London, 1994), 137-143). See also Human Rights Watch, *Off Target: the Conduct of the War and Civilian Casualties in Iraq* (2003), 59.

²⁴⁹ During the initial phase of the Kosovo war, when the campaign aimed to deny Serb forces the possibility of persecuting Albanians in Kosovo, targets selected by NATO were 'radar sites, air defense sector headquarters, electronic warfare and radio intercept sites, missiles storage facilities, airfields, microwave relays, regional army and police headquarters'. (Clark, *Waging Modern War*, 208-209).

attack may be lost entirely if all elements of a system targeted cannot be destroyed almost simultaneously.²⁵⁰ Thus in an interdiction campaign, cancelling an attack on one part of a system at the last moment, on account of the unexpected presence of civilians, or attacking an objective with less than overwhelming force, may vitiate the entire operation. In these circumstances, collateral damage from individual attacks will sometimes be heavy, without necessarily being unlawful.

3.2 Occupation and liberation of territory

When at least one aim of a campaign is to secure control of territory, targets of choice are likely to include troop concentrations and assets such as tanks and artillery pieces, particularly those holding or defending locations such as beachheads, heights or passes. A campaign of interdiction will sometimes continue in parallel, aimed at preventing reinforcements from reaching the front and at destroying military communication and surveillance systems. The military leadership may be a specific target if it is thought that key leaders cannot easily be replaced by others equally committed to continuing the conflict. None of these targets is controversial legally, with the exception of military leadership in the form of civilian Commanders-in-Chief, civilian ministers of defence with some degree of command responsibility, and purely ceremonial military commanders.²⁵¹ There may even be a particular incentive during a campaign of liberation or occupation to minimize collateral damage to civilian and dual-use objects, in order to reduce the cost and difficulties of post-war reconstruction, which often has to be borne largely by the victorious party.²⁵²

²⁵⁰ As for instance when on 10.06.82 an Israeli air strike put the entire Syrian anti-aircraft system out of action within an hour, allowing airspace dominance to be exploited at a time when it was totally unexpected (see Edward Luttwak, *Strategy: the Logic of War and Peace* (London, 2001), 202).

²⁵¹ W. Hays Parks suggests that it is comity, rather than law, that protects civilian Commanders-in-Chief from being targeted ('Executive Order 12333 and Assassination' (1989), *The Army Lawyer*), though see also Rogers, *Law on the Battlefield*, 46, implying that attacks against purely ceremonial Commanders-in-Chief would not be lawful.

²⁵² According to the in-theatre national contingent commander of British forces in Iraq in 2003, 'In this operation we wanted very much to be using minimum force so as to leave the infrastructure of Iraq and also the perception of the people of Iraq intact' (House of Commons Defence Committee, *Lessons of Iraq*, (London, 2003), (hereinafter 'HCDC, *Lessons of Iraq*') para.96). There may be tactical as well as political reasons for wanting to minimize destruction. Buildings which have

Nonetheless, collateral damage can be devastating during campaigns for the occupation and liberation of territory, particularly if towns become the object or the scene of military operations. Nor is there any guarantee that targets selected will be limited to the uncontroversial ones mentioned above where the object of a campaign is occupation or liberation.

3.3. Coercion

In campaigns in which the object is to coerce an opponent to behave (or to refrain from behaving) in a certain way, the requirements of law and of military logic may seem to stand in direct opposition. Sometimes this has led to the law simply being disregarded, as for instance when in 1998 the Liberation Tigers of Tamil Eelam (LTTE) attacked the Buddhist Temple of the Tooth in Kandy, Sri Lanka,²⁵³ or when armed militants took several hundred schoolchildren hostage in the town of Beslan, North Ossetia (Russia), in 2004.²⁵⁴ Sometimes, those directing military operations have been more subtle, launching attacks on questionably legitimate targets, or failing to take proper care to ensure that only genuine military objectives are struck and subsequently claiming that civilians or civilian objects were hit by accident, or by rogue elements not under their direct control, or acting outside their orders.

The frequency with which the letter and spirit of the law has been violated in coercive wars does not mean a coercive war cannot be fought lawfully and effectively. The modern definition of a military objective is flexible enough for belligerents to be able to select, from among objects meeting the widely accepted definition of a military objective, targets which, if struck, will put pressure on an

been reduced to rubble are not only easier to use for defensive purposes, but may also make it impossible to use weapons guidance systems relying on image recognition.

²⁵³ The attack was a *prima facie* violation of the customary law prohibition on wilfully attacking cultural property. But the bomb damage to the colourful 1940s interior decoration of the Temple had the unexpected effect of exposing the vastly more culturally significant 18th century murals hidden beneath, to the astonishment and delight of Sri Lankan scholars. (See 'Attack on Sri Lanka's sacred site', BBC Online, 25.01.98 and the later report, 'Rebel attack unveils historic art', BBC Online, 07.02.01)).

²⁵⁴ See 'What happened in Beslan?', BBC Online, 17.09.04

enemy to concede.²⁵⁵ Furthermore, the total destruction of a selected target or targets is often seen as unnecessary in campaigns of coercion, in contrast to campaigns of interdiction, occupation/liberation or self-defence, in which attacks will seldom make sense unless their target is destroyed or rendered useless. An Israeli attack on the electricity infrastructure of Beirut on 14 April 1996, after which the commander of the Israeli Air Force warned that the attack had been intended as ‘just a hint of what we can do’, is one example of less than overwhelming military force being used coercively in order to send a message.²⁵⁶ Such use of military power may provoke criticism, particularly if the object struck is only a questionably legitimate target. But the symbolic use of military power for coercive purposes may have less severe consequences for non-combatants than attacks aimed at the complete destruction of military objectives, particularly if these are dual-use objects (i.e. serve both the military effort and the civilian population), or if the attack goes off target.

The real difficulty is how to predict what objects and how many will need to be struck before an enemy will give way.²⁵⁷ This is as much a task for civilian analysts as for military commanders.²⁵⁸ Failure to make this prediction accurately can put a belligerent in the invidious position of having to choose between continuing the effort to coerce the enemy by selecting targets which are increasingly controversial from the legal and political perspective, thus risking loss of support both at home and abroad; or in effect giving up.²⁵⁹ There is thus a danger that if and when a coercive campaign fails to make the desired impact

²⁵⁵ See e.g. AFP 14-210, in which those selecting targets for attack are encouraged to consider ‘does the target contribute to the adversary’s capability *and* will to wage war?’ (Emphasis added), (para.5.3).

²⁵⁶ Human Rights Watch, *Israel/Lebanon* (1997), 6.

²⁵⁷ See Clark, *Waging Modern War*, 221. See also *Lessons of Kosovo* (Vol. I), paras.71-72, 100.

²⁵⁸ ‘[T]o defeat an enemy of any substance by a finite number of high-precision attacks, the inner workings of its civil and military institutions must be intimately understood – and that requires cultural insight as much as factual intelligence information’, (Luttwak, *Strategy*, 200).

²⁵⁹ During the Kosovo war, NATO began to run out of what were considered suitable targets from the political, as well as the military perspective at an early stage of the campaign and a split soon developed between those arguing for attacks against more politically (and legally) sensitive targets, such as television stations and presidential residences, and those arguing for a continued campaign against military and paramilitary forces in Kosovo itself. After only ten days, many of the targets of value which were sufficiently isolated for the risks of collateral damage to be relatively low had already been struck, leading General Clark to conclude that if the campaign were to be intensified, the risks of increased numbers of unintended civilian casualties would have to be accepted. (Clark, *Waging Modern War*, 217-218 and 238-241).

through initial attacks on conventional military objectives located well away from population centres, collateral damage may begin to rise exponentially as other targets are selected in an effort to sustain, or increase, the pressure.²⁶⁰

3.4. Defensive target selection

Where the defence of territory or of assets such as warships or embassies is concerned, the speed at which attacking aircraft, missiles and even vehicles or vessels may travel means there may be little time to establish that an approaching object is hostile if effective action in self-defence is to be taken. If an enemy's preparations for attack are detected, a defending belligerent can take measures of anticipatory self-defence when attack is imminent; but pre-emptive strikes, aimed at destroying or degrading the military assets of a potential enemy before an armed attack is actually imminent, are generally regarded as prohibited under international law.²⁶¹ Thus lawful and effective target selection for the sole purpose of defence depends largely on good intelligence and surveillance, extremely good target verification procedures and very rapid speed of reaction. It also requires a careful balancing of the risks, on the one hand, of taking defensive action against an object which then proves to have been non-military, against the risks, on the other, of not taking defensive action against an object which then launches an attack.

²⁶⁰ The final stage of the NATO campaign against the FRY was a coercion campaign, which was considered more effective in terms of achieving NATO's overall war aims than the earlier interdiction phase, (see e.g. *Lessons of Kosovo* (Vol. I), para.123) but this was at some cost to perceptions of legitimacy where target selection was concerned.

²⁶¹ See e.g. UNSCR 487 (1981), in which the UN Security Council condemned Israel's attack against the Osirak nuclear reactor in Iraq in 1981 as having been 'in clear violation of the Charter of the United Nations and the norms of international conduct'. See also Yoram Dinstein, *War, Aggression and Self-Defence* (4th Edition) (Cambridge, 2005), 182-187, and Christine Gray, *International Law and the Use of Force* (Oxford, 2000), 111-115.

4. IMPLEMENTING THE RULES: GOOD PRACTICE

*'How shall I learn about the law of arms?' asks the pursuivant. 'I tell you', says his master, 'that you will find it in a book called 'The Tree of Battles' and for this reason you must get a clerk's learning; and you should also follow the wars, for there you will hear of the judgements that are delivered from time to time which are not all mentioned in 'The Tree of Battles'.*²⁶²

Between 1980 and 2005, the number of states party to Additional Protocol I grew from three to 163. In parallel, the world's pre-eminent military power of the period, the United States, while unwilling to be bound by this treaty, nevertheless developed weaponry and surveillance systems allowing attacks to be launched from long distances with an unprecedented degree of precision and for force to be applied in a way that greatly reduced the risks of damage to the surrounding area of the target.²⁶³ Many of the new systems relied on global positioning system (GPS) technology, laser guidance, computer networking or some combination of the three, possibly including older, radar-based technology as well. 'Non-lethal' weapons, designed to repel or incapacitate temporarily rather than kill, and non-explosive weapons, designed to put 'dual-use' military objectives such as power stations temporarily out of action rather than destroy them, were also developed and deployed. Other states too, though to a lesser extent, acquired and deployed precision-guided weaponry and equipment for long-range target identification.

During this period, the new rules and technology were put to the test in several international armed conflicts (often involving NATO member states), as well as numerous peace support and maritime security operations in which military servicemen and women seemed at least as likely to lose their lives as in conventional armed conflict. There is at the time of writing enough material in the public domain to allow a tentative assessment of the extent to which, in the

²⁶² Quoted in Maurice Keen, *The Laws of War in the Late Middle Ages* (Chatham, 1965), 21, citing a fifteenth-century heraldic treatise.

²⁶³ As Adam Roberts observes, the US, although not party to several treaties relating to the conduct of hostilities, 'takes at least some of these accords more seriously than some States that are parties'. ('The role of humanitarian issues in international politics in the 1990s' (1999), *IRRC*).

heat of battle and the dangerous confusion of military operations other than war, the new rules and technology can be said to have proved their worth.

This chapter looks at good practice adopted between 1980 and 2005 in relation to implementation of the rules on precautions in attack. It also looks at where things have gone wrong. The review does not pretend to be comprehensive. But by drawing on examples of where effective precautions in attack appear to have been taken (or not) in recent conflicts, particularly those in which states party to Additional Protocol I have participated or in which the new technology has been used, it aims to point to what can reasonably be expected of modern belligerents in various circumstances, and to mark up some of the lessons that have been learned.

4.1. The obligation to verify that objects to be attacked are military objectives

a) Preliminary remarks

Technological developments towards the end of the twentieth century, particularly in relation to the use of satellites for locating potential targets and guiding weapons towards them, increasingly enabled belligerents to strike targets accurately from great distances, given the correct geographical co-ordinates.²⁶⁴ But the development of weaponry capable of hitting targets with precision from long range was not always matched by the development of surveillance systems able to provide detailed imagery of potential targets and their surroundings by remote means. Technological advances meant that sometimes information on a prospective target, including photographs obtained by unmanned aerial vehicles (UAVs) and geographical co-ordinates obtained from satellites, could be assembled so as to give combatants a very clear picture in advance of what a potential target looked like, at least from the outside, and where exactly it was

²⁶⁴ See Adam Roberts, 'The Laws of War and the Gulf Conflict' (1990), *Oxford International Review*, 52.

located.²⁶⁵ But remote surveillance technology was seldom if ever able to reveal what or who was inside a particular building. Nor was it able to provide detailed imagery of potential targets in bad weather.

Some of the worst targeting mistakes made between 1980 and 2005 stemmed from unwarranted inferences based on limited evidence being made about the nature of potential targets. After the mistaken Iraqi attack on the USS *Stark* in the Persian Gulf in May 1987, the US House Armed Services Committee criticized ‘the Iraqi policy of firing at targets that appear on radar without first checking them visually’, observing that ‘the surprise is not that an Iraqi missile fired at an unintended target, but that [an Iraqi missile] did not fire at an unintended target before this’.²⁶⁶ Conversely, mistakes were sometimes avoided when rudimentary information about a potential target, for instance radar-generated imagery, was treated sceptically.

b) *Forward observers and human reconnaissance.*

The traditional means of verifying and locating military objectives before they are attacked has been the use of forward observers or other forms of human reconnaissance, land-based or airborne. This allows a high degree of confidence about the nature of a potential target to be obtained, but often at the price of exposing observers to considerable danger. Good vision-enhancing equipment can to some extent reduce the dangers of forward observation while increasing its effectiveness.

Forward observers were regularly used by both US and British forces in Afghanistan and Iraq in 2001-2003 to direct air and (in the case of Iraq) artillery

²⁶⁵ For instance the ‘basic target graphic’ used by the US Air Force and described in AFP 14-210, para.12.3.3.2.

²⁶⁶ *House Committee on Armed Services, Report on the Staff Investigation into the Iraqi Attack on the USS Stark, 14 June 1987* (text in de Guttery and Ronzitti, *The Iran-Iraq War*, 152ff). See also Sandy Woodward *One Hundred Days* (London, 1992), 209-210 for examples of problems generated by assumptions being made on the basis of radar imagery as the British naval task force made its way to the Falkland Islands in 1982.

strikes.²⁶⁷ Military aircraft were equipped with vision-enhancing equipment to help aircrew confirm the legitimacy of a target before opening fire.²⁶⁸ Traditional 'eyes on' reconnaissance was combined to good effect with modern technology in Afghanistan by the use of special forces on the ground, equipped with GPS and laser designators, who were able to observe a potential target, then call in appropriate precision attacks. In Iraq in 2003, head-mounted night vision devices provided to 'some soldiers', at least, were said to have improved the ability of British troops to operate effectively in urban environments at night, though perhaps tellingly, this was said to be as a result of 'shared' situational awareness.²⁶⁹

An egregious example of an attack in which civilian casualties appear to have been a direct result of failure to observe a target before attacking it occurred in eastern Serbia on 12 April 1999, when a NATO air strike hit the Grdelica Gorge Bridge as a passenger train was crossing it, killing at least ten people. The NATO Supreme Allied Commander (Europe) explained subsequently that the pilot 'launched his missile from his aircraft that was many miles away, he was not able to put his eyes on the bridge, it was a remotely directed attack.'²⁷⁰ Later, in the build-up towards military operations in Iraq in 2003, a spokesman for the US Department of Defense remarked that in situations where civilians may be present

²⁶⁷ See Human Rights Watch, *Off Target*, 95 and 100. See also US DoD News Briefing, 05.12.01. For description of the use of land-based observers during the Afghan campaign, see Anthony H. Cordesman, *The Ongoing Lessons of Afghanistan* (Washington, 2004), 17 and 36-38 and also Alice Hills, *Future War in Cities: Rethinking a Liberal Dilemma* (London, 2004), 143-144 and 149. An important US innovation in Iraq in 2003 was the use of mixed-service 'Anglico' teams of ground-based forward observers, with the ability to identify targets for either tactical or strategic attack and to call on the full range of indirect fire available to the US-led coalition (HCDC, *Lessons of Iraq*, para.91).

²⁶⁸ After the 2003 Iraq war, the British MoD nevertheless observed, 'The campaign...showed that coalition aircraft needed to be able to identify and target mobile, camouflaged and underground assets and facilities and to achieve discrimination in urban areas. This requires improvements in data transfer, tactical reconnaissance and high definition imagery systems to deliver shorter sensor to shooter times for time-sensitive and 'find and destroy' missions.' (MoD, *Operations in Iraq: First Reflections*, (London, 2003) (hereinafter 'MoD, *First Reflections*'), Chapter 3). HCDC, *Lessons of Iraq*, in plainer language, highlighted a need for British military aircraft to have better equipment for identifying small targets from medium to high altitude (para.100).

²⁶⁹ See MoD, *Operations in Iraq: Lessons for the Future* (London, 2003), (hereinafter 'MoD, *Lessons for the Future*'), 23.

²⁷⁰ *ICTY Committee Report (NATO)*, para.59. This explanation can account for the launching of the first missile. Facing the greater challenge of accounting for the pilot's decision to launch a second missile at the bridge after he had seen the train, General Clark explained that the pilot believed that he had to destroy the bridge and could not see exactly where the train was because of the smoke from the first strike.

in or around military objectives (for instance, if placed there as human shields) 'it requires that we work very carefully with the intelligence community to determine what that situation might be at a particular location'. The spokesman implicitly acknowledged, however, that aircrew using weapons with autonomous guidance systems did not always directly observe their targets before launching weapons, relying instead on civilians having heeded warnings to remain clear of military facilities.²⁷¹

When fourteen civilians were killed in July 2002 during an Israeli attack on a building in which a leading Hamas militant was present, Israel claimed to have been unaware of the presence of the civilians in the building. The attack was criticized as 'heavy-handed' by US President George W. Bush and was condemned by the European Union's foreign policy spokesman, a spokesman for the UN Secretary General, and by the British Foreign and Commonwealth Office.²⁷² Nonetheless, similar mistakes resulting from failure to reconnoitre targets adequately before striking them were apparently made by US forces in Afghanistan between 2001 and 2003. A US air strike on 29 December 2001 reportedly struck five buildings in the village of Niazi Qalaye in Paktia province, two of which were ammunition dumps but three of which were ordinary civilian houses, killing between 11 and 120 villagers. And on 6 December 2003, nine children and one man, said to have been a civilian, were killed in the village of Hutala in an air strike intended for a Taleban official, whom villagers told a western journalist had left ten days previously.²⁷³

Lack of adequate human reconnaissance at ground level appears to have been a contributing factor to two attacks by the US Air Force on wedding parties, one in Dehrawad, Afghanistan (Urazgan province) in July 2002, the other in Makr al-Deeb in Iraq in May 2004, after celebratory gunfire was mistaken for hostile fire

²⁷¹ See US DoD 'Background Briefing on Targeting' (press briefing, 05.03.03). The British MoD report on the Iraq war, by contrast, observed that 'GPS information on mobile targets provided by land forces was sometimes quickly out of date, *underlining the need for pilots to reconfirm mobile targets by sight* before committing to an attack' (Emphasis added). (MoD, *Lessons for the Future*, 30).

²⁷² See *Ha'aretz*, 25.07.02.

²⁷³ See 'Pressure grows to stop Afghan bombing', BBC News Online, 03.01.02 and 'DNA tests hold key to Afghan raid', BBC News Online, 08.12.03. See also Human Rights Watch, *Off Target: the Conduct of the War and Civilian Casualties in Iraq* (2003).

directed at aircraft.²⁷⁴ An additional contributing factor to the errors may have been a willingness to allow aircrew discretion to identify and engage targets in designated areas, rather than limiting them to attacks on specific, assigned targets known to be military objectives, and action in self-defence.²⁷⁵ The celebratory fire incidents also raise the question of the degree to which civilians themselves can reasonably be expected to take responsibility for their own safety and to refrain from conduct likely to lead to their being mistaken for enemy combatants.

c) Unmanned aerial vehicles

Information for targeting purposes provided by human reconnaissance is not only often dangerous to obtain and to transmit, but can be unreliable, for instance if provided by people unaware of the relevant facts, as occurred during the 1999 Kosovo war, when reports given to NATO by the Kosovo Liberation Army (KLA) about which villages were no longer inhabited by civilians proved inaccurate,²⁷⁶ or by people with a personal motive for wanting a particular object to be attacked, as seems to have occurred on occasions in Afghanistan and Iraq.²⁷⁷

Unmanned aerial vehicles (UAVs) can bypass these problems to some extent. UAVs were widely used since the beginning of the 1990s, when they first came into service, and provided extremely detailed imagery, which, by the end of the 1990s, could be relayed to distant locations almost instantaneously. During the 1999 Kosovo war, UAVs gave NATO the ability to obtain detailed information in near-real time about potential targets without putting its military personnel at risk.

²⁷⁴ See 'US to probe Afghan bombing "blunder"', BBC News Online, 02.07.02 and "'Wedding video' clouds US denials', BBC News Online, 24.05.04. See also US DoD News Briefing, 08.07.02.

²⁷⁵ US aircrew operating over Afghanistan in 2001-2002 normally included a forward air controller (FAC). Any object positively identified by the FAC as a military target in a predetermined target category and within an 'engagement zone' could be fired on without further authority being required (US DoD News Briefing, 17.10.01). For details of US and Saudi practice of attacking 'targets of opportunity' during the 1991 Gulf war, see Greenpeace International, *On Impact*, 31.

²⁷⁶ Clark, *Waging Modern War*, 277.

²⁷⁷ After fourteen civilians were killed by an air strike on a house in Mosul, Iraq in January 2005, a local leader speculated that the US could have been given false information in the context of a tribal dispute. (See *The Times*, 10.01.05). For examples of occasions when US forces appear to have been misled into attacking civilians by local warlords with scores to settle in Afghanistan, see Cordesman, *Ongoing Lessons of Afghanistan*, 64, 125 and 138.

By the time of the 2003 Iraq war, miniature, portable UAVs were in field service. Devices such as the *Dragon Eye*, weighing about 5.5lbs (and launched with a rubber band), could be carried by an infantry patrol, to which it could transmit real-time imagery of the scene ‘over the hill’ from an altitude of 300-500 feet.²⁷⁸ This second generation of UAVs not only provided combatants in the field with a tool allowing them, in the grateful words of a US Marine Corps report, ‘to collect against the commander’s priorities, locations and schedule without interference from higher headquarters’,²⁷⁹ but also, in principle, to check on the nature and location of a suspected military objective (e.g. a presumed source of artillery fire) and on whether it could be attacked without causing disproportionate collateral damage.

What UAVs in field service during the period under review could not do was to see inside buildings and caves.²⁸⁰ Furthermore, the 1999 Kosovo war showed how over-reliance on UAV imagery not backed up by human reconnaissance on the ground could be exploited by an adversary skilled in the techniques of ‘Cover, Concealment, Camouflage, Denial and Deception’ (known in Soviet military doctrine as ‘maskirovka’). Such techniques were used to good effect by Yugoslav forces to deceive NATO pilots: the NATO attacks appear to have had some success in constraining the movement of Yugoslav ground forces, but this was at the cost of a certain amount of attrition as costly precision weaponry was wasted on bogus targets such as imitation tanks.²⁸¹

On 13 May 1999, a NATO air strike on a military camp near the village of Korisa in Kosovo, carried out with laser-guided weapons, killed approximately eighty-seven civilians, of whose arrival and presence at the area NATO was

²⁷⁸ See Anthony Cordesman, *The Iraq War: Strategy, Tactics and Military Lessons* (Washington, 2003), 187. In addition to the *Dragon Eye* itself, the patrol would need to carry a laptop computer to receive its transmissions.

²⁷⁹ *Ibid.* For most of the period under review, UAV imagery of a potential target could be transmitted to command centres, but could not be transmitted to an airborne pilot or a platoon commander in the field.

²⁸⁰ Some use was however made by US forces in Afghanistan of ground-based robots for attempting to gather such information. The *Packbot* robot, fitted with video cameras and rechargeable batteries (and apparently capable of being equipped with a grenade launcher and a shotgun as well) was reportedly used to reconnoitre 26 caves (Cordesman, *Ongoing Lessons of Afghanistan*, 39).

²⁸¹ See *Newsweek*, 15.05.03. See also *Lessons of Kosovo* (Vol. I), para.115.

unaware. It was subsequently reported that approximately 600 Albanian civilians had been brought to the camp shortly before it was struck, possibly in an attempt to shield it. Due to bad weather, however, the camp had not been observed by UAV in daylight before the attack. The last minute visual verification made by an airborne forward observer and by the lead pilot himself before he launched his (night-time) attack was enough to reassure him that the object below was a military camp, but not to reveal the presence of the civilians, some at least of whom were sleeping in the open by their vehicles, raising the question of whether the aircrew involved had suitable night vision equipment.²⁸²

Though they were expensive during the period under review, and worked only in favourable weather, UAVs can be expected to become increasingly capable and their production costs to come down, making them play an ever-more prominent role in effective (and relatively risk-free) surveillance. Nevertheless, except where UAV imagery is very recent, it seems unlikely to be capable of providing an entirely adequate substitute for human reconnaissance and forward observation.

d) Counter-battery fire systems

By the 1980s, sound-ranging systems and computerized radar systems were available capable of tracking the trajectories of incoming artillery or mortar shells and returning fire on their calculated source.²⁸³ Such systems could also calculate the source of rocket fire, though with less accuracy, given the typically erratic trajectories of rockets. Unfortunately, those with counter-battery technology of this nature could easily be tricked by an unscrupulous adversary into returning fire onto locations the striking of which would cause international outcry.²⁸⁴ Perhaps

²⁸² For details of the incident, see Clark, *Waging Modern War*, 299-300; Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*; and *ICTY Committee Report (NATO)*, paras.86-89.

²⁸³ Sound-ranging systems were used in the 1991 Gulf War by British forces to locate enemy artillery and mortar positions (see Peter de la Billière, *Storm Command* (London, 1995), 276). Israel, in 1996, had at its disposal the computerized radar Hughes TPQ-37 Firefinder system, which it had been using since the 1980s (see Reisman, 'The Lessons of Qana', 385).

²⁸⁴ A meeting in Sarajevo attended by the UN Special Representative of the Secretary General (SRSG) in 1993 was punctuated by outgoing fire from an adjacent 120mm mortar. This was

partly for this reason, during the 1999 Kosovo war, US lawyers in the Department of Defense insisted, to the apparent annoyance of the NATO Supreme Allied Commander (Europe), that fire directed at Serb anti-aircraft defences had to be observed on the basis of TV or photographic data no more than a few hours old, rather than being directed at locations estimated as the source of enemy fire – or ‘templated’ as was, apparently, ‘standard Army procedure’.²⁸⁵

Counter-battery fire and other systems said to be currently under development and designed to return fire automatically on the calculated source of incoming artillery or even sniper fire,²⁸⁶ would appear of limited usefulness to a belligerent concerned to avoid inadvertent collateral damage (and of great use to a belligerent not itself in possession of the technology, but keen to embarrass an adversary using it). Of far greater practical value may be counter-battery systems linked up to systems able to provide visual imagery of the calculated source of incoming fire with a ‘man in the loop’ to decide whether or not fire should be returned. Also of value, in addition to small, portable UAVs like those used in Iraq in 2003 by the US Marine Corps, may be systems such as the so-called ‘reconnaissance round’ reportedly being developed as another means of enabling artillery crew to see ‘over the hill’ before opening fire onto a suspected enemy position beyond normal visual range.²⁸⁷

e) *Laser designation*

A system for target identification widely used in the 1991 Gulf war, the 1999 Kosovo war and military operations in Afghanistan and Iraq in 2001-2003 was laser designation. Laser beams were used by forward observers either airborne or on the ground to designate targets which had been located and identified visually.

suspected by at least some of those present to be designed to provoke Serb counter-battery fire onto the building where the SRSB was widely known to be present.

²⁸⁵ Clark, *Waging Modern War*, 306.

²⁸⁶ For instance the *Gunslinger*, a rapid-fire gun, said to be currently under development in the US, designed to detect enemy snipers and automatically fire back at them, and the US Navy *Phalanx* system which ‘automatically detects, tracks and engages anti-air warfare threats such as anti-ship missiles and aircraft’ (see *Sunday Telegraph*, 19.09.04 and US Navy Fact File <http://www.chinfo.navy.mil/navpalib/factfile/weapons/wep-phal.html> (visited 26.11.02))

²⁸⁷ See John Edwards, *The Geeks of War* (New York, 2005), 67-81.

The laser beam would reflect off the target in the form of an inverted cone, the code of which could be recognized by a suitably programmed bomb or missile which, dropped in approximately the right place, could alter its trajectory to travel down the cone and strike the designated target.²⁸⁸ The system allowed for several successful high precision attacks from high altitude. During the 1991 Gulf war, special forces personnel were said to have infiltrated Baghdad while the air campaign was underway, in order to act as 'laser spotters'.²⁸⁹ At considerable personal risk, such spotters probably contributed greatly to the accuracy of aerial attacks on targets located in Baghdad and the minimization of collateral damage.

f) Mobile phones

On 21 April 1996, Russian military forces located the exact position of the then Chechen leader and military commander, Djokar Dudaev, apparently by means of the signal given out by a satellite telephone he was using. Dudaev, considered at the time to be the driving force behind Chechen armed resistance to Russia, was then killed in what is believed to have been a rocket attack directed at the origin of the satellite signal. Although three other militants standing close to Dudaev were killed, his wife and son, only 12 metres away, were unhurt.²⁹⁰

Seven years later, the United States proved unable to attain anything like this degree of accuracy when a similar technique was apparently used to try to locate and target individual members of the Iraqi military leadership in 2003.²⁹¹ Attacks were reportedly directed at the locations from which the personal mobile phones of the intended victims were emitting signals. None of the individuals intended as

²⁸⁸ 'Why bombing can go wrong', BBC News Online, 16.10.01.

²⁸⁹ Greenpeace International, *On Impact*, 85.

²⁹⁰ De Waal and Gall, *Chechnya*, 318-321. See also <http://www.aeronautics.ru/chechnya/dudayev.htm> (visited 14.09.04).

²⁹¹ A Human Rights Watch report speculates that at least some of the attacks on prominent Iraqi leaders relied on mobile telephone intercepts to locate the relevant individuals. (Human Rights Watch, *Off Target*, 34, 37).

objects of these attacks was hit, but many civilian casualties were caused when the locations where they were thought to be present were struck.²⁹²

The problem appears to have been that the mobile phones allegedly being used as homing devices by the United States in Iraq in 2003 were capable of giving their own location only to within a circle with a radius of 100 metres.²⁹³ There is little information in the public domain to indicate why the attack on Dudaev was, by contrast, quite so precise. The presence of Russian military aircraft in the area where Dudaev was killed may have contributed to the Russians' ability to pinpoint the exact source of the satellite phone call.²⁹⁴ Finally, when he was struck, Dudaev was making his telephone call in the open, near a vehicle, which would have made him a much easier target than if he had been inside a building, as the Iraqi leaders targeted by the United States in 2003 often were.

g) Remote imagery and radio intercepts

A US Army/Marine Corps manual for military legal advisers published in 2000 gives examples of 'many legitimate ways to identify a target', including not only UAV data, but also a number of radar-based systems and even 'an intercepted enemy transmission that states the grid co-ordinates of enemy unit locations'. It suggests that 'a strict "eyes-on" requirement, while potentially appropriate and necessary in some environments and situations, may unduly tie a commander's hands in others'.²⁹⁵ The advice goes on to clarify that information such as radar data should only be acted on in the context of 'reliable situational awareness': it is clearly not a green light for attacks against anything which *might*

²⁹² Human Rights Watch, *Off Target*, 6, 22-23. The fact that the intended targets escaped altogether suggests they may have become wise to the dangers of emitting on known mobiles and consequently to have adopted the practice of never using the same mobile phone for long.

²⁹³ Human Rights Watch, *Off Target*, 24.

²⁹⁴ For discussion of how satellite phones can (sometimes) be used to locate their users with precision, see Anick Jesdanum, 'Satellite Phones in Iraq Could Become Beacons for Bombs', *Associated Press* 21.03.03, available on http://www.space.com/business/technology/satellite_phones:030321.html (visited 14.09.04).

²⁹⁵ 'Rules of Engagement (RoE) Handbook for Judge Advocates', available via the website of the Center for Law and Military Operations (CLAMO), (3-24) (hereinafter '*RoE Handbook for Judge Advocates*').

be a military objective. But the problem with the advice is that it risks encouraging attacks against targets which have been only very imperfectly identified and about which little is in fact known. While it might be justified in some circumstances to launch an attack against a particular location on the basis of an intercepted enemy radio message suggesting it to be an artillery position, the risk of mistaken attacks against civilian objects would seem high if such a practice were adopted regularly.

A system known as Joint Surveillance and Target Attack Radar System (JSTARS), first used by the United States in the 1991 Gulf war, combines satellite and radar technology to produce basic imagery of moving objects beyond visual range.²⁹⁶ NATO use of this technology during the 1999 Kosovo war, when it had no forces on the ground, meant it could obtain some indication, at least, of the location of mobile military objectives, such as tanks and military convoys, from a distance even in bad weather. What the system could not at this point do was produce imagery of sufficient resolution to indicate the exact nature of moving vehicles: this could only be surmised from their position and behaviour. It seems at least possible that this limitation may have led to targeting errors during the Kosovo war.

Only one case of a civilian vehicle being mistakenly targeted by coalition aircraft was publicly reported during the 2003 Iraq war.²⁹⁷

h) Identification Friend or Foe systems

‘Identification Friend or Foe’ (IFF) systems and procedures are designed to reduce the risk of mistaken attacks on friendly forces (‘friendly fire’). The frequency of friendly fire accidents caused by failure of IFF systems and procedures during the period under review is a reminder of the genuine difficulty which even the most sophisticated armed forces can face in identifying targets

²⁹⁶ For details, see ‘Joint STARS Ground Stations’, <http://globalsecurity.org/intell/systems/jstars-gsm.htm> (visited 14.09.04).

²⁹⁷ Human Rights Watch, *Off Target*, 21.

accurately. An understanding of some of the problems which have caused friendly fire accidents in the past (and those which may cause such accidents in the future) may contribute to an understanding of what can reasonably be expected of armed forces in terms of avoiding accidental attacks on civilian or medical vehicles in, or near, a combat area.

After nine British soldiers were killed and eleven injured in southern Iraq in 1991 when two British armoured personnel carriers (APCs) were mistakenly fired on by US Air Force A-10 jets flying at 9,000 feet (c.3,000 metres), an inquiry pointed to some of the problems. Although the fluorescent identification markings on the British APCs were visible from 6,000 feet, this was below the operating height of the A-10s, which had passed over the British APCs twice, once at 15,000 feet and once at 8,000 feet, and had not seen their markings. The pilots claimed they had not been informed that friendly forces were in the area and had been given only a description, not a precise grid reference, for their assigned target, which was in fact 20 kilometres away. It was recommended after the accident that in future, pilots should always be given a latitude and longitude grid reference for their assigned target in their mission briefs and that this should always be formally acknowledged by the pilots.²⁹⁸ Such a practice, if widely adopted, seems likely to reduce not only the risk of friendly fire, but also of mistaken attacks on civilian objects.²⁹⁹ The facts of the case as reported suggest that civilian authorities in conflict zones would be well advised to ensure, to the extent possible, that markings intended to be visible to military aircraft should be of sufficient dimensions and luminosity to be visible with the naked eye at 8,000 feet.³⁰⁰

²⁹⁸ See 'Friendly fire in the Gulf: Board's findings' (statement to the House of Commons by Archie Hamilton, Armed Forces Minister, July 1992) (1992), (*Army Quarterly Defence Journal*).

²⁹⁹ Use of the 'nine-line brief' system has been standard RAF practice for many years. Critical information on the location and nature of an assigned target (e.g. latitude and longitude, bearing, elevation etc.) is confirmed orally, in a fixed sequence, to the airborne pilot (or navigator), who then repeats the information back before attacking the target.

³⁰⁰ Luminosity in daylight can be enhanced by fluorescent tape. The use of thermal tape has been shown to be effective in making distinctive markings visible to aircrew using infra-red vision-enhancing equipment in night-time or poor weather conditions (Dominique Loyer 'Making the distinctive emblem visible to thermal imaging cameras' (1997), *IRRC*).

Some states are said to be developing co-operative IFF systems, which, fitted in equipment belonging to friendly forces, would enable these forces to be automatically recognized as friendly by weapons systems.³⁰¹ A danger of such technology is that it may make combatants quicker to presume that vehicles, vessels and aircraft without this equipment are hostile, when they may be civilian, neutral or medical (or even friendly forces with defective transmitter chips or out-of-date codes). Making the technology available to selected neutral states and international agencies, or installing it on medical vehicles, risks simply augmenting the presumption that vehicles, vessels and aircraft without the equipment may be safely fired upon, thus increasing the risks for ordinary civilians, unless it is made clear to military personnel that there must be some other reason for assuming a suspect object or person to be hostile, in addition to lack of IFF equipment.

i) Naval exclusion zones

Properly notified and operated naval exclusion zones can be one of the means by which armed forces, 'in the conduct of military operations at sea...take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects'.³⁰² Given the relatively loose rules of naval warfare in relation to the feigning of civilian status,³⁰³ it is not unreasonable for belligerents to make at least preliminary inferences about a vessel's status and intentions on the basis not only of its appearance, but also of its location. What they may not do is fire on an

³⁰¹ See *Sunday Telegraph*, 17.10.04.

³⁰² Additional Protocol I, article 57.4.

³⁰³ The law applicable to conduct of hostilities on land prohibits feigning of civilian status by combatants with a view to facilitating military action, qualifying such conduct as perfidious (Additional Protocol I, article 37. See also *Ex parte Quirin et. al.* (US Supreme Court, 1942), 317 US 1 (1942), where the US Supreme Court considered it a violation of the law of war to penetrate enemy lines in civilian dress 'with hostile purpose' even if no actual act of hostility was perpetrated.) By contrast, customary international law has traditionally recognized as legitimate the practice of disguising warships as merchant ships to facilitate approach to enemy vessels, so long as the warship reveals its true colours before opening fire (See Robert Tucker, *The Law of War and Neutrality at Sea*, (Washington, 1957), 139). Resistance to the practice has been growing, however, and the *San Remo Manual* proposes a rule prohibiting a warship 'at all times from actively simulating the status of...[inter alia] passenger vessels carrying civilian passengers' (emphasis added) (*San Remo Manual* paras.110-111 and commentary).

apparently civilian vessel in the absence of good reason to believe it is in fact a legitimate military objective.

During the 1982 Falklands conflict, maritime exclusion zones were established by both the United Kingdom and Argentina. The British 'Total Exclusion Zone' (TEZ) consisted of the area within a 200-mile radius emanating from the centre of the Falkland Islands.³⁰⁴ The Argentinian exclusion zone was the area within 200 miles from the Argentinian mainland and 200 miles from the coastline of the Falkland Islands.³⁰⁵ The British zone provoked complaints from the Soviet Union.³⁰⁶ However the establishment of the zones, which were well publicized and in which neither side operated a policy of firing on sight, did not result in a single civilian vessel or aircraft being mistakenly attacked.³⁰⁷ This may have been largely due to the fact of civilian shipping and aircraft heeding warnings given and staying clear of the zones. It should be noted, however, that British naval forces were not in fact authorized under their Rules of Engagement to attack any vessels other than warships in the TEZ.³⁰⁸ By contrast, maritime exclusion zones operated by both Iran and Iraq in the 1980s were in effect unlawful free-fire zones in which any ship was liable to be attacked.³⁰⁹

During the 1980-1988 Iran-Iraq war, a fishing boat, thought not to have been carrying appropriate radio equipment for communication with US naval forces in the area, was attacked by a US frigate.³¹⁰ The risk of accidents with fishing vessels in maritime areas where warships are on high alert can be reduced if civilian vessels operating near exclusion zones or in areas of military tension are equipped with GPS devices, to help them avoid entering exclusion zones through

³⁰⁴ See the letter of 28.04.82 from the British Permanent Representative to the UN to the President of the UN Security Council ('UK Materials on International Law 1982', *BYIL* 1982, 542).

³⁰⁵ Woodward, *One Hundred Days*, 82.

³⁰⁶ Michaelsen, 'Maritime exclusion zones', 374.

³⁰⁷ The sinking within the TEZ of the Argentinian 'fishing boat' the *Narwal*, which turned out (as had been suspected) to have been a military reconnaissance vessel, (see Woodward, *One Hundred Days*, 191-195) can even be seen as an example of the effectiveness of properly notified maritime exclusion zones as a means of helping belligerents to distinguish between civilian and military vessels.

³⁰⁸ Woodward, *One Hundred Days*, 191.

³⁰⁹ See Michaelsen, 'Maritime exclusion zones', 375.

³¹⁰ De Guttry and Ronzitti, *The Iran-Iraq War*, 13, n.18.

navigational error,³¹¹ and appropriate radio equipment for communication with warships. If a maritime exclusion zone adjoins a coastline, it may also be advisable for civilian authorities to provide for the welfare of local fishermen: otherwise, economic pressure may lead them to disregard the dangers of fishing in the exclusion zone.

j) Naval security zones

The US Navy adopted a practice at the beginning of the 1980-1988 Iran-Iraq war of establishing 'security zones' (sometimes called 'defensive bubbles') of five nautical miles in any direction of US warships in the Persian Gulf, Strait of Hormuz, and the Sea of Oman, including the airspace up to 2,000 feet. Other states were informed that any aircraft entering such a zone without having been cleared for arrival or departure at a regional airport and without establishing contact with US forces could be 'held at risk by US defensive measures' – i.e. shot down.³¹² Later, notice was given that vessels, too, whether surface or submarine, coming within five nautical miles of US warships in this area would be at risk of 'defensive measures' if no prior contact with US forces had been made and their intentions were unclear.³¹³ Iran reacted strongly against this measure, calling the notice to airmen and mariners (NOTAM) in question 'a clear violation of international law and common practice regarding the freedom of flying over high seas'.³¹⁴

Shortly after a US warship, the *Stark*, was mistakenly attacked in the Persian Gulf by an Iraqi fighter jet in May 1987, a revised NOTAM was issued by the US authorities, in which aircraft 'approaching US naval forces', were requested to establish and maintain radio contact with US forces on one or other of two

³¹¹ At the time of writing (January 2006), fixed GPS devices designed for civilian maritime use can be purchased for approximately £300.

³¹² NOTAM, *Notices to Airmen and Marine[r]s for Persian Gulf, Strait of Hormuz, Gulf of Oman and North Arabian Sea, January 1984* (text in de Guttry and Ronzitti, *The Iran-Iraq War*, 137).

³¹³ *Automated Notice to Mariner-Selected Broadcast Warnings, for Persian Gulf, Strait of Hormuz and Gulf of Oman, 14 May 1986, ibid.*, 139.

³¹⁴ *Ibid.*, 34, n.66.

specified frequencies.³¹⁵ It was made clear that any aircraft approaching US naval forces in the Persian Gulf, Strait of Hormuz, Gulf of Oman or Arabian Sea could be 'at risk from defensive measures' in the event of failure to identify itself and clarify its intentions on the specified frequency if it was seen to be 'operating in a threatening manner'. A further NOTAM issued two months later modified the guidance, specifying that all aircraft should maintain a listening watch on one or other of the designated frequencies, while those 'approaching within 5nm of US naval forces' should take the initiative in establishing and maintaining radio contact.³¹⁶

In July the following year, the USS *Vincennes* shot down an Iranian civilian airliner, on a scheduled flight in a commercial airway,³¹⁷ which had apparently failed to respond on either of the international frequencies specified in the revised NOTAM to requests for identification made by the warship. The airliner had been at an altitude of 13,500 feet, well above the *Vincennes*' 'defensive bubble', and climbing when it was struck. All 290 passengers lost their lives. The facts that the *Vincennes* was engaged in hostilities with Iranian vessels at the time of the incident and its crew believed an Iranian F-14 jet to be nearby strongly suggest it was feared, in the heat of the moment but not on the basis of very powerful evidence, that the airliner may have been an Iranian military aircraft coming to assist the Iranian boats.³¹⁸ A false alarm that the airliner was descending appears to have added to the confusion.³¹⁹ There is no evidence to suggest that the airliner was deliberately attacked in the knowledge it was a civilian aircraft.

³¹⁵ *Revised Notice to Airmen/Notice to Mariners for the Persian Gulf Area, July 1987* (text in *ibid.*, 140).

³¹⁶ *Notice to Airmen, September 1987*, (text in *ibid.*, 141-142).

³¹⁷ The flight had, however, departed 27 minutes late and was not in the centre of the airway (Anthony Cordesman and Abraham Wagener, *The Lessons of Modern War II: the Iran-Iraq War* (London, 1990), 577.)

³¹⁸ According to the US Chairman of the Joint Chiefs of Staff, the airliner's failure to respond to US warnings, the facts that it had taken off from an airfield also used by military aircraft and gave no definitive radar emissions, the ongoing surface action and the fact that the aircraft was proceeding in the direction of the *Vincennes* meant 'it was only prudent for Captain Rogers to assume that the contact was related to his engagement with the Iranian boats until proven otherwise'. *Statement by the Chairman of the Joint Chiefs of Staff, 19 August 1988* (text in de Guttry and Ronzitti, *The Iran-Iraq War*, 206-209).

³¹⁹ See de Guttry and Ronzitti, *The Iran-Iraq War*, 205-206, 208.

What went wrong? First, the relevant NOTAM itself, though presumably intended to reduce the risks for civilian shipping and aircraft in the Persian Gulf area, may have had the reverse effect. The NOTAM failed to indicate what might be understood by 'operating in a threatening manner', or to indicate the language in which radio communication was expected to take place.³²⁰ It may have given the overall impression that civilian aircraft flying outside US 'defensive bubbles' could safely proceed over the Persian Gulf. And the reliance placed by the NOTAM on VHF/UHF radio communication between US warships and local civilian pilots seems not to have been based on much, if any, experience of this system working in practice.³²¹ In addition, the circumstances in which the airliner was shot down suggest serious problems with target verification procedures on the warship itself. The report into the incident conducted by the US Department of Defense, while clearing the ship's commander of any wrongdoing, gives no indication of the grounds on which the airliner was judged to have been demonstrating 'hostile intent' and gives no indication of any precautions having been taken to verify its nature, other than the abortive efforts made by the *Vincennes* to communicate with the pilot of the aircraft by radio (five times on one frequency, four times on the other).³²²

The incident invites comparison with one which occurred in the south Atlantic in 1982 as a British naval force made its way towards the Falkland Islands. Believing a nearby aircraft was an Argentinian military reconnaissance plane that would reveal the force's position, rendering it vulnerable to aerial attack, the commander of the naval force had obtained authority to attack the aircraft, had locked onto it with a naval missile, and was on the point of opening fire. Before the word was given, as a final precaution the aircraft's route was projected onto a map. This revealed that the plane was flying in a straight line from Durban to Rio

³²⁰ It was stated that illuminating US warships with weapons radar would be 'viewed with suspicion', but no indication was given of what else, if anything, might be interpreted as 'operating in a threatening manner'. The *Navy Procedure for Communicating with Unidentified Aircraft 1988* (text in de Guttery and Ronzitti, *The Iran-Iraq War*, 142) seems to assume that English would be understood by all pilots operating in the region.

³²¹ See de Guttery and Ronzitti, *The Iran-Iraq War*, 154 and 157.

³²² *Department of Defense, Formal Investigation into the Circumstances Surrounding the Downing of Iran Air Flight 655 on 3 July 1988, 19 August, 1988* (text in *ibid.*, 201). The crew had checked the timetable of scheduled flights, but appear not to have made allowance for the possibility of delayed departures (Cordesman and Wagener, *Lessons of Modern War* (Vol II), 577).

de Janeiro. Fire was held, and planes sent up to inspect the aircraft reported it was a Brazilian civilian airliner. The comparison, though instructive, is not entirely fair. Part of the reason for the British commander's last-minute hesitation was the fact that a military reconnaissance plane would not, itself, have been capable of launching an attack, while the human and diplomatic cost of a mistaken attack on a civilian aircraft would have been catastrophic.³²³ But it remains a useful example of good practice in terms of taking precautions in the context of defensive military operations at sea.

4.2. Taking precautions in the choice of means and methods of attack - weaponry

a) *Preliminary remarks*

Once a target has been selected, located and confirmed as a legitimate military objective, normally the next stage is to choose the appropriate weapon or munition for striking the target so as to achieve the military aim most efficiently in compliance with relevant legal requirements. Even belligerents unaware of, or unmoved by, their legal obligations will often want to take steps to ensure neither ammunition nor goodwill is squandered by ill-considered use of destructive power in excess of that needed to achieve a particular military aim. The process of selecting the appropriate weapon or munition for the task in hand is known in US military doctrine as 'weaponeering'.³²⁴

Obviously in some situations there will be a greater choice of weaponry than in others. Where an attack is to be launched from the air or with long-range artillery by a sophisticated belligerent, the options are likely to be extensive, allowing a relatively detailed decision to be made about the degree of damage to a target which will be caused, where and how, as well as how much collateral

³²³ Woodward, *One Hundred Days*, 102-104 and 192.

³²⁴ AFP 14-210 defines weaponeering as 'the process of estimating the quantity of a specific type [of] weapon required to achieve a specific level of damage to a given target, considering target vulnerability, weapon effects, munition delivery errors, damage criteria, probability of kill, weapon reliability etc.' (para.6.1)

damage will be caused and to what (barring accidents and unforeseen events).³²⁵ Where an attack is to be launched by poorly supplied front-line infantry, or by a very primitive belligerent, the options will naturally be much more limited - for instance to a simple choice between a mortar attack and a raid.

b) *Line-of-sight weapons*

Line-of-sight weapons, whether small arms, rocket propelled grenades (RPGs) or larger guns mounted on tanks, normally expose the bearer or operator to danger whenever they are lined up to fire at a target (assuming the target itself has a means of defence).³²⁶ They thus discourage hesitation, and the chances of targeting mistakes being made with such weapons when combatants and non-combatants are closely intermingled in a combat zone are high. During street-to-street fighting in built-up areas peopled by combatants and civilians, troops with line-of-sight weapons often have to take split-second 'him or me' decisions. There are no easy answers to the question of how the risks of civilian casualties from line-of-sight weapons can be minimized during this kind of combat.³²⁷

³²⁵ AFP 14-210 encourages the practice of deciding in advance the exact degree of damage required (eg 'mobility kill', 'catastrophic kill', 'prevent take-off kill' etc.) and even the exact length of time for which an object should be disabled (para.6.5.4). An appendix lists 20 different types of warhead fuse, designed to control in different ways the point at which the warhead will detonate. The USAF had a system, (the 'bug-splat program') for estimating the area likely to be affected if a particular weapon was used in a particular way (see US DoD, 'Background Briefing on Targeting', 05.03.03). Clark, in *Waging Modern War*, 203-204, gives a commander's perspective of the difficulties of implementing this time-consuming approach in practice in a fast-moving situation.

³²⁶ This may not be the case if one side has superior long-range optical equipment and long-range firepower to match, allowing targets to be identified and fired on before they can pose a threat, as was the case with British tank crews in the 1991 Gulf war (see de la Billière, *Storm Command*, 286).

³²⁷ According to one military writer, 'Currently, no military force has a workable doctrine on how to fight in built-up terrain without inflicting heavy casualties on the civilian population and causing heavy collateral damage'. (Gregory Celestan, 'Wounded Bear: the Ongoing Russian Military Operation in Chechnya' (1996) *Foreign Military Studies Office* <http://fmso.leavenworth.army.mil/fmsopubs/issues/wounded/wounded.htm> (visited 14.09.04). Hills, in *Future War in Cities*, suggests it is unrealistic to expect to avoid urban warfare in future conflicts, and that in such warfare, 'immediate tactical advantage usually accrues to the side with less concern for the safety of non-combatants' (238). Whether the immediate tactical advantage that may be gained by ruthlessness in urban combat can be converted to longer term strategic success is clearly a different matter.

One positive aspect of the 1991 Gulf war was the almost total absence of urban warfare.³²⁸ During the Iraq war of 2003-2004, it was not avoided to quite this extent, though it mostly took place after major combat operations had been declared over. It has been suggested that between 572 and 616 civilians were killed during the battle between US forces/Iraqi governmental forces and Iraqi insurgents in the Iraqi city of Fallujah in November 2004.³²⁹ The reason for these heavy civilian casualties are not entirely clear, but the fact that regular warnings were issued to the civilian population to evacuate the city before the attack was launched may have kept the non-combatant death toll lower than it might otherwise have been. By contrast, the failure of the Russian authorities to evacuate civilians from the city of Grozny, Chechnya, before sending tanks on to the streets in January 1995 may have contributed to the large scale loss of life among the civilian population of the city in the months that followed.³³⁰

During the US-led military occupation of Iraq from May 2003 to May 2004, it was not uncommon for ordinary civilians to keep firearms for their own protection.³³¹ To reduce the risk of such people being fired on, occupying forces in some of the major cities prohibited civilians from carrying weapons in public, or required them to wear orange jackets if authorized by the occupying forces to carry arms.³³² This did not eliminate mistaken attacks on *bona fide* civilians,³³³ but may have reduced the number of such errors.

³²⁸ The desire to avoid the high civilian and combatant casualties typical of urban warfare was, according to the US DoD, a factor in deciding against an amphibious assault on Kuwait City during the 1991 Gulf war (*Final Report to Congress*, 612).

³²⁹ See website of Iraq Body Count (<http://www.iraqbodycount.net/press/> , visited 26.04.05).

³³⁰ For background to the dispatch of Russian tanks to Grozny on 31.01.94, see de Waal and Gall, *Chechnya* 1-19, Anatol Lieven, *Chechnya: Tombstone of Russian Power* (New Haven and London, 1999), 108-113, and Celestan, 'Wounded Bear'. De Waal and Gall suggest about 27,000 people may have perished in the three-month battle for Grozny at the beginning of 1995 (*Chechnya*, 227). Lieven puts the figure much lower, at 5,000 maximum (*Chechnya*, 107-108).

³³¹ See Amnesty International, *Iraq: Killings of Civilians in Basra and al-Amara* (2004).

³³² See *ibid.*, quoting a letter from a British Army representative, dated 04.08.03, stating 'Although all good people are allowed to keep 2 weapons at home and another at their place of work, weapons are forbidden on the streets to avoid...misunderstandings with the Army and Police'.

³³³ See *ibid.*

c) *Land-based artillery and mortars – the case for an ‘800 metre rule’*

Since the mid-nineteenth century, land-based artillery and mortars have normally been used for indirect fire against targets out of the gunners’ visual range,³³⁴ with shells being directed towards their target by careful calculation of the angle and direction of the gun or mortar, taking into account topographical and atmospheric conditions, and the weight and charge of the ammunition. Accuracy is enhanced when forward observers are used for fire correction, though forward observation may sometimes pose practical difficulties, for instance if fire is defensive and prior arrangements for target observation have not been made. Even when fire is observed and crews are highly trained, targeting with artillery and mortar fire using munitions without terminal guidance is a very imperfect science, rendering such weapons ill-suited for precision attacks on targets located within concentrations of civilians or in close proximity to protected objects.³³⁵

It needs to be recalled that trees or other obstacles may deflect shells off-course, the cartographic and meteorological information needed for accuracy may be unreliable or unavailable, and inexperience on the part of a gun or mortar crew may affect the accuracy of their fire. It also needs to be recalled that in hilly ground, while mortar fire, with its relatively vertical trajectory, may continue to be reasonably accurate if properly aimed, long-range artillery fire aimed *horizontally* (or relatively horizontally) at a target on the crest of a hill will go very far off-course indeed (possibly by several kilometres) if it overshoots the crest by only a fraction. The less skilled the artillery or mortar crews, the greater the margin of error they will need to anticipate: in 1994, a separatist entity informed the ICRC that it had ordered its troops not to bombard targets located

³³⁴ See Christopher Bellamy, ‘The Russian artillery and the origins of indirect fire’ (1982), *Army Quarterly*.

³³⁵ According to a senior instructor at the British Royal School of Artillery (RSA), trained British artillery crews would normally expect their fire from medium range (i.e. 10-16km) to be accurate to within about 400 metres in any direction, assuming the availability of accurate cartographic, meteorological and other relevant data, but if using artillery in the vicinity of friendly forces would want to keep a distance of *800 metres* between any intended target of their fire and friendly forces to be confident of the safety of the latter. Students at the school are taught about the multiple factors which may affect the accuracy of their fire, including the Earth’s rotation, atmospheric conditions and the effect on the speed (and thus the range) of an artillery shell of the increase in the gun’s muzzle temperature as it heats up through repeated use. It is only when all these variables (many of which will also apply to mortar fire) have been properly taken into account that artillery accuracy to within 400 metres can reasonably be expected.

within 500 metres of civilian dwellings,³³⁶ suggesting (if true) little confidence in their ability to land shells on target. Finally, it needs to be recalled that a shell landing at a certain distance from its target will, on exploding, have a destructive impact extending further still, depending on its 'spread pattern'.³³⁷

The degree of accuracy possible with artillery and mortar fire depends on the nature of the weapon as well as the terrain and the skill of the crew. Some artillery pieces, such as the intermediate-range *SCUD* missiles used by the Iraqi army during the 1991 Gulf war and the Second World War-vintage 'Katyusha' rockets used by Hezbollah in southern Lebanon against northern Israel in 1996, cannot be aimed with much accuracy, whatever the technical competence of the crew.³³⁸ Others, such as multiple barrel rocket launchers, are designed as area weapons, intended to cause destruction over a wide area, rather than to neutralize a 'point' target, such as an enemy artillery position. At the other end of the spectrum, the 2003 Iraq war saw the first use (by the United States) of the precision guided *SADARM* artillery munition, capable in principle of detecting and validating targets before homing in on and destroying them.³³⁹

A case heard by the International Criminal Tribunal for the former Yugoslavia in 2003, in which expert evidence in relation to short-range mortars was heard, sheds interesting light on the standards of accuracy to which modern belligerents may possibly be held should indiscriminate use of these weapons be alleged in judicial proceedings. The Tribunal rejected the argument of the Defence, submitted in pre-trial proceedings, that a margin of error of 300-400 metres in any direction of a military objective needed to be conceded before it could be said that mortar fire was indiscriminate, given the 'targeting zone' of these weapons,³⁴⁰

³³⁶ See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol II), 384.

³³⁷ The 'spread pattern' or 'area of effectiveness' of a unitary shell from a 105mm gun is likely to be about 250 metres in any direction, with lethal consequences within about 60 metres. Both distances should be doubled for a unitary shell from a 155mm gun.

³³⁸ The main reasons for the inaccuracy of the *SCUDs* and *Katyusha* rockets are that i) they are both normally fired from launchers on the back of a truck, which if wrongly positioned or stationed on soft or uneven ground will make all the rockets in the launcher go off target; ii) the trajectory of the rockets is strongly affected by atmospheric conditions, as propellants burn faster in hot temperature, thus increasing the range.

³³⁹ See Cordesman, *The Iraq War*, 360-361.

³⁴⁰ *Prosecutor v. Galic, (Motion for Acquittal)* (2002), ICTY, para.30. In *Prosecutor v. Strugar, (Trial Judgement)* (2005), ICTY, a Defence expert witness made the similar claim that 'firing with

though it is not clear whether it entirely accepted the Prosecution's contention that the mortar units in question 'could expect their first shot to be accurate within 50 metres.'³⁴¹ It is certainly debatable whether the Trial Chamber was reasonable to insist on quite such a high standard of accuracy for mortar fire as it did,³⁴² and the ruling on this point was not unanimous.³⁴³ But it is interesting that even the Defence did not argue that mortar units needed to be permitted a greater margin of error than 300-400 metres in any direction.

During Israel's campaign *Operation Grapes of Wrath* against Hezbollah in southern Lebanon in 1996, Israeli artillery batteries were reportedly prohibited by their standing Rules of Engagement (ROE) from firing on targets within 300 metres of UN establishments without specific permission from higher authority.³⁴⁴ The rule is revealing in terms of the degree of accuracy that can be expected of medium-range artillery: if it was considered that accuracy to within *less* than 300 metres could be generally relied on where competent artillery crews were concerned, it seems unlikely that the Israel Defence Forces would have countenanced such restrictive ROE.³⁴⁵

mortars...at any target which was less than 500 metres from the Old Town would lead to at least some of the shells landing in the Old Town' (para.207).

³⁴¹ *Galic (Trial Judgement)*, para.338.

³⁴² 'Evidence in the Trial Record establishes that a target such as Markale market can be hit from a great distance with one shot if the area is pre-recorded' *ibid.*, para.494. See also para.344. It is important, however, to distinguish the Circular Error Probable (CEP) of a correctly aligned mortar or artillery piece (i.e. the relatively small area within which 50% of its missiles will normally fall, once the bearing and elevation have been properly set) from the overall margin for targeting error needing to be considered in the context of anticipating collateral damage. The latter is the much larger area within which 100% of the missiles can be expected to fall, making realistic allowance not only for the elliptical dispersion pattern of shells fired from a weapon in a certain position aligned at a certain bearing and elevation (the Probable Error Range), but also for 'sighting shots' before the correct alignment of the weapon can be established, and at least minor errors being made in setting the bearing and elevation of the gun or mortar at various stages.

³⁴³ See separate and partially dissenting view of Judge Nieto-Navia, (para.98).

³⁴⁴ Reisman, 'The Lessons of Qana', 385. On one occasion, when an Israeli artillery battalion was authorized to go outside these ROE to return fire on a Hezbollah rocket position within 300 metres of the UNIFIL compound at Qana, 13 shells hit the compound, killing 102 civilians. For further details and discussion of the incident, see, in addition to Reisman's article, *Report Dated 1 May, 1996 of the Secretary General's Military Adviser Concerning the Shelling of the United Nations Compound at Qana on 18 April 1996* (UN Doc.S/1996/337 (1996) ('Kappen report')); statement to the UN Security Council by Israel's representative (UN Doc.S/PV.3654, 14); Turns, 'Some Reflections on the conflict in South Lebanon'; Human Rights Watch, *Israel/Lebanon* (1997) and Amnesty International, *Israel/Lebanon: Unlawful Killings During Operation 'Grapes of Wrath'* (1996).

³⁴⁵ 300 metres corresponds approximately to the distance by which a shell fired by an artillery piece from 16 kilometres will go off target if the angle of the gun is 3 mils. out (either through line (bearing) or elevation error). (Different armed forces use different calibration systems for

In Iraq in 2003, British artillery crew operated a policy of not firing on targets which had not been recently observed either by eye or by UAV, even where counter-battery fire was concerned.³⁴⁶ US artillery crew by contrast reported being prepared to use unobserved fire to respond to incoming fire identified by radar.³⁴⁷

It is submitted that in the interests of their own safety, civilians in a combat zone in which artillery or mortar fire is regularly used should, to the extent possible, remain at least 800 metres away from obvious military objectives, given the limited accuracy of these weapons and the variety of factors that can cause shells without terminal guidance to go off target. It is also submitted that combatants using artillery or mortars can reasonably be expected to be accurate, normally, to within a range of 400 metres *maximum* in any direction of a target, to use observed fire wherever possible and (except in proportionate self-defence) to avoid using artillery or mortar fire against targets within 500 metres of villages or other known concentrations of non-combatants.

d) Naval artillery

Artillery used by warships, including submarines, is often designed for attacks on objects beyond visual range, the nature and location of which will usually have been confirmed by aerial reconnaissance, or forward observers if the target is on land. Well-funded navies can equip their warships with GPS technology and gyroscopic stabilization equipment to ensure that the pull of the current and motion of the waves does not affect the accuracy of artillery fire when warheads without terminal guidance are used, although the same factors that need to be taken into account by land-based artillery crew, such as weather conditions, will need to be considered. Sometimes, 'over the horizon' naval missiles may be

measuring angles: the British 'military circle' has 6,400 'mils.' (equivalent to 360 degrees); the Swedish one has 6,200; the Russian one has 6,000). In the UK, the RSA teaches students to anticipate a 3 mils. 'system error' whenever a gun is lined up.

³⁴⁶ Human Rights Watch, *Off Target*, 95.

³⁴⁷ *Ibid.*, 94-95.

equipped with sensors, capable of actively seeking out a target. A danger is that use of electronic counter-measures by an enemy warship may deflect such missiles, which may then home in on a merchant vessel or hospital ship without such defences.³⁴⁸ Such risks can be reduced (in principle) if naval missiles are designed so that projectiles will self-destruct (or can be destroyed remotely) if they fail to hit the target.³⁴⁹ Missile design of this nature can perhaps be seen as a modern application of the rule in the 1907 Hague Convention VIII prohibiting the use of torpedoes 'which do not become harmless when they have missed their mark'.³⁵⁰

During the 1982 Falklands conflict, naval weapons and target identification systems proved not entirely free from the hazards of malfunction.³⁵¹ On no occasion does this appear to have caused collateral damage to civilian vessels. The existence of the maritime exclusion zones probably played an important role in ensuring civilian vessels were not endangered by malfunctioning missiles.

e) Cluster munitions

Cluster munitions consist of a quantity of submunitions packed together and launched in the form of a bomb or missile from the air or by artillery. Moments before landing, the submunitions separate out over a wide area, or footprint,

³⁴⁸ In the British Royal Navy, officers are trained to assess the consequences of deploying particular counter-measures and to avoid using certain systems if merchant ships are in the vicinity.

³⁴⁹ The *Exocet* missiles used by Argentina in the Falklands conflict as an anti-ship weapon could not be destroyed or diverted once launched, as was also the case with some of the earlier versions of the *Tomahawk* cruise missile. Later versions of the *Tomahawk* which were available to some belligerents towards the end of the period under review could be destroyed remotely in flight. Likewise, the *Harpoon* missiles made available to the British Royal Navy towards the end of the period under review have, according to the manufacturers, been designed to self-destruct when no target can be acquired after radar activation (<http://www.designation-systems.net/dusrm/m-84.html> (visited 11.01.06)).

³⁵⁰ Article 1.3. Dinstein considers this rule to reflect contemporary customary international law (*The Conduct of Hostilities*, 71).

³⁵¹ See Woodward, *One Hundred Days*, 272-273, on the problems encountered when the Sea Dart missile system with which British warships were equipped proved unable to function properly after essential parts became encrusted with sea-salt.

sometimes as large as a football field.³⁵² They are designed to explode either on impact, or shortly before or after (or some combination of the three). Their main military purpose is to destroy tanks and artillery positions, or attack troop concentrations.

The wide 'spread pattern' of cluster munitions and their tendency to malfunction meant they had a relatively high propensity to cause collateral damage during the period under review. One form of malfunction took the form of the capsules releasing their submunitions prematurely, as happened over the city of Nis, southern Serbia, during the 1999 Kosovo war.³⁵³ Another problem was that, like unitary munitions, cluster munitions sometimes landed off target for reasons outside the control of the attacker. Several civilians were killed in Afghanistan in 2002 when cluster bomb units launched by US aircraft hit the villages of Qala Shutar, Ainger and Ishaq Suleiman.³⁵⁴ These casualties may have been the result of the inappropriate use of an area weapon against villages in which civilians and combatants may have been intermingled. They may simply have been the result of the bombs falling off target.

Another hazard where cluster munitions were concerned came from the 'dud' submunitions (of which all cluster munitions used had, typically, at least a small percentage) which failed to explode as intended and remained unexploded but highly unstable on the surface, liable to explode when disturbed.³⁵⁵ During the period under review, the bright yellow colouring of some submunition duds could make them tempting for children and risk their being mistaken for the standard,

³⁵² See Human Rights Watch, *Off Target*, 55 and Peter Herby and Anna Nuiten, 'Explosive remnants of war: protecting civilians through an additional protocol to the 1980 Convention on Certain Conventional Weapons' (2001), *IRRC*.

³⁵³ Fourteen civilians were killed in this accident (Human Rights Watch, *Under Orders*, 451).

³⁵⁴ See Human Rights Watch, *Fatally Flawed: Cluster Bombs and Their Use by the US in Afghanistan* (2002), Chapter V.

³⁵⁵ The RBL 755 Cluster Bomb Unit, widely used during the 1999 Kosovo war, has 147 bomblets per unit, 5% of which on average fail to explode immediately due to malfunction (see *Lessons of Kosovo* (Vol. I), para.148). Some Cluster Bomb Units have failure rates of up to 40%, with the rate tending to the higher end of the spectrum when submunitions land on snow or soft ground (see Maresca and Maslen, *The Banning of Anti-Personnel Landmines*, 295). See also Human Rights Watch, *Fatally Flawed*, for the malfunction tendencies of cluster bombs used in Afghanistan in 2001-2002.

yellow plastic-covered US humanitarian aid packages which were also sometimes delivered by air.³⁵⁶

In January 2001, the US Department of Defense directed that all submunitions produced for cluster weapons in 2005 and beyond should have a dud rate of less than 1%,³⁵⁷ though the policy did not preclude the continued procurement and use of cluster munitions with older, less reliable submunitions.³⁵⁸ Subsequently, new cluster munitions were developed with reduced dud rates, improved guidance systems or both. In the Iraq war of 2003, the US Air Force used a cluster bomb unit (CBU) system in which not only were self-destruct mechanisms built into the submunitions, but the CBUs were equipped with infra-red sensors to guide the submunitions onto armoured vehicles.³⁵⁹ Another new model, apparently used by the US Air Force in 68% of its cluster bomb strikes on Iraq in 2003,³⁶⁰ had a guidance system making it more accurate than the CBUs routinely used in Afghanistan in 2002. The conflict also saw the first use of the *SADARM* system for the precision guidance of cluster munitions designed to self-destruct if they failed to find their target.³⁶¹ The British Army used a new model of artillery submunition with a self-destruct mechanism said to reduce the dud rate of submunitions to 1-2%.³⁶² The governments of Norway and Germany in 2005

³⁵⁶ See 'The cluster bomb controversy', BBC News Online, 03.04.03. See also Cordesman, *Ongoing Lessons of the Afghan Conflict*, 68.

³⁵⁷ Human Rights Watch, *Off Target*, 116.

³⁵⁸ See Human Rights Watch, *Cluster Munitions Too Costly: Department of Defense FY 2005 Budget Requests Related to Cluster Munitions*, (2004), 2. It should be noted, however, that a recent procurement request for a variety of CBUs made by the Department of Defense to Congress also included a bid for \$42.2 million to be spent on 'retrofitting' submunitions in 11,400 artillery projectiles with self-destruct mechanisms to reduce the dangers posed by duds (*ibid.*, 6, 12).

³⁵⁹ The CBU-105 (see Human Rights Watch, *Off Target*, 60-61, 111).

³⁶⁰ The CBU 103 (see *ibid.*, 59).

³⁶¹ *Ibid.*, 84-85, Cordesman, *Lessons of Iraq*, 360-361.

³⁶² The L20A1, (Human Rights Watch, *Off Target*, 85). By 2004, however, efforts were said to be still under way in the US to develop submunitions with a completely 'fail safe' mechanism to prevent them remaining active for extended periods (Cordesman, *Ongoing Lessons of the Afghan Conflict*, 78). The NGO Landmine Action criticized the UK for taking on trust the manufacturers' estimate for the dud rate of the L20A1 submunitions, rather than gathering and analyzing data from the field after these weapons had been used (Landmine Action, *Out of Balance*, November 2005, 18-20). Given the security situation in Iraq at the time, the implied expectation that the exact number of dud submunitions left on the ground in Iraq by British L20A1s could and should have been established seems unrealistic.

reported that they would not acquire newly produced submunitions unless the estimated dud rate was below 1%.³⁶³

Not only were the new models of cluster munitions with guidance systems and reduced dud rates available by the time of the 2003 Iraq war, but lessons had been learned from previous conflicts. The Coalition reportedly dropped relatively few cluster munitions by air on or near populated areas,³⁶⁴ and attempts were made to limit ground-launched cluster munition attacks against targets located in urban areas to night-time,³⁶⁵ and to refrain from launching them against targets within 500 metres of a building or object on a 'no-strike list'.³⁶⁶

Nevertheless, over a thousand civilians in Iraq were killed or injured by cluster munitions in 2003, according to the NGO *Human Rights Watch*.³⁶⁷ The number of casualties is likely to rise over time, as the duds take their toll. It has been suggested that part of the explanation for the apparently high casualty rate from cluster munitions was the sheer scale on which they were used by Coalition forces overall, which was considerably greater than had been the case in either Yugoslavia or Afghanistan, and to some extent negated the effect of the lower dud rates of some of the new cluster munitions being used.³⁶⁸ Another reason appears to be that older models of cluster munition with indifferent guidance mechanisms and dud rates of up to 16% continued to be used.³⁶⁹

³⁶³ Human Rights Watch, *States Parties' Responses to 'International Humanitarian Law and ERW' Questionnaire*, (2005).

³⁶⁴ Human Rights Watch, *Off Target*, 58.

³⁶⁵ *Ibid.*, 95.

³⁶⁶ US infantry had a list of 12,700 sites that could not be fired upon, which included schools, mosques, hospitals and historic sites (*ibid.*, 92-94). The 'no-strike list' did not, however, include ordinary residential areas (*ibid.*, 97). According to the RSA, a similar 'no-strike list' was operated by British forces.

³⁶⁷ Human Rights Watch, *Cluster Munitions Too Costly*, 1.

³⁶⁸ According to Human Rights Watch, an estimated 1,800,000 submunitions, (with varying dud rates), were dropped on Iraqi territory in 2003 by US forces, in addition to 113,190 by British forces, compared to 295,000 used by NATO as a whole in Yugoslavia in 1999 and 248,056 used by the USAF in Afghanistan in 2002 (Human Rights Watch, *Off Target*, 104). According to the British MoD, British forces delivered 70 RBL 755s and about 2,000 artillery-delivered L20A1 shells (MoD, *First Reflections*, 4.9). Assuming a dud rate of 5% for the RBL 755s (with 147 submunitions per bomb) and 2% for the L20A1s, (with 49 submunitions per shell) approximately 2,500 duds can be expected to have been left in Iraq by weapons used by British forces in 2003, compared to the 4,000 – 10,000 estimated to have been left on the ground in Kosovo by British forces (*Lessons of Kosovo* (Vol I), para.148).

³⁶⁹ Human Rights Watch, *Off Target*, 61, 83-84.

Cluster munitions are not *per se* unlawful under international law,³⁷⁰ but the older versions of cluster munition with relatively high dud rates and poor levels of accuracy are difficult to use lawfully given the foreseeable danger they usually pose for civilians, including those nowhere near military objectives (for instance, people returning at the end of hostilities to villages and agricultural land contaminated by submunition duds). A recent US Army field manual warns 'Commanders must...consider the precision error and large submunitions dispersion pattern when applying this method of attack [use of Multiple Launch Rocket Systems loaded with cluster munitions] due to the high probability of extensive collateral damage',³⁷¹ and a US Air Force background paper warns that there are 'clearly some areas where CBU's normally couldn't be used (eg populated city centers)'.³⁷²

Restrictions on the use of cluster munitions, for instance to night-time attacks only, may reduce collateral damage to some extent, but do nothing to protect civilians from duds and may have military disadvantages. There is thus much to be said for belligerents ensuring they have other means at their disposal for performing tasks traditionally carried out by cluster munitions, such as attack helicopters or anti-tank guided missiles,³⁷³ to ensure cluster munitions are not used *faute de mieux* in situations where they are inappropriate.

³⁷⁰ They may, however, be unlawful (or on the point of becoming unlawful) for some states under national law. In July 2005, the Belgian senate reportedly passed legislation banning the use of cluster munitions, and similar initiatives were said to be being planned by the parliaments of France, Germany and Italy (Human Rights Watch, *States Parties Responses to 'International Humanitarian Law and ERW' Questionnaire*).

³⁷¹ 'Tactics, Techniques and Procedures for Multiple Launch Rocket System Operations', Field Manual 6-60, Washington DC, 1996, quoted in Human Rights Watch, *Off Target*, 97, n.312.

³⁷² US Air Force Bulletin Background Paper on International Legal Aspects Concerning the Use of Cluster Munitions, quoted in *ibid.*, 62.

³⁷³ The UK was said in 2000 to be developing an anti-tank guided missile (the *Brimstone*), expected to be '20 times as effective against main battle tanks deploying modern countermeasures as the cluster bomb currently in service' (*Lessons of Kosovo* (Vol. I), para.149). Delays in the project meant the system was still not available to UK forces as an alternative to the RBL 755 by the time of the 2003 Iraq war, however. It eventually came into service in January 2006 (*The Times*, 04.01.06).

f) Laser-guided missiles

During the period under review, laser-guided missiles and bombs were considered marginally more accurate than cruise missiles guided by GPS,³⁷⁴ but their accuracy depended on clear atmospheric conditions. If the laser cone identifying the target was broken up by smoke or cloud but the missile was launched nonetheless, instead of altering its trajectory on meeting the cone and homing in on the target, the missile risked missing the laser-signal and consequently exploding on impact anywhere within 15 kilometres.³⁷⁵

Laser-guided munitions contributed to an air campaign of unprecedented accuracy during the 1991 Gulf war. But the Coalition's ability to hit targets with precision was not always matched by detailed knowledge of the nature of the targets. The worst accident in terms of civilian casualties occurred when, on 13 February 1991, Coalition forces used laser-guided bombs to attack the al-Amariyah/al-Firdus bunker near Baghdad, apparently in the belief it was a military command and control facility and unaware of the presence of several hundred civilians sheltering overnight. The camouflaged bunker had a roof of reinforced concrete, and military trucks had been seen approaching and leaving. The mistake appears to have been made in good faith, but to have resulted from doubtful inferences being made about the military significance of the bunker on the basis of very limited information.³⁷⁶

During the Kosovo war, NATO forces had to cancel or postpone planned strikes with laser-guided missiles on numerous occasions due to bad weather.³⁷⁷

³⁷⁴ See Luttwak, *Strategy*, 204.

³⁷⁵ See Boyle in Hector and Jellema, *Protecting Civilians*, 37.

³⁷⁶ See Freedman and Karsh, *The Gulf Conflict*, 327-328 and de la Billière, *Storm Command*, 261. See also *Final Report to Congress*, 615-616 and Greenpeace International, *On Impact*, 88-92. For discussion of the legality of the attack, see Hampson, 'Means and methods of warfare in the conflict in the Gulf', 96-97.

³⁷⁷ According to the British Chief of the Defence Staff at the time, 'On many occasions our pilots returned with their bombs because they did not dare drop them through cloud in case they hurt the civilians below' (*Lessons of Kosovo* (Vol.II), para.85).

g) GPS-guided weapons

GPS-guided weapons allow strategic targets to be attacked from long range or high altitude with minimal collateral damage. Unlike laser-guided weapons, their guidance system functions in poor atmospheric conditions. Yet even more so than in the case of laser-guided weapons, given that they tend to be launched from beyond visual range, their successful use depends on good, up-to-date targeting intelligence which may not always be available.

Missiles or bombs guided at least partly by GPS devices were first used in the 1991 Gulf war, when *Tomahawk* cruise missiles were used for several successful precision attacks against long-range targets.³⁷⁸ Yet the location and identification of appropriate targets proved a challenge: after this conflict, an analyst claimed that out of a Coalition list of 800 targets identified for strategic attack by a combination of satellite imagery and expert knowledge of Iraq, fifty had been misidentified.³⁷⁹

The 1999 Kosovo war saw the first systematic use of Joint Direct Attack Munitions (JDAMs) – ordinary munitions onto which a device has been fixed able to receive and interpret satellite signals and to guide the munition onto a precise location, having been programmed with the relevant geographical co-ordinates.³⁸⁰ Procedures during this conflict for obtaining accurate information about the nature and location of targets provisionally selected for attack with GPS-guided weapons revealed their shortcomings when on 7 May 1999 USAF aircraft mistakenly launched a long-range attack on the Chinese Embassy in Belgrade. The US government explained that three maps of Belgrade dating from 1989, 1996 and 1997 had been used to locate both the intended target (the Federal Procurement and Supply Directorate) and the position of the Chinese Embassy and that none of the three maps accurately identified the location of either building.³⁸¹

³⁷⁸ See 'Tomahawk @ Cruise Missile', US Navy Fact File <http://www.chinfo.navy.mil/navpalib/factfile/missiles/wep-toma.html> (visited 14.11.04).

³⁷⁹ Freedman and Karsh, *The Gulf Conflict*, 312.

³⁸⁰ For details, see <http://www.globalsecurity.org/military/systems/munitions/jdam.htm> (visited 14.11.04). For use of JDAMs in Kosovo, see Rebecca Grant, 'The Redefinition of Strategic Airpower' (2003), *Air Force Magazine*.

³⁸¹ *ICTY Committee Report (NATO)*, para.81.

Furthermore, it appears that although photographic images of the locations scheduled for attack were available, they may not have been looked at carefully.³⁸² Problems with the correct identification and location of buildings selected for long-range attack with precision weaponry also appear to have occurred in Afghanistan in 2001.³⁸³

By the 2003 Iraq war, procedures appeared to have improved, and there do not appear to have been reports of civilian buildings having been attacked by Coalition forces in the mistaken belief that they were part of the military infrastructure and legitimate targets. Precision attacks against fixed, pre-planned targets enabled much damage to be caused to the Iraqi command and control system with apparently little collateral damage.³⁸⁴

GPS-guided bombs or missiles which malfunction can go very far off target indeed. As one expert put it, 'When you start looking at Tomahawk land-attack missiles and the cruise missiles that are coming into service, you are talking about 600 kilometres – ie, you are talking about the wrong *country* never mind the wrong *county*'.³⁸⁵ One problem with the system is that the guidance mechanisms, which need to be very sensitive to pick up the often very faint satellite signals on which they depend, are vulnerable to external jamming, whether accidental or deliberate.³⁸⁶ Another is that if GPS satellites become vulnerable to disabling

³⁸² The NATO Supreme Allied Commander (Europe) recognized that 'at any stage, anyone could have contacted someone with very recent experience in Belgrade who might have recognized that the building pictured for Target 493 was the new Chinese Embassy'. A review was then conducted of the available photographs of all approved targets, 'to be sure that the photographs actually were the targets we were after'. Another remedial measure was the addition of further information to the 'no-strike' list. (Clark, *Waging Modern War*, 299).

³⁸³ For instance, on 16.10.01 a Red Cross warehouse in Afghanistan was bombed by the US Air Force, having been misidentified as a military storage facility (US DoD News Briefing, 17.10.01). When the warehouse was bombed again later the same month, the accident was described enigmatically by a US spokesman as 'a different kind of mistake' (American Forces Information Service, 29.10.01). One of the problems reportedly faced by US intelligence was that co-ordinates for air strikes on targets in Afghanistan could only be obtained from old Russian maps, from which the co-ordinates would be translated to English maps using pencils and rulers. (*The Times*, 23.11.02).

³⁸⁴ See Human Rights Watch, *Off Target*, 42 and 50-51, where positive comments are made about the care taken by the Coalition to avoid collateral damage when attacking pre-planned targets. The organization was more critical of the collateral damage caused by attacks on other targets, such as individual leaders.

³⁸⁵ Boyle in Hector and Jellema, *Protecting Civilians*, 37.

³⁸⁶ See J. Ruley, 'GPS Jamming' AV Web, 12.02.03

(<http://www.avweb.com/news/avionics/182754-1.html> , visited 14.09.04). During the Iraq war,

attack in any form, precision weapons depending on them may become almost useless unless also equipped with alternative guidance systems.³⁸⁷ Compared to other weapons systems, however, GPS-guided missiles proved relatively reliable during the period under review.³⁸⁸

Risks of mistaken attacks on non-military objects with GPS-guided weapons can be reduced if belligerents record details of buildings such as hospitals in or near to conflict zones, as suggested in the 1998 US Air Force Targeting Manual.³⁸⁹ According to a US DoD spokesman, improvements were made after the Kosovo war in respect of the maintenance of such databases by the United States.³⁹⁰ Civilian authorities in conflict zones and humanitarian organizations with fixed assets in a theatre of active military operations need, for their part, to be sure that belligerents using GPS-guided weaponry are given accurate co-ordinates, in the correct format, of buildings such as hospitals for inclusion in these databases.

h) Gravity bombs – the case for a ‘1000 metre rule’

According to a report referred to in a British parliamentary Defence Committee report, no more than 2% of the 1000lb gravity bombs dropped during the 1999 Kosovo war could be confirmed as hitting their targets.³⁹¹ Nevertheless, there was sometimes a preference for gravity bomb attacks on targets visually identified by pilots, particularly when military objectives were well separated from civilian objects.³⁹² This is understandable in view not only of the cost of

the Coalition managed to locate and destroy all of Iraq’s jamming devices at the start of the war. (See Cordesman, *Lessons of the Iraq War*).

³⁸⁷ As of 2004, there were no reported cases of anti-satellite weapons used in international conflict, although primitive anti-satellite technology had been tested successfully as early as 1985 and ‘a spectrum of technologies’ for neutralizing satellite systems was available by 2004 (Michel Bourbonnière, ‘Law of armed conflict (LOAC) and the neutralisation of satellites or *ius in bello satellitis*’ (2004), *JCSL*).

³⁸⁸ Boyle, in Hector and Jellema, *Protecting Civilians*, 37.

³⁸⁹ AFP 14-210, para.12.4.2.

³⁹⁰ US DoD, ‘Background Briefing on Targeting’ (05.03.03).

³⁹¹ *Lessons of Kosovo* (Vol I), para.145.

³⁹² See *Lessons of Kosovo* (Vol I), para.145 and (Vol. II), para.236. See also Boyle in Hector and Jellema, *Protecting Civilians*, 34. The UK and France were not willing to launch aerial attacks on ground forces within 500 metres of a village (Clark, *Waging Modern War*, 277).

precision weaponry but also malfunction risks and the need, particularly where effective use of GPS-guided weaponry was concerned, for first-rate and up-to-date targeting intelligence.

The figure of 2% needs to be understood in context. During the period under review, well trained aircrew flying at the appropriate altitude and using bombs without terminal guidance would in fact have expected all the weapons dropped in a 'stick' (i.e. the extended oblong shape into which a payload of gravity bombs will normally fall when all are released) over an assigned target to fall within approximately 500 metres of the target (the miss error being greater the higher the altitude and the less steep the angle). They would not, however, have been able to exclude the risk of the bombs landing up to a kilometre off-target in the event of freak conditions, or something having gone very badly wrong.³⁹³ An attack with a single gravity bomb could in normal circumstances have been expected to have been accurate to within 100 metres.³⁹⁴ Whether or not it would have been possible to confirm the bombs as having hit (let alone destroyed) the target would have been another matter.

As with artillery, where air-delivered gravity bombs were concerned, efforts to minimize collateral damage needed to take account both of a reasonable margin for targeting error and the likely 'spread pattern' of the warhead in the specific environment. For example, an FAB-250 high explosive aviation bomb weighing 250kg, with a horizontal fragment dispersion radius of 1,170 metres,³⁹⁵ could potentially have endangered anyone out in the open within this distance of its point of impact if the bomb had been dropped on open ground on a hard surface, and fused to detonate on impact. By contrast, an identical bomb dropped on very soft ground, or fused to detonate only after having penetrated its target, would have had a much smaller horizontal fragment dispersion radius.

³⁹³ Informal briefing, Joint Services Command and Staff College (JSCSC), Shrivenham, October 2005.

³⁹⁴ *Ibid.*

³⁹⁵ *Isayeva v. Russia* (2005), ECtHR, para.94. The term 'fragment dispersion radius' may give a misleading impression that fragments from a gravity bomb will spread out in an approximately circular fashion, which is far from the case. (The judgment is considered further in Chapter 7).

There are too many variables for it to make sense to suggest a specific distance which should invariably separate targets chosen for attack with gravity bombs from concentrations of civilians in conflict areas. As a basic rule of thumb, however, in conflicts where gravity bombs are used, practice during the period under review suggests it is reasonable to expect that properly trained combat aircrew will normally be able to confine their bombs to within 500 metres at most of the intended target. However, given that freak accidents can never be excluded by even the most careful aircrew, it would seem wise for civilian settlements, hospitals and important cultural property to be separated from obvious military targets for aerial bombardment by at least a kilometre where possible.³⁹⁶

i) Hand grenades

During a military operation conducted in the village of Samashki, Chechnya, on 7-8 April 1995 by Russian forces, more than 100 civilians were reported killed.³⁹⁷ According to witness statements made to the Russian human rights group *Memorial*, at least some of the casualties were caused by hand grenades thrown by Russian troops into rooms or cellars where they knew there were people.³⁹⁸ Witnesses informed *Memorial* that some soldiers had refrained from throwing grenades into the cellars when they realized that those sheltering there were civilians, while others did not.³⁹⁹ These accounts suggest that among the Russian units concerned, good practice in the use of these weapons had come to depend substantially on the courage and humanity of the common soldier, rather than on proper military planning, training and discipline.

³⁹⁶ A further precaution that can be taken by civilians living or working in conflict zones is to cover glass windows with transparent, adhesive plastic sheeting and/or place heavy curtains in front, which will normally lead to a lower rate of death or serious injury among the occupants of a building in the event of bombs exploding in the vicinity than would otherwise be the case (see David Lloyd Roberts, *Staying alive: safety and security guidelines for humanitarian volunteers in conflict areas* (Geneva, 1999), 84-85). Clearly, however, an attacking belligerent cannot assume such precautions will have been taken when assessing whether or not a military objective in close proximity to a civilian building or hospital can be subjected to aerial bombardment without causing excessive collateral damage.

³⁹⁷ See Memorial, *Vsyemi Imyeuchshimisya Sredstvami* ('By all available means'), available on <http://www.memo.ru/hr/hotpoints/CHECHEN/SAMASHKI> (visited 23.11.04).

³⁹⁸ See *ibid.*, Chapter 9.

³⁹⁹ *Ibid.*, Chapter 8.

As already noted in the context of discussion of line-of-sight weapons, good practice in urban warfare on the part of an attacker consists primarily in every effort having been made to evacuate civilians from the area in question before street-to-street fighting begins. Even so, it needs to be remembered in the context of urban warfare that people invariably get left behind in any evacuation, and if it is suspected there may be civilians sheltering in buildings or cellars, they will need to be warned to come out (and given time to do so) before the use of hand grenades can be considered appropriate. If such situations are anticipated, good practice may involve equipping troops with CS/CR hand grenades, which are normally non-lethal, but allow the user to subdue temporarily all those in a confined space. This may not always be an attractive option, however: in some situations, military legal advisers may object to the use of CS/CR grenades on account of the prohibition on the use of gas as a weapon of war,⁴⁰⁰ and the non-lethality of these weapons cannot be relied on. Another problem is the risk of enemy combatants protecting themselves from such weapons with gas masks if their use is anticipated. Perhaps the most that can sensibly be said is that the use of such weapons should not be ruled out when it may be the only way that an attack in an urban context can be carried out in a discriminating fashion.

j) Non-explosive warheads

The 2003 Iraq war saw the use of various novel, non-explosive weapons systems designed to put enemy facilities out of action without destroying them, for instance when carbon-fibre bombs were used to incapacitate electrical power distribution facilities.⁴⁰¹ In Nassiriya, an attack of this nature caused a short circuit, sparking an unintended fire which destroyed three transformers. This put the town's power and water supply out of action for a month, although generators allowed the hospital to continue providing life-saving treatment. The fact that non-explosive weaponry was used may have prevented civilian casualties as well as allowing the power distribution facility to be more quickly repaired than would

⁴⁰⁰ See the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare (hereinafter '1925 Geneva Protocol').

⁴⁰¹ Human Rights Watch, *Off Target*, 42.

have been possible had it been destroyed with high explosive.⁴⁰² This conflict also saw the use of an air-delivered non-explosive cluster bomb containing steel rods to disable communications antennae on the roof of the Ministry of Information in Baghdad.⁴⁰³ This allowed the facility to be disabled without causing civilian casualties or collateral damage to neighbouring buildings or even to the facility itself, beyond the destruction of the antennae.⁴⁰⁴ British and US aircrew also had the option of using inert 500lb or 1000lb ‘concrete bombs’ capable of being directed onto a target by laser with a view to destroying it without damaging surrounding buildings or endangering passers-by.⁴⁰⁵

k) Non-lethal weaponry

Several types of ‘non-lethal’ weapons were developed during the period under review, designed to incapacitate temporarily or repel or disperse people without resort to lethal force. Such weapons relied on irritant or soporific substances, such as capsicum spray or sedative gas, non-lethal ammunition, such as rubber bullets, taser darts or powerful jets of water, immobilizing substances (which either fix the victim to the spot, or make movement impossible by eliminating surface friction), intolerable noise, nauseating odour, dazzling beams creating temporary or permanent blindness, or electromagnetic waves of increasing intensity.⁴⁰⁶ These weapons appear to have been used rarely, if ever, during armed conflict between 1980 and 2005, though were sometimes used in operations short of armed conflict.⁴⁰⁷ Use of some non-lethal weapons may raise legal issues on account of treaty rules prohibiting use of gas or chemical

⁴⁰² *Ibid.*, 43-45.

⁴⁰³ The CBU-107 (*ibid.*, 112).

⁴⁰⁴ *Ibid.*, 46.

⁴⁰⁵ ‘Tornadoes to drop “concrete bombs”’, BBC News Online, 04.04.03. See also Cordesman, *The Iraq War*, 286. The RAF used these weapons in Iraq in 2003, but the MoD’s terse public assessment after the event was ‘these often did not create the desired effect’ (MoD, *Lessons for the Future*, 30).

⁴⁰⁶ See Massimo Annati and Ezio Bonsignore, ‘Non-Lethal Weapons; Possibilities, Programmes, Perspectives and Problems’ (2003), *Military Technology*. See also AFP14-210 (Table 11.1, 89), for a list of various disabling mechanisms available to the USAF.

⁴⁰⁷ Baton rounds were used by SFOR in Bosnia, though some nations were initially reluctant to authorize their use and many contributing nations did not have them.

substances as a weapon of war.⁴⁰⁸ Others, such as lasers designed for the sole purpose of causing permanent blindness, may be banned outright for states party to certain treaties.⁴⁰⁹

‘Non-lethal’ is a misnomer: sometimes a weapon that will be ‘non-lethal’ against a healthy young adult may kill a child or an elderly person.⁴¹⁰ The term is used not to describe weapons which never cause death, but weapons not intended to cause death. Where it is likely that non-lethal weapons may be used, it is important that efforts should be made to keep young children, the elderly and the infirm well clear. In situations of high tension, it is likely to be easier (relatively) for civilian leaders to ensure that vulnerable people are kept out of danger of ‘non-lethal’ weapons than for military personnel to ensure that vulnerable people are not affected by them. That said, some categories of vulnerable people (such as young teenagers) may be unresponsive to warnings, from whatever quarter, of the potential dangers of provoking soldiers equipped with ‘non-lethal’ weaponry.

Use of almost any non-lethal weapons system will need to anticipate casualties in need of specialized medical treatment or, if immobilizing agents are used, physical liberation. If insufficient provision is made for this, use of ‘non-lethal’ weaponry may cause at least as many fatalities as lethal weaponry would have done.⁴¹¹

⁴⁰⁸ See for instance the 1925 Geneva Protocol and the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. See also *Operational Law 2005*, 19-20, for US policy towards the use of non-lethal chemical substances for riot control.

⁴⁰⁹ See Protocol IV to the Conventional Weapons Convention.

⁴¹⁰ The alternative term ‘less than lethal’ is hardly less misleading.

⁴¹¹ 15% of the hostages being held by Chechen militants in a Moscow theatre reportedly died in October 2002 after Russian security forces broke the siege by pumping anaesthetic into the theatre. (*Financial Times*, 05.12.02). It has been claimed that the authorities’ hesitation in providing paramedical assistance to those affected by the anaesthetic and in providing doctors treating the victims with information about its nature may have contributed to the high death toll (see B. Van Damme, ‘Moscow theatre siege: a deadly gamble that nearly paid off’ (2002), *The Pharmaceutical Journal*).

l) Electronic warfare

Certain enemy systems can be disabled by computer network attacks, airwave jamming or electromagnetic pulses. Such attacks may be able to create a desired effect with minimum physical injury or destruction and no immediate collateral effects. A good example was the use by the United States during the 1999 Kosovo war of EA-6B *Prowler* aircraft with electronic jamming capabilities (available to no European state) which played a critical role in suppressing enemy air defence (without bloodshed).⁴¹² There may sometimes be indirect collateral effects caused by electronic warfare, for instance if radio jamming aimed at confusing enemy aircraft interferes with civilian air traffic control, which will need to be anticipated in planning electronic warfare attacks.⁴¹³

4.3. Taking precautions in the choice of means and methods of attack – timing and techniques

a) Timing

British military doctrine states: 'The law stipulates that the military worth of the target needs to be considered *in relation to the circumstances at the time*. Therefore, a commander needs to have *an up-to-date assessment of the significance of a target and the value of attacking it*.'⁴¹⁴ (Emphasis added). A recent US Air Force manual observes in similar vein: 'Because the characteristics of all objects and areas are changeable, each target must be routinely monitored to ensure that any status related changes are brought to the attention of target analysts'.⁴¹⁵ As this guidance recognizes, it is not enough for potential targets to have been observed at some point before an attack: they need to have been

⁴¹² *Lessons of Kosovo* (Vol. I), paras.104-106.

⁴¹³ See Michael Schmitt, 'Wired warfare: Computer network attack and *jus in bello*' (2002), *IRRC* and Brian O'Donnell and James Kraska, 'Humanitarian law: developing international rules for the digital battlefield' (2003) *JCSL* for discussion of the legal implications of attacks on computer networks.

⁴¹⁴ *British Defence Doctrine*, (JWP 0-01) (available via MoD website). As Hampson observes, 'the value of the target has to be assessed at the time of the attack'. ('Means and methods of warfare in the conflict in the Gulf', 97).

⁴¹⁵ AFP 14-210, para.1.7.4.2. See also *ROE Handbook for Judge Advocates*, 3-25.

observed sufficiently recently for confidence that they are still appropriate targets at the time of the attack. In the case of many targets, this may mean very recently indeed, often at the very last moment before a weapon is launched. Last minute observation may often be the only means of establishing that a target is legitimate at the time of attack, or that it can be attacked without causing disproportionate collateral damage.

During the 1999 Kosovo war, NATO attacks on bridges and factories in Serbia often took place at night, causing few or no civilian casualties.⁴¹⁶ Nonetheless, several civilians were killed in attacks on bridges which took place either in daytime or during the evening.⁴¹⁷ After a daytime attack on a bridge in Varvarin, Serbia, on 30 May 1999 killed nine civilians, NATO's Supreme Allied Commander (Europe) acknowledged that the question as to why the attack had taken place during the day rather than at night (asked in the local press by a schoolteacher), was a good one and the decision was taken that henceforth bridges would be attacked only at night.⁴¹⁸ Night-time attacks cannot be considered to be good practice invariably, however: the reduced likelihood that civilians will be present in the vicinity of certain targets during the night needs to be offset against the difficulties at night of visually identifying targets and confirming their legitimacy for attack at that particular moment.

⁴¹⁶ E.g. NATO attacks on the bridge in Novi Sad (4.55am-5.30am, 01.04.99); a factory in Cacak (3.17am, 04.04.99); the Pancevo oil refinery (4.29am, 04.04.99); the New Belgrade Heating Plant (4.35am, 04.04.99); the Kruskik factory (Valjevo) (2.15am, 17.04.99); and the Ostruznica bridge (12.58-4.35am, 29.04.99). (Human Rights Watch, *Civilian Deaths in the NATO Air Campaign (Appendix A)* (2000).

⁴¹⁷ On 12.04.99, a NATO attack on the Grdelica Klisura Gorge Bridge, near Leskovac in southern Serbia, which took place 'in the evening' killed between ten and twenty people in a passenger train crossing the bridge as it was hit. On 30.04.99, two civilians were killed and fifteen wounded when a bridge in Trstenik, central Serbia, was hit by a Precision Guided Munition at 3.15pm; six civilians were killed and seven wounded when a bridge in Murino, Montenegro, was hit by a PGM at 10.10pm the same day. On 01.05.99 thirty-nine civilians were killed and thirteen injured when the bus in which they were travelling was crossing a bridge in the village of Luzane (Kosovo) as it was hit by a NATO air strike at 1.40pm. On 30.05.99, a NATO air strike against a bridge in Varvarin, Serbia, between 1.00pm and 1.25pm killed nine civilians and injured between twenty-eight and forty (*ibid.*). Three daytime attacks on bridges in, respectively, Nassiriya, Fallujah and Samawa, were reported to have killed at least 330 civilians during the 1991 Gulf war. (Human Rights Watch, *Needless Deaths in the Gulf War: Civilian Deaths During the Air Campaign and Violations of the Laws of War* (1991), 5).

⁴¹⁸ Clark, *Waging Modern War*, 336.

It will not always be reasonable to expect combatants to inspect an intended target closely moments before an attack is launched, for instance if there are compelling military reasons for launching the attack from long-range or high-altitude and forward observation is not an option. What can reasonably be expected is that consideration will have been given to the likely presence of non-combatants in or around a chosen target at particular times. Religious festivals and holy days will affect the number of civilians present in or around particular shrines or places of worship in the vicinity of military objectives. Markets may take place on particular days of the week, sometimes in a town centre, sometimes in an out-of-the-way location. Some buildings and objects, such as factories and bridges, can reasonably be expected to be relatively free of civilians at night whereas residential areas may be less densely populated by day. There will be times when even buildings normally free of non-combatants, such as army camps and headquarters, will be full of civilian family members or other non-combatants, for instance ceremonial occasions, or the immediate aftermath of a major engagement, when large numbers of wounded people may be present in military establishments other than marked hospitals.

There may sometimes be pressing military reasons for launching an attack at a particular moment, for instance if weapons systems are being used which depend for accuracy on clear atmospheric conditions, or if large numbers of enemy forces are on the move. There may also be good military reasons for synchronizing a set of attacks if the intention is to disable a system, rather than to disable or destroy an isolated military objective. However, non-military reasons for launching attacks at particular moments, for instance a perceived need to keep up the pressure of a campaign for political reasons, should not influence commanders obliged by law to make the difficult assessment of whether the expected collateral damage of an attack would be excessive in relation to the concrete and direct *military* advantage anticipated from the attack.⁴¹⁹

⁴¹⁹ See Additional Protocol I, article 57.2(a)(iii).

b) *Methods of attack*

The altitude issue

In a report submitted to the ICTY Prosecutor in relation to NATO's conduct during the Kosovo war, it was observed that although there was nothing necessarily unlawful about the practice of NATO pilots of operating out of range of air defences, it would have been difficult for aircrew flying at high speed and altitude to distinguish between military and civilian vehicles in a convoy.⁴²⁰ It has been suggested nevertheless that during the 1991 Gulf war, aircrew flying well above 10,000 feet 'had the perspective to find and recognize their target, launch their weapons with deliberation, and observe if the target was hit', in contrast to those flying 'fast and low', who would have been able to see 'nothing below except indistinct terrain flashing past' and would have been unable to use laser guided bombs effectively.⁴²¹ The NATO Supreme Allied Commander (Europe) recorded that although towards the end of April 1999, pilots were authorized to descend below 15,000 feet (c. 5,000 metres) if necessary to identify targets on the ground, they reported that they were usually more effective when flying at higher altitudes and using high-powered binoculars.⁴²²

In this context, it seems surprising that according to General Clark, the pilots responsible for the mistaken attack on the civilian convoy near Djakovica on 15 April 1999 reportedly 'viewed their target with the naked eye, rather than remotely', despite being at an altitude of 15,000 feet.⁴²³ Part of the explanation may be that in practice, cockpit binoculars could be cumbersome to use. Aircrew may have been reluctant to take their eyes off the wider picture in order to use

⁴²⁰ *ICTY Committee Report (NATO)*, para.69. See also Human Rights Watch, *Under Orders*, 443.

⁴²¹ See Luttwak, *Strategy* (202-203). Luttwak arguably overstates his case: only if dropped at a very low altitude indeed would a laser-guided missile be unable acquire its target. Nor did it seem to have been the case that aircrew flying at 8,000-12,000 feet were always able to recognize targets effectively (see 'Friendly fire in the Gulf: Board's findings' (statement to the House of Commons by Archie Hamilton, Armed Forces Minister, July 1992) (1992) (*Army Quarterly Defence Journal*)).

⁴²² Clark, *Waging Modern War*, 278.

⁴²³ *ICTY Committee Report (NATO)*, para.64. See also para.67.

them, particularly in the case of pilots of single-seater aircraft, such as the F16s which constituted most of the attacking planes on this occasion.⁴²⁴

Vision-enhancing equipment for military aircraft during the period under review had limitations. In British aircraft, in-cockpit displays such as the target designation equipment used were able to provide magnification of the ground below to some extent, but often magnification was digitalized, rather than optical, with the result that an enlarged on-screen image, for instance of a vehicle, would be no less blurred than the smaller image had been. The image would normally have been monochrome, so the colour of a vehicle, which at medium or low altitude might have suggested civilian character, would not have been visible at high altitude, even if the image was magnified.⁴²⁵

The lesson seems to be that there is no reason why high altitude attacks should not constitute acceptable practice in terms of taking precautions, so long as the true nature of provisionally selected targets can be confirmed before weapons are launched, either by the use of appropriate vision-enhancing equipment capable of allowing aircrew to distinguish civilian from military vehicles and to identify protective markings on buildings, or by some other suitable means such as communication with land-based observers.

Angles of attack

The direction from which an attack is launched, whether from the air, the sea or on land, and the angle at which bombs, missiles and projectiles approach their targets are critical for reducing the risk of collateral damage. For these reasons, careful selection of the exact direction from which an attack with ground forces, or an air-strike or missile attack on a target, will be launched, and detailed knowledge of the surrounding area, play a vital role in minimizing collateral

⁴²⁴ *Ibid.* para.69.

⁴²⁵ Informal briefing, JSCSC, Shrivenham, October 2005.

damage.⁴²⁶ The tendency of air delivered gravity bombs to fall in an extended oblong shape or ‘stick’, over the target means any collateral damage is likely to affect the area in front of or behind the target (in relation to the path of the aircraft), rather than to the right or left of it. If loss of guidance signals causes air-delivered laser-guided munitions to miss their target, they will usually fall short of the target, rather than overshooting it.⁴²⁷

c) *Force security*

Taking ‘feasible precautions’ to minimize collateral damage is widely understood to mean taking precautions which are ‘practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.’⁴²⁸ A major military consideration in relation to any operation will be force security – the lives of servicemen and women, in other words. The degree of personal risk which a combatant is expected to take to reduce the risk of causing death or injury to non-combatants during an operation is not a matter on which the law can provide hard and fast guidance,⁴²⁹ and military practice in this respect has varied widely not only during the period under review but throughout history. But military servicemen are sometimes the first to express the view that some degree of risk may need to be taken for the sake of that degree of discrimination in attack needed for an operation to be perceived as competent and legitimate.⁴³⁰

During the 1991 Gulf war, US and British policy was to allow attacks on targets which might give rise to collateral damage if planners considered such

⁴²⁶ See US DoD ‘Background Briefing on Targeting’ 05.03.03. See also Australia’s *Defence Force Manual*, quoted in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, (Vol. II), 413. For examples of practice in the 1991 Gulf war and the 2003 Iraq war, see Rogers, *Law on the Battlefield*, 103 and Human Rights Watch, *Off Target*, 17 and 53.

⁴²⁷ Informal briefing, JSCSC, Shrivenham, October 2005.

⁴²⁸ Article 3.10, Amended Protocol II of the Conventional Weapons Convention. See also statements of understanding made on signature or ratification of Additional Protocol I by Belgium, Canada, France, Italy, the Netherlands and the UK.

⁴²⁹ Rogers, ‘Zero-Casualty Warfare’, 177. As a US military spokesman put it to Human Rights Watch, ‘There’s no standard that says one US life equals X civilians’ (Human Rights Watch, *Off Target*, 94).

⁴³⁰ See e.g. Chris Norton, ‘Operation Allied Force’ (2002), *Royal Air Force Air Power Review*.

attacks would 'shorten the war or protect coalition lives.'⁴³¹ Nonetheless, preference was apparently given to the minimization of collateral damage over force security when Coalition forces decided to deploy special forces to sever the fibre optic cables on the three bridges over the Euphrates which had remained intact after the other bridges had been destroyed by aerial bombardment.⁴³² This relatively high risk operation enabled the Coalition to achieve an important military advantage without causing the civilian hardship which would have ensued from a lower risk operation to destroy all the bridges over the Euphrates by aerial bombardment. British military doctrine now recognizes explicitly that '...there may be occasions when a commander will have to accept a higher level of risk to his own forces in order to avoid or reduce collateral damage to the enemy's civil population'.⁴³³

A criticism which has been made of the 1999 Kosovo war is that concern to avoid NATO casualties and loss of aircraft took undue precedence over other considerations, including collateral damage.⁴³⁴ Yet on those occasions where attacks resulted in loss of civilian life, although criticisms can be made of NATO's procedures, concern for force security seldom seems in fact to have been the main problem (with the possible exception of NATO's reluctance to jeopardize the safety of aircrew by giving advance warnings of attacks).⁴³⁵ NATO demonstrated that it had the means to conduct attacks in a way that both minimized collateral damage and exposed its forces to little if any risk – given a willingness to wait for suitable weather.

The issue of force security is sometimes presented starkly as a zero-sum game: the more care that is taken to avoid civilian casualties, the more military personnel will themselves be put at risk.⁴³⁶ It is not always as black and white as this. For a primitive armed force or group, without sophisticated surveillance or optical

⁴³¹ De la Billière, *Storm Command*, 260.

⁴³² Freedman and Karsh, *The Gulf Conflict*, 326.

⁴³³ *British Defence Doctrine* (JWP 0-01).

⁴³⁴ See e.g. Amnesty International, *NATO/Federal Republic of Yugoslavia: 'Collateral Damage' or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force* (2000).

⁴³⁵ See *ibid* (3.4). See also Clark, *Waging Modern War*, 176-177, 428.

⁴³⁶ See e.g. Reisman, 'The Lessons of Qana', 397, and Rogers 'Zero-casualty warfare', 175.

equipment and with very limited choice of weaponry, there may indeed often be a direct trade-off between force security and the minimization of collateral damage (although very clumsy attacks in which non-combatants are killed as a result of combatants not wishing to expose themselves to danger may actually jeopardize force security by provoking revenge attacks and enlistment in enemy ranks). But for the more sophisticated (and wealthier) belligerent, technology often offers a third way, enabling high quality information about a potential target to be obtained in near-real time with no risk to personnel before attacks are launched (e.g. by extensive use of UAVs) and enabling attacks to be carried out with precision from safe distances. The key word here is ‘often’. It will not *always* be possible to identify a target reliably or observe it properly by remote means, nor will it always be possible to strike it with precision from a safe distance.

4.4. The proportionality calculation

For effective ‘proportionality calculations’ to be made, in which humanitarian and military considerations in relation to specific, planned attacks are properly balanced, procedures and systems for assessing the likely collateral damage of an attack need to be established.

During the 1999 Kosovo war, NATO planners considered the construction of potential targets,⁴³⁷ as well as the proximity of non-combatants and civilian objects, before choosing weapons for particular attacks, and used mathematical models to estimate likely collateral damage if particular targets were struck with particular weapons.⁴³⁸ By 2003, a computer model was being used by US forces to determine the effect which particular warheads could be expected to have on

⁴³⁷ See e.g. Clark, *Waging Modern War*, 253. AFP 14-210 recommends that the structure of targets should be analyzed, in order to determine their vulnerability and select the best point for attack (para.6.5.3).

⁴³⁸ NATO used tables to work out how much of a building which was to be attacked would be affected by the blast and fragmentation effects of bombs and missiles. It was considered that the ‘radius of damage’ of particular bombs and missiles could be predicted with considerable accuracy. A formula had been developed for estimating the number of people likely to be in a particular building. All this information was then pulled together to give an overall estimate for the expected collateral damage in relation to specific targets which were to be submitted to the political authorities for approval. (Clark, *Waging Modern War*, 181 and 240-241).

particular targets.⁴³⁹ Few armed forces had the technology available for this type of analysis. However any commander needed to be able to rely on a reasonable amount of intelligence about the location of non-combatants in the vicinity to make effective proportionality calculations, as was often recognized in military manuals.⁴⁴⁰

Not only did computer graphics for making proportionality calculations evolve during the period under review, but institutional procedures for doing so became more structured. During the 1991 Gulf war, potential targets assigned to the British Royal Air Force (RAF) by Coalition military planners were not attacked unless the RAF commander in theatre was satisfied that collateral damage likely to be caused would not be disproportionate to the military advantage anticipated.⁴⁴¹ By the time of the Kosovo war, the United Kingdom, like most other European members of NATO, with the notable exception of France, had ratified Additional Protocol I and was thus bound by this treaty 'to refrain from deciding to launch any 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', and also to cancel or suspend an attack in the event of it becoming apparent that such an attack would have such a result.⁴⁴² Where attacks to be carried out with any British involvement were concerned, proportionality calculations were often made in London after painstaking consideration, involving senior governmental lawyers, of the potential military and humanitarian consequences of attacking certain targets, rather than being left to the judgement of military commanders.⁴⁴³ Other NATO member states often wanted assurance that collateral damage would not exceed certain limits, or would

⁴³⁹ See Human Rights Watch, *Off Target*, 19. See also the US DoD's 'Background Briefing on Targeting', 05.03.03, and Cordesman, *The Iraq War*, 257.

⁴⁴⁰ See e.g. passages from Australia's *Defence Force Manual* and France's 'Law of Armed Conflict Summary Note' quoted in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol II), 363-364. See also commentary at para.457.3 of the *Handbook of Humanitarian Law*.

⁴⁴¹ House of Commons Defence Committee, 10th Report, *Preliminary Lessons of Operation Granby*, para.274. See also Rogers, *Law on the Battlefield*, 103 and 105.

⁴⁴² Additional Protocol I, article 57.2(a)iii and 57.2(b).

⁴⁴³ See Boyle in Hector and Jellema, *Protecting Civilians*. Peter Rowe's albeit tentative assessment that 'it might be argued that all the detailed rules so carefully drafted in 1977 were of little consequence' ('Kosovo 1999: the air campaign') was written before the elaborate target selection procedures in this legally self-conscious campaign had become widely known.

be avoided altogether, before being prepared to agree to attacks on certain targets by NATO forces, whether or not their own assets or territory were to be directly involved.⁴⁴⁴ During the 2003 Iraq war, as far as the United Kingdom was concerned, an even wider range of military and governmental departments became involved in the process of making proportionality calculations than had been the case during the Kosovo war.⁴⁴⁵ This time, however, ‘significant delegated powers’ were given to British commanders in theatre to select targets within parameters already set by the political authorities, with the aim of facilitating rapid, lawful targeting decisions in relation to ‘time sensitive targets’.⁴⁴⁶ The US procedure for approving targets seems to have been less centralized, though any attack expected to put more than 30 civilians at risk required the approval of the Secretary of Defense.⁴⁴⁷

Criticism of proportionality calculations taken during the period under review has often focussed on perceived failures to take proper account of the likely long-term or deferred humanitarian consequences of attacks on particular targets, such as power stations, or of using weapons such as cluster munitions.⁴⁴⁸ It is not unreasonable to expect that military planners should give some consideration to collateral damage which can be expected to occur as a result of, but some time after, an attack.⁴⁴⁹ An example of this perspective can be found in a US Air Force

⁴⁴⁴ See Clark, *Waging Modern War*, 318-319.

⁴⁴⁵ According to the British MoD report *First Reflections*, ‘Strong coordination between the MOD, the Permanent Joint Headquarters (PJHQ) at Northwood and the in-theatre National Contingent Command helped ensure coherent target planning (a lesson from previous operations). The Department for International Development was also consulted on key humanitarian infrastructure issues. The process for approving all targets for UK aircraft, submarine-launched cruise missiles or for coalition aircraft using UK facilities was conducted with appropriate political, legal and military oversight at all levels. We also influenced the selection and approval of other coalition targets’ (para.2.6).

⁴⁴⁶ MoD, *Lessons for the Future*, 28. See also HCDC, *Lessons of Iraq*, para.94. It has not, in the period under review, been customary for states to publicize the reasons for their decisions not to attack certain targets. Adam Roberts observes that the reluctance of planners to reveal such information may stem from a desire to avoid giving adversaries ‘a recipe book for not being bombed’. (‘Counter-terrorism, armed force and the laws of war’ (2002), *Survival*).

⁴⁴⁷ Cordesman, *The Iraq War*, 275.

⁴⁴⁸ See e.g. Human Rights Watch, *Needless Deaths*, on the long-term consequences of attacks on Iraqi power stations in 1991 by Coalition forces and Human Rights Watch, *Fatally Flawed*, on the long-term effects of use of cluster bombs in certain contexts.

⁴⁴⁹ Christopher Greenwood suggests it would be ‘an excessively narrow approach’ to take the view that any collateral damage which did not occur during an attack itself could be disregarded, but proposes that if long-term collateral damage is to be taken into account during proportionality calculations, so should long-term military advantage (‘Command and the Laws of Armed Conflict’ (1993), *Strategic and Combat Studies Institute, Occasional Paper No. 4*, 20).

background paper, which declares that in view of the fact that unexploded bomblets from cluster bombs are ‘reasonably foreseeable’, the dud rate must be part of the proportionality calculation.⁴⁵⁰ This type of consideration of the predictable long-term humanitarian impact if a particular weapon is used in a particular context, certainly conforms to the spirit of the rules on precautions in attack.

It might be argued nevertheless that a combatant using cluster munitions can never predict *for certain* the long-term collateral effects of his action, since he cannot know whether local civilians will return to farm the land, whether the duds will be cleared by the local authorities, or even whether or not they will ever actually be disturbed by civilians, and that trying to accommodate anticipated deferred effects of the use of cluster munitions into proportionality calculations is thus impractical.⁴⁵¹ However, if the land is fertile, the country densely populated, and the national authorities poor, disorganized, indifferent to the welfare of the rural population (or possibly all three), and cluster munitions with dud rates of between 2% and 16% have been used in large quantities without provision having been made by the user for subsequent clearance, it is hard to see how it could coherently be anticipated that civilians would not be killed and maimed in the ordinary course of events as an incidental result of the use of such weapons. The number of such casualties would not be possible to calculate exactly, but as the USAF background paper quoted above implies, reasonable estimates can and should be made during the proportionality calculation.⁴⁵²

⁴⁵⁰ US Air Force Bullet Background Paper on International Legal Aspects Concerning the Use of Cluster Munitions (quoted in Human Rights Watch, *Off Target*, 115).

⁴⁵¹ Christopher Greenwood has argued that ‘the risks posed by ERW once the immediate aftermath of an attack has passed are too remote to capable of assessment at that time’ (i.e. when the proportionality test is being applied at the time of the attack). (See written advice provided to the Group of Government Experts of States Parties to the Weapons Convention, ‘Legal issues regarding explosive remnants of war’, CCW/GGE/XI/WE.1/WP.7, 23.05.02).

⁴⁵² This is also the position of the ICRC which has observed that ‘implementing the rule of proportionality during the planning and execution of an attack using cluster munitions must include an evaluation of the foreseeable incidental consequences for civilians during the attack (immediate death and injury) and consideration of the foreseeable short and long term effects of submunitions that become ERW.’ (‘Existing principles and rules of international humanitarian law applicable to munitions that may become explosive remnants of war’, CCW/GGE/XI/WG1/WP.7, 28.07.05).

4.5. Taking the decision to abort

The law of armed conflict requires an attack to be postponed or cancelled if it becomes apparent that the selected target is not a legitimate military objective, or if expected collateral damage would be excessive in relation to the concrete and direct military advantage anticipated from the attack.⁴⁵³ Decisions to abort attacks may, however, have adverse consequences for an attacker. Often, the moment for an attack will have been chosen with some care; an equally suitable moment may not present itself again for some time, or, in a worst case scenario from the attacker's perspective, the entire effect of the attack may be nullified by a last minute decision to abort it in part or entirely. Aborting an attack may even leave an attacking force, or those it wishes to protect, in imminent danger from the object that was to have been neutralized.

During the 1991 Gulf war and the 1999 Kosovo war, British policy was to leave the final decision on whether or not an assigned target should be attacked to the pilots.⁴⁵⁴ In 2003 it was reported that Israel allowed pilots the final say on whether specific missions directed against Palestinian militants in the occupied territories should be carried out or aborted,⁴⁵⁵ and Iraq has claimed that during the 1980-1988 Iran-Iraq war, Iraqi pilots who refrained from striking listed targets that appeared on observation to be civilian objects were not held responsible for this apparent failure to obey orders.⁴⁵⁶ Australian policy is to allow aircrew discretion as to whether or not to attack an assigned target.⁴⁵⁷

British pilots released their weapons on only 40% of their missions during the 1999 Kosovo war: on other occasions attacks were aborted, largely as a result of

⁴⁵³ Additional Protocol I, article 57.2(b).

⁴⁵⁴ See de la Billière, *Storm Command*, 260. On practice in Kosovo, see *Lessons of Kosovo*, (Vol II), para.240.

⁴⁵⁵ *The Week*, 27.09.03.

⁴⁵⁶ See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol.II), 397.

⁴⁵⁷ Australia's *Defence Force Manual* gives as an example of a situation in which aircrew would be obliged to cancel an attack as follows: '...an aircrew may be ordered to bomb what the mission planner believes to be a command and control centre. If, in the course of the mission, the command and control centre is displaying an unbriefed symbol of protection, e.g. a Red Cross symbol, then aircrew must refrain from completing their attack. The Red Cross symbol indicates the facility is a protected installation and is immune from attack unless intelligence, or higher authority, determines that the facility has lost its protected status because the emblem is being misused.' (Quoted in *ibid.*, 393).

pilots being unable adequately to identify targets or to be certain of hitting them because of atmospheric conditions.⁴⁵⁸ Landing aircraft with bombs or missiles still attached was said in 2001 to be standard practice for US pilots unable satisfactorily to identify an assigned target and to have been British practice during the 1999 Kosovo war.⁴⁵⁹ But it was not always the safest of manoeuvres to execute, for instance where jets needing to return to aircraft carriers were concerned. A common practice during the Kosovo war appears to have been for pilots to jettison their bombs in the Adriatic if they had not been able to deliver them on target – sometimes a safer solution, but neither cost-effective nor environmentally friendly.⁴⁶⁰ During the 2003 Iraq war, Coalition pilots routinely returned to base with their weapons, having been unable to identify assigned targets with confidence. On one occasion during the latter conflict, a pilot diverted a *Maverick* guided missile, already launched at a missile-launch trailer near a bridge, into the river to avoid hitting a civilian vehicle he saw crossing the bridge after he had released the missile.⁴⁶¹

The policy of allowing pilots to abort attacks on assigned targets on their own authority is clearly good practice. But it requires pilots to be extensively briefed, both in relation to the exact nature of the object being attacked and in relation to the importance (or otherwise) of it being struck on a particular day or at a particular moment. A pilot with authority to abort an attack would need to be given detailed information about an assigned target which was an important military objective concealed in a building disguised as a civilian facility. Likewise, if the assigned target were the only bridge over a river, being rapidly approached by enemy forces, the pilot would need to know the importance of destroying it within a certain timeframe. Technological developments may in due course help reduce some of the costs and dangers of last-minute decisions to abort attacks; meanwhile the complexity of decisions which aircrew often have to

⁴⁵⁸ *Lessons of Kosovo* (Vol. II), annex 2, Memorandum submitted by the Ministry of Defence (01.03.00) Q5.

⁴⁵⁹ See e.g. US Department of Defense news briefing of 11.10.01. See also *Lessons of Kosovo* (Vol. II), paras. 85 and 240.

⁴⁶⁰ This practice is referred to obliquely in *Lessons of Kosovo* (Vol. II), para. 763.

⁴⁶¹ Interview with Andrew Brookes, aerospace analyst, International Institute for Strategic Studies, September 2005.

take in a very short timeframe before releasing weapons should not be underestimated.⁴⁶²

4.6. The obligation to give warnings of attack unless circumstances do not permit

a) *Situations in which warnings of attack may be impossible*

There are often two practical difficulties with the legal obligation to give warnings of attacks likely to affect the civilian population. First, there may not be an obvious medium or channel of communication for such warnings. Secondly, warnings may be seen as jeopardizing the success of a mission or the security of the attacking forces.

There are several examples of the first difficulty having been overcome in the period under review. During the Iran-Iraq war, warnings for shipping to stay clear of certain areas were broadcast in Farsi on local Iranian radio stations. Although hardly an example of good practice, the system worked: the broadcasts were picked up by US monitoring services, translated into English and widely promulgated.⁴⁶³ During the 1991 Gulf war, general warnings were issued to the Iraqi authorities and the civilian population via leaflets and radio broadcasts for civilians to stay away from military objectives,⁴⁶⁴ though according to one non-governmental report, this was not until some weeks into the war, and was in part a reaction to the al-Firdus bunker incident.⁴⁶⁵ In southern Lebanon in 1996,

⁴⁶² The New Zealand Manual notes: 'In practice, it is extremely difficult to stop an attack. The obligation does not extend below the level of commanders who have the authority and practical possibility to do so; say a commander of a battalion group. The obligation is in any event subject to the knowledge principle...which means that its application will be rare' (quoted in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 395). Sweden's military manual observes: 'to require an assessment according to the proportionality rule from an individual aircraft pilot [after the decision to launch an attack has been taken by a senior commander] is probably unrealistic' (*ibid.*). This assertion seems too sweeping and to underestimate the ability of experienced and well trained pilots (and ground based forward air controllers) to react appropriately and rapidly to unexpected situations.

⁴⁶³ See de Guttry and Ronzitti, *The Iran-Iraq War*, 133.

⁴⁶⁴ W. Hays Parks, 'The Protection of Civilians from Air Warfare' (1998), *Israeli Yearbook on Human Rights*, 88, n.60.

⁴⁶⁵ Greenpeace International, *On Impact*, 131.

warnings issued by the Israel Defence Forces to local civilians to evacuate their villages were broadcast in Arabic on local radio networks and appeared to reach their target audience without difficulty.⁴⁶⁶ A few years later, the United States declared it had used leaflets and broadcasts to good effect in Afghanistan in 2001-2002 and in Iraq in 2003 to warn civilians to stay clear of 'military targets', although it did not appear that very specific information had been given about what objects might be regarded as military targets.⁴⁶⁷ US practice during the war in Iraq appears to have been to warn civilians to evacuate either certain areas of a town (as in the case of Najaf in August 2004) or an entire town (as in the case of Fallujah in November 2004) when military action in urban areas was anticipated.⁴⁶⁸

According to a US Air Force manual, the legal requirement to give warnings can be met without putting aircrew or the success of their mission at risk by keeping warnings general.⁴⁶⁹ During the Kosovo war, the preferred NATO approach appeared to be to seek to maximize the safety of aircrew by refraining from giving warnings of forthcoming air strikes.⁴⁷⁰ In the event, some indications of specific targets to be attacked were given, for instance when a forthcoming strike on the Serbian Radio and Television (RTS) building in Belgrade was hinted at during a Pentagon news briefing. As a warning, this was somewhat oblique, but it was believed the Yugoslav authorities had got the message that the RTS building was at risk of attack when all international journalists were promptly ordered there.⁴⁷¹ The Australian *Defence Force Manual* indicates that advance warning may be dispensed with if the proposed action is likely to be 'seriously compromised' by giving such a warning.⁴⁷²

⁴⁶⁶ See Amnesty International, *Unlawful killings during 'Grapes of Wrath'* and Human Rights Watch, *Israel/Lebanon*.

⁴⁶⁷ US DoD 'Background Briefing on Targeting', 05.03.03.

⁴⁶⁸ *The Times*, 11.08.04; *Sunday Times*, 07.11.04.

⁴⁶⁹ See AFP 14-210, para.A4.3.1.4.

⁴⁷⁰ See Amnesty International *NATO/Federal Republic of Yugoslavia* (para.3.4).

⁴⁷¹ Clark, *Waging Modern War*, 252, 265-266.

⁴⁷² Quoted in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol.II), 401.

b) *Warnings for authorities*

Warnings for authorities which are very general, or which take the form merely of hints, are questionable practice, however, particularly for a force which has already effectively suppressed its enemy's air defences and is thus not at serious risk when carrying out air strikes. The more general or oblique the warning, the more likely that civilians will be in the wrong place at the wrong time. Unfortunately, however, specific warnings given to the authorities about places liable to be attacked may lead to those same authorities deliberately seeking either to protect such places by shielding them with civilians, or to secure a propaganda victory by encouraging civilians to remain in or near the target, knowing or expecting this will not in fact protect it from attack.

c) *Warnings for the civilian population*

Such practice on the part of unscrupulous authorities is one good reason for giving warnings directly to the civilian population, for instance to remain a certain distance from specific military objectives, such as artillery pieces, or possibly to evacuate a town or area altogether which may, exceptionally, be the lesser of various evils. But it needs to be recalled that certain members of the civilian population, such as the severely disabled or bedridden and those looking after them, tend to remain behind after evacuations. One way of providing protection for those too infirm to be evacuated is by the identification and marking of hospital zones, as was done with some success in the town of Jaffna, Sri Lanka, in 1990.⁴⁷³ The establishment and protection of 'safety zones' in conflict areas is nonetheless an ambitious undertaking, and the several efforts made in the 1990s ranged from the moderately successful (the 'safe havens' of northern Iraq) to the disastrous (the 'safe areas' of Srebrenica, Tuzla, Zepa, Bihac and Gorazde in Bosnia-Herzegovina, designated by the UNSC in 1993).⁴⁷⁴

⁴⁷³ See Sassoli and Bouvier, *Un Droit dans la Guerre?* 1305.

⁴⁷⁴ See Roberts, 'The role of humanitarian issues in international politics in the 1990s'.

Given the reluctance, normally, of even able-bodied civilians to abandon property unless in imminent peril, vague or premature warnings are unlikely to be effective; warnings need to be specific and indicative of imminent danger if they are to persuade civilians to leave homes, crops, livestock etc. Another problem may be that civilians may not realize that certain objects or locations, the military importance of which they may have not appreciated, such as bridges or coastal areas, can become military objectives. Attacking belligerents thus need to be reasonably clear about those places from which civilians should keep their distance. During military operations conducted by Israel in Lebanon in 1982, 1.7 million leaflets were dropped over Beirut warning civilians to avoid 'military objectives'.⁴⁷⁵ It is questionable how effective these warnings can have been without some indication of what would be considered to be a military objective. Obviously an attacking force cannot be expected to give enemy civilians notice of the precise hour and location of a planned amphibious landing; but warnings to civilians to remain clear during a critical period of objects or locations such as coastal areas, major bridges, or railway stations can sometimes be given without military advantage or security being compromised.

d) *Warnings in relation to booby traps and mines*

Some states state explicitly in their military manuals that if booby traps are used other than on or in the vicinity of a military objective, warnings must be given to the local civilian population, for instance by the posting of signs or sentries.⁴⁷⁶ This guidance is of limited protective value in that it implies that warnings of booby traps need not be given when such devices are placed in the vicinity of a military objective, notwithstanding the danger to civilians which such practice poses. Mines, likewise, are not always unlawful weapons for all states, but their lawful use normally requires care to be taken to ensure civilians are

⁴⁷⁵ Parks, 'The Protection of Civilians and Air Warfare', 100.

⁴⁷⁶ E.g. Australia, Canada and Kenya (Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol.II), 1808-1814)

warned of their location, during and after the end of active hostilities.⁴⁷⁷ The military manuals of several states contain provisions to this effect.⁴⁷⁸

e) Warnings for ships and aircraft

When military hostilities begin, belligerents often issue formal notifications for mariners and civilian airline companies (NOTAMs), indicating the circumstances in which unidentified ships or aircraft in certain areas risk being considered hostile by warships.⁴⁷⁹ An important part of such notifications will normally be the indication of radio frequencies to be monitored and guidance on procedures for communication in the event of a civilian aircraft (or vessel) needing to contact a warship.⁴⁸⁰

f) Effective warnings

Advance warnings of attacks liable to affect the civilian population must be 'effective'.⁴⁸¹ They need to be issued in a language which enemy civilians can understand, to make requirements of them with which they can realistically be expected to comply, and to give them sufficient time to act. If issued orally, they need to be audible above whatever ambient noise is present. In some circumstances, the line between a warning that is effective enough to make sure civilians act on it and an unlawful threat of violence aimed at spreading terror

⁴⁷⁷ See Amended Protocol II to the Conventional Weapons Convention, article 3. See also Hague Convention VIII, article 3 on the obligation to warn of the presence of naval mines. As Dinstein observes, although much has happened since the latter convention was drafted, 'the core of the Hague concept is as valid as ever' where naval mines are concerned (*The Conduct of Hostilities*, 70-71).

⁴⁷⁸ E.g. Australia, Belgium, Germany and Kenya. The US Air Force Commander's Handbook states that parties to a conflict should take 'reasonable measures' to ensure that civilians 'are not unnecessarily endangered, both during and after the conflict' by mine warfare, adding (perhaps a little too hesitantly) that such measures 'might' include warning civilians, using mines that self-destruct after a period of time and clearing minefields after the end of hostilities. (Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol.II), 1872-1876).

⁴⁷⁹ For examples of NOTAMs issued during the 1980-1988 Iran-Iraq war, see de Guttery and Ronzitti *The Iran-Iraq War*, 37-38 and 137-142.

⁴⁸⁰ As proposed by para.75 of the *San Remo Manual*.

⁴⁸¹ See Additional Protocol I, article 57.2(c).

among the civilian population⁴⁸² may seem thin. But an attacking force cannot reasonably be expected to give such extensive notice of a forthcoming attack that not only do civilians have time for an unhurried departure, but the defending forces have time to ensure the target becomes unassailable.⁴⁸³ And a warning that does not invoke any fear at all in the civilian population may prove a false kindness.

Before military operations were launched in southern Lebanon by Israel and the South Lebanese Army (SLA) against Hezbollah in April 1996, warnings were broadcast by radio ordering the residents of about 40 towns and villages, including the city of Tyre, with a population of approximately 120,000, to leave within hours.⁴⁸⁴ The warnings did not indicate specific localities or objects liable to be attacked, or precautions that civilians should take to avoid being mistaken for combatants. They simply took the form of an instruction for all civilians in the towns and villages concerned to evacuate immediately to the north. Some were unable to move because of infirmity and some were unwilling to do so; the fact that they remained in southern Lebanon placed them in danger, but in no sense made them legitimate targets. Against that background, the circumstances in which a number of civilians were killed during military operations suggest that undue reliance was placed by Israeli forces on the effectiveness of evacuation warnings alone in protecting civilians.⁴⁸⁵ Large numbers of civilians did, however, heed the warnings and leave. Though fear and great hardship were clearly caused by the warnings, they may have led to lower civilian casualties than

⁴⁸² See *ibid.*, article 51.2.

⁴⁸³ Several states have made clear in their military manuals their understanding that warnings are not required in situations where surprise is of the essence (e.g. Belgium, Canada, Ecuador, South Africa, the UK and the US) (See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol.II), 401-404).

⁴⁸⁴ Human Rights Watch, *Israel/Lebanon*.

⁴⁸⁵ Nine members of one family, apparently believing they would be safe if they stayed in their home, the walls of which had been specially reinforced, were reportedly killed when their house was destroyed by an Israeli helicopter attack. Another family was said to have been killed when attempting to leave the village of Mansouri in an ambulance shortly after the expiry of the deadline for departure given by the Israeli authorities. (See Human Rights Watch, *Israel/Lebanon* and Amnesty International *Israel/Lebanon: unlawful killings during Operation 'Grapes of Wrath'*).

would have occurred if urban warfare had been conducted in towns and villages in southern Lebanon where civilians and combatants were intermingled.⁴⁸⁶

Warning shots may sometimes constitute effective warning, though they also carry the risk that innocent bystanders may be killed by the descent of the bullets.⁴⁸⁷ Such an accident may have been the cause of death of a small child killed by a bullet in unclear circumstances in Iraq in 2003.⁴⁸⁸ Failure to respond to a shouted warning or a warning shot cannot reasonably be regarded as evidence of hostile intent unless there is some other reason for regarding the person as a threat. Nor can failure to respond necessarily be regarded as evidence that a building or cellar is empty. In a tragic example of the particular vulnerability of disabled people during military operations, a 68-year-old deaf Palestinian, who had failed to hear warnings to evacuate the building, was alleged to have been killed in 2002 when his house in Gaza was demolished by Israeli forces while he was inside it.⁴⁸⁹

Where a military target is about to be attacked by aerial bombardment and there are civilians nearby, effective warning may sometimes take the form of military over-flight.⁴⁹⁰

4.7. The duty of constant care

a) Preliminary remarks

The opening paragraph of article 57 of Additional Protocol I provides that:

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

⁴⁸⁶ During the 17-day *Operation Grapes of Wrath*, around 150 civilians were killed, 102 of them in a single incident (the shelling of the UN compound at Qana), and 50 militants (Amnesty International, *Israel/Lebanon: unlawful killings during Operation 'Grapes of Wrath'*).

⁴⁸⁷ ROE sometimes explicitly prohibit the use of warning shots, probably partly for this reason.

⁴⁸⁸ See Amnesty International, *Iraq: Killings of civilians in Basra and al-Amara*.

⁴⁸⁹ *The Times*, 04.12.02.

⁴⁹⁰ *ICRC Commentary (Additional Protocols)*, para.2224 refers to such practice during the Second World War.

This rule imposes on states parties, at least, an over-arching obligation to take care to avoid collateral damage over and above the obligation to comply with the more specific rules on precautions in attack which then follow. Before concluding this chapter, two important areas in which it seems reasonable to expect a party to a conflict to comply with this general ‘duty of constant care’ will be examined: action in relation to mines and unexploded ordnance (UXO); and liaison with civilians in the vicinity of military operations.

b) *Mines and unexploded ordnance*

Uncleared mines and cluster munition duds often account for a significant proportion of overall civilian casualties from armed conflict.⁴⁹¹ The most serious threat for non-combatants usually comes not from mines or munitions being used in actual combat, but from those initially used for combat purposes which then remain in place (or drifting in sea, sand or soft topsoil) long after the end of active military operations.⁴⁹²

There are two approaches to mine and unexploded ordnance (UXO) clearance which should not be confused: humanitarian de-mining and military de-mining. The aim of ‘humanitarian de-mining’ is to make land contaminated by mines or UXO permanently usable for normal civilian purposes, such as farming, by the comprehensive (or near comprehensive) location and neutralization of mines and UXO in a designated area. The work is dangerous and very time-consuming. ‘Military de-mining’, though also dangerous, is less ambitious and can be done more quickly, the aim being, typically, to clear a passage through a piece of territory to a standard allowing it to be crossed (possibly on just one occasion and

⁴⁹¹ According to the ICRC paper ‘Explosive remnants of war: the lethal legacy of modern armed conflict’, approximately 11,000 people in Laos have been killed or injured by explosive remnants of war (ERW) since the end of hostilities in that country in 1975, and in Kosovo, nearly 500 people were killed or injured by ERW in the year after the NATO campaign ended. (See also Landmine Action’s report *Explosive remnants of war and mines other than anti-personnel mines: global survey 2003-2004* for a recent review of the extent of ERW contamination in the worst-affected countries).

⁴⁹² Abandoned ammunition may also pose a grave threat to the civilian population, but is not dealt with here, not being directly related to the obligation to take precautions in attack.

not necessarily on foot) by a military force without the force being unreasonably exposed to danger.

No state appears to have trained or instructed its own armed forces to carry out humanitarian de-mining systematically in countries where mines and submunitions were used during the period under review.⁴⁹³ In Kosovo, Iraq and Afghanistan, UXO was sometimes cleared by military explosive ordnance disposal (EOD) teams in the context of civil-military co-operation (CIMIC) work,⁴⁹⁴ but it often remained a danger unless and until cleared by civilian organizations,⁴⁹⁵ or even, in desperation, by local residents themselves.⁴⁹⁶

The argument that humanitarian clearance work should be performed by military personnel of the state or entity responsible for delivering or laying the weapons has a certain moral tidiness, but is not a strong one. If de-miners are to obtain reliable information about the location of UXO, they need to be able to communicate effectively with the local population as well as the parties to the conflict and to enjoy the trust of all concerned. If they are to complete the job, they need to remain in the area for a long time. Military personnel might in principle be able to meet these criteria, given the necessary language training, immersion in the local culture and degree of detachment from their parent units, but by this point they would have begun to look remarkably like expensive versions of civilian de-miners. More powerful is the argument that those responsible for delivering or laying UXO and mines should provide adequate

⁴⁹³ The US explicitly stated that it would not use its own military personnel for clearance work (Human Rights Watch, *Off Target*, 36, n.253). British military personnel did some UXO clearance work in Iraq in 2003, for both military and humanitarian purposes, although the MoD clarified that it regarded humanitarian UXO clearance as a task best carried out by NGOs and commercial de-mining companies, not least because of the greater ability of such organizations to work closely with local people (see note provided by the MoD for the House of Commons Defence Committee, *Lessons of Iraq*, (Evidence) 441-442).

⁴⁹⁴ According to the MoD's report, *Lessons for the Future*, British military EOD teams in 2003 had a list of disposal tasks to work through, including the disposal of abandoned Iraqi munitions, on which work was expected to be completed by the end of the year. Thereafter, military personnel would only be required to clear UXO that affected the ability of Coalition forces to do their job (68). Further details of how priorities for clearance work had been set were provided in a note to the House of Commons Defence Committee (HCDC, *Lessons of Iraq*, (Evidence), 441)

⁴⁹⁵ See Human Rights Watch, *Fatally Flawed*, Chapter VII.

⁴⁹⁶ 'After a BLU [cluster bomb remnant] killed a child in Takhar [Afghanistan]...an elderly woman began to gather bomblets. "She decided she was an old lady and if anyone should get it, it should be her"... The woman piled up eighteen bomblets, lit a fire under them and walked away' (*ibid.*, 35).

information,⁴⁹⁷ finance and access to technical equipment to allow for the comprehensive humanitarian de-mining of contaminated territory by specialized de-mining agencies at the end of hostilities. An unwillingness to do this on the part of belligerents which have made extensive use of mines or cluster munitions cannot easily be reconciled with claims to be taking constant care to spare the civilian population.⁴⁹⁸

Use of cluster bombs and submunitions over Kosovo in 1999, and over Afghanistan and Iraq in 2001-2003, left these territories severely contaminated by UXO. A British MoD report on the Iraq war suggests that procedures for estimating the likely location of CBU duds expected to have been left by weapons used by British forces and for sharing this information with de-mining agencies were improved after the Kosovo war.⁴⁹⁹ There is also evidence to suggest that in Afghanistan during 2001-2002, de-mining agencies were provided with information by the US government about the likely location of CBU duds left by US forces more systematically than had been the case in the past, though opinions appear to vary on how effective this co-operation was in reality.⁵⁰⁰ Both the United States and the United Kingdom provided financial assistance for mine and UXO clearance in Kosovo, Afghanistan and Iraq, although the British allocation of £5 million for UXO clearance work by civilian agencies in Iraq was criticized

⁴⁹⁷ An interesting article on the legal implications of the continued presence on Libyan territory of mines and other explosive remnants from the Second World War suggests that whereas Libya could not insist that states which had laid the mines etc. should clear them themselves, nevertheless, 'the states responsible for laying the mines should be considered as being legally committed to handing over maps showing the location of planned minefields and whatever information that is available about the final placement of the mines' (Karl Partsch, 'Remnants of War as a Legal Problem in the Light of the Libyan Case' (1984), *AJIL*).

⁴⁹⁸ In 2004, the British House of Commons Defence Committee noted, 'As the occupying power, the coalition has a legal and moral responsibility to provide security for civilians in Iraq, including protection from unexploded ordnance (UXO)' (HCDC, *Lessons of Iraq*, para.427).

⁴⁹⁹ See MoD, *First Reflections*, para.4.11. The MoD's later report, *Lessons for the Future*, gives some details of the support provided by the UK for UXO clearance in Iraq, clarifying that although British forces were not always directly involved in the clearance work, care was taken to provide civilian agencies with quality information in relation to the likely location of dud submunitions.

⁵⁰⁰ The Human Rights Watch report *Fatally Flawed* criticizes the US record in providing information and financial support to de-mining NGOs working in Afghanistan in 2001-2002, claiming that although information was circulated appearing to indicate the likely location and quantity of CBU duds left by US forces it was often inconsistent or inaccurate. The report concluded that 'a shortage of resources and a delay in outside assistance slowed the clearance process' (38). According to Colonel Gary Crowder of the USAF's Air Combat Command, the US by 2003 had 'the ability basically to track every weapon as it's released, or reported back to the air operations center', (See Cordesman, *Lessons of the Iraq War*, 272). This development may improve the quality of information which the US is able to provide in future to de-mining agencies about the likely location of CBU duds.

by a parliamentary report as ‘surprisingly little’ in the context of overall expenditure by the United Kingdom on the conflict and post-combat activities in Iraq,⁵⁰¹ and the \$7 million in cash and equipment given by the United States government to de-mining NGOs in Afghanistan between October 2001 and June 2002 did not deflect *Human Rights Watch* from its conclusion that the resources provided by the US for UXO clearance in Afghanistan were inadequate.⁵⁰² In Iraq, the volatile security situation which persisted long after the end of major combat operations is likely to have been the main obstacle to UXO clearance.

There are at the time of writing several legal texts pointing to elements of good practice in terms of dealing with the problem of UXO and uncleared mines. Protocol II to the Conventional Weapons Convention and its technical annex deals with procedures for recording and notifying the location of minefields.⁵⁰³ Good practice in relation to the notification and clearance of naval mines is set out in the *San Remo Manual*.⁵⁰⁴ The Ottawa Convention obliges each state party to destroy anti-personnel mines in all territory ‘under its jurisdiction or control’, to mark areas known to be contaminated by anti-personnel mines pending their clearance, and, in various ways and to the extent feasible, to assist other states in dealing with anti-personnel mines and their consequences.⁵⁰⁵ Protocol V to the Conventional Weapons Convention, concluded in 2003, and its technical annex set out procedures to be adopted by states parties to facilitate the location, marking and effective clearance of explosive remnants of war (ERW)⁵⁰⁶ at the end of a conflict. Through this treaty, states parties undertake to mark and clear ERW in *territory under their control*, the obligation thus extending not only to states enjoying sovereignty over the territory in question, but also to occupying powers.⁵⁰⁷ Where UXO on territory not under the control of the state responsible for delivering it is concerned, the obligation is to provide assistance, ‘where feasible’, ‘to facilitate’ the marking and clearance of such ordnance.⁵⁰⁸ States

⁵⁰¹ See HCDC, *Lessons of Iraq*, para.432.

⁵⁰² Human Rights Watch, *Fatally Flawed*, 38-39.

⁵⁰³ Article 7 (original version of the Protocol); articles 9-11 (1996 amended version).

⁵⁰⁴ Paras.83-84 and 90-91.

⁵⁰⁵ See Ottawa Convention, articles 5 and 6.

⁵⁰⁶ This term is used to cover both unexploded ordnance and abandoned explosive ordnance.

⁵⁰⁷ Conventional Weapons Convention, Protocol V, Article 3.2.

⁵⁰⁸ *Ibid.*, article 3.1.

parties also undertake to adopt procedures for the systematic recording, retention and transmission of data in relation to the likely location of submunition duds.⁵⁰⁹ The emphasis is thus more on what is practically possible in terms of addressing the problem than on holding to account those responsible for creating it. This proposed practice should help reduce civilian deaths and injuries from ERW, so long as it is adopted in good faith, without words and phrases in the text such as 'feasible' and 'subject to...legitimate security interests' being used as escape clauses, and so long as it is supported by sufficient funding for the safe, prompt and thorough clearance of ERW by de-mining agencies at the end of active military operations.⁵¹⁰

c) *Civilian liaison*

Belligerents can be expected to have at least some idea of the location and movements of enemy non-combatants, and in the light of this information, to take reasonable measures to prevent them being killed or injured in error.⁵¹¹ This is not quite the same as taking feasible precautions in the choice of methods and means of attack with a view to avoiding or minimizing collateral damage, or giving warnings: it may involve participating in arrangements for the evacuation of civilians cut off by fighting, dropping leaflets warning the civilian population to avoid conduct which may lead to their being mistaken for combatants or making efforts to establish the exact location of protected buildings such as hospitals. Civilians may need to be told the obvious - to avoid wearing military clothing or carrying weapons. During a military occupation, civilians may need

⁵⁰⁹ *Ibid.*, article 4.

⁵¹⁰ Part of the solution may be not just immediate funding for clearance work, but also investment in the development and distribution of improved technology. The US, for example, was reported to have funded a number of research projects aimed at identifying ways of locating and clearing mines and UXO which might be less dangerous and costly, and more reliable, than methods deployed by de-mining agencies during the period under review (See Edwards, *The Geeks of War*, 81-83 and 157-158).

⁵¹¹ For an interesting discussion of some of the implications for US military doctrine and procedures of this relatively new expectation on the part of the international community, see Richard Butler, 'Modern War, Modern Law, and Army Doctrine: Are We in Step for the 21st Century?' (2002), *Parameters*.

specific instructions about approaching checkpoints.⁵¹² This does not mean that military personnel are entitled to open fire on any civilians not conforming to such instructions, but it may reduce the risk of non-combatants mistakenly being perceived as hostile.

In its judgment in the case of *Isayeva v. Russia*, the European Court of Human Rights regarded it as evident that in the context of an internal conflict on the territory of a state party, ‘when the military considered the deployment of aviation equipped with heavy combat weapons within the boundaries of a populated area, they also should have considered the dangers that such methods invariably entail’.⁵¹³ The Court’s expectation was that in such a situation, the Russian authorities would have taken practical steps for the effective evacuation of civilians such as ‘ensuring that they were informed of the attack beforehand, how long such an evacuation would take, what routes evacuees were supposed to take, what kind of precautions were in place to ensure safety, what steps were to be taken to assist the vulnerable and infirm etc.’⁵¹⁴

The protection of civilians from the effects of attacks is of course largely the responsibility of defending, not attacking, forces. The very notion of a ‘duty of care’ towards an enemy population is certainly open to challenge, with the important exception of conflicts taking place within the territory of a state, where governmental forces clearly have a duty of care towards all their own citizens. The above mentioned precautions are examples of good practice which nevertheless can be, and sometimes have been, adopted by attacking or occupying forces.⁵¹⁵

⁵¹² Giving evidence to the House of Commons Defence Committee, Air Vice Marshall Heath described British information operations during the 2003 Iraq war as being intended (among other things) ‘to prevent or limit civilian casualties, predominantly through creating an understanding with the population that they were not the target group if we moved into conflict *and how they could remain relatively safe*’ (emphasis added) (HCDC, *Lessons of Iraq*, para.446. See also paras.449-450). The Defence Committee concluded ‘[t]here is clear evidence that leaflet drops and radio broadcasts successfully persuaded many Iraqis in Basra to stay indoors’ (para.512).

⁵¹³ *Isayeva v. Russia* (2005), ECtHR, para.189.

⁵¹⁴ *Ibid.*

⁵¹⁵ In international conflicts, the language barrier between attacking forces and enemy civilians will often be one challenge needing to be overcome before such precautions can be taken very effectively. In Iraq in 2003, liaison between British forces and Iraqi civilians was hampered by the fact that British forces had only one Arabic-speaking military interpreter for approximately every 1,000 troops (HCDC, *Lessons of Iraq*, para.414)).

4.8. Conclusions

Between 1980 and 2005, innovative developments in military technology and a growing willingness on the part of belligerents to accept and apply new legal rules reduced, to some extent at least, the dangers to non-combatants of military operations.⁵¹⁶ But accidents still occurred with grim regularity, even during conflicts where the parties were technologically advanced nations mindful of their legal obligations.

Four systemic problems often contributed to such accidents:

- failure to accord sufficient priority to traditional ‘eyes on’ reconnaissance and intelligence work directed towards target identification and verification;
- unwillingness or inability to invest in or make available military equipment specifically designed to minimize collateral damage or to assist with target identification;

⁵¹⁶ According to what appear to be Iraqi government statistics, 2,278 civilians were killed during the 1991 Gulf war (Freedman and Karsh, *The Gulf Conflict*, 329); Human Rights Watch claim that between 489 and 528 civilians were killed during the 1999 NATO air campaign against the FRY (*Civilian Deaths in the NATO Air Campaign*). According to the NGO Iraq Body Count, nearly 20,000 civilians were reported to have died in the Iraq war and occupation between March 2003 and March 2005 (<http://www.iraqbodycount.net/press/> visited 26.04.05). (It needs to be recalled, however, that this latter figure is a tally of reported civilian deaths, not an estimate of the true total, which is likely to be somewhat higher). By contrast, about 40,000 people, mainly civilians, are believed to have perished in one night in a firestorm caused by the bombing of Hamburg in 1943, approximately 100,000 people are believed to have been killed in one night by the fire-bombing of Tokyo in 1945 and approximately 210,000 to have died in the course of 1945 as a result of the bombing of Hiroshima and Nagasaki (see Jonathan Glover, *Humanity: a Moral History of the Twentieth Century* (London, 2001), 78, 95 and 99). 100,000 civilians are thought to have been killed in the battle for Manila towards the end of the Second World War, mostly as a result of cross-fire (Fenrick, ‘Attacking the Enemy Civilian as a Punishable Offence’). The 1950-1953 Korean war has been estimated to have left nearly two million civilian dead or missing, many as a result of fighting for the city of Seoul and aerial bombardment of the northern part of the peninsula (see Matthew White, ‘Death Tolls for the Major Wars and Atrocities of the Twentieth Century’ (<http://users.erols.com/mwhite28/warstat2.htm> (visited 08.11.05), citing Andrew Nahm, *Historical Dictionary of the Republic of Korea* (1993) and P. de. Haan, ‘50 Years and Counting; the Impact of the Korean War on the People of the Peninsula’ (2002), (http://www.calvin-edu/news/releases/2001_02/korea.htm, visited 14.12.04). Estimates of civilian deaths in the Vietnam war between 1965 and 1973 range from 315,000 to about two million (White, ‘Death Tolls’).

- conducting military operations in or against built-up areas from which the civilian population had not been effectively evacuated;
- malfunctioning cluster munitions.

Nevertheless, reporting of conflicts in this period shows there are many practical ways in which belligerents can and do implement the rules on precautions in attack effectively in modern armed conflict, including the relatively new and demanding rules of Additional Protocol I. Not all these measures are risk-free: effective reconnaissance of urban areas is intrinsically dangerous and will remain so unless and until machines are designed capable of seeing inside buildings. And not all are cheap: weaponry may have been developed capable of great precision at long range, and of putting systems out of action by means less destructive than by the use of high explosives, but is expensive.

That said, some of the precautions identified in this chapter, while not necessarily legal requirements in any formal sense, can reasonably be expected of any armed force or group, whether a sophisticated and well-equipped army engaged in a UN-authorized enforcement action, or a cash-strapped guerrilla army engaged in an internal conflict. They include the following:

- Ensuring attacks are not launched unless prospective targets have been directly viewed, photographed or videoed immediately or very shortly before an attack.
- Ensuring combatants have the weaponry (or choice of weaponry) and vision-enhancing or surveillance equipment they will need in the context to be able to identify targets properly and engage them with discriminate force.⁵¹⁷

⁵¹⁷ Miniature UAVs and infra-red night vision goggles are likely to be prohibitively expensive for most belligerents; ordinary binoculars, by contrast, had come down in price and weight by the 1990s.

- Ensuring that those responsible for executing attacks have the personal authority to abort attacks – and know when it will be appropriate to do so.
- Issuing effective warnings before attacks liable to affect the civilian population, making sure in particular that warnings are clear, specific and comprehensible - and can in practice be acted on.
- Providing the necessary resources and information for the prompt and effective clearance of unexploded ordnance at the end of active hostilities.

5. INTERNAL PROCEDURES FOR PROMOTING COMPLIANCE

The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.

1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Article 1.

Until the 1990s, information about distant conflicts tended to be disseminated by specialized war correspondents, acting, usually, under strict reporting restrictions and with limited access to the scene of military operations. By the end of the twentieth century, all this had changed. Access to the internet enabled troops on active service abroad to send messages and photographs home instantaneously, or distribute information and impressions to a wider audience by means of anonymous ‘weblogs’, with minimal censorship being exercised. During the Iraq war of 2003, journalists embedded with military units produced graphic accounts of the ugly side of urban warfare. In Iraq and elsewhere, others without such privileged access to the military could reach victims of conflict and broadcast their stories immediately to the audio-visual media by satellite. Human rights organizations monitoring armed conflicts proliferated and could sometimes conduct their own battle damage assessment exercises allowing them to publicize information about the collateral effects of military campaigns.⁵¹⁸ In the Balkans, peacekeepers and international monitors proved able and willing to gather evidence of combatant misconduct, some of which was later drawn on in criminal proceedings before the International Criminal Tribunal for the former Yugoslavia.⁵¹⁹

As a result, the conduct of combatants on and around the battlefield became exposed to public and legal scrutiny as never before. States (and to some extent, non-state actors) thus came under increased pressure to ensure that their internal

⁵¹⁸ See e.g. Human Rights Watch’s report, *Off Target*.

⁵¹⁹ See e.g. references to evidence submitted by UNPROFOR and SFOR personnel and UN Military Observers in the trial of General Galic, (*Galic (Trial Judgement)*), paras.617, 622-623, 628-652, 668-675, 679-693 and 697-699).

procedures for promoting compliance with the law of armed conflict were effective and seen to be effective.

This chapter looks at internal procedures adopted by states for promoting compliance with the rules on precautions in attack. Like the previous chapter, it does not attempt to present a comprehensive review, but rather to draw on evidence of good practice in this area in order to try to identify procedures which, it is submitted, can reasonably be expected of modern belligerents, including, to some extent at least, armed opposition groups. Most of these procedures are already standard practice in some armed forces: in many cases, there is no good reason why they should not be adopted more widely.

5.1. Domestic legislation

a) *Preliminary remarks*

For the law of armed conflict to be implemented effectively, states need to have domestic legislation giving them power to enforce the rules, including, where necessary, by means of criminal sanctions. There are broadly two ways this is done: either treaties to which a state is party are automatically considered the law of the land and individuals violating their provisions can be prosecuted before the national courts without reference to domestic legislation (the monist system); or specific implementing legislation is passed to give effect to treaties through the domestic law of the state, including by the creation, if necessary, of new criminal offences (the dualist system).⁵²⁰

⁵²⁰ For detailed treatment of national implementation of treaties on the law of armed conflict in both monist and dualist systems, see David Turns, 'Aspects of National Implementation of the Rome Statute: the United Kingdom and Selected Other States' in *The Permanent International Criminal Court* (Oxford, 2004) (eds. Dominic McGoldrick, Peter Rowe and Eric Donnelly).

b) Monist systems

In monist legal systems, treaties with provisions on the legal obligation to take precautions in attack are automatically considered part of domestic law, whether or not additional implementing legislation is passed to facilitate enforcement of such rules.⁵²¹ Thus during the court martial in 1993 of a Belgian soldier accused of having accidentally, but culpably, caused the death of a Somali citizen, the court cited article 57 of Additional Protocol I in a manner which seemed to imply this provision could if necessary be applied directly, as a matter of Belgian law, to an individual facing a criminal charge.⁵²² In the event, the soldier was acquitted. But only in a monist system could it have been thinkable to suggest a person could even in principle be held individually criminally responsible under national law for violating an international treaty, without the need for any kind of intermediary domestic legislation.

The problem with this approach is that it fails to distinguish clearly between, on the one hand, treaty provisions violation of which is clearly intended to entail individual criminal responsibility, and, on the other, hortatory provisions the purpose of which is to encourage good practice. Hortatory provisions, often couched in open-ended terms such as ‘do everything feasible’, or ‘do all in his power’, reflect an important commitment on the part of states accepting such provisions to require combatants to do their level best in good faith to conform to the spirit of the law *over and above* taking the necessary steps to avoid criminal prosecution. Treaty provisions on precautions in attack fall largely into this category. If such provisions are construed as setting an objective standard, failure to meet which will result in prosecution, they risk being seen as requiring only that the bare minimum be done, rather than being understood in their proper, hortatory sense.

⁵²¹ See e.g. constitutions of the Russian Federation, the Netherlands, Germany and Spain. See also Vladlen Vereshchetin, ‘New constitutions and the old problem of the relationship between international law and national law’ (1996), *EJIL*.

⁵²² ‘Attendu que même le droit des conflits armes contient des obligations touchant les précautions à prendre afin d’épargner la population pendant les attaques (article 57 du Protocole I du 8 mai 1977 additionnel aux Conventions de Genève du 12 août 1949)’. (Osman Somow Mohammed c. Soldat Paracommando, cited in Sassoli and Bouvier, *Un Droit dans la Guerre?* 1327-1331).

c) Dualist systems

States with dualist legal systems, by contrast, normally make clear which violations of a treaty will constitute crimes for which people may be prosecuted under domestic law; in such systems, violations of treaty provisions not indicated as crimes under domestic law will not be regarded as such by national tribunals. For instance, the United Kingdom's Geneva Conventions Amendment Act of 1995 and its International Criminal Court Act of 2001 explicitly indicate those violations of the international law of armed conflict which, if committed by persons within the jurisdiction of the courts of England and Wales, will be considered crimes under domestic law.⁵²³ Likewise, the US War Crimes Act of 1997 criminalizes violations of specific provisions of the Geneva Conventions and Hague Regulations,⁵²⁴ implying other violations may not necessarily be treated as criminal offences under US law.

d) Compliance orders issued by commanders

An intermediate approach which can be adopted in either monist or dualist systems is for a senior commanding officer to issue a formal order to those under his command to comply with the provisions of the international law of armed conflict, or, more specifically, with the provisions of certain named treaties.⁵²⁵ Assuming legislation is in place requiring military personnel to obey all lawful

⁵²³ For discussion of war crimes legislation in the UK, see Robert Cryer, 'Implementation of the International Criminal Court Statute in England and Wales' (2002), *ICLQ*, 733.

⁵²⁴ See *Operational Law 2005*, 34.

⁵²⁵ See e.g. Israel's 1982 'Order of the General Staff No. 33.0133: *Discipline – Conduct in Accordance with International Conventions to which Israel is a Party*', quoted in Dov Shefi, 'The Status of the Legal Adviser to the Armed Forces: his Functions and Powers' (1983), *Military Law and Law of War Review*. See also the USAF's Air Force Policy Directive 51-4 of 26.04.93. In Sweden, eight 'servicemen's rules' on observance of the law of armed conflict have been issued by the Commander-in-Chief (see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol II), 3183). The 'Order on the publication of the Geneva Conventions and Protocols' issued by the Russian Ministry of Defence requires 'the implementation of the instructions concerning the application of the rules of international humanitarian law by the armed forces of the USSR' which are annexed to the order in the form of Russia's military manual (*ibid.*, 3183). See also Dinstein, *The Conduct of Hostilities*, 26.

orders, this approach makes it possible for a wide range of violations of the law of armed conflict to be considered criminal offences.

In terms of indicating to members of the armed forces what rules they can be prosecuted for violating, and how such rules (and others) can be observed without prejudice to military effectiveness or their own personal safety, such orders are of limited value.⁵²⁶ Nor will they protect senior commanders from prosecution for acquiescence in serious violations of the law of armed conflict: ICTY jurisprudence suggests that general orders to comply with the Geneva Conventions or with 'the laws of war' may have little value as a defence against war crimes charges if evidence indicates that notwithstanding such orders, serious violations of the law of armed conflict have been committed systematically by the subordinates of an accused commander and have gone unpunished.⁵²⁷

The device of an over-arching 'compliance order' is valuable, however, as a means of dispelling the sense of double jeopardy which military personnel may feel on receiving a patently illegal order, which it might seem they cannot obey without violating international law, nor disobey without violating military law. Compliance orders enable those who decide to disregard unlawful orders to defend their decisions by citing standing orders from higher authority. This is likely to be a more attractive excuse for disobeying a superior order than explanations such as, 'it would have gone against my conscience to do it'⁵²⁸ or 'they told us at an IHL presentation that sort of thing was illegal' etc..

⁵²⁶ The order issued by the Chief of General Staff of the Yugoslav Peoples' Army on 03.10.91 stating, 'YPA [JNA] units have the duty to secure in the area of their operations full and unconditional implementation of rules of international law of armed conflicts and suppress violations of those rules' (quoted in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, (Vol II), 3184) was not notably effective in ensuring compliance with international law by Yugoslav federal forces and their successors in the conflicts in the former Yugoslavia which followed.

⁵²⁷ See *Galic (Trial Judgement)*, paras.707-708 and 717-719.

⁵²⁸ See *Handbook of Humanitarian Law*, para.139.

5.2. Rules of Engagement

a) Preliminary remarks

Rules of Engagement (ROE) are instructions issued to military forces indicating the precise circumstances in which they have authority to use force and to what extent. ROE, usually confidential for several years at least, normally cover three areas:

- i) a state's purpose in deploying its armed forces;
- ii) a state's understanding of its international legal obligations on the use of force as they relate to the mission;
- iii) a state's perception of the political constraints on its use of force.

The nature and function of ROE is sometimes misunderstood. They are not simply reminders of the rules of the law of armed conflict: a state's purpose in deploying armed forces may dictate that quite another body of law is applicable, for instance if they are deployed in peacetime in support of the civil authorities. Likewise, a state's perception of the political constraints within which it has to act and concern to avoid antagonizing neutral states or domestic opinion may lead to ROE more restrictive than the rules of the international law of armed conflict alone.

ROE are a vital tool in ensuring that armed forces act in conformity with international law, with a state's policy objectives and with all due consideration for non-combatants, while retaining the freedom of action necessary for mission accomplishment and self-defence. Good, clear ROE, well adapted to the task in hand, presented in an intelligible way and properly enforced, reduce the dangers for non-combatants in conflict zones without prejudice to the ability of forces deployed on a military operation to accomplish their mission and protect themselves. Within sophisticated armed forces, much time and attention is paid to the drafting and amending of ROE before and during military operations, especially air and maritime operations.

b) ROE and pocket cards

Formal ROE tend to be long, technical, and subject to regular alteration as a conflict progresses or new circumstances come to light. The initiative for changes may come from the commander on the spot, if he considers ROE insufficiently flexible, or from political authorities or the military central command if, for example, information suggesting an increased threat level to the forces deployed is received. Proposed revisions are sometimes the subject of extensive and protracted debate.⁵²⁹

The ‘pocket cards’ often issued to individual members of the armed forces, containing basic rules on the circumstances in which weapons may be used, are slightly different. They are not, formally, ROE. They constitute simpler guidance on when and how weapons may lawfully be used and serve as memory-joggers in relation to the actual ROE, on which briefing and training will normally have been provided before deployment, but texts of which are unlikely to have been widely distributed.⁵³⁰

c) ROE content

At all levels and in all circumstances, good ROE will make two things explicitly clear:

- i) non-combatants posing no threat may never be deliberately attacked;

⁵²⁹ See de la Billière, *Storm Command*, 141 and 175-176 on the lengthy discussions in relation to British ROE governing the circumstances in which UK forces in Saudi Arabia and the Persian Gulf in 1990 could use their weapons in self-defence before active military operations began in January 1991.

⁵³⁰ The pocket card issued to US military personnel serving in Iraq in 2003 is reproduced as Appendix E to the Human Rights Watch report *Off Target*. The full text of the pocket card ‘Alpha’ issued to British military personnel deployed in the same conflict, but with rather different ROE, is reproduced in *R.(Al-Skeini) v. Secretary of State for Defence (Divisional Court)*, para.45.

- ii) necessary and proportionate force, up to and including lethal force, may always be used in self-defence.

After Canadian troops taking part in a UN-authorized peace enforcement operation in Somalia shot dead (in the back) an unarmed civilian fleeing from the compound they were guarding in May 1993, an inquiry identified ambiguous ROE as having been at least part of the problem. According to the extant ROE, ‘an opposing force or terrorist unit commits a hostile act when it attacks or otherwise uses armed force against Canadian forces, Canadian citizens, their property, Coalition forces, relief personnel, relief materiel, distribution sites, convoys and non-combatant civilians, or employs the use of force to preclude or impede the mission of Canadian or Coalition forces’.⁵³¹ This vague guidance became highly dangerous after a Canadian politician boasted publicly that the ROE allowed Canadian soldiers ‘to shoot first and ask questions later’ and a commanding officer, citing this poisonous nonsense, told his soldiers that within this framework, ‘deadly force could be used against Somalis found inside Canadian compounds or absconding with Canadian kit, whether or not they were armed’.⁵³² Had the ROE (and the political and military leadership of the Canadian Forces) made clear from the outset that it could never be permissible to shoot unarmed civilians posing no threat, the tragedy might never have occurred.

It will sometimes be difficult for combatants to tell the difference in the heat of the moment between somebody who *is* posing a threat (and may be fired upon) and somebody who *might be* posing a threat (who in most situations may not be fired upon). ROE, no matter how well drafted, cannot eliminate this difficulty. If they make it clear that it is never permissible knowingly to fire on non-combatants posing no threat, this will help prevent war crimes, but it will not prevent mistakes. Non-combatants, and those with influence over them, need to be mindful of this and to be aware of the kinds of gestures, conduct and appearance which may be seen as threatening by combatants in conflict zones.

⁵³¹ Paragraph 7(c) of the ROE, quoted in *Dishonoured Legacy: the Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa, 1997) (hereinafter *Somalia Inquiry Report*) (Vol. 2), Chapter 22.

⁵³² *Ibid.*

Self-defence is a particular problem area. ROE issued for US forces deployed in situations other than full-scale armed conflict, eg a peace enforcement mission, or deployment in anticipation of a conflict considered likely or imminent, normally rely on the concepts of 'hostile intent' (or 'hostile approach') and 'hostile acts' to indicate when force can be used in self-defence in a particular context. Essential to an understanding of the evolution of the US approach towards action in self-defence is an appreciation of the impact of two incidents in the 1980s: the attack on the US Marine Battalion Landing Team Headquarters in Beirut in 1983 and the 1987 attack on the USS *Stark* in the Persian Gulf. In the former case, it transpired that Marines guarding the building had deliberately kept their weapons unloaded as a precaution against accidental or inappropriate use of weapons leading to the death or injury of civilians;⁵³³ in the latter case, the warship's commander and crew, not anticipating that Iraqi aircraft might pose a threat, had failed to identify and respond to the danger in time.⁵³⁴ The trauma of these events undoubtedly shaped the subsequent US approach to both the drafting and interpretation of ROE in relation to self-defence. ROE summaries in 'pocket card' form issued for US servicemen in the 1990s invariably stated emphatically at the outset that ROE would never preclude action in self-defence.⁵³⁵ By 1990, US land forces deployed in Saudi Arabia reportedly had ROE allowing them to fire in self-defence on aircraft considered to be making a 'hostile approach' even from about 40 kilometres' distance; British forces, by contrast, were not permitted to open fire on a suspect aircraft until it had locked on with a weapons radar system or (at sea) was within a few kilometres of a ship.⁵³⁶ As it transpired, neither approach was put to the test before combat operations began in earnest the following year, although the significance of the difference in the ROE of the two forces caused anxiety, at least on the British side.⁵³⁷ In Iraq in 2003-2004, differences between the US and the British approach towards use of force in self-

⁵³³ See O' Donnell and Kraska, 'Humanitarian law: developing international rules for the digital battlefield'.

⁵³⁴ See House Committee on Armed Services, Report on the Staff Investigation into the Iraqi Attack on the USS *Stark*, 14 June, 1987, reproduced in de Guttry and Ronzitti, *The Iran-Iraq War*, 152-158.

⁵³⁵ For numerous examples, see annex C of the *RoE Handbook for Judge Advocates*.

⁵³⁶ De la Billière, *Storm Command*, 175.

⁵³⁷ *Ibid.*, 140-141 and 175-177.

defence caused friction on occasions, with British troops sometimes considering their US allies too quick to open fire in ambiguous situations.⁵³⁸

In situations other than full-scale hostilities, reliance is sometimes placed on graduated warnings to individuals not posing an immediate threat, but whose conduct or appearance is suspect. (Where an immediate threat is clearly posed, use of force in self-defence will automatically be permitted). For instance, ROE for peace-enforcement personnel deployed in Bosnia in 1996 and in Kosovo in 1999 gave texts in Serbo-Croat (or Serbo-Croat and Albanian) for a verbal warning to be given as a first step if possible.⁵³⁹ Providing texts of warnings in the local languages is clearly a sensible precaution. An example of what can go wrong if troops fail to communicate an oral warning effectively seems to have occurred in June 1999, when an Albanian civilian, riding on the roof of a car and engaging in celebratory fire with an automatic rifle, was shot dead by British troops. The civilian apparently failed to comply with a warning, shouted in English, to 'put down your weapon', instead firing the weapon once again into the air, and then turning towards the source of the shouting, weapon still in hand.⁵⁴⁰

d) *Enforcement of ROE*

In many armed forces, it is a criminal offence for a serviceman to open fire with a weapon in violation of his ROE. Thus a US pilot who, departing from his ROE, mistakenly opened fire on Canadian troops in southern Afghanistan in 2002, believing them to be enemy forces, initially faced the prospect of court martial on the criminal charge of manslaughter. In the end he was not court-martialled after a recommendation that non-judicial proceedings should be brought instead, 'in the interest of good order and discipline.'⁵⁴¹ He was, however, found guilty of dereliction of duty for opening fire without having properly identified his target as hostile. He was deprived of half his salary for two

⁵³⁸ One British commander reports having instructed his troops to stay well away from US installations at night, given the danger of being fired on by 'jumpy' US sentries. (Tim Collins, *Rules of Engagement*, (London, 2005), 119-120).

⁵³⁹ See *Operational Law 2002*, Chapter 5, Appendix B.

⁵⁴⁰ See *Mohammed Bici and Skender Bici v. Ministry of Defence*.

⁵⁴¹ *Shreveport Times*, 20.06.03.

months and prohibited from further flying missions. (The leniency of the penalty caused dismay in Canada and at one stage even the pilot himself was unhappy at being deprived of the opportunity to present his side of events in full which a court martial would have provided.)⁵⁴² In June 2005, an Israeli court martial convicted a soldier of the Israel Defence Forces of manslaughter for having shot and killed an unarmed peace activist. The court appeared to accept the soldier's explanation that in aiming for a spot adjacent to the activist's head, he had not intended to kill him, but to warn him off. He was convicted of manslaughter (and sentenced to eight years' imprisonment) on the basis of having killed the activist by opening fire 'in complete violation of IDF rules of engagement'.⁵⁴³

During the period under review, some states, such as Italy, appeared to operate a policy of launching formal, internal investigations automatically when their troops opened fire in situations other than full-scale armed hostilities, irrespective of whether or not unlawful conduct was alleged.⁵⁴⁴ Others showed greater reluctance to take the initiative in investigating incidents of the use of lethal force by their armed forces in unusual circumstances.⁵⁴⁵ British practice appeared to lie somewhere in the middle, with details of incidents being routinely recorded when troops opened fire in situations other than full-scale hostilities, but decisions on launching formal investigative, disciplinary or judicial proceedings being left to a large extent to the discretion of commanding officers on the spot.⁵⁴⁶

It is not uncommon for decisions on whether or not to conduct internal investigations into the use of lethal force by troops in certain situations to hinge

⁵⁴² See *The Globe and Mail*, 20.06.03 and *The Times*, 05.07.04.

⁵⁴³ See 'IDF soldier convicted of six charges for the killing of Mr Tom Hurndall', website of the Israel Defence Forces, <http://www1.idf.il/DOVER/site/mainpage.asp?sl=EN&id=7&docid=41715.EN>, (visited 30.06.05). See also *Daily Telegraph*, 12.08.05.

⁵⁴⁴ After Italian troops exchanged fire with militants in Nassiriya on 06.04.04 and several Iraqi civilians were killed, an Italian military prosecutor based in Rome initiated an investigation, said to have been required under Italy's military legal code, notwithstanding assurances given by the local commanding officer that the rules of engagement had been followed (see *Corriere della Sera*, 08.04.04).

⁵⁴⁵ For an extreme example, see *Isayeva, Yusopova and Bazayeva v. Russia* (2005), ECtHR. See also criticism of Russian investigative procedures in the separate case of *Isayeva v. Russia* (2005), ECtHR, (paras.215-224).

⁵⁴⁶ See *R.(Al-Skeini) v. Secretary of State for Defence (Divisional Court)*, 47-49 for details of procedures adopted in Iraq by British forces for the investigation of civilian deaths. See also *Hansard*, 07.01.04, Column 139.

on whether or not the relevant commanding officer considers that the ROE have been violated. Such an approach raises questions. Why should only shootings outside the ROE be investigated? Should there be different policies regarding investigations according to whether the situation is an international armed conflict, a non-international conflict, a military occupation, a counter-insurgency operation or a peace-support operation? Is it right that decisions on whether or not investigations should be launched should be taken by commanding officers, rather than military prosecuting authorities or an entirely independent authority?

In the context of *internal* procedures for enforcing the rules on precautions in attack, ROE are of critical relevance. This is because they delineate, for the combatant, the border between state-authorized use of force and private acts of violence. In terms of international law, use of force does not become lawful simply by virtue of being state-authorized; but in the context of domestic law-enforcement, a state cannot coherently prosecute a member of its armed forces for opening fire in conformity with ROE issued by that same state's military authorities. The relevance of a commanding officer's view as to whether or not an investigation or prosecution should take place needs to be seen in the same light. As the person responsible for his subordinates' orders, training and understanding of their mission, he is the person best placed to know whether or not these orders, this training, and the way a mission has been explained can justify (or excuse) a subordinate's use of force on a particular occasion. His input is thus indispensable for the fair treatment of a combatant accused of having failed to take adequate precautions in attack. There is, however, an obvious risk of violations of the law of armed conflict going unchecked if commanding officers alone are able to decide whether or not investigations into an alleged violation of the law of armed conflict are launched, given the natural desire a commanding officer may have to protect his subordinates (or possibly himself) when things go wrong.⁵⁴⁷

⁵⁴⁷ The practice of effectively allowing commanding officers alone to decide on what action, if any, to take in the event of suspected misconduct by troops is criticized in the Canadian *Somalia Inquiry Report* of 1997 (Vol. 5, Chapter 40). In the UK, in December 2005, the MoD published proposed new legislation according to which where servicemen were alleged to have committed certain crimes, including misconduct on operations, murder, manslaughter or war crimes, decisions on whether or not to bring charges would be made not by commanding officers, but by a 'Director of Service Prosecutions', independent of the chain of command (*The Times*, 02.12.05).

The greater the extent to which the military criminal justice system is seen as capable of providing effective justice for both victims (or their relatives) and defendants when serious violations of the rules on precautions in attack are alleged, the less likely it will be that such allegations are taken to other judicial forums. The Rome Statute makes clear that the International Criminal Court may not exercise jurisdiction over a person alleged to have committed an offence within the subject matter jurisdiction of the Court if a state which has jurisdiction over that person (e.g. the state of which he is a national) is able and willing to investigate and prosecute the case effectively itself.⁵⁴⁸ Should the person be acquitted after a proper trial, the *ne bis in idem* principle will protect him from further prosecution for the same offence.⁵⁴⁹ Visibly fair, prompt and effective courts martial of military personnel credibly alleged to have committed serious violations of the law of armed conflict are thus essential for those states who wish to support the work of the International Criminal Court, but not to see their own servicemen and women being brought before it.⁵⁵⁰

Procedures adopted by states for conducting internal investigations into the use of lethal force by their armed forces in unusual circumstances, and if necessary prosecuting unauthorized use of force, have seldom had any real equivalent within armed opposition groups. That is not to say that armed opposition groups cannot reasonably be expected to have some kind of system in place for investigating allegations of failure on the part of their members to take reasonable precautions in attack and for taking appropriate remedial action if the allegations turn out to be well-founded and to have had serious consequences.⁵⁵¹

⁵⁴⁸ See Rome Statute articles 1 and 17.

⁵⁴⁹ *Ibid.*, article 20.

⁵⁵⁰ Where states parties to the ECHR are concerned, court martial proceedings will need to be compatible with article 6 on the right to a fair trial (see *Findlay v. UK* (1997), ECtHR and Hilaire McCoubrey, 'Due Process and British Courts Martial: a Commentary on the Findlay Case' (1997), *Journal of Armed Conflict Law*).

⁵⁵¹ Article 1 of Additional Protocol II requires that 'dissident armed forces or other organized armed groups' should be under responsible command for the Protocol to be considered applicable. According to article 43 of Additional Protocol I, 'armed forces', whose members will be entitled to prisoner of war status in a conflict subject to the rules of that treaty, need not necessarily belong to an authority recognized by the adverse party, but do need to be 'subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.'

Nor is it unreasonable to expect that they should at least have procedures for requiring ammunition to be accounted for.

e) ROE and legal inter-operability

If states fighting in alliances have significantly different understandings of what is a legitimate military objective and what the law requires of them in terms of taking precautions in attack - for instance, in relation to the extent to which a suspect 'civilian' should be given the benefit of the doubt in a zone of military operations, or in relation to what is an unlawfully indiscriminate weapon – they may have difficulty in working together.⁵⁵² Multi-national brigades in which participating troops and their officers come from different states with different treaty obligations may also face problems. The formulation of multi-national ROE may be part of the solution.⁵⁵³ But multi-national ROE will only be able to create a uniform approach if different belligerents have reasonably similar understandings of what constitutes an act triggering the right to use deadly force in self-defence and what degree of certainty is required about the nature of a target before it can be engaged.

The convergence since the 1980s of the rules of customary law on precautions in attack with the rules of Additional Protocol I noted in Chapter 2 may have reduced legal inter-operability problems within alliances to some extent. The treaty regimes of other more recent treaties by which some members of military alliances may be bound but not others, such as the Ottawa Convention and the Second Protocol to the Hague Cultural Convention, may present new challenges, however.

⁵⁵² See Parks, 'Air War and the Law of War', 137, for an example of a difficulty which could arise if troops from a state not party to Additional Protocol I, hemmed in by enemy troops in residential buildings, called in close air support from an ally which was party to the Protocol and consequently reluctant to attack buildings resembling civilian objects. The difficulty could presumably be overcome if those calling for air support made it clear that the buildings in question were being used for hostile purposes and not full of civilians. But they would need to be made aware that this degree of detail would need to be given.

⁵⁵³ See *Operational Law 2005*, 99.

5.3. The role of the military legal adviser

a) *Military legal advisers*

Specialized military legal advisers often provide on-the-spot advice for military commanders and their civilian superiors on how military aims can be accomplished within the framework of international law. States party to Additional Protocol I are obliged to make legal advisers available to military commanders for this purpose,⁵⁵⁴ and some states not party to the Protocol do so as a matter of good practice.⁵⁵⁵

Practice in terms of the deployment of military legal advisers varies. US practice is for military legal advisers to be deployed in, or relatively close to, combat zones and to be attached at all times to middle levels of command as well as military headquarters.⁵⁵⁶ This allows expert advice to be provided instantly at various levels, and at different stages of the planning process.⁵⁵⁷

The more common practice is for military lawyers to be deployed more sparingly, with units of military legal advisers being attached to service headquarters in capitals, tactical headquarters in theatre and, during a large scale deployment, to divisional or brigade-level headquarters, but not deployed with front-line forces.⁵⁵⁸ This allows for less complicated decision-making in theatre.

⁵⁵⁴ Article 82.

⁵⁵⁵ E.g. India and Israel and the US. See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol II), 3203-3204. (See also Steven Keever, 'Lawyers in the War Room' (1991), *ABA Journal* and Shefi, 'The Status of the Legal Adviser to the Armed Forces').

⁵⁵⁶ During the 2003 Iraq war, military lawyers were attached to US brigades as well as divisional headquarters (Human Rights Watch, *Off Target*, 94. See also US DoD 'Background Briefing on Targeting' (05.03.03)).

⁵⁵⁷ According to a US DoD report, 'The willingness of commanders to seek legal advice at every stage of operational planning ensured US respect for the law of war throughout Operations Desert Shield and Desert Storm' (*Final Report to Congress*, 632). US military legal advisers were also said to have been closely involved in tactical decisions in Iraq in 2003 relating to target selection. The British approach, reportedly, was to rely on observers rather than lawyers for advice at the tactical level on whether particular targets should be engaged at particular moments (Human Rights Watch, *Off Target*, 95).

⁵⁵⁸ British practice is for legal advice to be made available through separate legal branches for the different services, normally (in the Army) at divisional level (*UK Manual 2004*, para.16.5, n.16). An MoD report states that during the 2003 Iraq war, not only were legal specialists working in the

But it requires that middle-ranking and senior commanders without a legal adviser at their immediate disposal should have a sufficient mastery of the basics of international law to enable them to take legally sound decisions when there is insufficient time to obtain legal advice.⁵⁵⁹

b) *Military manuals*

Military manuals are normally designed primarily to serve as handbooks for military legal advisers, although well written, jargon-free manuals that are easy to use for reference and in which practical examples are given, may appeal to a wider readership. They are a valuable tool in promoting compliance with some of the more technical procedures connected to the rules on precautions in attack, such as the steps that need to be taken by an attacking force if cultural property is being used by an enemy in support of military operations. Manuals can also play a useful role in dispelling some of the myths about the law of armed conflict.

c) *Weapons review and defence procurement*

If there is a risk that innovations in military technology would fall foul of rules of international law, or might be likely to contribute to, rather than help avoid, collateral damage, (as for instance in the case of counter-battery systems designed to fire back automatically on a calculated source of fire), this needs to be spotted at an early stage, so the system can be appropriately adapted – or, in an extreme case, investment in its development terminated altogether. Conversely, if states make clear the importance they attach to being able to carry out military operations in a discriminating manner, this will provide an incentive to defence industry research and development departments to develop weapons and target

Permanent Joint Headquarters at Northwood, but Service lawyers were deployed in theatre to advise commanders on the spot (MoD, *First Reflections*, Chapter 6).

⁵⁵⁹ The Australian *Defence Force Manual* remarks, 'As appropriate, legal advisers should be available to assist commanders in ensuring compliance. In contrast, an aircraft pilot, a company commander or a commander of a RAN vessel may not have this direct access; consequently, it is essential that they have a sound knowledge and understanding of LOAC issues', (quoted in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol II), 3197).

identification systems to accommodate this demand. During the period under review, the United States in particular appears to have appreciated the importance of considering collateral damage issues at the stage when new weapons and target intelligence systems are being designed and developed.⁵⁶⁰

Several states have procedures for ensuring legal advice is sought at various key stages of the development of new methods and means of warfare.⁵⁶¹ For states party to Additional Protocol I this is a legal obligation.⁵⁶² Obviously such reviews are easier if the system in question is being developed by a domestic manufacturer or research institution than if it is being developed abroad, in which case the state may have to wait until the system is virtually on the market before deciding whether and if so how it can lawfully be used.

5.4. Training for compliance

a) Preliminary remarks

There are two different forms of training which are equally important for effective compliance with the rules of international law in relation to precautions in attack: basic formal instruction on the law of armed conflict, normally provided in some form to most if not all members of an armed force;⁵⁶³ and practical training on performing specific military tasks with due consideration for the law of armed conflict and pre-deployment training on specific Rules of Engagement.

⁵⁶⁰ See Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19.01.93, quoted in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol.II), 381. See also Cordesman, *Ongoing Lessons of the Afghan Conflict*, 66-68.

⁵⁶¹ See Justin McClelland, 'The review of weapons in accordance with Article 36 of Additional Protocol I' (2003), *IRRC*. See also Isabelle Daoust et. al., 'New wars, new weapons? The obligation of states to assess the legality of means and methods of warfare' (2002), *IRRC*. See also *Operational Law 2005*, 18-20, and US Air Force Instruction 51-402 (Weapons Review) of 13.05.94.

⁵⁶² See article 36.

⁵⁶³ The obligation to provide instruction to members of the armed forces on the provisions of the Geneva Conventions is enshrined in the conventions themselves (see Geneva Convention I, article 47, Geneva Convention II, article 48, Geneva Convention III, article 127 and Geneva Convention IV, article 144). It can be considered a rule of customary law.

b) *Instruction on the law of armed conflict*

A good approach to formal instruction on the law of armed conflict is to establish a basic introductory course for all military personnel, lasting no more than half a day and aimed at inculcating probably no more than ten or eleven basic rules which can reasonably be expected to become ingrained, in due course, in the mind of every member of the armed forces, and which will be promoted as an integral part of the ethos of his profession.⁵⁶⁴ The success of the training will depend at least as much on the attitude of officers, particularly senior ones, towards knowledge of and respect for the law of armed conflict as it will on the quality of the instruction from a technical perspective.⁵⁶⁵ Sometimes, the rules introduced in this kind of training are distributed widely in written form, for instance on the back pages of first aid pocket books as an *aide memoire*.⁵⁶⁶ Short videos showing battlefield scenarios raising law of armed conflict issues are a valuable tool for this kind of introductory instruction. Dubbed as necessary into other languages (and distributed with tact), such materials can help spread good practice internationally, particularly among armed forces without the resources for sophisticated law of armed conflict training programmes of their own.⁵⁶⁷ There is seldom any good reason why this kind of instruction should not also be provided by armed opposition groups to their members.⁵⁶⁸

⁵⁶⁴ See Charles Garraway 'Training: the whys and wherefores' (2002), *Social Research* for a description of this type of approach. See also Françoise Hampson, 'Fighting by the rules: instructing the armed forces in humanitarian law' (1989), *IRRC*. In 1993 a Directive was issued to the US Air Force by the Secretary of the Air Force requiring that 'Once each year, all commanders make sure their people are trained in the principles and rules of LOAC needed to carry out their duties and responsibilities. At a minimum it will include training required by the 1949 Geneva Conventions for the Protection of War Victims and the Hague Convention IV 1907, including annexes.' (Air Force Policy Directive 51-4 of 26.04.93).

⁵⁶⁵ Garraway, 'Training: the whys and wherefores'. See also Daniel Munoz-Rojaz and Jean-Jacques Fresard, 'The roots of behaviour in war: understanding and preventing IHL violations' (2004), *IRRC*.

⁵⁶⁶ Reference to several such publications and training materials is made in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol II), 3211-3245. See also British Army manual D/DAT/13/35/66, Army Code 71130 (1981), Annex A, for a good example of a written *aide memoire* for soldiers.

⁵⁶⁷ Such materials vary in quality. In January 2005, a British training video was submitted to a court martial in support of arguments that training on the law of armed conflict provided to soldiers had been inadequate. (*The Times*, 20.01.05).

⁵⁶⁸ An agreement concluded in 1992 between parties to the conflict in Bosnia-Herzegovina provided that: 'The parties undertake to spread knowledge of and promote respect for the

Basic instruction of this nature is supplemented in many armed forces by more advanced teaching of the law of armed conflict aimed at equipping those with command responsibility with the legal knowledge they will need.⁵⁶⁹ Such courses are not designed to turn commanders into legal experts, but to give them enough familiarity with the law of armed conflict to be able to take the basic principles into account almost instinctively when making decisions, while knowing where to find the more detailed rules if necessary. This kind of training is also likely to enable commanders to defend themselves and those under their command against unfair or uninformed allegations of violation of the rules. Given the military value of keeping the time between the identification of a potential target and the launching of an attack against it as short as possible, there is something to be said from the military perspective for commanders (including junior ones) having sufficient training to be able to make legally sound judgements on the spot about whether and if so how certain targets may lawfully be attacked.

c) *Practical training on taking precautions*

Many states routinely conduct combat training exercises in which complicated scenarios are simulated where legal considerations have to be taken into account. Such exercises can include scenarios where quick decisions need to be taken about whether or not a person is a combatant in an environment where combatants are not always in uniform; where a choice is available between various methods and means for attacking or destroying a military objective; where armed adversaries are using civilian or cultural property for cover; where difficult

principles and rules of international humanitarian law and the terms of the present agreement, especially among combatants. This shall be done in particular:

- by providing appropriate instruction on the rules of international humanitarian law to all units under their command, control or political influence;
- by facilitating the dissemination of ICRC appeals urging respect for international humanitarian law;
- by distributing ICRC publications.'

(Quoted in Henckaerts and Doswald Beck, *Customary International Humanitarian Law* (Vol. II), 3209-3210)

⁵⁶⁹ A good example of a practically oriented 12-module course of this nature for officers, with guidance for instructors, is David Lloyd Roberts' 'The Law of Armed Conflict: Teaching File for Instructors', issued by the ICRC and in use in several countries.

proportionality calculations need to be made; where protected buildings, such as hospitals, are being used perfidiously in support of military operations; where unarmed civilians behave aggressively etc.

Pre-deployment training on ROE is taken with great seriousness by many armed forces. British practice is to send soldiers on intensive pre-deployment courses, covering specific-to-theatre tactics and requirements, including ROE. These courses generally last up to three weeks and run at different levels, but all include both theory and practice, often in highly realistic settings and scenarios. US naval forces deployed in the Persian Gulf in the 1980s received regular training on ROE, particularly in relation to the correct recognition of 'hostile intent' and 'hostile acts'.⁵⁷⁰ Sometimes immense efforts are made to simulate as accurately as possible in ROE training exercises the kinds of situation in which troops are likely to find themselves.⁵⁷¹ The training facilities for such exercises are likely to be beyond the budget of many armed forces, however.⁵⁷² Less costly training techniques include variants of the type of relatively low-budget exercise used by the British Army in which participants are required simply to imagine the presence of some particular element which needs to be taken into account.⁵⁷³ A US Army/Marine Corps manual, published in 2000 and available online, contains plentiful examples of techniques which can be used to help inculcate ROE effectively during low budget training courses, including mnemonics and situational 'vignettes'. Some of the vignettes are designed for ROE-specific training; others are suitable for more general law of armed conflict training and could be used as training aids by any armed force.⁵⁷⁴

⁵⁷⁰ See de Guttry and Ronzitti, *The Iran-Iraq War*, 156-157.

⁵⁷¹ 'Zussman village' at the US Army centre at Fort Knox, Kentucky, attempts to recreate realistic situations for training purposes using civilians, the sounds of planes, tanks and gunfire, and even the smell of sewage and decomposing bodies, though total verisimilitude is apparently hampered to some extent by environmental, health and safety regulations. (Hills, *Future War in Cities*, 257). It was reported in 2000 that a French urban training facility was being established at Sisonne (Rupert Pangelley, 'French Army in profile: hollow force to hard core' (2000), *Jane's International Defence Review*).

⁵⁷² The Fort Knox centre cost \$15million and has annual operating costs of \$800,000 (Hills, *Future War in Cities*, 257). 100 million euro were said to be being invested over five years in the French establishment at Sisonne (Pangelley, 'French army in profile').

⁵⁷³ The paradigm being 'Tactical Exercises Without Troops' (TEWTs) for NCOs.

⁵⁷⁴ See *RoE Handbook for Judge Advocates*, Appendix E. The scenarios are well presented, but the 'model answers' to the vignettes sometimes questionable. One, describing a scenario where a US military convoy in a peace support operation meets an armed local man who tries to prevent the convoy from proceeding, explains, in the model answer, the degree of force which may be used

The importance of this kind of training was recognized in the 1997 report of a Canadian Commission of Inquiry, which recommended *inter alia* that ‘the Chief of the Defence Staff establish in doctrine and policy that no unit be declared operationally ready unless all its members have received sufficient and appropriate training on mission-specific rules of engagement and steps have been taken to establish that the rules of engagement are fully understood’. It was specifically recommended, furthermore, that such training should be ‘scenario-based and integrated into training exercises, in addition to classroom instruction or briefings, to permit the practice of skills and to provide a mechanism for confirming that instructions have been fully understood’⁵⁷⁵ For ROE-specific training to be possible, however, ROE need to be finalized in good time.

Such training is nonetheless of little value if ROE are allowed to fall into contempt or be undermined by contrary instructions from officers once troops are in an actual combat situation. The US-based NGO *Human Rights Watch* reported being informed by junior US soldiers serving in Iraq in 2003 that they had been told by their superiors during the advance to Baghdad from 5-7 April of that year to ‘assume that all targets were hostile’, rather than to obtain positive identification. By contrast, their pocket card rules stated ‘Positive identification (PID) is required prior to engagement. PID is a reasonable certainty that the proposed target is a legitimate military target. If no PID, contact your next higher commander for decision’.⁵⁷⁶ Poorly drafted (and unrealistic) pocket book language of this nature is not helpful for the soldier on the spot and comments made regularly to journalists by individual US servicemen stationed in Iraq suggest formal ROE were not held in great respect nor enforced with much vigour.⁵⁷⁷ The result appears to have been a complete collapse of the ROE system in some situations, with US troops openly admitting in interviews with the

to overpower him. Asking him *why* he is trying, single-handed, to delay a US military convoy is not included in the list of steps to be taken.

⁵⁷⁵ *Somalia Inquiry Report*, Vol. 2, Chapter 21.

⁵⁷⁶ Human Rights Watch, *Off Target*, 99-100.

⁵⁷⁷ See *The Times*, 15.04.04; *Daily Telegraph*, 26.04.04; and *The Economist*, 01.01.05.

international media to firing on unarmed civilians thought to be in some way connected with insurgents.⁵⁷⁸

There is some evidence to suggest that among both Russian troops serving in Chechnya in 1995 and US troops serving in Iraq in 2003, a counter-culture in conflict with both military professionalism and with the stated political objectives of their governments was allowed to develop unchecked. That young servicemen should display a degree of bravado in front of journalists or other civilians is only to be expected. But in Chechnya in the mid-1990s, an officer could sensibly have suggested that bandanas with the slogan 'born to kill' should have been removed before Russian troops (said to be in Chechnya to 'restore constitutional order') began giving interviews to the eminent human rights group *Memorial*.⁵⁷⁹ Likewise, in Iraq in 2003, it might have been wise for an officer to have had a quiet word with the US marine wearing a helmet emblazoned with the slogan 'kill 'em all', at least before he was captured on film by a photographer from *The Guardian*.⁵⁸⁰

5.5. Conclusions

It is submitted that internal procedures for promoting and enforcing rules of international law in relation to precautions in attack which it will usually be reasonable to expect of states include the following:

- when troops are deployed abroad, the publication of a formal order from the senior commander in theatre concerning compliance with the law of armed conflict;
- carefully drafted ROE, focussing in particular on what is to be understood by 'self-defence' and '*hors de combat*';

⁵⁷⁸ See *The Economist*, 01.01.05.

⁵⁷⁹ See Memorial's report *Vsyemi Imyeushchimisya Sredstvami*, Chapter 8.

⁵⁸⁰ See front page of *The Guardian Weekly*, 03.04.03– 09.04.03.

- the distribution of pocket cards, summarizing the main points of the ROE for all troops deployed on active service and issued with weapons;
- practical, pre-deployment training on ROE for all weapon-bearing troops;
- the provision of a basic introduction to the law of armed conflict for all military personnel, plus dissemination of the basic rules in suitable written form, and regular testing on the subject;
- the provision of a relatively advanced (but short) course on the law of armed conflict for commanders;
- establishment of procedures for ensuring that allegations of violations of the rules reach military legal advisers, independent of the chain of command, at a relatively early stage;
- an effective and credible court martial system.

Procedures which can reasonably be expected of armed opposition groups will depend greatly on the context, but are likely to include, as a bare minimum:

- as above, a basic introduction to the law of armed conflict for all weapons bearers;
- a procedure for conducting investigations into alleged violations of the basic rules on precautions in attack and for taking the necessary action when allegations prove well-founded;
- a system whereby weapons bearers have to account to commanders for ammunition used.

6. INDIVIDUAL CRIMINAL RESPONSIBILITY FOR VIOLATIONS OF THE OBLIGATION UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT TO TAKE PRECAUTIONS IN ATTACK

...if a man pursue a lawful occupation and take due care, the result being that a person loses his life, he is not guilty of that person's death, whereas, if he be occupied with something unlawful or even with something lawful but without due care, he does not escape being guilty of murder if his action results in someone's death.

*St. Thomas Aquinas, Summa Theologia II-II,
Question 64, Eighth Article.*

On 31 January 2005, Pavle Strugar, a former lieutenant-general of the Yugoslav People's Army (JNA), was sentenced by the International Criminal Tribunal for the former Yugoslavia (ICTY) to eight years' imprisonment, having been found guilty of attacks on civilians and 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, in violation of the laws of war.⁵⁸¹ The Tribunal found that Strugar had failed to take the 'necessary and reasonable measures'⁵⁸² to prevent or to punish unlawful attacks on civilians and protected property by forces under his command during a military operation in December 1991, in which the Old Town of Dubrovnik was extensively damaged by artillery fire. In March 2004, Miodrag Jokic, Strugar's immediate subordinate, was sentenced by the ICTY to seven years' imprisonment for his part in the same operation.⁵⁸³ Four months previously, in December 2003, Stanislav Galic, a former major-general in the Bosnian-Serb army, was sentenced by the ICTY to twenty years' imprisonment for implementing a deliberate campaign of terror against the civilian population of Sarajevo during the two-year long siege of that city by forces under his command.⁵⁸⁴

⁵⁸¹ *Prosecutor v. Strugar (Trial Judgement)* (2005), ICTY.

⁵⁸² See ICTY Statute, article 7(3).

⁵⁸³ *Prosecutor v. Jokic (Sentencing Judgement)* (2004), ICTY.

⁵⁸⁴ *Prosecutor v. Galic (Trial Judgement)* (2003), ICTY.

A novel feature of *Galic*, *Jokic* and *Strugar* from the perspective of international criminal law is that unlike defendants in most previous war crimes trials before international tribunals, the defendants in these cases were not convicted for crimes committed against persons directly within their power (or that of forces under their command), but for the killing of non-combatants and the destruction of protected property *from a distance* in the context of conventional military engagements.⁵⁸⁵ Though the distance involved in these cases was no more than a few kilometres, this element complicated the task of the Trial Chambers in assessing whether, and if so to what degree, the killing of civilians and (in *Jokic* and *Strugar*) the destruction of cultural property which formed the basis of the indictments was intentional. A related interesting feature of these cases is that the Trial Chambers concerned inferred the necessary *mens rea* for criminal conviction to a major extent from the precise way in which two standard military operations had been conducted and controlled: the sustained siege of a defended town, and the capture from enemy troops of a tactically important, fortified hill.

It seems opportune in the light of this jurisprudence to examine whether there might now be circumstances in which failure to take the legally required precautions in attack could lead to criminal conviction on the international legal plane in the event of an international criminal tribunal being able to take jurisdiction over the alleged offender. This chapter looks first at some general principles of criminal law concerning the relationship between intent and crime, and at the particular conceptual difficulties which 'combat crimes' pose against this background. It then looks at the special form of criminal liability in international criminal law which has emerged from the doctrine of command responsibility. Finally, it considers the implications of the judgements in *Galic*,

⁵⁸⁵ In *US v. Wilhelm List et. al.* (1948) (Military Tribunal, Nuremberg), convictions for wanton destruction of property and unlawful killing of civilians related to the deliberate burning (at close range) of civilian houses and the killing of civilians as reprisal measures in occupied territory. Likewise in *Kordic and Cerkez*, although the ICTY initially convicted the defendants for attacks against civilians and civilian property using artillery, as well as for the deliberate burning of civilian houses and killing of civilians at close range, on appeal the convictions relating to artillery attacks were overturned (see *Prosecutor v. Kordic and Cerkez (Appeal Judgement)* (2004), ICTY, paras.421, 472, 477, 487, 525-526, 535, 554, 557-558, 562, 563, 566, 568, 570, 574-575, 580, 586 and 589).

Jokic and *Strugar* for military commanders in the event of these cases being considered persuasive precedents by other courts.

The chapter focuses on the potential criminal liability on the international plane of individuals for failure to take the precautions in attack required by international law, whether in international armed conflicts or internal conflicts.⁵⁸⁶ It does not consider their potential civil liability under the municipal law of certain states for harm caused by such conduct.⁵⁸⁷

6.1. Crime, intention and combat

a) *Crime, mens rea, and degrees of intention*

The legal maxim *actus non facit reum nisi mens sit rea* may not go back to Roman times,⁵⁸⁸ but it goes back a long way and exercises a powerful influence on both common and civil law criminal justice systems. It reflects the traditional view that normally a person should not be convicted of a criminal offence unless it can be shown not only that he has caused or contributed to a harmful act prohibited by law (*actus reus*), but that he has done so with the necessary degree of mental guilt (*mens rea*) in relation to the act in question to warrant the punishment and stigma which normally follow criminal conviction. The principle

⁵⁸⁶ The principle that individuals may be held criminally responsible under international law for certain violations of the law of armed conflict during internal conflicts is now enshrined in the ICC Statute as well as ICTY and ICTR jurisprudence. It is also reflected in the domestic criminal codes of several states (for details of the latter, and relevant national jurisprudence, see Thomas Graditzky, 'Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts' (1998), *IRRC*).

⁵⁸⁷ In theory, failure to take the legally required precautions in attack might lead to civil proceedings before a competent domestic court instead or as well as criminal proceedings on the domestic or international plane. US courts might in principle be able to hear such cases, by virtue of the US Alien Tort Claims Statute of 1999 (28 USC 1350), giving US district courts 'original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the US'. In English law, although traditionally enemy aliens resident in enemy territory have been unable to bring proceedings before an English court if a state of war existed at the material time between the UK and the state of the plaintiff, it was established in a case heard in July 2005 that civil suits could be brought before English courts by 'enemy aliens' if relations between the UK and the state of the plaintiff at the material time did not amount to 'a state of war in the technical sense' (*Ahmed Amin v. Brown* (2005), Chancery Division (UK)).

⁵⁸⁸ Albin Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in *International criminal law: a commentary on the Rome Statute for an International Criminal Court* (Oxford, 2001), eds. Antonio Cassese et.al., 890.

is an important bulwark against the savagery of purely retaliatory justice. That said, both common and civil law systems recognize, at least to some extent, the notion of criminal responsibility without the need for a defendant to be shown to have had *mens rea*. And where crimes for which *mens rea* on the part of a defendant does need to be shown are concerned, the nature of the mental element needing to be demonstrated can vary considerably.

Common law systems and mens rea.

In criminal trials in common law systems, conviction for serious crimes is seldom possible unless it is found that a defendant's conduct was voluntary, and he either consciously intended the *actus reus* or acted recklessly, not intending the *actus reus*, but acting with culpable indifference to the likelihood of it occurring, with no justification for taking the risk.⁵⁸⁹ It is not usually necessary that a defendant should have known he was committing a crime,⁵⁹⁰ nor that he should have desired the outcome of the *actus reus*, for instance if he acted not in pursuit of a particular outcome, but to avoid some kind of unpleasantness.

In the United States, recklessness is normally considered to involve a conscious decision to take an unjustifiable risk.⁵⁹¹ English criminal law, by contrast, distinguishes between two forms of recklessness: acting in the knowledge that a harmful result is likely to ensue and going ahead anyway ('Cunningham', or 'advertent' recklessness); and acting in a way that is in fact likely to produce the harmful result, yet without having given any thought at all to the consequences ('Caldwell' or 'Lawrence' recklessness).⁵⁹² What is excluded altogether from the common law concept of recklessness is acting in the mistaken

⁵⁸⁹ For an overview of the role of *mens rea* in English criminal law, see *Smith and Hogan: Criminal Law* (10th Edition) (London, 2003), ed. J. C. Smith, Chapter 5 (Hereinafter '*Smith and Hogan*'). For a US perspective, see George P. Fletcher, *Basic Concepts of Criminal Law* (New York, 1998).

⁵⁹⁰ *Smith and Hogan*, 97-101.

⁵⁹¹ Fletcher, *Basic Concepts*, 115-116.

⁵⁹² *Smith and Hogan*, 77-84.

belief that one's actions will not cause the harmful act in question nor be likely to do so, even if this mistaken belief is unreasonable.⁵⁹³

Although the normal requirement for criminal conviction in common law systems is a finding of *mens rea* in the form of either intention or recklessness, a finding of negligence may be sufficient to ground a conviction for certain crimes. 'Crimes of negligence' in common law systems tend to relate to conduct which, though normally attributable to incompetence or inattentiveness rather than malice or recklessness, can cause such harm that criminalization irrespective of intent is considered by lawmakers to be both justified and necessary.⁵⁹⁴ They include so-called crimes of strict liability, normally set out by statute, and also the crime of manslaughter or negligent homicide, for which a person may be convicted on the basis of a finding of gross negligence.⁵⁹⁵ In some common law jurisdictions, such as New Zealand, an approach has developed in relation to some crimes whereby once the *actus reus* has been proved, criminal responsibility can be presumed without the need for *mens rea* to be demonstrated, unless the person to whom the harmful act is attributed can rebut the presumption that he may properly be held responsible for it by showing that there were reasonable grounds for his failure to be aware of or to foresee the relevant facts.⁵⁹⁶ This approach, also envisaged in relation to certain statutory crimes in other common law jurisdictions,⁵⁹⁷ has been described as a kind of 'half-way house' between crimes requiring *mens rea* and crimes of strict liability.⁵⁹⁸ 'Crimes of negligence' are the exception, however, and common law systems remain antipathetic to the notion of serious crime without *mens rea* in the traditional sense.⁵⁹⁹

⁵⁹³ See e.g. *R. v. Lamb* (1967), Queen's Bench Division (UK). See also *Smith and Hogan*, 108.

⁵⁹⁴ Examples in English law are a number of motoring crimes and various crimes related to food safety and environmental pollution.

⁵⁹⁵ For details on the *mens rea* requirement for the crime of manslaughter in English law, see *Smith and Hogan*, 385-387.

⁵⁹⁶ *Smith and Hogan*, 136-137.

⁵⁹⁷ See e.g. the UK's 1968 Trade Description Act.

⁵⁹⁸ *Smith and Hogan*, 136-137.

⁵⁹⁹ See *Smith and Hogan*, 488, referring to the House of Lords ruling in *B (a minor) v. DPP*. See also Fletcher, *Basic Concepts*, 116.

Civil law systems and mens rea

Civil law systems, like common law systems, normally require demonstration of *mens rea* for serious criminal convictions. But the conceptual approach is slightly different. Rather than subdividing degrees of intention into three broad categories of intent, recklessness and negligence, civil law draws on five concepts: *dolus directus* (first degree); *dolus directus* (second degree); *dolus eventualis*; conscious negligence; and unconscious negligence.⁶⁰⁰

Dolus directus (first degree) is the state of mind of the person who intentionally causes harm he has both foreseen and desired. *Dolus directus* (second degree) is the state of mind of the person who intentionally causes harm he has foreseen, but not desired in itself, or at least which it was not his primary intention to cause. *Dolus eventualis* is the state of mind of the person who causes harm he understood to have been likely (though not certain) to ensue from his action and accepted, though did not desire. Conscious negligence is the state of mind of the person who knowingly acts dangerously, causing harm he nonetheless neither foresaw nor desired. Unconscious negligence is the state of mind of the perpetrator of a harmful act who acts dangerously, and thereby causes harm, but without having been aware of the dangerousness of his conduct on account of a failure to give proper consideration to its possible consequences.⁶⁰¹

Dolus directus in the first degree will clearly pass the *mens rea* test. *Dolus directus* in the second degree may or may not do so, depending probably on the extent to which the primary intention is seen as sufficiently meritorious to excuse the secondary intention. *Dolus eventualis*, likewise, though it may sometimes be considered a form of *mens rea*,⁶⁰² may in some circumstances fail the *mens rea* test. An example of *dolus eventualis* falling short of *mens rea* would be the state of mind of a person administering cardio-pulmonary resuscitation to a casualty in the knowledge that the force being used to keep the heart pumping might well fracture a rib.

⁶⁰⁰ See Eser, 'Mental Elements', 905-908.

⁶⁰¹ *Ibid.*

⁶⁰² See *Prosecutor v. Blaskic (Appeal Judgement)* (2004), ICTY, para.39.

Although conscious negligence is sometimes described as the civil law equivalent of the common law notion of recklessness,⁶⁰³ it is not quite the same. Unlike the person acting with Cunningham recklessness (or with *dolus eventualis*), who knows harm is likely to ensue from his actions, and unlike the person acting with Caldwell recklessness, who has given no consideration at all to the consequences of his action, the person acting with conscious negligence will have considered the consequences of his behaviour but may have concluded optimistically that while his conduct was dangerous, harm was not in fact likely to ensue. Conscious negligence thus represents a combination of indifference and poor judgement, straddling the boundary between the common law concepts of recklessness and negligence. Whether or not this state of mind will pass the *mens rea* test is likely to depend on whether indifference or poor judgement is perceived to have been the dominant cause of the harm. Unconscious negligence is seldom likely to pass the *mens rea* test where serious crime is concerned.

International criminal law and mens rea

Though *mens rea* is approached slightly differently by common law and civil law systems, it is normally considered important in both systems that the state of mind of a criminal defendant in relation to the wrongful act in question at the relevant time should be determined with care before a verdict is reached. In both systems a spectrum of degrees of intention is recognized, with malicious intent at one end, total involuntariness at the other end, and several shades of grey in between. In any particular case, the location on this spectrum of the mental element necessary for criminal conviction will depend on the nature of the crime and of the criminal justice system.

So it is with international criminal law. Where war crimes are concerned, international treaties often indicate that a certain state of mind is required for an

⁶⁰³ As Eser implies in 'Mental Elements', (906).

act to entail criminal responsibility.⁶⁰⁴ Normally the requisite mental element is intent or wilfulness, but there are acts which will qualify as criminal violations of the law if committed with a degree of mental responsibility which may be considered either a little less culpable than intent or rather more so.⁶⁰⁵ Some acts which are crimes if committed wilfully become crimes of greater gravity if committed with a particular purpose.⁶⁰⁶

During negotiations on the text of the Rome Statute establishing the International Criminal Court (ICC), it was decided to include a provision requiring the demonstration of the requisite 'mental element' before any conviction.⁶⁰⁷ It is noteworthy that the term 'mental element' was preferred over the term '*mens rea*'. This may reflect the fact that in relation to many war crimes, the mental element necessary for conviction by the ICC is more demanding than *mens rea* in the traditional sense,⁶⁰⁸ while in some circumstances, a person may be held criminally responsible for crimes which he knew or should have known about, but in relation to which he personally had no *mens rea* at all.⁶⁰⁹

It was also decided that the provision on the mental element of crimes would not cover the concept of recklessness, on the grounds that as the term was not used in the Statute's catalogue of crimes, this was unnecessary.⁶¹⁰ The reluctance of states to give the ICC express jurisdiction to find criminal responsibility for war crimes on the grounds of recklessness is understandable. But the fact that the concept is not mentioned in the Rome Statute does not mean it has been banished altogether from international criminal law. The ICRC Commentary to Additional Protocol I indicates that for the purposes of its 'grave breaches' provision, the

⁶⁰⁴ See e.g. Additional Protocol I, article 85 (paras.3 and 4), ICTY Statute, article 2(a), (c) and (f) and articles 8.2 and 30 of the Rome Statute.

⁶⁰⁵ See Eser, 'Mental elements', 898-900.

⁶⁰⁶ E.g. the crime of genocide (see 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide, article II, ICTR Statute, article 2.2 and Rome Statute, article 6) and the crime of causing terror (see *Galic*, (Trial Judgement), para.136). For further discussion of 'specific intent' crimes, see Eser, 'Mental elements', 900-902.

⁶⁰⁷ See article 30. See also Eser, 'Mental elements', 890.

⁶⁰⁸ See Eser, 'Mental elements', 946.

⁶⁰⁹ See Rome Statute, article 28. Whether this article will in fact be interpreted as allowing convictions without *mens rea* in the traditional sense remains to be seen.

⁶¹⁰ Eser, 'Mental elements', 932. See also Roger Clark, 'The mental element in international criminal law: the Rome Statute of the International Criminal Court and the Elements of Offences' (2001), *Criminal Law Forum*, 314-315.

term ‘wilfully’ should be understood as encompassing the concepts of wrongful intent and recklessness, though defines the latter somewhat loosely as ‘the attitude of an agent who, without being certain of a particular result, accepts the possibility [*sic*] of it happening’.⁶¹¹ Sometimes citing this passage of the Commentary,⁶¹² the ICTY has not shied away from the practice of considering recklessness as a form of intent. According to the Trial Chamber in *Strugar*:

It is now settled that the *mens rea* [for the crimes of wilful killing and murder] is not confined to cases where the accused has a direct intent to kill or to cause serious bodily harm, but also extends to cases where the accused has what is often referred to as an indirect intent...

...to prove murder, it must be established that death resulted from an act or omission of the accused, committed with the intent either to kill or, in the absence of such a specific intent, in the knowledge that death is a probable consequence of the act or omission.⁶¹³

According to a report prepared by members of the Office of the Prosecutor, where the crimes of attacks not directed at military objectives and attacks which cause disproportionate collateral damage are concerned, ‘the *mens rea* for the offence is intention or recklessness, not simple negligence’.⁶¹⁴

The Tribunal’s approach to the concept of recklessness has nonetheless been cautious. The Appeals Chamber has clarified that criminal responsibility for serious violations of international humanitarian law will not be engaged by ‘the knowledge of any kind of risk’ and that attacks which cause collateral damage as a result of bad military judgement are not necessarily crimes.⁶¹⁵ While accepting the position of the ICRC Commentary that recklessness should be seen as a form of wilfulness for the purposes of establishing the necessary *mens rea* for conviction for some serious violations of international humanitarian law, the

⁶¹¹ *ICRC Commentary (Additional Protocols)*, para.3474. Nonetheless, some violations of the Protocol, notably launching indiscriminate attacks, will only be ‘grave breaches’ if committed with knowledge that excessive collateral damage will result; mere recklessness will not suffice. (*ICRC Commentary*, 3479). See also *Galic (Trial Judgement)* para.59.

⁶¹² E.g. in *Galic (Trial Judgement)*, para.54 and *Prosecutor v. Delalic et. al. (Trial Judgement)* (1998), ICTY, para.437.

⁶¹³ Paras.235-236.

⁶¹⁴ *ICTY Committee Report (NATO)*, para.28. See also paras.62 and 70.

⁶¹⁵ *Blaskic (Appeal Judgement)*, paras.41 and 463.

Tribunal has generally chosen to be guided by common law jurisprudence, rather than the Commentary, in relation to what recklessness means.⁶¹⁶

The ICC can be expected to be more cautious still about the circumstances in which recklessness may be seen as an adequate form of *mens rea* for conviction for war crimes within the subject matter jurisdiction of the Court. Article 30 of the Rome Statute indicates that normally conviction will only be possible where war crimes are committed with ‘intent and knowledge’. The Statute indicates that intent does not have to be direct to constitute the necessary *mens rea*: article 30.2(b) provides that the necessary mental element may exist if a person does not mean to cause a particular outcome, but is ‘aware that it will occur in the ordinary course of events’. This can be seen as a direct reflection of the civil law notion of *dolus directus* (second degree), but does not accommodate the concept of recklessness in its entirety.⁶¹⁷ As seen above, *dolus directus* (second degree) is conceptually distinguishable both from the common law notion of advertent recklessness and the civil law notion of *dolus eventualis*. It is further removed still from the concepts of ‘Caldwell recklessness’ and conscious negligence.

It may, however, prove difficult in practice for the Court to distinguish evidence that a person believed a certain outcome (such as avoidable or excessive non-combatant casualties) would occur in the ordinary course of events from evidence that a person simply believed such an outcome was likely.⁶¹⁸ (The former state of mind would be sufficient *mens rea* for most of the crimes within the Court’s jurisdiction; the latter would not). What seems beyond doubt is that the Statute will prevent the Court from convicting in circumstances where it is clear that a defendant considered a certain outcome possible, but not likely. It would also appear to be difficult under the terms of the Statute (if not impossible) for the Court to convict a defendant of a war crime were it to appear that neither

⁶¹⁶ See e.g. *Blaskic (Appeal Judgement)*, paras.34-39.

⁶¹⁷ See Eser, ‘Mental elements’, 915-916. See also Gerhard Werle and Florian Jessberger ‘“Unless otherwise provided”: Article 30 of the ICC Statute and the mental element of crimes under international criminal law’ (2005), *Journal of International Criminal Justice*.

⁶¹⁸ Robert Cryer suggests the Rome Statute deliberately departs from customary law in setting a new standard for the degree of conscious and culpable acquiescence in a crime needed for criminal conviction by the ICC. (See ‘General Principles of Liability in International Criminal Law’, in McGoldrick, Rowe and Donnelly, *The Permanent International Criminal Court*).

he, nor (if the defendant is being tried on account of the conduct of his subordinates) the direct perpetrator gave any thought at all to the possible consequences of his actions.

b) Mens rea and 'combat crimes'

There is nothing controversial about the notion that combatants have no automatic entitlement, by virtue of their profession, to use the force at their disposal as they please without fear of prosecution. But while the notion that a combatant should face prosecution if he robs an enemy civilian for personal gain or in revenge kills a defenceless prisoner of war is unlikely to provoke serious dissent, unease is often expressed publicly as well as privately when combatants face the prospect of prosecution for 'unlawful killing' or 'wanton destruction' carried out ostensibly in the line of duty and patently not for personal gain or gratification, particularly if this leads to trial in civilian courts.⁶¹⁹

In earlier times, it might have been plausible to argue that by and large criminal law did not apply to combatants in the heat of battle. The argument was that combat, by its very nature, consisted of acts normally considered criminal, thus rendering absurd the idea of prosecution for combat activity. That position is no longer tenable. War crimes trials after the Second World War and ICTY jurisprudence have shown that combatants can be held to account by criminal tribunals for unlawful acts of violence committed not only in the margins of an armed conflict, but while actively engaged with enemy forces.⁶²⁰ The creation of the ICC, with its wide-ranging jurisdiction, raises the prospect that such trials may become more common.

Though the case law in this area is in its infancy, it is clear already that a difficulty with prosecuting 'combat crime' is how to identify and demonstrate the

⁶¹⁹ See e.g. the record of the debate in the House of Lords on 14.07.05 on the question of war crimes prosecutions of British troops serving in Iraq (*Hansard*, 14.07.05, Column 1220).

⁶²⁰ See e.g. *US v Wilhelm List et. al.* (Military Tribunal, Nuremberg, 1948), *Kordic and Cerkez*, (*Appeal Judgement*), *Blaskic* (*Appeal Judgement*), *Galic* (*Trial Judgement*), *Jokic* (*Sentencing Judgement*) and *Strugar* (*Trial Judgement*).

necessary mental element for a finding of guilt in relation to a crime alleged to have been committed in the heat of battle. The difficulty can be broken down into three elements: fractured responsibility; reflexive action; and double-effect decisions. The point of raising these difficulties is not to suggest that 'combat crimes' cannot or should not be prosecuted, but to underline the need for extreme caution and considerable specialized expertise if judgements in this area are to command respect.

Institutional decision-making and the fracturing of responsibility

When a person is unlawfully killed in peacetime, responsibility can usually be restricted if not to one person alone, to a small and finite group of persons considered to have ordered, perpetrated or assisted in the killing and whose guilt can be determined individually in terms of each person's contribution to the crime and degree of culpable intent. This is seldom so when non-combatants are unlawfully killed on the battlefield. If, in the course of an attack on combatants sheltering in an enemy village, a soldier throws a grenade into a room containing no-one but unarmed civilians and kills them, it could plausibly be considered, for instance by a local coroner, that the civilians had been unlawfully killed. But if it came to bringing a prosecution, whether on the national or international plane, the number of people who might be considered at least partially responsible, in addition to the soldier himself, might run into the hundreds as consideration came to be given to the orders, training, equipment, information, possibly even the drugs,⁶²¹ given to the soldier, the manner in which the operation was planned, and the precautions taken or not taken before the attack on the village was launched. In such a situation not only is responsibility for the deaths of the civilians scattered amongst a vast quantity of people, but it may also be that not a single one, including the soldier who threw the grenade, actually wanted or intended the

⁶²¹ Misuse of powerful analgesic drugs issued to Russian troops for first aid purposes was said to have contributed to the ill-discipline shown by those who took part in an operation in the Chechen village of Samashki in 1995 which left more than 100 civilians dead (see Memorial, *Vsyemi Imyeushchimisya Sredstvami*). Likewise, after the mistaken attack on Canadian troops near Kandahar by a US pilot in 2002, concerns were expressed in the media that amphetamines officially distributed to US combat pilots may have contributed to the error ('Friendly fire' pilots took 'go' pills', BBC Online, 15.01.03).

civilians to be killed. Many of the same considerations apply *mutatis mutandis* to the unlawful destruction in combat of protected property.

Reflexive action and mens rea

In combat situations, the deaths of non-combatants and destruction of protected property will often be the result of decisions taken in the heat of the moment, on the basis of inadequate information, by people under extreme stress. The cognitive concepts on which criminal convictions in peacetime often rely, such as 'malice aforethought', or 'intent permanently to deprive', might seem to belong to another, more leisurely world. That is not to say it is impossible for a combatant in these circumstances to take a decision based on sheer malice. But often those in combat situations will be acting reflexively, rather than reflectively, and on the basis of fast and aggressive reflexes deliberately developed by the military organization to which they belong.

Specifically, modern combat troops may have been trained to open fire instinctively, within a split second, in response to certain visual stimuli. After a post-Second World War study found that a large proportion of US combat troops had never actually fired their weapons throughout the war, even in situations of mortal danger, efforts were made by the US military to develop training techniques that would reduce the proportion of 'non-firers' among the infantry, for instance by the use of 'pop-up' targets, which soldiers would be rewarded for shooting at as soon as they appeared.⁶²² Modern technology has made such training more sophisticated, but the objective usually remains the same: to encourage prompt and effective use of lethal force on the battlefield and discourage hesitation - the result sometimes being that highly trained troops 'kill without taking the conscious decision to do so'.⁶²³

⁶²² See Kilner 'Military Leaders' Obligation to Justify Killing in War', citing S. L. A. Marshall *Men Against Fire: the Problem of Battle Command in Future War* (New York, 1961).

⁶²³ Kilner, 'Military Leaders' Obligation to Justify Killing in War'.

Combatants themselves would probably be the first to object to the idea that on the battlefield they cannot, because of their training, properly be considered moral agents and should be treated by the criminal law as if they were robots. It seems unlikely that a combatant charged with unlawful killing or destruction on the battlefield would consider a defence of automatism or that if he did, that such a defence would succeed. But it would seem contrary to natural justice for the influence of automatic reflexive responses and battle stress on combatants to be disregarded entirely in consideration of the *mens rea* aspect of an unlawful act of violence on the battlefield. Whereas it would seldom if ever be appropriate for such considerations to form the basis for an acquittal or a decision not to prosecute, they may be relevant as mitigating factors at the stage of sentencing in the event of a guilty verdict.⁶²⁴ Unlawful acts of violence regularly committed as a result of reflexive action or battle stress may also point to systemic failures within the unit to which the offenders belong. In such a case, the military organization in question might be the more appropriate object of legal proceedings than the individual combatants directly responsible for the acts.

Double effect decisions

In the *Einsatzgruppen* judgment, rendered by a US Military Tribunal at Nuremberg in 1948, the judges reasoned:

A city is bombed for tactical purposes: communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed all for the purpose of impeding the military. In these operations, it inevitably happens that non-military persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of hostile battle action. The civilians are not individualized. The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and in law, from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women and children and shooting them'.⁶²⁵

⁶²⁴ Unlike common law systems, international criminal law recognizes no crime of 'manslaughter': killing is either lawful or unlawful. The culpability of an unlawful killing will normally be considered at the sentencing stage (in the event of a guilty verdict), but is not considered to affect the nature of the crime.

⁶²⁵ *US v. Ohlendorf et. al.* (Military Tribunal, Nuremberg, 1948).

This rather crude approach to the relationship between intent and criminal responsibility was presumably formulated more with an eye to countering any suggestions that the bombardment of German cities by the Allies should be considered as a war crime than with an eye to describing universally acknowledged principles of criminal law. There was nothing new in 1948 about the notion that criminal responsibility might in some circumstances accrue to a person causing the death of another by failing to take sufficient care while engaged in a lawful activity. It has in the meantime become an established principle of treaty and customary law that causing collateral damage in the course of an attack on a military objective, if such damage is excessive in relation to the concrete and direct military advantage anticipated from the attack, is unlawful,⁶²⁶ and may in some circumstances engage criminal responsibility.⁶²⁷

A consequence of this is that a combatant may now, in principle, be prosecuted for causing 'excessive' collateral damage in the course of an attack if a case can be made that the collateral damage was clearly excessive in relation to the anticipated military advantage and known by the attacker to be so.⁶²⁸ In parallel, a novel defence has become available which may be termed the defence of 'excusable collateral damage'. It may take two forms: first, the defendant claims he did not intend or anticipate that any non-combatants at all would be killed or injured or any protected property damaged; secondly, he claims that although he had anticipated collateral damage as possible, probable, or even inevitable, he had considered it would not be excessive in relation to the concrete and direct military advantage anticipated from the attack.⁶²⁹

In the event of a person accused before a competent tribunal of unlawful attacks on protected persons or property relying on such a defence, the tribunal would probably not wish to convict without satisfying itself that the attacker had in fact anticipated excessive collateral damage, given the normal requirement in serious criminal trials for *mens rea* of some kind to be established. Direct

⁶²⁶ Additional Protocol I, article 51.5(b) and 57.2(a).iii.

⁶²⁷ *Ibid.*, article 85.3, Rome Statute, article 8.2(b)(iv).

⁶²⁸ See Rome Statute article 8.2(b)(iv).

⁶²⁹ The defence was advanced before the ICTY in *Galic* and also in *Strugar*, in both of which cases it received short shrift since the Trial Chambers were unconvinced by the evidence that the attacks in question had in fact been aimed at military objectives.

evidence of the requisite mental attitude is unlikely to be forthcoming, however: it is more likely that the mental element needed to establish the crime will need to be inferred from circumstantial evidence.⁶³⁰ In its simplest form, such evidence might be the extent and location of collateral damage, with a tribunal choosing to conclude that to a lesser or greater degree, what had been hit was what had been targeted. Less crudely, the evidence might take the form of indications that a relatively indiscriminate means of attack had been decided upon for no good reason, or that an attack had been knowingly planned for a time when non-combatants would be present, with no proper military justification for such timing. If the defendant were shown to have foreseen and accepted the prospect of collateral damage which, though not obviously excessive in relation to the concrete and direct military advantage anticipated, could nonetheless easily have been avoided, there seems no reason why a tribunal should not consider this too as evidence of *mens rea* sufficient for criminal conviction for intentionally directing attacks against protected persons or objects. As the civil law concept of *dolus directus* (second degree) recognizes, harm can be considered to have been intentionally caused if it was foreseen and accepted by the perpetrator as an inevitable consequence of his conduct, even if causing it was not his primary intention. Whether or not *dolus directus* (second degree) will qualify as *mens rea* for a war crimes conviction in such a situation is likely to depend heavily on the circumstances of the case.

⁶³⁰ According to the 'Elements of Crimes' annex to the Rome Statute, intent and knowledge 'can be inferred from the relevant facts and circumstances' (ICC Statute, Elements of Crimes, General Introduction, para.4). Eser warns, 'it appears questionable whether conclusions from the objective commission of a crime to the presence of the relevant mental element can be drawn as easily as suggested by the Preparatory Commission's Elements in allowing that the "existence of intent and knowledge can be inferred from relevant facts and circumstances"'. If at all, such an inference would be feasible as a procedural device, but not in terms of substantive substitute for intent' (Eser, 'Mental elements', 903).

6.2. Command responsibility and criminal liability for negligence in combat

a) *Historical antecedents of the command responsibility doctrine*

It is a well-established principle of international criminal law that a military commander may be held criminally responsible for crimes committed by his subordinates if it can be shown that he ordered, participated in, instigated or otherwise aided or abetted such crimes.⁶³¹ More broadly, a commander is responsible under international law for ensuring the proper conduct of those under his command; this latter duty of commanders has been established by long-standing custom and is reflected in international treaties.⁶³²

These two respects in which a commander may be said to be responsible for the acts of his subordinates are logically distinct. But a third, hybrid form of responsibility exists in the form of the doctrine peculiar to the law of armed conflict, according to which a commander or superior may be held criminally responsible for crimes committed by his subordinates, even if he was not, strictly speaking, a participant in or accessory to the crimes, if it can be demonstrated that he knew or had reason to know of such crimes and failed in his duty to prevent or punish them.⁶³³ It is this form of criminal responsibility, effectively a form of criminal liability for negligence,⁶³⁴ which can be considered command responsibility proper for the purposes of international criminal law, as opposed to

⁶³¹ See *US v. Wilhelm von Leeb et al* (1948) Military Tribunal, Nuremberg; ICTY Statute, article 7(1); ICTR Statute, article 6(1); and Rome Statute, article 25.

⁶³² See Hague Regulations, article 1 and Additional Protocol I, article 87.

⁶³³ See e.g. Additional Protocol I, article 86.

⁶³⁴ On this point see Eser, 'Mental elements', 903. However an ICTR Appeals Chamber has warned of the danger of 'confusion of thought' if command responsibility is referred to as a form of responsibility for negligence, since for the criminal responsibility of a commander to be incurred for the conduct of his subordinates, he should have either deliberately failed to discharge his duties as a superior, or 'culpably' (*sic*) or 'wilfully' disregarded them (*Prosecutor v. Bagilishema (Appeals Judgement)* (2002), ICTR, paras.34-37, echoed in *Blaskic (Appeal Judgement)*, 63). The disjunction of 'culpably' and 'wilfully' begs the question of what form of *mens rea* is envisaged by the Tribunals for command responsibility: what is probably meant is not that command responsibility may never be considered a form of liability for negligence, but that (commensurate with the approach to *mens rea* of many municipal criminal law systems) only gross negligence should entail the criminal responsibility of a commander for criminal conduct of his subordinates in which he was not a direct participant.

the criminal responsibility which a commander, like anyone else, will incur if found to have been an accessory to crime.⁶³⁵

International criminal law seems unclear about whether, for a commander or superior to be held criminally responsible for crimes committed by his subordinates, it needs to be shown that he knew (or had reason to know) of their activities, or whether it is sufficient for it to be argued successfully that in his position he should have known of such activities. The confusion can be traced to the post-Second World War trial of the Japanese general Tomoyuki Yamashita. It was in this judgment, rendered not by a judicial body but by a US Military Commission drawn from occupying forces in Manila, that the modern doctrine of command responsibility first emerged.⁶³⁶

Yamashita, who between October 1944 and September 1945 had commanded Japanese forces in the Philippines responsible for widespread atrocities in the archipelago as US forces closed in, was found guilty by the Commission of 'permitting' the atrocities and sentenced to death. The judgment implies that the Commission considered circumstantial evidence had shown that Yamashita *either* knew of the crimes being committed by his subordinates, *or* wilfully remained ignorant of them, and that he failed to do what it was in his power to do to prevent the crimes. It was not, thus, a finding of strict liability. This reasoning was enough to satisfy a US Supreme Court majority, which (in spite of two powerful dissenting judgments) confirmed the judgment and sentence.

The Commission's judgment did not, however, make clear whether the legal principle followed had been that a commander could be held criminally responsible for crimes committed by his subordinates which he *should* have

⁶³⁵ On the evolution and implications of the doctrine of command responsibility see W. Hays Parks, 'Command Responsibility for War Crimes' (1973), *Military Law Review*; Greenwood, 'Command and the Laws of Armed Conflict'; Leslie Green, 'Command Responsibility in International Humanitarian Law' (1995), *Transnational Law and Contemporary Problems*; Howard Levie, 'Command Responsibility' (1998), *Journal of Legal Studies*; and Kai Ambos, 'Superior Responsibility' in *International criminal law: a commentary on the Rome Statute for an International Criminal Court* (Oxford, 2001) eds. Antonio Cassese et.al.. See also Cryer, 'General Principles of Liability in International Criminal Law'.

⁶³⁶ *Trial of General Tomoyuki Yamashita*, (1945) US Military Commission, Manila, and (1946) Supreme Court of the US.

known about (and if so, whether this meant a positive obligation to obtain knowledge, or simply an obligation to take note of readily available information), or only for crimes which he *did* know about. One writer suggests that the principle which can be abstracted from the *Yamashita* judgment is that a commander may be held criminally responsible for crimes committed by his subordinates which he *knew or should have known about* and which he failed to take the feasible steps to prevent or punish.⁶³⁷ A contemporary review of the judgment prepared by a staff judge advocate before judgment and sentence were confirmed takes the more nuanced view that Yamashita's conviction was founded on the basis that the evidence had shown that Yamashita either 'knew *or had the means to know* of the commission of atrocities by members and units of his command' (emphasis added).⁶³⁸ On this interpretation, Yamashita had either known what was happening or had been wilfully blind to readily available information: there could be no question of him having been convicted on the basis of simple negligence or incompetence, let alone strict liability. But the imprecision of the Commission's judgment, and the Supreme Court's inability or unwillingness to clarify the *mens rea* reasoning behind it, left it open to the far-reaching construction, by both critics and supporters alike, that commanders may be convicted for serious war crimes which they should have known about, given their position, but did not.

In striking contrast to the briskness with which Yamashita was convicted and sentenced was the treatment by US Military Tribunals at Nuremberg a few years later of senior military commanders of the Wehrmacht. In the trials of Field Marshal Wilhelm von Leeb and other members of the German High Command and of General Wilhelm List and other senior German officers who had held field commands in south-east Europe, scrupulous care was taken to ensure that each defendant was convicted and sentenced not merely on the basis of evidence of crimes committed by his subordinates, but on the basis of detailed evidence in

⁶³⁷ Levie, 'Command Responsibility', 10.

⁶³⁸ Parks, 'Command Responsibility for War Crimes', 31-32.

relation to the extent of his own knowledge and actual powers, and the degree of his direct involvement or conscious acquiescence in specific crimes.⁶³⁹

Subsequent war crimes trials of military commanders before national tribunals have tended to prefer the *von Leeb* and *List* approach, requiring a commander's knowledge of subordinates' crimes (or clear wilful blindness towards such crimes) to be demonstrated for conviction to be possible, over the 'knew or should have known' approach associated with the *Yamashita* judgment.⁶⁴⁰ Though this caution has been criticized,⁶⁴¹ the argument that it conflicts with customary international law on command responsibility is unconvincing. During negotiations on the text of the command responsibility article of Additional Protocol I, wording submitted by the Netherlands according to which commanders would be considered criminally responsible for crimes of their subordinates about which they 'knew or should have known' was rejected.⁶⁴² The wording finally agreed upon ('knew or had information which should have enabled them to conclude' ('leur permettant de conclure')),⁶⁴³ owes more to *Von Leeb* and *List* than to *Yamashita* and can be seen to reflect widespread resistance to any appearance of the criminalization of simple negligence.

⁶³⁹ *US v. Wilhelm von Leeb et. al.* (1948), US Military Tribunal V, Nuremberg, 543-544. *US v. Wilhelm List et. al.* (1948), US Military Tribunal V, Nuremberg, 1261, 1286.

⁶⁴⁰ See Michael Smidt, 'Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations' (2000), *Military Law Review*.

⁶⁴¹ *Ibid.* Smidt argues that the *Yamashita* 'knew or should have known' standard for command responsibility now represents customary law and not the more cautious standard which has usually been preferred by US courts martial (eg that of Captain Ernest Medina in 1971), according to which actual knowledge by a superior of a subordinate's crimes needs to be shown for that superior to incur criminal responsibility.

⁶⁴² See Parks, 'Command Responsibility for War Crimes', 95, who observes that the 'knew or should have known' standard was that favoured in war crimes trials conducted in the Soviet Union after the Second World War.

⁶⁴³ The fact that the original French text, unlike the ambiguous English version, contains no equivalent of the word 'should' provides support for the argument that the article was not intended to impose on commanders criminal liability for negligence beyond the gross negligence of ignoring relevant information in their possession.

b) Command responsibility and the ad hoc tribunals

Against this background, it comes as some surprise to see *Yamashita* being cited with approval in two recent ICTY cases.⁶⁴⁴ Nonetheless, the command responsibility doctrine set out in the ICTY and ICTR statutes in fact comes closer to the reasoning in *von Leeb* and *List*. According to article 7(3) of the ICTY Statute:

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. (Emphasis added).

The ICTR Statute contains an almost identical provision (article 6(3)).

The requirement for it to be established that the superior ‘knew or had reason to know’ of the crimes in question and failed to take the ‘necessary and reasonable measures’ to prevent them or to punish the perpetrators provides an important safeguard against the conviction of a commander with no knowledge or information at his immediate disposal about the misdeeds of his subordinates, or with no means of preventing them, while making it impossible for a commander to place himself beyond the reach of the law by deliberately keeping himself ignorant of his subordinates’ actions. The jurisprudence has clarified that the ‘knew or had reason to know’ standard means a superior may be held criminally responsible for the acts of his subordinates only if it is shown either that he had actual knowledge of these acts, or that specific information was available to him which would have provided notice that offences had been or were likely to be committed by his subordinates.⁶⁴⁵

⁶⁴⁴ See *Hadjihasanovic (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility)* (2003), ICTY, para.23 and *Strugar (Trial Judgement)*, n.1099 in support of para.376. See also Smidt, who considers ‘*Yamashita* is the rule in both [ad hoc] tribunals’ (206).

⁶⁴⁵ See *Delalic et. al (Trial Judgement)*, paras.379-393 and *Delalic et. al.(Appeal Judgement)*, paras.230-240. See also *Prosecutor v. Kordic and Cerkez (Trial Judgement)* (2001), ICTY para.437 and *Blaskic (Appeal Judgement)*, paras.62 and 405-406.

Difficulties with this approach arise, however, in cases where protected persons or objects are harmed in the course of active military operations. It is one thing to hold a commander criminally responsible for failure to prevent or punish an attack against protected persons or objects where it is shown not only that the commander knew an attack was taking place, but also that he knew civilians or protected property were being, or had been, deliberately targeted. It is quite another matter for a tribunal to convict a commander for failure to prevent or punish unlawful violence on the part of his subordinates when there are grounds for doubting his knowledge or ability to know that unlawful violence was occurring (or had occurred) in the context of a conventional attack on a military objective. Part of the problem is that in the course of a military engagement, the lawfulness of an artillery volley or a burst of gunfire depends not on what is in fact hit, but on what is aimed at and why – about which a tribunal may speculate and make inferences, but which often only the direct perpetrator of the attack will know for certain.

The command responsibility doctrine of the *ad hoc* Tribunals does not require a commander's failure to act to be shown to have caused or contributed significantly to the commission of the crimes in question for him to be found criminally responsible.⁶⁴⁶ Whereas a commander's negligence in failing to control his subordinates has to be serious before criminal liability may be incurred,⁶⁴⁷ it does not have to amount, in effect, to aiding and abetting the crime;⁶⁴⁸ criminal responsibility may be incurred in some circumstances simply

⁶⁴⁶ See *Delalic et. al. (Trial Judgement)* para.398. Gunaël Mettraux criticizes the ICTY approach for inconsistency with both precedent and legal literature on the relevance of causation. (*International Crimes and the Ad Hoc Tribunals* (Oxford, 2005), 309-310).

⁶⁴⁷ The ICRC *Commentary (Additional Protocols)* suggests that for command responsibility to be incurred, negligence must be so serious 'as to amount to malicious intent' (see para.3541). There is nothing in the ICTY jurisprudence, however, to suggest the Tribunal considers that malice on the part of a commander need be demonstrated for command responsibility to be engaged (see e.g. *Prosecutor v. Aleksovski (Appeal Judgement)* (2000), ICTY, para.178 and also *Strugar (Trial Judgement)*)).

⁶⁴⁸ If it did amount to aiding and abetting, the commander could be found responsible for the crime under article 7(1) of the ICTY Statute (ICTR Statute article 6(1)). In *Blaskic (Appeal Judgement)*, the Appeals Chamber gave much consideration to the *mens rea* on the part of a commander which could be considered to engage his criminal responsibility under article 7(1) for crimes committed by his subordinates. The fact that the Chamber considered that the defendant had not possessed the necessary *mens rea* for a finding of 7(1) responsibility as opposed to 7(3) responsibility to be justified on any of the counts on which he had been convicted contributed to a substantial reduction of his sentence (see paras.27-42).

for failure to prevent or punish crimes committed by subordinates.⁶⁴⁹ This doctrine clearly gives commanders an incentive to avoid turning a blind or indulgent eye when subordinates appear to have violated the law of armed conflict, but creates the risk that unscrupulous commanders may unreasonably make scapegoats of their subordinates when operations miscarry.

c) *Command responsibility and the International Criminal Court*

The Rome Statute of the ICC sets out the doctrine of command responsibility to be followed by the International Criminal Court in great detail. Two forms of command responsibility are described: that of a military commander and that of a civilian superior. (The criminal responsibility which commanders, like anyone else, will incur if found somehow to have participated *directly* in crimes is dealt with in a separate Statute article.)⁶⁵⁰

The formal recognition that civilians can exercise military command is consistent with ICTY and ICTR jurisprudence;⁶⁵¹ the designation of separate forms of command responsibility for military personnel and civilians respectively is an innovation, a significant feature of which is the introduction of an apparently new standard of care which military commanders are expected to meet in preventing their subordinates from committing serious violations of the law of armed conflict. Article 28 (a) of the Statute provides:

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 authority and

⁶⁴⁹ However, in *Prosecutor v. Hadjihasanovic (Interlocutory Appeal on Command Responsibility)* (2003), ICTY, an ICTY Appeals Chamber clarified, by majority decision, that a superior may only be held responsible for crimes committed by subordinates when he was the superior of those subordinates at the material time. He cannot be convicted for failing to punish crimes committed by his subordinates prior to his having become their superior. (See further Christopher Greenwood, 'Command responsibility and the *Hadjihasanovic* decision' (2004), *Journal of International Criminal Justice*.). It was further clarified by an Appeals Chamber in *Krnojelac*, that 'where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control' (*Prosecutor v. Krnojelac, (Appeal Judgement)* (2003), ICTY, para.171).

⁶⁵⁰ Article 25.

⁶⁵¹ See *Delalic et. al. (Trial and Appeal Judgements)*, *Kordic and Cerkez (Trial and Appeal Judgements)* and *Akayesu (Trial and Appeal Judgements)*.

control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- i) 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
- ii) 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. (Emphasis added).

Unlike the *ad hoc* Tribunals' doctrine, the ICC doctrine appears to impose on commanders a positive duty to acquire a certain level of knowledge about their subordinates' activities, on pain of being held criminally responsible for crimes of which they were in fact ignorant, but about which they 'should have known'. This might appear to be creating criminal liability not just for 'gross negligence' or 'wilful blindness' on the part of a commander whose subordinates commit war crimes, but for simple negligence.

It is questionable whether the ICC command responsibility doctrine is intended to be this progressive. The 'should have known' standard needs to be read in context as 'owing to the circumstances at the time should have known'. What a commander 'should have known' depends not on the professional standards to be expected of a person of his rank, but on the information actually at his potential disposal in the circumstances. Any criminal responsibility on his part for war crimes committed by his subordinates will thus derive not from incompetent supervision, but from what can be seen as culpable indifference on his part to the crimes. It cannot be assumed, however, that it will always be easy for judges to discern the difference between a commander who is merely incompetent and one who is culpably indifferent to the consequences of his failure to exercise effective command.

Article 28 of the Rome Statute needs to be read in conjunction with article 30, requiring the relevant mental element for crimes described in the Statute to be shown to have been present before a person may be convicted. There is no strict liability for crimes under the Statute. A commander may in some circumstances be convicted by the ICC for a crime he did not intend (or perhaps even know

about);⁶⁵² but it will need to be shown at the very least that in view of the circumstances, he should have known of the crime. It will also need to be shown that the direct perpetrator of the crime had the necessary state of mind (normally wilfulness) to render the act criminal under the terms of the Statute.

In contrast to the command responsibility doctrine of the *ad hoc* Tribunals, the ICC command responsibility doctrine allows commanders to be held criminally responsible for crimes committed by subordinates only when it is shown either that they participated in these crimes, or that the crimes of their subordinates were the result of their own failure to exercise proper control. A causal connection between the commander's acts or omissions and the crimes in question is required before he may be convicted for them.⁶⁵³

6.3. Criminal responsibility and failure to take precautions in attack – the ICTY case law

a) *Preliminary remarks*

Although the criminal law systems of many states can accommodate the notion of criminal responsibility for negligence to some degree, the concept of crimes of negligence does not appear to have passed into international criminal law, except to the limited extent that it can be seen in the command responsibility doctrine. Recent ICTY judgements in the cases of *Galic*, *Jokic* and *Strugar* suggest, however, that although it will normally be inappropriate to regard failure

⁶⁵² Canada's war crimes legislation avoids this departure from the traditional *mens rea* requirement by creating a separate offence of 'breach of responsibility by a military commander' (Crimes Against Humanity and War Crimes Act, 2000, ss 6-7). Thus a commander who culpably fails to prevent or punish crimes committed by his subordinates in which he was not a direct participant may be convicted of the offence of failing to exercise proper command, but not of the actual crimes committed by his subordinates (Turns, 'National Implementation of the Rome Statute', 360).

⁶⁵³ See article 28. Robert Cryer, having noted that states are readier to be legally adventurous when creating 'safe' tribunals which will not normally have jurisdiction over their own nationals than when creating 'unsafe' tribunals where there is a greater risk of this occurring, sees this element of article 28 as an example of where the Statute resiles from customary international law. ('The boundaries of liability in international criminal law or 'selectivity by stealth' (2001), *JCSL*). However the decision of the Rome Conference not to endorse the command responsibility doctrine of the *ad hoc* Tribunals in its entirety seems strong evidence in itself that the doctrine lacks adequate *opinio juris* to qualify as customary law.

to take precautions in attack as in itself criminal, such failure may legitimately be submitted as evidence in support of arguments that a person had the necessary *mens rea*, in the form of intention or recklessness, to establish the existence of the crime of wilful attacks on protected persons or property. These three judgements are not altogether persuasive and it remains to be seen to what extent they will be confirmed on appeal.⁶⁵⁴ They will in any event have little formal authority as precedents: the ICC is not bound to follow ICTY jurisprudence and the ICTY does not have many further new cases to hear.⁶⁵⁵ But they may be turned to for guidance by parties involved in future cases where commanders are accused of unlawful attacks on civilians or protected property in the course of military operations and thus merit careful examination.

b) *The siege of Sarajevo – the Galic case*

Stanislav Galic, who with the rank of major-general commanded Bosnian-Serb forces besieging Sarajevo between 1992 and 1994, was convicted by an ICTY Trial Chamber in December 2003 for acts of violence aimed at spreading terror amongst the civilian population of Sarajevo, murder, and inhumane acts, on account of the civilian casualties caused by shelling and sniping attacks by forces under his command over a period of 23 months. The indictment included a schedule of 26 separate shelling and sniping incidents, which the Prosecution argued to have been criminal, and in relation to which it submitted evidence. The Prosecution claimed these incidents pointed to a deliberate campaign of terror waged against the civilian population of Sarajevo between 1992 and 1994 which extended further than these incidents alone, but of which the incidents could serve as indicative evidence. By majority decision, Galic was found guilty of having ordered and condoned unlawful shelling and sniping attacks against civilians, with the aim of spreading terror among the population.⁶⁵⁶

⁶⁵⁴ At the time of writing (January 2006), Jokic's appeal against his sentence has been dismissed (see ICTY press release of 30.08.05), but appeals lodged by both Strugar and Galic have yet to be determined.

⁶⁵⁵ UNSCRs 1503 and 1534 call on the ICTY and the ICTR to complete all trial activities at first instance by the end of 2008 and to complete all work in 2010.

⁶⁵⁶ Judge Nieto-Navia dissented partially from the judgement on various grounds.

Galic was convicted not for his own or his subordinates' failure to take due care in the conduct of military operations, but for the wilful killing of civilians in the context of a campaign aimed deliberately at terrorizing the civilian population. The Trial Chamber's finding that the killings had been wilful was based largely (though not wholly) on circumstantial evidence.⁶⁵⁷ This evidence included the use by forces under Galic's command of relatively indiscriminate weapons in an environment where civilians and combatants were intermingled,⁶⁵⁸ and the fact that civilians killed or injured by Bosnian-Serb snipers had often been engaged in typically civilian activities.⁶⁵⁹ In several of the scheduled sniping incidents, the Trial Chamber found that the civilians in question had been killed by forces under Galic's command not necessarily with direct intent, but 'in reckless disregard of the possibility that he/she was a civilian'.⁶⁶⁰ (The Trial Chamber explicitly records its view that for the purposes of the crime of 'wilfully' launching attacks on civilians, the notion of 'wilfulness' should be understood as incorporating the notion of 'recklessness').⁶⁶¹

An incident accepted by the Trial Chamber as evidence of a campaign of deliberate attacks on the civilian population was that in which a large number of those watching or participating in a football match on the outskirts of Sarajevo were killed and injured by shells apparently fired from Bosnian-Serb positions.⁶⁶² Defence arguments that there were legitimate military objectives in the vicinity, and the football match had been hit by accident, were rejected. A reason the Trial Chamber gave for not accepting these arguments was that the two shells which hit

⁶⁵⁷ Some direct evidence of Galic's intent that civilians should be killed was submitted by the Prosecution (see *Galic (Trial Judgement)* paras.681 and 726-729). This may have played a role in convincing the Trial Chamber that the killings of civilians in Sarajevo were not accidental, but it seems unlikely this evidence alone would have been considered sufficient for a conviction.

⁶⁵⁸ The judgement cites evidence that the use not only of Multiple Barrelled Rocket Launchers but also of mortars against urban targets would be inappropriate, whether or not the actual targets were military, given the spread pattern of these weapons and the consequent near certainty of civilian houses being hit (paras.644-648). In a 1996 'Rule 61' decision, an ICTY Trial Chamber took the view that use of a certain type of weapon (Orkan Multiple Barrelled Rocket Launchers) against central Zagreb, given the characteristics of this weapon, in itself indicated that civilians and not any military objective had been the object of the attack (*Martić, (Rule 61 Proceedings, Trial Chamber)*, para.31, quoted in Sassoli and Bouvier, *Un Droit dans la Guerre?* 1520).

⁶⁵⁹ *Galic (Trial Judgement)* paras.355, 360, 366, 419 and 429.

⁶⁶⁰ *Ibid.*, paras.523 and 543. See also paras.317, 331-345, 355, 410 and 429.

⁶⁶¹ *Ibid.*, para.54. See also *Kordić and Cerkez (Trial Judgement)*, para.346 and *Prosecutor v. Naletilić and Martinović (Trial Judgement)* (2003), ICTY, para.579 on recklessness as *mens rea* for the crime of 'wanton destruction'.

⁶⁶² *Galic (Trial Judgement)* paras.372-388.

the football pitch car park, killing and injuring civilians, had been fired in quick succession, the second landing no closer to the alleged military objective in the vicinity than the first had done.⁶⁶³ The Chamber was not taking the view that the failure of the Bosnian-Serb mortar crews to correct their fire (which could only have been done if it was being observed) was criminal; rather, the Bosnian Serbs' failure to correct their fire appears to have helped persuade a majority of the Chamber that they had intended to hit the civilians.⁶⁶⁴

The Trial Chamber was persuaded it was reasonable to expect a high degree of accuracy from the Bosnian-Serb mortar crews,⁶⁶⁵ possibly to within 50 metres,⁶⁶⁶ and rejected the contention of the Defence that where mortar fire was concerned, a margin of error of 300-400 metres in any direction needed to be allowed.⁶⁶⁷ This encouraged a presumption that what had been hit by mortar fire was what had been aimed at - or was extremely close to what had been aimed at. Consequently, the Chamber's main concern in relation to the scheduled shelling incidents was to evaluate the ballistics evidence in relation to the likely origin of the mortar fire, to which task much of the judgement is devoted.⁶⁶⁸ In some instances, the existence of what could be considered legitimate military targets within the area where the shells fell was acknowledged in the judgement, but given the degree of accuracy which the Chamber had assumed (questionably) to be possible for the Bosnian-Serb forces, was considered of no great relevance.⁶⁶⁹

One implication of *Galic* is that for the crime of wilful attacks on civilians, recklessness on the part of an attacker in relation to whether a target was civilian or military may be inferred from circumstances, and if so inferred, may be considered sufficient *mens rea* to establish the existence of the crime. The case also suggests that a certain standard of accuracy can reasonably be expected from mortar crew, which if not met (and if civilians are killed as a result), may be seen

⁶⁶³ *Ibid.*, paras.382-383. See also para.409.

⁶⁶⁴ For the minority opinion on this incident, see *Separate and Partially Dissenting Opinion of Judge Nieto-Navia*, paras.63-65.

⁶⁶⁵ *Galic (Trial Judgement)* para.494.

⁶⁶⁶ This Prosecution assessment is cited without criticism in the judgement (*ibid.* para.338)

⁶⁶⁷ See *Galic (Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galic)*, para.30.

⁶⁶⁸ See *Galic (Trial Judgement)* paras.403-409 and 438-496.

⁶⁶⁹ See *ibid.*, paras.331-345 (in particular para.344) and 372-388.

as probative evidence of intent to kill civilians. Finally, the case sets a precedent for the conviction of a commander for the wilful killing of civilians on the basis not of direct evidence of orders having been given for such killings, but on the basis of orders for a campaign directed against civilians having been inferred from evidence of the circumstances in which civilians were killed during a military operation. It is important to stress, however, that like General Yamashita, General Galic was convicted not on the basis of strict liability for civilian deaths caused by those under his command. He was convicted on the basis of a judicial assessment that the evidence was sufficient for it to be inferred not only that he had tolerated the killing of civilians in Sarajevo, without taking steps to prevent or punish wilful attacks against them, but that he must have ordered a campaign directed at least in part against the civilian population of that city.

c) *The Dubrovnik cases – Jokic and Strugar*

Background

The *Jokic* and *Strugar* cases arose pursuant to one of the earliest military engagements of the conflict in the former Yugoslavia - the abortive attempt in December 1991 by Yugoslav National Army (JNA) forces under the command of the two defendants to dislodge Croatian forces from a hill overlooking Dubrovnik, in the course of which the Old Town of Dubrovnik was extensively damaged by artillery and mortar fire.

The hill in question, Mount Srdj, rises 412 metres above the sea, from which it is about two kilometres inland. To the south-west, it dominates Dubrovnik and its Old Town; to the north-east, it faces the hills of southern Herzegovina. In 1991, the hill, topped by a fort and a communications tower, was defended by a small group of Croatian forces, supported by light artillery and mortar units based in the city of Dubrovnik, in which a Croatian paramilitary brigade was also stationed.⁶⁷⁰ JNA artillery and infantry units were placed in the hills behind Mount Srdj, to the

⁶⁷⁰ *Strugar (Trial Judgement)*, paras.22, 71 and 196.

north,⁶⁷¹ and to the south-east at Zarkovica, a location approximately two kilometres along the ridge to the east of Mount Srdj, with a clear line of sight to the Old Town and Mount Srdj.⁶⁷² JNA naval forces blockading Dubrovnik meant the encirclement was almost complete.⁶⁷³

The assault on Mount Srdj began at around 5am on 6 December 1991, when two JNA infantry platoons, each accompanied by a T55 tank, advanced towards the hill from two separate directions. As they approached Mount Srdj at around 6am, JNA artillery and mortar fire from inland was directed at the lower fortifications on the hill. The JNA infantry then came under mortar fire from the direction of Dubrovnik and small arms fire from Croatian forces on Mount Srdj itself. When the JNA infantry reached the fortress at Srdj, the Croatian forces retreated into underground tunnels, while continuing to fight back with grenades, and the JNA troops came under heavy mortar fire from the Croatian side.⁶⁷⁴ They requested artillery support to neutralize the source of the firing.⁶⁷⁵ JNA mortar and artillery fire continued throughout the day, causing much damage to the city, including the Old Town, recognized by the United Nations Educational, Scientific and Cultural Organization (UNESCO) as a World Heritage Site and as such, meant to be demilitarized and immune from military operations.⁶⁷⁶ The JNA troops were eventually driven off the hill, under cover of continued JNA mortar fire. Intermittent fire from both sides continued until approximately 4.30pm.⁶⁷⁷ By the end of the day, fifty-two buildings in the Old Town had been damaged or destroyed in the fighting.⁶⁷⁸ Two civilians in the Old Town had been killed and two seriously injured. In the wider Dubrovnik area, several more civilians had been killed and injured, and several more buildings damaged or destroyed. Of the forty JNA troops who had attempted to storm the fort, five had been killed and seven injured.⁶⁷⁹

⁶⁷¹ *Ibid.*, para.91.

⁶⁷² *Ibid.*, para.126.

⁶⁷³ *Ibid.*, para.43.

⁶⁷⁴ *Ibid.*, para.124.

⁶⁷⁵ *Ibid.*, paras.121-125.

⁶⁷⁶ *Ibid.*, para.21.

⁶⁷⁷ *Ibid.*, para.110.

⁶⁷⁸ See *ibid.*, Annex I for details.

⁶⁷⁹ *Ibid.*, para.118.

As a result of this operation, Admiral Miodrag Jokic, in command of the naval and land forces in the Dubrovnik area at the time, and Lieutenant-Colonel-General Pavle Strugar, Jokic's immediate superior, were both indicted by the ICTY.⁶⁸⁰ Jokic, who had initially pleaded not guilty to the sixteen counts set out in his indictment, changed his plea after agreement with the Prosecution and pleaded guilty to the six counts of a revised indictment, namely, murder,⁶⁸¹ cruel treatment, unlawful attack on civilians, devastation not justified by military necessity, unlawful attack on civilian objects and 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.⁶⁸²

Contradictory evidence was submitted at Strugar's trial about the level at which the attack was planned. There is, however, nothing controversial legally about the decision to attempt to capture the fort, making the question of who took the decision to go ahead with the assault on 6 December 1991 of limited relevance.⁶⁸³ The key questions, rather, were whether or not protected people and property were wilfully attacked or disproportionate force wilfully used in the course of the assault; and if so, the extent to which the defendants could be held criminally responsible for such crimes.

The implications of Jokic's guilty plea

In the case of *Jokic*, the ICTY was spared the trouble and expense of having to hear evidence in relation to these questions as a result of Jokic's guilty plea. The

⁶⁸⁰ Two more junior commanders were also indicted as a result of the shelling of Dubrovnik, but at the time of writing (January 2006) their cases have not come to trial.

⁶⁸¹ In international criminal law, 'the *actus reus* of murder is the taking of the lives of persons taking no active part in hostilities in an internal armed conflict. The requisite *mens rea* is the intention to kill or to inflict serious injury, in reckless disregard of human life' (Kriangsak Kittichaisaree, *International Criminal Law*, (Oxford, 2001)). See also *Delalic et. al. (Trial Judgement)*, paras.422 and 437-439, *Kordic and Cerkez (Trial Judgement)*, paras.230-236, and *Strugar (Trial Judgement)*, 235-236.

⁶⁸² *Jokic (Sentencing Judgement)*, paras.5-11.

⁶⁸³ The judgement dwells extensively on the state of ceasefire negotiations (*Strugar (Trial Judgement)*, paras.51-55, 73-84). However, irrespective of the intentions of either or both parties to agree a ceasefire in early December, or at least to demilitarize Dubrovnik and declare it a neutral zone, there was no effective ceasefire in place on 6 December 1991 and Dubrovnik had not been demilitarized (*ibid.*, paras.73, 81, 83).

evidence was thus not litigated until Strugar's trial. Since the essence of Strugar's defence was that the events which had given rise to the charges had not been crimes, but legitimate military actions, Strugar's defence team faced the awkward task of seeking to persuade a Trial Chamber that crimes to which a previous defendant had pleaded guilty had not in fact occurred. It remained open in principle to the Trial Chamber in Strugar's case to acquit the defendant on the basis that the elements of the crimes alleged had not been proven (and had it done so, Jokic's appeal against his sentence would presumably have been urgently accelerated), but the wisdom of the Chamber in accepting Jokic's guilty plea in the circumstances seems questionable.

Jokic affirmed that he had agreed to plead guilty freely and voluntarily and that his decision to accept criminal responsibility for what had occurred had been 'informed, competent and voluntary'.⁶⁸⁴ It was, however, almost unprecedented for a military commander to be convicted of murder as a result of civilians being killed by artillery fire from forces under his command in the course of a military engagement. The one precedent which had been established (*Kordic and Cerkez*) was under appeal and in due course (December 2004, nine months after Jokic had been sentenced) the Appeals Chamber overturned many of the defendants' convictions, particularly those relating to civilian deaths caused by artillery,⁶⁸⁵ declaring 'artillery shelling, including mortar fire of various calibres, is as such typical of a military attack but is not telling as to what the target of the attack is'.⁶⁸⁶ Those convictions that were upheld related to the killing of civilians or the burning of civilian houses at what was clearly, or could reasonably have been considered to have been, close range, in circumstances where there were no real questions about the intentionality of the attacks.⁶⁸⁷ While Jokic's remorse for what had happened on 6 December 1991 may have been sincere, there seems reason to doubt that he was in fact in a position to know that these events had

⁶⁸⁴ *Jokic (Sentencing Judgement)*, para.9.

⁶⁸⁵ *Kordic and Cerkez (Appeal Judgement)*, paras.430-56, 466, 471, 497, 503, 518, 523.

⁶⁸⁶ *Ibid.*, para.438. See also para.433

⁶⁸⁷ *Ibid.*, paras.421, 472, 477, 487, 525-526, 535, 554, 557-558, 562, 563, 566, 568, 570, 574-575, 580, 586 and 589.

been crimes and crimes for which he could properly be held responsible under international criminal law.⁶⁸⁸

The establishment of the actus reus

In *Strugar*, when the question of whether or not the actions of the JNA forces on 6 December 1991 could properly be considered crimes came to be litigated, the Trial Chamber concluded that the only reasonable explanation of the civilian casualties and the damage caused to the Old Town was that the Old Town had been deliberately targeted by the JNA. The testimony of JNA officers in relation to what they had seen and been aiming at was dismissed as implausible and self-serving;⁶⁸⁹ expert evidence on ballistics given on behalf of the Defence was rejected, being considered to have been based on unwarranted factual assumptions;⁶⁹⁰ evidence of a Croatian officer in relation to the actual location of artillery assets in and around Dubrovnik was accepted;⁶⁹¹ and much was made of a remark reportedly made on the day of the attack by Strugar to an international observer to the effect that Dubrovnik was being attacked as a response to attacks on JNA forces by Croatian paramilitaries in Herzegovina.⁶⁹² Strugar was found guilty of the same crimes as those for which Jokic had been convicted. Unlike Jokic, he was not found guilty of having aided and abetted the crimes, but was convicted on the basis of his command responsibility for them.⁶⁹³

There is much that is unconvincing about these findings. First, there is nothing in the judgement to indicate that proper account was taken of the scope

⁶⁸⁸ The willingness of the ICTY to accept Jokic's guilty plea can be compared to the refusal by a US Court Martial President to accept the guilty plea of a US military defendant accused of the mistreatment of Iraqi detainees in Abu Ghraib prison, on the grounds that he was not convinced that the defendant, who had entered her plea as the result of a plea bargain, in fact believed herself to be guilty (*The Times*, 05.05.05).

⁶⁸⁹ *Strugar (Trial Judgement)*, paras.185-188 and 190-193.

⁶⁹⁰ *Ibid.*, para.208.

⁶⁹¹ *Ibid.*, paras.189, 196-197 and 205. Critically, the Trial Chamber was willing to accept the evidence of the Croatian commander in charge of mortar and artillery assets in Dubrovnik that none of the Croatian 'Flying Charlies' (mortars or small artillery pieces carried in vehicles) (see para. 68) were used in the vicinity of the Old Town on 6 December 1991 (para. 205).

⁶⁹² *Ibid.*, paras.159 and 161-169.

⁶⁹³ I.e. he was found guilty pursuant to article 7(3) but not article 7(1) of the ICTY Statute, (see *ibid.*, paras.478 and 480).

for collateral damage when artillery and mortar fire are exchanged in hilly terrain. The possibility cannot be excluded that mortar fire aimed at the fort on the top of Mount Srdj from certain JNA positions may have overshoot and hit the Old Town.⁶⁹⁴ Although this was something the JNA should have considered in planning the attack on Mount Srdj,⁶⁹⁵ the danger which using Mount Srdj for military purposes posed to the Old Town should also have been borne in mind by the Croatian side.⁶⁹⁶ It should certainly have been borne in mind by the Trial Chamber in determining whether the evidence showed beyond reasonable doubt that the Old Town had been deliberately targeted. Secondly, a former Croatian military officer, giving evidence for the Prosecution, admitted that the Croatian side had had four artillery or mortar positions within 400 metres of the Old Town (two of them within 150 metres).⁶⁹⁷ Had JNA mortar or artillery units believed their comrades on Srdj were imperilled by enemy weaponry at any of these locations and targeted them, the Old Town would have been unlikely to have escaped unscathed, without any crime having been committed, unless JNA fire had been wilfully disproportionate. The judgement recalls that Defence evidence did not refer to these particular locations as JNA targets.⁶⁹⁸ But this does not indicate beyond reasonable doubt that fourteen years earlier, in the chaos of battle, Croatian weapons at these locations had not in fact been identified and targeted by the JNA.

Against this background, the Trial Chamber seems to have held unreasonably high expectations in relation to the degree of accuracy possible with mortar and artillery fire. Even at the best of times, there are numerous factors which can affect the accuracy of this type of fire, such as wind speed and direction, muzzle

⁶⁹⁴ The Old Town would have been well within the range of the JNA's 82mm mortars at Strincjera (see *ibid.* para.91). Strincjera lies to the northwest of Srdj at about 2 kilometres from the Old Town (42:39:36N;18:06:16E <http://new.mapplanet.com/mp/mp/places/HR/03/2685244> , visited 05.11.05) (The Old Town lies south-east of Srdj).

⁶⁹⁵ The Trial Chamber records its view, however, that notwithstanding the substantial provision made for artillery support, the plans made for the capture of Mount Srdj on 06.12.91 were not shown to have been inappropriate (*Strugar (Trial Judgement)*, para.341).

⁶⁹⁶ See Cultural Convention, article 4.1, which prohibits the use of the 'immediate surroundings' of cultural property for 'purposes which are likely to expose it to destruction or damage in the event of armed conflict'. Attackers, for their part, are obliged to refrain 'from any act of hostility directed against such property' (emphasis added) (*ibid.*). Both these obligations may be waived in case of military necessity (*ibid.*, article 4.2). These provisions can be considered customary law applicable in internal as well as international conflicts.

⁶⁹⁷ See *Strugar (Trial Judgement)*, para.196.

⁶⁹⁸ See *Strugar (Trial Judgement)*, para.211.

temperature, marginally inaccurate establishment of one's own location or that of a target due to the 'stretching' effect of maps onto which the spherical surface of the Earth has been projected, mistakes in trigonometrical calculation etc. The practice of using observed fire may improve accuracy, but only for so long as a target remains in the same place. When mortar and artillery is being used reactively in an attempt to suppress enemy fire, and when targets move frequently only to reappear in new locations,⁶⁹⁹ inaccuracy will inevitably be compounded. The remark in the judgement that 'the Chamber is not able to accept [the Defence expert witness's] opinion that targeting a position less than 500 metres from the Old Town walls could result in mortar shells landing in the Old Town on 6 December 1991'⁷⁰⁰ thus seems questionable. And the assertion that 'if properly directed, the JNA mortars should have been able to make an impact on the relatively few Croatian firing positions',⁷⁰¹ (without, it is implied, hitting civilians or civilian buildings by accident) suggests a serious misunderstanding of what even well trained mortar crew can achieve in terms of establishing the location of incoming fire and returning effective fire onto its source promptly and accurately.

Finally, it seems possible that the Trial Chamber may have at least partly misconstrued Strugar's alleged remark to an international observer on the day of the attack on Mount Srdj, linking events around Dubrovnik with attacks on JNA forces in Bosnia-Herzegovina. In the context of the overarching directive issued by the JNA General Staff in September 1991,⁷⁰² the remark (assuming it was in fact made) makes sense: the JNA would not have been able to conduct a counter-offensive against paramilitaries in Herzegovina unless it could secure its rear in the Dubrovnik area.⁷⁰³ Rather than being a frank admission of a pointless act of

⁶⁹⁹ A western journalist testified orally to the Trial Chamber that Croatian forces in Dubrovnik used the tactic of firing from mortars or small cannons carried on lorries, which would be quickly and quietly moved away after firing to avoid detection (see *Transcripts*, 601 and 627). See also *Strugar (Trial Judgement)*, para.68

⁷⁰⁰ *Ibid.*, para.211.

⁷⁰¹ *Ibid.*, para.138. See also para.139.

⁷⁰² The directive gave instructions for the deployment of forces with the objective 'to cut off the Adriatic highway at several points...to seal off Dubrovnik, Cilipi Airport and Prelavka from the land and sea, and to prevent enemy forces from manoeuvring; then, providing support from the direction of Ploce, to engage in destroying and disarming the surrounded enemy forces, *and to be in a state of readiness for further offensive operations in western Herzegovina*' (emphasis added). *Strugar (Trial Judgement)*, para.31.

⁷⁰³ Not only did Croatian forces on Mount Srdj pose a threat to JNA forces in the immediate vicinity, but oral evidence was given to the Trial Chamber suggesting Dubrovnik was at the time

revenge against the residents of Dubrovnik for the actions of paramilitaries in Herzegovina, Strugar's remark may perhaps have been simply an attempt to explain to his interlocutor (himself a military officer) the rationale of the operation to take Mount Srdj and its tactical importance for the JNA at that moment.⁷⁰⁴

The Trial Chamber's decision to regard the evidence of the testifying JNA officers in relation to what their mortar and artillery fire had been aimed at as implausible is obviously one it was entitled to take. But its rejection of specific JNA claims to have been aiming at Croatian artillery and mortar positions within and in the vicinity of the Old Town,⁷⁰⁵ and broader assessment that the damage to the Old Town could not be explained by JNA efforts to suppress Croatian artillery and mortar fire during the battle for Srdj,⁷⁰⁶ imply that at a time when their comrades were in mortal peril from artillery and mortar units in the Dubrovnik area, the JNA chose to target civilians and civilian objects in the Old Town instead of the actual or presumed source of Croatian fire. This would have been strange conduct even for the most callous of war criminals. More convincing might have been a finding that collateral damage caused by JNA artillery and mortar fire was excessive in relation to the concrete military advantage anticipated by the attack, and was foreseen by the JNA to have been excessive.⁷⁰⁷ But the Trial Chamber explicitly rejected this option in favour of the finding that the civilian population and monuments of the Old Town of Dubrovnik had been deliberately targeted. There was consequently no detailed discussion in the judgement of whether, and if so on what basis, the events of 6 December 1991

an important point of entry for ammunition intended for Croatian paramilitaries, which the JNA naval blockade was proving only partially successful in intercepting (see *Transcripts*, 585-586).

⁷⁰⁴ The Trial Chamber made some attempt to interpret the alleged remark in a manner relatively favourable to the defendant (see *ibid.* paras.166-167), but appeared nevertheless to regard the remark as *at best* evidence pointing to Strugar having given an order that was unjustifiably reckless in the circumstances.

⁷⁰⁵ *Ibid.*, paras.185, 187 and 188.

⁷⁰⁶ *Ibid.*, para.214.

⁷⁰⁷ Even a finding of this nature would have been questionable. Far from overwhelming force having been used in the attempt to take Srdj, the attack seems to have gone off at half-cock. According to oral evidence given to the Trial Chamber, the infantry assaulting Srdj used AGF (tear-gas) grenades in an unsuccessful attempt to flush out Croatian forces from the tunnels beneath the fortress (*Transcripts*, 7915). They were not in the event supported by the JNA's heavy artillery, which had the whole of Dubrovnik its sights (*Strugar (Trial Judgement)*, para. 137). They retreated from Srdj without having achieved their objective, yet having had five of their number killed and seven wounded (*ibid.*, paras.117-118). These circumstances fail to compel the conclusion that the force used by the JNA, which had led to the deaths of two civilians and the destruction of six buildings in the Old Town, had been disproportionate.

could be held to have been a case of an intentionally disproportionate attack on a military objective.⁷⁰⁸

The establishment of the mens rea

It was not necessary for the conviction of Jokic or Strugar for the Prosecution to establish that either defendant personally had *mens rea* in relation to the crimes in question; what did, however, need to be established was that the crimes in question were committed with *mens rea* on the part of one or more of their subordinates.⁷⁰⁹ The judgement implies, in several places, that Captain Kovacevic, the local JNA battalion commander responsible for co-ordinating the assault on Mount Srdj (and, according to some accounts, the officer who had initially proposed the attack) had the requisite *mens rea*.⁷¹⁰ It is also implied more broadly that *mens rea* on the part of the attacking units could be inferred from the extent of the destruction caused to the Old Town and the unpersuasive nature (in the Trial Chamber's assessment) of the explanations given by the Defence as to what could have caused this destruction, other than deliberate firing on the Old Town for no plausible military reason.⁷¹¹

Command responsibility for failure to prevent the crimes

The orders issued by both Jokic and Strugar a few weeks before the 6 December 1991 attack to the effect that the Old Town was not to be targeted proved insufficient to save either commander from conviction for what were

⁷⁰⁸ *Ibid.*, paras.214 and 281.

⁷⁰⁹ This can be inferred from the ICTY doctrine on command responsibility coupled with its jurisprudence in relation to the requisite *mens rea* for serious violations of international humanitarian law coming within its subject matter jurisdiction. (See *Blaskic (Trial Judgement)*, paras.180, 185 and 217, *Kordic and Cerkez (Trial Judgement)*, paras.236 and 328, *Galic (Trial Judgement)*, para.54. See also *Prosecutor v. Krstic (Trial Judgement)* (2001), ICTY, para.495.

⁷¹⁰ This is never stated explicitly, but the fact that the Trial Chamber considered Kovacevic to have been responsible for a serious crime can be inferred from the fact that his being promoted, rather than punished, shortly after the events in question appears to have been considered relevant to the criminal responsibility of both Jokic and Strugar for the shelling of the Old Town (*Strugar (Trial Judgement)*, paras.413, 436-437 and 441-442).

⁷¹¹ *Ibid.*, paras.195, 214 and 329.

deemed to be unlawful deliberate attacks on the Old Town by their forces.⁷¹² The Trial Chamber considered that in the circumstances, Strugar ought to have issued a fresh, express order prohibiting the shelling of the Old Town at the time of the order to attack Mount Srdj.⁷¹³ It appears to have taken the further view that once JNA shells had begun to land on the Old Town, the legally correct course of action for Strugar would have been to have obtained an immediate report from the field about what was going on, and then to have ordered the cancellation of all JNA artillery fire and the withdrawal of the infantry troops already on Mount Srdj.⁷¹⁴ Such intervention would have needed to have been effective: the fact that Jokic did prevent some at least of the JNA's artillery from being used on 6 December was not enough to save him from conviction for the murder of the two civilians in the Old Town killed in the battle, though it appears to have led to a belief among his own troops that his intervention had contributed to the failure of the attempt to take Mount Srdj and to their own casualties.⁷¹⁵

Command responsibility for failure to punish the crimes

Jokic and Strugar were convicted not only on the basis of their actions and omissions during the day of 6 December, but on the grounds of their failure subsequently to take steps to punish what in the view of the Trial Chamber had been criminal acts. The Trial Chamber in *Strugar* considered the investigation into events of 6 December 1991 launched by Jokic immediately afterwards to have been inadequate. It was not impressed by the disciplinary action taken, nor with the promotion soon afterwards of Captain Kovacevic from Captain to

⁷¹² Orders from the JNA General Staff issued on 16.10.91 prohibited attacks on cultural property. Jokic's order of 11.11.91 explicitly prohibited attacks on the Old Town of Dubrovnik except in cases of lethal fire coming from the Old Town, stating further that troops could only return fire on the Old Town in an extreme situation if they had come under fire that inflicted heavy losses. Strugar's order of 18.11.91 required units 'not to open fire on the Old Town of Dubrovnik and to retreat units exposed to enemy fire to cover.' (*Ibid.*, paras.61 and 74).

⁷¹³ *Ibid.*, para.421.

⁷¹⁴ *Ibid.*, paras.396, 405, 414, 423, 424 and 427. The Trial Chamber seems to have thought it would have been no harder for the JNA infantry on Mount Srdj to have withdrawn back down the hill, protecting themselves from enemy fire to their rear, than to have continued the advance (para.427).

⁷¹⁵ *Ibid.*, paras.137 and 425. See also *Transcripts*, 7378 and 7422.

Captain (First Class), which it understood to have been approved of by Strugar.⁷¹⁶ It concluded that both Jokic and Strugar had failed in their duty to punish serious crimes and could therefore be held criminally responsible for them.

Whereas Jokic was found responsible (on the basis of his own guilty plea) for having aided and abetted the crimes in question, Strugar's conviction for the crimes rested solely on the Trial Chamber's findings that he failed to prevent or to punish them. The disconcerting implication is that Strugar's conviction for war crimes rests ultimately on nothing more than his failure on 6 December 1991 to order Captain Kovacevic to cease all artillery and mortar fire and to withdraw his men from Mount Srdj (irrespective of the losses on the JNA side this would have been likely to cause) the moment he heard that shells were falling on the Old Town, coupled with his subsequent failure to punish Captain Kovacevic for having allowed the fire which damaged the Old Town - presumably dismissing, as did the Trial Chamber, his officers' accounts of what had prompted them to fire at or near to the Old Town.

6.4. Conclusions

Under international criminal law, failure to take the legally required precautions in attack should not in itself engage criminal responsibility, unless it can be shown to have been tantamount to a deliberate attack on the civilian population or civilian objects. Failure to take precautions in attack may, however, sometimes be seen as probative evidence of the crime of wilfully attacking protected persons or objects or launching an unlawfully indiscriminate attack.

In armed conflict, there will inevitably be occasions where mistaken attacks on protected objects or accidental killing of non-combatants will be perceived or portrayed as deliberate or at least reckless. Where combatants and commanders

⁷¹⁶ *Strugar (Trial Judgement)*, para.441. The promotion does not seem to have been an exceptional one. Kovacevic was, in autumn 1991, acting commanding officer of a battalion of 700 men. According to oral evidence given to the Trial Chamber, the decision to promote him had been taken in November 1991, in recognition of his successful capture of the other forts above Dubrovnik, and was not connected to the December events (*Transcripts*, 7354 and 7438-7439).

who are nationals of states parties to the ICC Statute are concerned, there is a chance this may now lead to criminal proceedings on the international plane.⁷¹⁷ Since the ICC's *mens rea* approach owes a certain amount to both civil and common law traditions, common law states perhaps need to be mindful that criminal responsibility may be engaged in the eyes of the ICC not only when the perpetrator meant protected people or objects to be hit (*dolus directus* (first degree)) but also where he knew this would 'occur in the ordinary course of events' (*dolus directus* (second degree)).

In this context, the ability of combatants and commanders to point to specific precautions taken to minimize collateral damage may come to play a critical role in enabling them to rebut allegations of deliberately or recklessly causing non-combatant deaths. It will also be increasingly important for commanders to be able to rely on the willingness and ability of their political leaders to ensure they have whatever equipment is necessary to enable them to identify and engage military targets in a way that will not expose them unduly to the risk of prosecution, and that they are given the time and manpower to be able to make sure that troops and junior officers are properly trained before deployment.

Criminal tribunals, for their part, need to proceed cautiously in this area. Too ready a willingness to accept arguments of military defendants that killings of non-combatants and destruction of civilian and cultural property were only accidents, or were proportionate collateral damage, may have the pernicious effects not only of bringing the tribunals into contempt, but more seriously, appearing to legitimize carelessness on the battlefield and encouraging the victims of culpably clumsy attacks to seek retribution outside the judicial framework. Conversely, *obiter dicta* suggesting misunderstanding on the part of judges hearing war crimes trials of the degree of control and accuracy that is possible on the battlefield may equally bring tribunals into disrepute and discourage co-operation. Ideally, judges of international criminal tribunals would have at their disposal, perhaps on an *amicus curiae* basis, military advisers with relevant

⁷¹⁷ The ICC's 'complementarity principle' means that such proceedings could not, however, take place if a state with jurisdiction chose to investigate and if necessary prosecute the case effectively (see Rome Statute articles 1 and 17).

combat experience and practical knowledge of what could reasonably have been expected in the relevant context. Such people could give impartial expert advice to the judges in cases where rulings need to be made on whether deaths and injury of protected persons and destruction and damage of protected property may be considered beyond reasonable doubt to have been wilfully caused during military operations.

Sometimes, however, the difficulty is that even if it may be clear that the law of armed conflict has been violated, *mens rea* cannot fairly be attributed to any one individual, or even to a manageable group of individuals, the violation being a consequence of systemic failings within a large and complex military organization, and possibly extending beyond that organization. It is not being suggested that the law cannot be enforced in cases where it is not possible to demonstrate beyond all reasonable doubt that non-combatant casualties or damage to civilian objects were intended by an identifiable individual or individuals. Rather, what is suggested is that where non-combatant casualties appear to have been caused as a result of negligence or systemic failings rather than individual malice or recklessness, procedures for dealing with state responsibility may prove a more effective and appropriate means of enforcing the law than individual criminal prosecution. This type of enforcement is the subject of the next and final chapter.

7. STATE RESPONSIBILITY FOR VIOLATIONS OF THE OBLIGATION UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT TO TAKE PRECAUTIONS IN ATTACK

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Article 3.

In 1946, the Nuremberg International Military Tribunal declared:

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.⁷¹⁸

The first part of the statement is true; the second at least debatable. Crimes, including those designated by international law, such as war crimes and crimes against humanity, are indeed committed by individuals, not abstract entities, and the unhappy concept of 'state crime' has probably been effectively put out of its misery by the International Law Commission's Articles on State Responsibility of 2001.⁷¹⁹ By contrast, it is states, not individuals, that become parties to international treaties, and are responsible for complying with their obligations thereby undertaken and the legal consequences if they fail to do so. It is states that have traditionally been the subjects of customary international law, entitled to its protection and bound by its rules, with individuals normally being subject not to international law (at least, not directly), but to the municipal law of the state in whose territory they find themselves. Provisions of international law designating certain acts and omissions as crimes constitute only a small part of the corpus of

⁷¹⁸ *Trial of the Major War Criminals Before the International Military Tribunal*, (Nuremberg, 1947), (Vol I), 218-224.

⁷¹⁹ See James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, (Cambridge, 2002), 16-20 and 242-248. For an earlier critique of the concept of 'state crime', see Geoff Gilbert, 'The criminal responsibility of states' (1990), *ICLQ*. Alain Pellet's article 'Can a state commit a crime? Definitely, Yes!' (1999), *EJIL* is not quite as wedded to the idea of state 'crime' as the title suggests, the writer's point being that whatever form of words is used, it needs to be made clear that some violations of international law by states require a more concerted and vigorous reaction by the international community than others.

international law in general and only a small part of the corpus of international law relating to armed conflict more specifically; more common are provisions conferring rights or obligations on states without any implications for individual criminal responsibility in the event of these provisions being violated. Thus not only *can* the provisions of international law be enforced by means other than the punishment of individuals who commit crimes, but frequently they must.⁷²⁰

This chapter addresses the following questions:

- In what circumstances, and by what means, may states be held responsible for violations of the obligation under international law to take precautions in attack?
- What may the legal consequences be for states of such violations?
- Why is it important that states, as opposed to individuals, should be held accountable for violations of the rules on precautions in attack?
- What value, if any, do the principles of state responsibility for internationally wrongful acts have for violations of the rules on precautions in attack by armed opposition groups in the course of internal conflicts?

⁷²⁰ The London Agreement establishing the post-Second World War International Military Tribunals may have confirmed the principle that individuals may be held criminally responsible by the international community for deeds recognized as crimes under international law (see the 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, article 6) but the activity of these Tribunals is better regarded as the exception than the rule in terms of enforcing international law.

7.1. State responsibility and individual responsibility

a) *The International Law Commission's Articles of 2001*

Having long been one of the more protean areas of international law, the law of state responsibility in 2001 received persuasive, if not definitive, clarification in the form of the final version of the International Law Commission's *Articles on State Responsibility*.⁷²¹ The *Articles* represent the culmination of the work of the Commission over several decades.⁷²² They were drafted by a prestigious group of international lawyers and their commendation by unanimous vote of the United Nations General Assembly⁷²³ reflects their widespread acceptability. But the text is not a treaty. Nor is it a summary of universally acknowledged principles of customary law, although the International Law Commission's commentary to the *Articles*⁷²⁴ often indicates those principles which can properly be considered to constitute customary law and on what basis. The status of the *Articles* as a legal text is thus uncertain. Nonetheless, they are the most authoritative guide available to the current state of international law on state responsibility.

The *Articles* proceed from the deceptively simple starting point that:

Every internationally wrongful act of a State entails the international responsibility of that State

...

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- a) is attributable to the State under international law; and
- b) constitutes a breach of an international obligation of the State.⁷²⁵

To some extent, the significance of the *Articles* lies in what they omit. No place is given to the concept of 'state crime'. No place is given to the concept of

⁷²¹ Crawford, *The International Law Commission's Articles on State Responsibility*.

⁷²² *Ibid.*, 1-60.

⁷²³ See UNGA Resolution A/RES/56/83, adopted unanimously by UNGA in plenary on 12.12.01, where the General Assembly welcomes the ILC's adoption of the *Articles* and attached commentary, takes note of the *Articles*, and commends them to the attention of Governments 'without prejudice to the question of their future adoption or other appropriate action'.

⁷²⁴ I.e. the Crawford commentary.

⁷²⁵ Articles 1 and 2.

blameworthiness. An internationally wrongful act, according to the *Articles*, is neither more nor less than a breach by a state of one of its international obligations. And in the event of such a breach, the state must, according to the *Articles*, cease the breach, give assurances of non-repetition as appropriate and make full reparation to the victim state or states in the form of restitution, compensation, satisfaction or some combination of the three.⁷²⁶

An important consequence of this refreshingly minimalist approach is that state responsibility is considered equally engaged by any violation by a state of its international obligations, whatever the source or nature of the obligation and without the need for fault to be demonstrated, so long as responsibility is properly attributed.⁷²⁷ The nature of the obligation in question may affect the standing of other states to invoke the responsibility of the offending state.⁷²⁸ And if an obligation which is a peremptory norm of international law⁷²⁹ is violated in a gross and systematic fashion, the *Articles* suggest that the responsibility of other states to take, or refrain from, certain actions will be engaged.⁷³⁰ But the wrongfulness of the act, and the obligation of the offending state to make appropriate reparation, lies purely in the fact that it is a breach of an international

⁷²⁶ Articles 30, 31 and 34. The requirement for the responsible state to make full reparation to the injured state can be considered a principle of customary international law; by contrast, the principle that the responsible state has a *separate* obligation to cease the violation and give assurances of non-repetition is a more progressive interpretation of the law. (See Diane Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002), *AJIL*).

⁷²⁷ See Crawford, 81-85. See also Emanuela-Chiara Gillard, 'Reparation for violations of international humanitarian law' (2003), *IRRC*. Some acts or omissions will only be violations of international law if committed with some degree of intention or fault. But whether or not intention or fault needs to be demonstrated depends on the specific nature of the primary obligation. It is not a necessary element of a finding of state responsibility for an internationally wrongful act.

⁷²⁸ According to the *Articles*, if an obligation is owed to a group of states, or to the international community as a whole, a state other than the injured state will have standing to invoke responsibility, but not otherwise (see Crawford, 276-280). In its judgment in the case of *Barcelona Traction, Light and Power Company, Limited, Second Phase* (1970), the ICJ gave as examples of *erga omnes* obligations of this nature obligations deriving from 'the outlawing of acts of aggression and of genocide as also from the principles and rules concerning basic rights of the human person including protection from slavery and racial discrimination' (para. 34).

⁷²⁹ A peremptory norm of international law, or *jus cogens*, is defined in the Vienna Convention on the Law of Treaties as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character' (article 53).

⁷³⁰ *Articles on State Responsibility*, article 41. This article is a progressive interpretation of the law (Shelton, 'Righting Wrongs').

obligation binding upon that state, in the absence of circumstances precluding wrongfulness.⁷³¹

b) *Implications for states of individual prosecutions for war crimes*

The terms of the 1907 Hague Convention IV and of Additional Protocol I of 1977 specify that states party to these treaties bear responsibility for all acts of members of their armed forces.⁷³² A state's responsibility for the acts of members of its armed forces can also be considered a principle of customary international law.⁷³³ The ILC *Articles* enshrine the broader principle that:

the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.⁷³⁴

The responsibility states bear for the acts of members of their armed forces is separate from the criminal responsibility which individuals may bear for war crimes. Thus if an individual combatant acts contrary to a provision of the international law of armed conflict, an internationally wrongful act will have occurred, which will be attributable to the state in whose armed forces he serves irrespective of any judicial, disciplinary or civil proceedings he personally may face.⁷³⁵ The state may in some circumstances be obliged to prosecute the alleged

⁷³¹ *Articles on State Responsibility*, articles 20-25.

⁷³² 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, article 3; Additional Protocol I, article 91.

⁷³³ See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol I), 530-532. The rule is not absolute, however: states are not responsible in international law for purely private misdeeds of members of their armed forces, such as an assault committed by a soldier on leave attending a football match in another country. See also *Articles on State Responsibility*, article 7. (For some of the case law, see Crawford, 99, 106-109 and Brownlie, *Principles of Public International Law*, 452-455). Marco Sassoli appears by contrast to regard *all* acts of members of a state's armed forces as attributable to the state by virtue of article 91 of Additional Protocol I and article 3 of the Hague Convention ('State responsibility for violations of international humanitarian law' (2002), *IRRC* at 405-406).

⁷³⁴ Article 4.

⁷³⁵ See Gunael Mettraux, *International Crimes and the Ad Hoc Tribunals*, 277, citing *Prosecutor v. Furundzija, Trial Judgement* (1998), ICTY, para.142, although it should be noted that the paragraph cited refers specifically to the crime of torture, not more generally to violations of international law by individuals.

offender (or hand him over to another state for prosecution),⁷³⁶ to surrender him for prosecution to an international tribunal,⁷³⁷ or to choose between these three courses of action. But prosecution at the domestic or international level of the alleged perpetrator of a violation of the law of armed conflict will not itself annul the state's own responsibility for the breach of its obligations which has occurred, nor remove its obligation to make full reparation to the victim state, including, as appropriate, by means of financial compensation, and (according to the *Articles*) to give assurances of non-repetition, if circumstances require. Likewise, a finding that a state has breached its international obligations through the actions of its armed forces does not necessarily mean a crime has been committed by the individuals concerned.⁷³⁸

c) *Accountability for violations of the law of armed conflict which are not war crimes*

The obligation under international law to take precautions in attack is a principle of great importance for the protection of non-combatants in armed conflict, as are the specific rules which derive from the general principle. But seldom could a violation of the rules on precautions in attack be said, strictly speaking, to be a war crime, as seen in the previous chapter, unless it were of such an egregious nature as to constitute, in effect, a wilful attack on protected persons or objects.⁷³⁹ Thus while states may be held to account for such violations within the framework of the law of state responsibility, mechanisms for the prosecution of individuals for war crimes are of limited usefulness in enforcing the rules on precautions in attack. Before moving on to consider the means by which states

⁷³⁶ See Geneva Convention I, article 50; Geneva Convention II, article 50; Geneva Convention III, article 129; Geneva Convention IV, article 146. See also Second Protocol to the Cultural Convention, article 17.1.

⁷³⁷ See ICTY Statute, article 9; ICTR Statute, article 8; and ICC Statute articles 89 and 90 (see also articles 17 and 20).

⁷³⁸ See e.g. *McCann v. UK* (1995), ECtHR.

⁷³⁹ David Turns disagrees ('National Implementation of the Rome Statute', 385), arguing that not only 'grave breaches' of article 57 of Additional Protocol I, but also ordinary violations thereof would be war crimes. Violations of article 57 are not, however, war crimes recognized in the Statute of the International Criminal Court, apart from the crime of *intentionally* launching an indiscriminate attack *in the knowledge* that disproportionate collateral damage will be caused (article 8.2(b)(iv) – which would also be a grave breach of Additional Protocol I (see article 85.3(b))

may be held accountable for violations of the rules on precautions in attack, a few remarks on the difference between violations of the law of armed conflict and war crimes may be in order.

For the purposes of the jurisdiction of the International Criminal Court, war crimes are defined in its Statute as grave breaches of the 1949 Geneva Conventions and other 'serious violations' of the laws and customs applicable in armed conflict (international and non-international), which are then specifically listed, and, as clarified later in the Statute, must normally be committed with 'intent and knowledge' to engage the criminal responsibility of the perpetrator.⁷⁴⁰ Thus all war crimes are violations of the international law of armed conflict, but not all violations of the international law of armed conflict are war crimes.⁷⁴¹ A prisoner of war who is not an officer and who fails to salute an officer of the Detaining Power violates article 39 of the Third Geneva Convention of 1949, but does not thereby become a war criminal. Nor does a war crime have to be tried before an international tribunal: on the contrary, all but the most primitive states can reasonably be expected to be willing and able to prosecute war crimes committed within their jurisdictions effectively without the need for proceedings on the international judicial plane. But if a crime being tried before a domestic tribunal is one which would not come under the subject matter jurisdiction of an international criminal tribunal (e.g. the crime of providing succour to the enemy),

⁷⁴⁰ Rome Statute, articles 8.2 and 30. For a discussion of the various ways in which the term 'war crime' has tended to be used in practice, which avoids attempting to define the term, see Peter Rowe, 'War Crimes' in McGoldrick, Rowe and Donnelly, *The Permanent International Criminal Court*. Mettraux suggests a 'war crime' may be defined as 'a serious violation of the laws or customs of war which entails individual criminal responsibility under international law' (*International Crimes and the Ad Hoc Tribunals*, 29).

⁷⁴¹ 'A finding to the effect that a given norm is binding *upon a state* – *qua* custom or treaty law – does not entail that its breach may also engage the criminal liability of the individual who committed the act, let alone that it may have that effect under customary international law'. (*Prosecutor v. Vasiljevic, (Trial Judgement)* (2002), ICTY, n.545). International treaties such as the 1949 Geneva Conventions, Additional Protocol I of 1977 and the 1999 Second Protocol to the 1954 Cultural Convention, require states parties to criminalize certain violations of these treaties, and the statutes of international criminal tribunals normally indicate specifically those violations of the law of armed conflict which will be considered 'war crimes' for the purposes of the tribunal in question. There is nothing to prevent a state from criminalizing other violations of the law of armed conflict if it so chooses (see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol II), 371 for examples, including, interestingly, the criminalization under Irish law of violations of article 57.2(a) (i)). It would be unusual, however, to describe minor violations of the international law of armed conflict as 'war crimes'.

the propriety of describing it as a 'war crime' is questionable.⁷⁴² Nor even can it be claimed that war crimes are necessarily more harmful than other violations of the law of armed conflict: the destruction or seizure of an item of enemy property, no matter how insignificant, is a war crime if it cannot be said to have been 'imperatively demanded by the necessities of war',⁷⁴³ by contrast, causing the deaths of hundreds of civilians by a surprise attack on a military objective conducted with massive firepower and without any warning, despite circumstances having been such that a warning could feasibly have been given, might not be considered by the ICC to be a war crime within its jurisdiction, given the terms of its statute. It would, however, probably be widely considered a violation of the law of armed conflict.⁷⁴⁴

d) *Joint state responsibility*

Article 16 of the ILC *Articles* provides that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

The Commentary to the *Articles* makes clear that this provision applies only to situations in which the conduct in question would be unlawful both for the assisting and the assisted state.⁷⁴⁵

⁷⁴² States often criminalize conduct in wartime which harms the state's interests, but does not violate the international law of armed conflict, for instance spying, or disobeying lawful orders. Such crimes, for which captured enemy nationals as well as a state's own nationals may sometimes be liable to prosecution, are not war crimes.

⁷⁴³ See ICC Statute, article 8.2 (b) (xiii).

⁷⁴⁴ See Hague Regulations, article 26 and Additional Protocol I, article 57 (c). The rule may be considered part of customary international law (Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol. I), 62).

⁷⁴⁵ Crawford, *The International Law Commission's Articles on State Responsibility*, 149-151.

7.2. Legal consequences of violations of the rules on precautions in attack

It is a well-established principle of international law that a state responsible for a breach of its international obligations must make full reparation for any harm resulting from the breach.⁷⁴⁶ The ILC's *Articles* set out in detail the legal consequences of state responsibility for an internationally wrongful act, namely: the obligation to terminate the breach and, as appropriate, to take steps to ensure non-repetition; the obligation where possible to restore the situation created by the breach to the *status quo ante*; and the obligation to pay compensation or provide satisfaction (for instance in the form of an apology) if restitution of the *status quo ante* is impossible.⁷⁴⁷

a) *Cessation and non-repetition*

According to the ILC's *Articles*:

The state responsible for [an] internationally wrongful act is under an obligation:

- (a) to cease that act if it is continuing;
- (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.⁷⁴⁸

There will be few circumstances in which it will be realistic to expect that a state can be prevailed upon to terminate an ongoing breach of the rules on precautions in attack. A situation in which a state could, technically, be obliged to terminate an ongoing breach of the rules might be if, during a military engagement, automatic counter-battery fire were being used against military targets located in a densely populated residential area from which non-combatants had not been evacuated. But it would take an unusually adventurous and eloquent legal expert to convey this message effectively to an artillery commander in the heat of the moment.

⁷⁴⁶ See *Factory at Chorzow (Merits)* (1927), PCIJ. See also *Articles on State Responsibility*, article 31 and commentary.

⁷⁴⁷ *Ibid.*, articles 30-37.

⁷⁴⁸ *Ibid.*, article 30.

Of much greater relevance for the protection of non-combatants in conflict zones is the (qualified) obligation to offer assurances and guarantees of non-repetition after an internationally wrongful act has occurred, set out in clause (b) of article 30 of the ILC's *Articles*, quoted above. The rider 'if circumstances so require' means the obligation is not absolute - it would be absurd if it were - but need not be taken to mean that it is up to the state responsible for the wrongful act to decide whether or not circumstances require it to give assurances and guarantees of non-repetition, any more than the adjective 'appropriate' need be taken to mean that the offending state alone is the proper judge of what action needs to be taken.⁷⁴⁹

Measures to ensure non-repetition of a violation of the rules on precautions in attack which can feasibly be taken will depend on the nature both of the violation and of the military context. It also needs to be recalled that in the aftermath of an accident attributable to a failure to take effective precautions, not all the measures which a state may decide to take to ensure non-repetition will be such that they can be publicly announced. A mistaken attack on a civilian person or object as a result of failure to take proper precautions might lead a state to revise the Rules of Engagement (ROE) for its forces in that area of operations, but it would not be reasonable to expect it to make the revised ROE public, or even to announce that more restrictive ROE had been issued, given the danger to which military personnel would be exposed if precise details of circumstances in which they were permitted to use force (and to what extent) were widely known.⁷⁵⁰

During the period under review, there were occasions where states took measures to try to ensure non-repetition of targeting mistakes. In May 1999, after the Chinese Embassy in Belgrade was bombed by the US Air Force during the NATO campaign against the Federal Republic of Yugoslavia, the attack was immediately acknowledged by the United States to have been a targeting error and

⁷⁴⁹ See *ibid.*, commentary to article 30. See also *LaGrand (Merits)* (2001), ICJ.

⁷⁵⁰ A French Army KFOR officer stationed in Mitrovica, Kosovo, reminded a journalist that if antagonists in a riot know for certain that security forces will only use tear gas initially, 'then you are in trouble' (Pengelley, 'French Army in Profile').

an internal enquiry was launched to establish what had gone wrong.⁷⁵¹ There was no public acknowledgement or determination that a violation of the law of armed conflict had occurred nor acceptance of any form of legal liability. But nor was there any attempt on the part of the US authorities to deny that its forces had been responsible for an attack on a building that was not a legitimate military objective, or to argue that all feasible precautions had in fact been taken to ensure the target of this attack was a military objective. On the contrary, once its internal enquiry was complete, the United States publicly acknowledged mistakes that had been made by its officials, and indicated the concrete steps it would take to ensure non-repetition of such errors. These steps included the publication of new, updated city maps ‘detailing locations of diplomatic sites and other “no-strike” facilities in and around Belgrade’, the updating of databases, with ‘new priority’ being placed on this task and the strengthening of internal procedures for selecting and identifying targets.⁷⁵² In a sign that these measures were intended to protect not only foreign embassies from being targeted in error in future, but also other buildings subject to legal protection, the communication affirmed that the US government would from that moment on ‘seek direct contact with other governments and interested organizations and persons to obtain their assistance in identifying and locating facilities of interest or concern’.⁷⁵³

Similarly, shortly after a malfunctioning cluster bomb unit launched from a US aircraft dispersed in the air prematurely and killed several civilians in the southern Serbian city of Nis, the United States issued a directive to restrict the future use by US forces of cluster munitions in the campaign.⁷⁵⁴ Again, there was no acknowledgement or authoritative determination that use of air delivered cluster bombs in the context had been a violation of the rules on precautions in attack. But the US government’s decision to impose new restrictions on their use after this accident was an implicit recognition of the need (and of the scope) for greater care to be taken when using these weapons.

⁷⁵¹ See message of 06.07.99 from US Under-Secretary of State Thomas Pickering to the Chinese authorities, published in ‘Contemporary Practice of the US’ (ed. Sean Murphy) (2000), *AJIL*, 128-131.

⁷⁵² *Ibid.*, 129.

⁷⁵³ *Ibid.*

⁷⁵⁴ See Human Rights Watch, *Civilian Deaths in the NATO Air Campaign – the Crisis in Kosovo*.

Some armed forces have formal 'lessons learned' procedures to minimize the chances of mistakes made during military operations being repeated.⁷⁵⁵ Such institutional readiness to learn from mistakes helps states to provide appropriate assurances and guarantees of non-repetition in the event of accidents during armed conflicts attributable to factors such as targeting error, inappropriate tactics or timing, or weapons malfunction.

b) Compensation

The ILC *Articles* affirm that a state responsible for an internationally wrongful act must pay compensation to the injured state for the damage caused thereby, insofar as the damage is not made good by restitution.⁷⁵⁶ Thus in the event of a state harming non-combatants or civilian property in another state as a result of failure to comply with its international obligations concerning precautions in attack, it must pay compensation. Under international law it is normally the injured state, not the individual victim, that has standing to claim compensation (the exception being the framework of international human rights law, which often gives individuals standing to claim compensation directly from a state). Nevertheless, states providing compensation to other states for harm caused to their nationals have sometimes been able to secure formal agreement that the beneficiary state will distribute the money to the individual victims and will provide evidence to indicate it has done so.⁷⁵⁷ The UN Compensation

⁷⁵⁵ See for example the 'lessons learned' analysis of US military operations in Bosnia and Kosovo (available via the website of the US Army's Center for Law and Military Operations). In the UK, all those directly involved in a military operation in theatre or elsewhere are required subsequently to submit 'frank reports', via the chain of command, on their experiences, indicating where things worked well, but also where improvements should be made (MoD, *Lessons for the Future*).

⁷⁵⁶ Article 36. Where harm is caused as a result of a failure to take all feasible or reasonable precautions in attack, restitution is unlikely to be possible, so this form of reparation is not considered here.

⁷⁵⁷ See e.g. Annex to the Memorandum of Understanding concluded between the US and China, in which the US agreed to pay \$4.5 million to China, to be given to the relatives of those killed and to those injured in the bombing of the Chinese Embassy in Belgrade and in which China undertook to provide the US with details of the names, addresses, ID card numbers and bank account details of those destined to receive compensation, plus a written acknowledgement from each recipient. ('Contemporary Practice of the US', (ed. Sean Murphy) (2000), *AJIL*, 130-131). After the shooting down of the Iranian airliner Iran Air 655, a settlement was eventually reached between the US and Iran whereby Iran would drop its claim filed with the ICJ and the US would pay the relatives of each victim \$300,000 for wage earning victims or \$150,000 for non-wage earning victims, with no money being paid to the Government of Iran (see statement by US President

Commission, examined further below, is an important exception to this general practice of providing compensation to states rather than individuals.

c) *Satisfaction*

Insofar as injury caused by an internationally wrongful act cannot be made good by restitution or compensation, the responsible state must give satisfaction for the injury.⁷⁵⁸ Such satisfaction will typically consist of an apology, but in the event of a case being heard by a tribunal, the tribunal may decide that its own public finding against the state can be considered appropriate satisfaction.⁷⁵⁹

The notion of satisfaction has an old-fashioned ring to it. But it is not an insignificant element of the means by which a state makes reparation for a wrong done. If the wrong consists of the killing in armed conflict of non-combatants as a result of a state's failure to take proper care, the willingness of the responsible state to acknowledge its fault and offer an apology is likely to be at least as important to a victim's family as financial compensation. For this reason, *ad hoc* procedures, according to which a certain amount of cash is handed out to the families of non-combatants killed in error by a state's armed forces, with condolences, but no formal admission of fault, may perhaps be seen as better than nothing, but may be regarded by the families (and possibly by their government) as an inadequate response in some situations.⁷⁶⁰

Clinton to the US Congress of 16 May, 1996, (<http://clinton6.nara.gov>, visited 23.06.05)). In both cases, the US formally denied any legal liability for these accidents. (See de Guttry and Ronzitti, *The Iran-Iraq War*, 225-231 and 'Contemporary Practice of the US', (ed. Sean Murphy) (2000), *AJIL*, 131).

⁷⁵⁸ Article 37.

⁷⁵⁹ See e.g. *Corfu Channel (Merits)* (1949), ICJ, 35.

⁷⁶⁰ For instance, during the military occupation of Iraq by a US-led coalition and after the military occupation formally came to an end, Coalition forces regularly offered *ex gratia* payments to non-combatants who had been injured or whose property had been damaged, or to the families of non-combatants who had been killed, as a result of their actions. Sometimes, the terms of the offer would state that it should be seen as a 'donation', not compensation. (See e.g. Amnesty International, *Iraq: Killings of civilians in Basra and al-'Amara*).

d) Redress for states and redress for individuals

Normally, individual victims of a state's breach of its obligation to take precautions in attack will not have standing to claim redress directly from that state in international law.⁷⁶¹ If the victims were at the material time within the jurisdiction of the state responsible for the violation, they may possibly have standing to seek redress under international human rights law. But victims of violations of the law of armed conflict committed in an international conflict will usually be able to obtain redress only if their cause is taken up successfully by their own state, and compensation thereby obtained is then distributed to them.

This means, paradoxically, that individuals injured by a breach of international law may have less chance of receiving compensation when there are friendly relations between the responsible state and the injured state than when there is tension between the two. In the latter case, the injured state is likely to press for maximum financial compensation as the price of an out-of-court settlement and the responsible state is likely to insist on being able to verify that the money reaches the individual victims. In the former case, the injured state may consider that its good relations with the responsible state are too important to be put at risk by public protest or the threat of legal proceedings. In theory, it may be open to the individual victim to bring proceedings against his own government in the domestic courts for failure properly to represent his interests, but there are few grounds for regarding such proceedings as likely to succeed.⁷⁶²

⁷⁶¹ Frits Kalshoven has observed that the *travaux préparatoires* of the 1907 Hague Convention IV indicate that its article 3 was originally intended to confer standing on individuals to make claims against states, though subsequently state practice came to favour the settlement of compensation claims on a state-to-state basis (insofar as there was to be any such settlement at all) ('State responsibility for warlike acts of the armed forces' (1991), *ICLQ*).

⁷⁶² In *R. (Abassi and Juma) v. Secretary of State for the Foreign and Commonwealth Office and Secretary of State for the Home Department* (2002), Queen's Bench Division (UK), the plaintiffs, one of whom was being detained by the US authorities in Guantanamo Bay, failed to convince the Court that the British government was under an obligation to make representations on the principal plaintiff's behalf to the government of the US. Had they succeeded, this would have had far-reaching implications for the freedom of governments to conduct foreign relations at their discretion.

7.3. Judicial enforcement of state responsibility

a) *The International Court of Justice*

In the event of a dispute between two or more states over whether or not a state has breached its international obligations in relation to the requirement to take precautions in attack, and if so, what the legal consequences are, the International Court of Justice (ICJ) may in some circumstances have jurisdiction. For the ICJ to have jurisdiction in a contentious case, the states concerned need either to have referred the case to the ICJ, to be bound by a treaty in relation to which the ICJ has explicitly been given jurisdiction,⁷⁶³ or to have made a declaration that they recognize the Court's jurisdiction as compulsory *ipso facto* in relation to certain matters and with respect to another state accepting the same obligation.⁷⁶⁴ They will need either to be party to the ICJ Statute, or to have been granted access to the Court by the UN Security Council.⁷⁶⁵ The ICJ's jurisdiction in contentious cases thus depends on some form of explicit or implicit consent to this jurisdiction having been given by the contending parties at some point.⁷⁶⁶ Should one of the states concerned not wish the case to be referred to the ICJ and not have made a declaration accepting the Court's compulsory jurisdiction, the ICJ might nevertheless have jurisdiction to give an advisory opinion on the issues at stake, if requested to do so by a body with standing to make the request.⁷⁶⁷ The ICJ thus may, in some circumstances, be able to give a ruling or an opinion in a case where one state alleges failure on the part of another to comply with its

⁷⁶³ ICJ Statute, article 36.1.

⁷⁶⁴ ICJ Statute, article 36.2. States may declare under article 36.2 that they accept the ICJ's jurisdiction as compulsory *ipso facto* subject to certain reservations. In such cases, the ICJ will decline jurisdiction if it considers such a reservation has been validly invoked (see *Case Concerning the Aerial incident of 10 August 1999* (2000), ICJ). The ICJ may decline jurisdiction to avoid passing judgment on the conduct of a state not party to the dispute, but is not prevented from adjudicating where its judgment might affect the legal interests of other states (see *Certain Phosphate Lands in Nauru* (1992), ICJ).

⁷⁶⁵ ICJ Statute, article 35. All UN members are *ipso facto* states parties to the ICJ Statute (see UN Charter, article 93).

⁷⁶⁶ '...there is no obligation in general international law to settle disputes and procedures for settlement by formal and legal procedures rest on the consent of the parties' (Brownlie, *Principles of Public International Law*, 703). States which have made declarations accepting the ICJ's compulsory jurisdiction in principle may, and in practice often do, object to ICJ jurisdiction in specific cases. The ICJ is the ultimate arbiter of its own ability to take jurisdiction (see ICJ Statute, article 36.6).

⁷⁶⁷ See *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), ICJ, paras.14-42.

obligations under the international law of armed conflict to take precautions in attack, though in practice, no such cases have yet been brought.

b) *The European Court of Human Rights*

The ECHR and international armed conflict

Where a state party to the ECHR is alleged to have killed or injured non-combatants by failing to take reasonable precautions in an international armed conflict occurring outside its own territory, the question may arise of whether such conduct could be considered a violation of the ECHR. There are two strands to this question: first, whether the ECHR should be considered to apply to international armed conflicts; and secondly, to what extent it can be considered applicable to the extraterritorial conduct of states.

None of the ECHR states parties participating in military operations (including full-scale armed hostilities) in the Gulf, Bosnia and Yugoslavia during the period under review derogated from the Convention at the outset of such operations.⁷⁶⁸ This could be seen as a sign of a widely held view amongst states parties that the Convention was never intended to apply to the conduct of extraterritorial military operations. Perhaps more realistically, it could be seen as a sign that immediately before a major military operation, states normally have more pressing concerns than the task of conducting a comprehensive review of all their treaty obligations, with a view to notifying depositaries and other states parties that in view of the situation, their abilities to fulfil certain treaty commitments may be temporarily hampered. The fact that article 15 of the Convention provides for derogation from the Convention ‘in time of war or other public emergency’ would seem to suggest that the Convention was drafted on the understanding that it would continue to apply in wartime to the conduct of states towards those within their jurisdiction, except to the extent that derogations had been submitted.

⁷⁶⁸ See *Bankovic et. al. v. Belgium et. al.* (2001) ECtHR, para.62. According to Abresch, writing in 2005, ‘no derogation to [ECHR] Article 2 ‘in respect of deaths resulting from lawful acts of war’ has ever been made’ (‘A Human Rights Law of Internal Armed Conflict’, 745).

The question of the extraterritorial application of the Convention was put to the test in 2001 in the case of *Bankovic et. al. v. Belgium et. al.*. In this case, the applicants, all Yugoslav nationals, sought to bring proceedings against those NATO states which were party to the Convention, alleging that NATO's attack on the RTS television broadcasting station in Belgrade in 1999 had violated article 2 of the ECHR (on the right to life). Although the application related to conduct during armed hostilities, the central issue was extraterritorial conduct, not the applicability of the Convention to armed conflict. The unanimous judgment of a Grand Chamber of the European Court of Human Rights (ECtHR) determined the application inadmissible. The Court took the view that Article 1 of the Convention, requiring states parties to 'secure to everyone within their jurisdiction the rights and freedoms...of the Convention' should be considered to reflect an 'essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case'.⁷⁶⁹ Nevertheless, in a more recent judgment, the ECtHR expressed the rather different view that notwithstanding *Bankovic*, 'the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.⁷⁷⁰ This latter dictum begs the question of the circumstances in which it is possible for the ECHR to be violated by a state party on the territory of another state, but the gist is clear enough. The most that can be said at present is that ECHR jurisprudence on the circumstances in which the Convention may be considered applicable to the extraterritorial conduct of states is unsettled.⁷⁷¹

⁷⁶⁹ *Ibid.*, para.61.

⁷⁷⁰ *Issa et. al. v. Turkey* (2004), ECtHR.

⁷⁷¹ For detailed discussion of ECHR case law on the extraterritorial applicability of the Convention, including *Bankovic*, *Issa* and the authorities on which both cases rely, see the Divisional Court's judgment in *R. (Al-Skeini) v. Secretary of State for Defence* and the December 2005 Court of Appeal judgment. The latter judgment, while confirming the decision of the lower court, considers in greater detail the emerging jurisprudence of the ECtHR in relation to the extraterritorial applicability of the ECHR, making extensive use of the two concepts of 'State Agent Authority' and 'Effective Control of an Area', either of which, once established, might, in the view of the Court of Appeal, be considered sufficient to trigger the extraterritorial applicability of the Convention. The reasoning is in harmony with that of the UN Human Rights Committee in its General Comment 31 on the extraterritorial applicability of the ICCPR and that of the Inter-American Commission on Human Rights in the case of *Coard et.al. v. US* (1999), IACHR, on the extent of the obligation of states parties to the ACHR to apply that Convention outside their own territories (para.37). For a contrasting view, see Michael Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005), *AJIL*.

The ECHR and internal conflict

By contrast, if an ECHR state party kills or injures non-combatants by failing to take reasonable precautions for their safety during a military operation on its own territory, the victims or their families will normally, in principle, be able to bring a case against the state in question before the ECtHR. Four recent cases of particular interest in this respect are *Gulec v. Turkey* (1998), *Ergi v. Turkey* (1998), *Isayeva, Yusopova and Bazayeva v. Russia* (2005) and *Isayeva v. Russia* (2005).

The Turkish cases - Gulec v. Turkey and Ergi v. Turkey

In both *Gulec v. Turkey* and *Ergi v. Turkey*, Turkey was found to have violated article 2 of the Convention through failing to take sufficient care for the safety of unarmed civilians during violent confrontations involving Turkish security forces, in which relatives of the applicants had been killed (and failing, subsequently, to conduct satisfactory investigations into the killings). In neither case did the Court find that the victims had been intentionally killed by the security forces.

In *Gulec v. Turkey*, a teenager was killed, apparently by a ricocheting bullet after Turkish security forces had sought to disperse a violent crowd of several thousand people by firing rounds onto the ground from a machine gun mounted onto an armoured vehicle.⁷⁷² The Court accepted that the demonstration was 'far from peaceful',⁷⁷³ and that the use of force in such a case 'may be justified' so long as a balance is struck 'between the aim pursued and the means employed to achieve it'.⁷⁷⁴ The Court also acknowledged, with implied approval, the assessment of the European Commission on Human Rights that the security forces

⁷⁷² *Gulec v. Turkey* (1998), ECtHR, paras.68 and 70.

⁷⁷³ *Ibid.*, para.70.

⁷⁷⁴ *Ibid.*, para.71.

had not used the weapon to kill demonstrators intentionally.⁷⁷⁵ What the Court found unacceptable was the fact that the security forces sent to deal with the situation did not appear to have at their disposal appropriate non-lethal weaponry.⁷⁷⁶ Thus the essence of the violation lay not in the decision to use force, nor in the conduct of those on the scene, but in the inadequate way these troops had been equipped.

In *Ergi v. Turkey*, Turkey was found to have taken insufficient precautions to protect the lives of civilians during an exchange of fire with an armed opposition group (the Workers' Party of Kurdistan (PKK)) which took place near a village in the south-east of Turkey and in which the applicant's sister was killed. The Court did not accept the applicant's submission that the death of his sister could be directly attributed to the Turkish security forces, considering the evidence on this point inconclusive.⁷⁷⁷ Rather, it was Turkey's inability to satisfy the Court that it had done all it could to avoid or minimize civilian casualties,⁷⁷⁸ and also Turkey's failure properly to investigate the death of the applicant's sister, which led the Court to hold Turkey responsible for a violation of article 2,⁷⁷⁹ irrespective of whether the fatal bullet had been fired by the Turkish security forces or the PKK.⁷⁸⁰

There was no explicit reference to the law of armed conflict in the *Ergi* judgment. Nor was there any determination that the violent unrest in the south-eastern part of Turkey which formed the background to the case should, for legal purposes, have been qualified as an armed conflict. Interestingly, however, the judgment declared that for the purposes of this case, the responsibility of the state

⁷⁷⁵ *Ibid.*, paras.68 and 70.

⁷⁷⁶ *Ibid.*, para.71.

⁷⁷⁷ *Ergi v. Turkey* (1998), ECtHR, paras.77-78.

⁷⁷⁸ For instance, it appeared that Turkish forces had organized an ambush without knowing the distance of the village from the place chosen for the ambush, and had placed themselves in a position which put the villagers at considerable risk of cross-fire. No information had been provided by the Turkish Government about any steps or precautions to protect the civilians from being caught by the cross-fire. According to the Court, 'In the light of the failure of the authorities...to adduce direct evidence on the planning and conduct of the ambush operation, the Court...finds that it can reasonably be inferred that insufficient precautions had been taken to protect the lives of the civilian population' (para.81).

⁷⁷⁹ The failure to investigate the killing adequately was held by the Court to be a violation of both article 2 (the right to life) and article 13 (the right to an effective remedy) of the ECHR.

⁷⁸⁰ *Ergi v. Turkey*, para.86.

could be considered engaged where '[agents of the state]...fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimizing, incidental loss of civilian life'.⁷⁸¹ This is an almost verbatim citation of article 57.2(a)(ii) of Additional Protocol I, although the judgment neither acknowledged this source, nor explained why it was drawn upon. The Court's choice of the same phraseology as that of the Protocol can hardly have been a coincidence and suggests it consciously took the view that a certain rule of the law of armed conflict found in Additional Protocol I should have been applied by Turkey during a security operation in its own territory.

It was unfortunate that the judgment shed no light on why the Court chose to use this language.⁷⁸² Rules of the law of armed conflict often cut two ways, seeking, on the one hand, to protect non-combatants from unnecessary harm during armed conflict, while at the same time recognizing that once an armed conflict has broken out, belligerents have the right to use military force against certain objectives and persons and that non-combatants may sometimes be harmed by such attacks without any unlawful act necessarily having occurred. The rule which slips into the *Ergi* judgment is no exception: the obligation to 'take all feasible precautions in the choice of means and methods...with a view to avoiding *and, in any event, to minimizing*, incidental loss of civilian life' (emphasis added), while requiring belligerents to conduct hostilities with due regard for the safety of non-combatants, nonetheless accepts that in armed conflict, civilians occasionally get killed by accident. This rule, though of great importance for the protection of non-combatants during armed conflict, does not reflect the normal obligations of a state towards its citizens in peacetime, when a rather higher standard of care may reasonably be expected.

⁷⁸¹ *Ibid.*, para.79.

⁷⁸² Abresch observes that use of the vocabulary of the law of armed conflict in ECtHR judgments 'has been taken as evidence that the ECtHR applies humanitarian law principles and concepts when dealing with cases arising out of armed conflicts, that it applies, *sub silentio*, humanitarian law as a *lex specialis*'. ('A Human Rights Law of Internal Armed Conflict', 746).

The Russian cases - Isayeva, Yusopova and Bazayeva. v. Russia and Isayeva v. Russia

The degree of care which states party to the ECHR are required to take for the protection of non-combatants during military operations in their own territory received further clarification in two judgments rendered in 2005 relating to the conduct of Russian forces in Chechnya. In *Isayeva, Yusopova and Bazayeva v. Russia*, Russia was found to have breached its obligations under the Convention and its First Protocol when a convoy of civilians trying to flee conflict in Chechnya was struck by rockets fired from two Russian military aircraft. Survivors testified that they had heard on the local radio that a 'humanitarian corridor' would open on 29 October 1999, allowing people to travel from Grozny into Ingushetia along the Rostov-Baku highway via a military checkpoint on the border between Chechnya and Ingushetia.⁷⁸³ On arrival at the checkpoint, they had eventually been turned back by Russian troops, who were initially uncertain as to whether or not civilians could be allowed through that day.⁷⁸⁴ On the return journey to Grozny, the convoy came under fire from Russian military aircraft.⁷⁸⁵ Twelve air-to-ground S-24 missiles were fired, killing at least sixteen civilians and injuring a further eleven.⁷⁸⁶ No evidence was submitted by Russia in relation to any militants having been killed or injured in the attack, other than the testimony of the pilots to the effect that they believed they had destroyed a truck of militants.⁷⁸⁷ The case was brought before the Court by a mother whose children had been killed in the attack and who had herself been injured, as well as others who had been injured or who had lost personal possessions in the attack.

The applicants made three legal submissions in relation to the attack:

- i) it constituted an intentional violation of the right to life, since the authorities should have known of the presence of the civilian convoy on the road when the attack took place and there was evidence to

⁷⁸³ *Isayeva, Yusopova and Bazayeva v. Russia* (2005), ECtHR, para.13.

⁷⁸⁴ *Ibid.*, paras.15-17.

⁷⁸⁵ *Ibid.*, paras.18-30.

⁷⁸⁶ See *ibid.*, paras.69 and 88.

⁷⁸⁷ *Ibid.*, para.28.

suggest the pilots had observed the convoy before launching their missiles;

- ii) the degree of force used was ‘manifestly disproportionate to whatever aim the military were trying to achieve’;
- iii) the bombardment was an indiscriminate attack on civilians which could not be justified under international humanitarian law.⁷⁸⁸

A *Human Rights Watch* report submitted by the applicants contended that certain provisions of the law of armed conflict applicable to the situation had been violated.⁷⁸⁹ The Russian government maintained the two military planes had come under fire from a truck of Chechen militants, and had taken lawful action in their own defence and that of the local population, being unaware there were civilian vehicles in the vicinity which might be endangered.⁷⁹⁰

In finding in favour of the applicants, the Court rejected the Russian contention that the pilots were unaware of the presence of the convoy when they opened fire, considering this version of events unsupported by the evidence.⁷⁹¹ The Court did not, however, explicitly take a position on whether or not the attack had been launched intentionally at the convoy in the knowledge of its civilian status. Nor did it take the view that Russian use in Chechnya of military aviation with heavy combat weapons would necessarily have been disproportionate, given the prevailing situation in the republic.⁷⁹² It did not even state that the bombardment had been an indiscriminate attack. The Court’s finding that Russia had violated its obligations under the Convention and its First Protocol was based instead on its view that even if Russian forces had been pursuing a legitimate aim in launching the missiles, Russia had failed to take the ‘requisite care’ for the lives

⁷⁸⁸ *Ibid.*, paras.155-157.

⁷⁸⁹ *Ibid.*, para.102.

⁷⁹⁰ *Ibid.*, paras.28, 30, 81 and 160.

⁷⁹¹ *Ibid.*, para.192.

⁷⁹² *Ibid.*, para.178.

of the civilian population in the planning and execution of this attack.⁷⁹³ This assessment was based on the following elements of the evidence:

- i) the troops manning the checkpoint from which the convoy had been turned back had not alerted the local air controller (who had authorized the pilots to open fire) to the presence on the Rostov-Baku highway of a large number of civilian vehicles;⁷⁹⁴
- ii) although it was routine practice for Russian military aircraft to carry forward air controllers, this precaution was dispensed with on the day in question, apparently because there were no federal forces in the vicinity who could be endangered by air strikes;⁷⁹⁵
- iii) twelve missiles with an impact radius in excess of 300 metres had been launched at a stretch of road filled with vehicles;⁷⁹⁶

The Court appeared to regard the obligation of states party to the Convention to take a high degree of care for the protection of non-combatants during military operations to be a self-standing duty under the Convention, independent of any obligation deriving from the law of armed conflict which might or might not be binding on them in the circumstances.

The Court based its judgment ultimately on facts which were either common ground or derived from evidence submitted by the respondent Government. It refrained from drawing inferences from circumstantial evidence about the intentions of those responsible for the attack, and declined to pronounce on the applicability to the situation of certain rules of the law of armed conflict. This restraint was wise. Had the Court accepted the applicants' legal submissions regarding the intentionality of the attack, or had it formally based its findings on a preference for the applicants' evidence over that of the respondent Government, not only would the fairness of the judgment have been open to question within

⁷⁹³ *Ibid.*, para.199.

⁷⁹⁴ *Ibid.*, para.187.

⁷⁹⁵ *Ibid.*, paras.80, 188 and 189.

⁷⁹⁶ *Ibid.*, para.195.

Russia and possibly elsewhere, but its value as a precedent for the judicial enforcement of the rules on precautions in attack would have been much diminished. As it was, the judgment established that in certain circumstances a state can be held to account by the ECtHR for failure to take reasonable precautions in attack during military operations within its own jurisdiction, irrespective of any criminal intent on the part of the perpetrators and irrespective of whether or not certain rules of the law of armed conflict can be said formally to apply. The fact that the Court chose to focus on what had gone wrong procedurally, rather than on the presence or absence of criminal intent on the part of the pilots, makes the judgment of particular practical value as a precedent, not least because it pointed to certain specific precautions (such as the use of forward air controllers for attacks in areas where civilians are present) which can reasonably be expected when air power is used – and failure to take which may, in certain circumstances, while not necessarily constituting a war crime, nonetheless have legal consequences for states if it leads to non-combatant casualties.

In the separate case of *Isayeva v. Russia*, the Court concluded that article 2 of the ECHR was violated when the applicant's son and three young nieces were killed in circumstances which, in the view of the Court, amounted to a failure on the part of Russian federal forces to take the requisite degree of care for the safety of non-combatants. A group of several hundred armed Chechen fighters had entered a village of about 25,000 people during the early morning of 4 February 2000.⁷⁹⁷ The village was subsequently attacked with artillery and aircraft,⁷⁹⁸ leading to the deaths of at least 46 civilians as well as substantial numbers of federal troops and Chechen fighters.⁷⁹⁹ According to evidence submitted by the Russian government, a safe passage out of the village was offered to the residents, information in relation to which was given to the head of the village administration and broadcast from a mobile unit as well as a helicopter equipped

⁷⁹⁷ *Isayeva v. Russia*, (2005), ECtHR, paras.15, 16. See also para.23.

⁷⁹⁸ *Ibid.*, paras.17 and 26. According to the applicant, the attack began early in the morning of 4 February, i.e. soon after the arrival of the rebel fighters and before the residents had made any attempt to leave the village; according to the Russian government, it was launched only once the residents had left, except for some who remained because the fighters would not allow them to leave.

⁷⁹⁹ *Ibid.*, paras.26 and 33. According to information submitted by the Russian government, 53 federal troops and 180 rebel fighters were also killed (para.27).

with loudspeakers.⁸⁰⁰ Evidence was submitted by the applicant which suggested that although a helicopter equipped with loudspeakers was seen by the villagers, the warnings to leave the village were broadcast only after the bombardment had already been underway for several hours, and were inaudible above the ambient noise.⁸⁰¹ The applicant and her relatives, having nonetheless learned of the existence of a 'safe passage', joined a bus full of people trying to flee along this route. Her relatives died from shrapnel injuries when the vehicles in which they were travelling were attacked by forces apparently unaware of any 'safe passage' having been designated.⁸⁰²

As in *Isayeva, Yusopova and Bazayeva v. Russia*, there was no finding that the death of the applicant's relatives had been caused intentionally and the Court again affirmed that Russian forces were pursuing a legitimate aim in using force in the overall circumstances.⁸⁰³ The use of military aviation and artillery was not seen as in itself unjustified, given the situation.⁸⁰⁴ What rendered the action unlawful was the failure of the Russian authorities to take the requisite care for the lives of civilians in the planning and execution of a military operation.⁸⁰⁵ The Court implied that if the attack on the village had occurred after an effective evacuation of the villagers had been organized by Russian forces, giving a realistic amount of time for people to get out and making proper provision for the evacuation of the infirm, no violation would have been found. The efforts which had been made by federal forces to evacuate civilians were noted, but judged to have been inadequate, with particular criticism of the failure of Russian forces to take appropriate measures to ensure the safety of those fleeing the village via the 'safe passage' or to co-ordinate announcements of the 'safe exit' for civilians with the military planning and execution of the operation.⁸⁰⁶

⁸⁰⁰ *Ibid.*, paras.25 and 72.

⁸⁰¹ *Ibid.*, paras.52 and 193.

⁸⁰² *Ibid.*, paras.17-18, 31 and 90.

⁸⁰³ *Ibid.*, para.200.

⁸⁰⁴ *Ibid.*, para.180.

⁸⁰⁵ *Ibid.*, paras.200-201. Earlier, the Court reaffirmed the reasoning of *Ergi v. Turkey* that when unarmed civilians are killed in a military operation, the responsibility of a State may be engaged if agents of the state involved in the operation 'fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimizing, incidental loss of civilian life' (para.176).

⁸⁰⁶ *Ibid.*, paras.189 and 219.

c) *Other human rights tribunals*

No other human rights treaty has an enforcement mechanism quite as powerful as that of the ECHR. It might be argued that non-combatant deaths which can be attributed to a state's failure to take reasonable precautions in attack should be considered a violation not only of the right to life as enshrined in the ECHR, but also of the right to life as enshrined in the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.⁸⁰⁷ In practice, however, the relative weakness of the specific enforcement mechanisms for these treaties means it is unlikely that any state not party to the ECHR would ever face the prospect of being obliged by an international human rights tribunal to pay compensation to individuals injured as a result of a failure to take precautions in attack. Nonetheless, the jurisprudence of the ECtHR in this area may influence other international or even domestic tribunals faced with cases where harm is alleged to have been caused to individuals unlawfully on account of a state's failure to take reasonable precautions for the safety of non-combatants during a military operation.

d) *Claims commissions*

Sometimes, *ad hoc* claims commissions are established to settle questions of reparation for violations of international law in the context of specific situations. The mandates of claims commissions, and thus the extent to which they can be considered judicial or administrative bodies, can vary greatly.

An example of a largely administrative claims commission is the United Nations Compensation Commission (UNCC), established by a series of UN Security Council Resolutions to provide financial compensation to individual and

⁸⁰⁷ See ICCPR article 6; ACHR, article 4; African Charter on Human and Peoples' Rights, article 4.

corporate victims of Iraq's invasion and occupation of Kuwait in 1991.⁸⁰⁸ Iraq's liability for loss and damages as a result of its invasion and occupation of Kuwait was established by the UN Security Council before the UNCC came into existence.⁸⁰⁹ Its task was thus the provision of equitable compensation to victims of a violation of the *jus ad bellum* by Iraq which had already been determined by the Security Council, not to adjudicate on alleged violations of the *jus in bello*.⁸¹⁰ The UN Secretary General clarified at the outset that the UNCC was to be chiefly a fact-finding, not a judicial body.⁸¹¹

The Eritrea-Ethiopia Claims Commission (EECC), established pursuant to article 5 of the Algiers Agreement of 12 December 2000 between the two states, is a rather different and legally more interesting kind of body, despite its restricted territorial reach. The mandate of this Commission is:

To decide through binding arbitration all claims for loss, damage or injury by one Government against the other and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.⁸¹²

The EECC is an adversarial forum, where allegations may be made of unlawful conduct by either of the two states subject to the EECC's arbitration, with the latter's task being to adjudicate such claims and decide on liability. EECC members are international lawyers, and the claims brought so far have been prepared with the involvement on both sides of leading international experts on the law of state responsibility. Notwithstanding the relative obscurity of the conflict to which the claims relate, the EECC's decisions are thus of considerable general interest.

⁸⁰⁸ See UNSCR 692. Further Security Council Resolutions were passed to establish the modalities for the allocation of funds to the Commission out of Iraqi oil revenue (see UNSCRs 705, 986 and 1483).

⁸⁰⁹ See UNSCR 687.

⁸¹⁰ See David Caron and Brian Morris 'The UN Compensation Commission: practical justice, not retribution' (2002), *EJIL*.

⁸¹¹ UN report S/22559 of 02.05.91.

⁸¹² See website of the Permanent Court of Arbitration.

Of particular interest in relation to the question of state responsibility for failure to take precautions in attack is the EECC's *Partial Award, Central Front (Ethiopia's Claim 2)* of 28 April 2004.⁸¹³ In making this award, the EECC determined that Eritrea, having failed to take the legally required precautions during an attack on a military objective,⁸¹⁴ was liable for the deaths, wounds and physical damage to civilians and civilian objects in Ethiopian territory which had been caused thereby.⁸¹⁵ The EECC accepted that the attack in question had been intended for an airfield that was unquestionably a military objective. But it considered that Eritrea had failed to take all feasible precautions to prevent two out of four of the attacking planes from mistaking their target and dropping cluster bombs in the vicinity of a school and a civilian neighbourhood, causing death and injury as a result.⁸¹⁶ Eritrea was thus held to have committed an internationally wrongful act and, consequently, to be liable to pay compensation.

e) Alien suits in domestic courts

Where a state whose nationals have been injured by another state's failure to comply with its obligations is unable or unwilling to seek redress from the responsible state, it may be possible for the individual victims or their relatives to seek redress through civil proceedings in the domestic courts of the responsible state.⁸¹⁷ This may, sometimes, be a means by which redress may be obtained

⁸¹³ See *ibid.* for the text of this Award.

⁸¹⁴ The EECC's policy of considering not only the provisions of the Geneva Conventions but also those of Additional Protocol I as applicable law in relation to the conflict, (except in the event of a provision being specifically objected to by one or other of the states concerned) is a pragmatic approach, adopted in the interest of the expeditious settlement of claims (unattributable statement, Royal Institute of International Affairs Conference on Customary International Humanitarian law, 18-19 April, 2005). See also section V.B of the EECC's Award in this case.

⁸¹⁵ *Ibid.* para.V.D.9

⁸¹⁶ *Ibid.* paras.IV.J.101-113.

⁸¹⁷ In 2003, relatives of Yugoslav civilians killed in the NATO air strike against Vavarin Bridge in Serbia in 1999 brought civil proceedings for damages against the German government in a state court in Bonn, not on the grounds that German planes had participated in the attack (they had not), but on the grounds of Germany's participation in the alliance responsible for an attack which they argued was illegal ('Serbs sue Germany over bridge attack', BBC Online, 15.10.03). The claim was rejected at first instance and on appeal. Significantly, however, the Higher Regional Court of Cologne ruled that under German law, an individual could, in principle, claim compensation for a wrongful act committed by governmental authorities, whether in time of war or peace. The appeal was rejected on the basis that in this particular instance, on the facts, no wrongful act could be attributed to the governmental authorities of Germany (judgment of 28.07.05 summarized in

from a state organ for a violation of international law. But it cannot be considered a means of holding a state formally to account for an internationally wrongful act. In the event of such proceedings succeeding, it would be a case of a state's judiciary ruling against a branch of the executive in favour of an individual or individuals within the context of that state's municipal law – the domestic enforcement of the state's own administrative law, in short, not a finding of state responsibility under international law.

7.4. Non-judicial enforcement of state responsibility

Although there are several judicial forums in which states may in principle be held to account for failing to comply with their legal obligations in relation to precautions in attack, states often have strong political and diplomatic incentives to make amends in a way that avoids judicial proceedings. In at least two cases during the period under review where states have suffered injury as a result of another state's apparent failure to take precautions in attack, reparation was made without any formal adjudication: after the shooting down of an Iranian civil airliner by the USS *Vincennes* in 1988, and after of the bombing of the Chinese Embassy by the US Air Force in 1999, compensation was agreed as a result of negotiation between the states concerned, with no direct judicial involvement.⁸¹⁸

When harm is caused as a result of a state's failure to take proper precautions in attack, and the state is initially unwilling to offer compensation to the victims or indicate what steps it will take to prevent the same thing happening again, third party pressure from other states may be at least as effective as judicial proceedings

English in *Bofaxe*, No. 295E of 02.09.05, published by the Institute for International Law of Peace and Humanitarian Law of the Ruhr-University, Bochum). By contrast, in Italy, when a claim was brought by a group of Serbian nationals, seeking to establish the responsibility of the Italian state for the deaths of their relatives in the NATO air strike against the RTS television station in Belgrade in 1999, the Court of Cassation ruled that it lacked jurisdiction over the claim as it related to the conduct of international relations, which was a sovereign activity (*President of the Council of Ministers v. Markovic and Others* (2002), Court of Cassation (Italy). For a critical analysis of this case, see Micaela Frulli 'When are states liable towards individuals for serious violations of humanitarian law? The *Markovic* case' (2003), *Journal of International Criminal Justice*). See also *Mohammed Bici and Skender Bici v. Ministry of Defence*.

⁸¹⁸ See 'Contemporary Practice of the US' (2000), (ed. Sean Murphy), *AJIL*, 130-131 and US President Clinton's statement to the US Congress of 16.05.96, (<http://clinton6.nara.gov> , visited 23.06.05).

in inducing the responsible state to make reparation. The obligation states parties to the Geneva Conventions and Additional Protocol I assume to 'respect and to ensure respect' for these treaties⁸¹⁹ can be construed as an obligation on third party states to use their influence to promote compliance by other states.⁸²⁰ This interpretation finds authoritative support in the ICJ's advisory opinion on *The Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory* in which the Court declared 'it follows from that provision [article 1 of the Fourth Geneva Convention] that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with'.⁸²¹ Article 89 of Additional Protocol I furthermore provides (vaguely) that in case of serious violations of the Protocol or of the Geneva Conventions, states parties must 'act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter'. Article 90 of the Protocol provides for the establishment of an 'International Fact Finding Commission' to investigate the facts of alleged serious violations of the Protocol or of the Geneva Conventions, and to 'facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol'. Unfortunately, though the Commission was eventually set up in 1992-1993, it was on no occasion made use of as a means of holding states to account during the period under review.⁸²²

There are a number of ways third party influence can be exercised. Where violations of the law of armed conflict by a state's armed forces are routine or particularly obnoxious, confidential representations can be made by heads of diplomatic missions to their host governments, objecting to such conduct and warning of its potential political cost. States with armed forces known and respected for their professionalism can, by means of military attachés in diplomatic missions or military advisers seconded to military training

⁸¹⁹ See first article of all five treaties.

⁸²⁰ See Sassoli, 'State Responsibility', 421-422, and Laurence Boisson de Chazournes and Luigi Condorelli, 'Common article 1 of the Geneva Conventions revisited: protecting collective interests' (2000), *IRRC*.

⁸²¹ Para.158.

⁸²² See Adam Roberts, 'The role of humanitarian issues in international politics in the 1990s' and Luigi Condorelli, 'La Commission internationale humanitaire d'établissement des faits: un outil obsolète ou un moyen utile de mise en œuvre du droit international humanitaire?' (2001), *IRRC*.

establishments in other countries, provide advice to host governments in relation to good practice. Defence sales and military training programmes can be made conditional, to some extent at least, on the recipient state's willingness to observe proper standards of care in the conduct of military operations.⁸²³

International organizations do not have the same formal, legal duty as states to ensure the law of armed conflict is respected. Members of UN peace support operations and other international missions are often, however, at least as well placed to exercise influence on the parties to a conflict to comply with their obligations under the law of armed conflict as are diplomats and may have better access to non-state actors. The regular demarches made by members of UNPROFOR and other international actors to parties to the conflict in Bosnia protesting at apparent violations of the law of armed conflict are an example of how this influence can be exercised.⁸²⁴ Questions might be raised about the effectiveness of this kind of action; but insofar as such scepticism is well-founded, it is an argument for more such pressure, not less.⁸²⁵ It should also be recalled that the presence of either diplomatic representatives or representatives of international organizations in conflict zones in which the law is being regularly violated risks being seen by the local authorities as endorsement of such conduct if such people fail to demur.

7.5. Responsibility for violations of the law of armed conflict by armed opposition groups

So far, the responsibility which parties to a conflict, as opposed to individual combatants, may bear for violations of the law of armed conflict has been considered in this chapter in terms of the responsibility of states, not armed opposition groups. There is a reason for this. It is a necessary feature of the international legal order that the *quid pro quo* of the exercise of sovereignty by

⁸²³ See also Sassoli, 'State Responsibility', 430-431.

⁸²⁴ See *Galic (Trial Judgement)*, paras. 667-675.

⁸²⁵ See Munoz-Rojaz and Fresard, 'The roots of behaviour in war: understanding and preventing IHL violations' for analysis of the relative effectiveness of various ways of seeking by non-judicial means to influence combatants to comply with the law of armed conflict.

states is accountability for compliance with international law.⁸²⁶ State responsibility for violations of the law of armed conflict cannot be seen as simply a form of collective or corporate responsibility, where an organized group, rather than an individual, needs to be penalized for a wrongful act or omission. That is not to say that there will be no adverse consequences for armed opposition groups which act in violation of international law; it is simply to say that they cannot, normally, be held to account under the law of state responsibility by international tribunals.

Armed opposition groups may, nevertheless, be held formally to account for their actions under the law of state responsibility if and when they come to power.⁸²⁷ Furthermore, the chances of such groups sustaining sufficient support to be able to come to power (or of being internationally accepted in the event of their becoming the *de facto* government) may be jeopardized by a record of conducting hostilities in total disregard of the safety and welfare of non-combatants.⁸²⁸

Meanwhile, non-judicial enforcement of the rules, for instance by the effective exercise of influence by third parties, arguably has as much chance of influencing armed opposition groups as it does of influencing states – and possibly more, given the relative dependence of armed opposition groups on outside assistance and popular support compared to their governmental opponents.⁸²⁹

⁸²⁶ 'Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian'. (*Arbitral Award in the Palmas case*, 1928).

⁸²⁷ See *Articles on State Responsibility*, article 10 and commentary.

⁸²⁸ Leaders of such groups sometimes recognize the public relations value of claiming to be taking steps for protection of non-combatants, as for instance in 1989 when the Chief of Staff of the FMLN in El Salvador publicly admitted that 'numerous civilians had fallen victim to its actions and accordingly [it had] recommended to its officers and combatants measures to avoid these occurrences in the future' (quoted in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Vol II), 3187, citing IACHR *Annual Report 1988-1989*, Doc. OEA/Ser.L/V/II.76 Doc. 10, (18.09.89), Chapter IV (El Salvador), 166).

⁸²⁹ See Sassoli, 'State Responsibility', 411: 'Violations of IHL by [insurrectional movements] entail their international legal responsibility; this is of particular importance with regard to the corresponding rights and duties of third States in the event of such violations'. See also Max Glaser, *Humanitarian engagement with non-state armed actors* (London, 2005) on the variables likely to affect the receptivity of armed non-state actors to arguments in favour of compliance with international law.

7.6. Conclusions

Judicial practice during the period under review suggests that only rarely will allegations that a state has failed to comply with its international obligations concerning precautions in attack result in the merits of such claims being heard by an international tribunal. Nevertheless, such failure may have adverse consequences, both financially and politically, even in the context of an internal conflict.

Where internal conflicts are concerned, holding states to account before international tribunals such as the ECtHR is almost by definition an asymmetric means of enforcing compliance. But the non-judicial means by which external actors can exert political, moral and economic pressure on belligerents, including armed opposition groups, to comply with the rules on precautions on attack are usually as relevant to internal conflicts as to international ones. The importance of these non-judicial enforcement measures, whatever the nature of the military operation, should not be under-estimated, just as the importance of judicial enforcement should not be over-estimated. Compensation can be paid, satisfaction given and measures instituted to ensure non-repetition of internationally wrongful acts without any need for judicial involvement. Ideally, this should be the norm, with international tribunals being called upon to pronounce only in cases where the legal issues are complex and require expert judicial appraisal.

The element of the law of state responsibility, as represented by the ILC's *Articles*, requiring states found responsible for violating their obligations to cease doing so and to give assurances of non-repetition potentially has great protective value for non-combatants in conflict zones. And the rule requiring states responsible for internationally wrongful acts to make full reparation to the victim state(s) holds out greater promise of meaningful redress for the individual victims of violations of the law armed conflict than does the successful prosecution of

individuals.⁸³⁰ Where effective enforcement on the international plane of the obligation under international law to take precautions in attack is concerned, there is much to be said for looking less to international criminal law, and more to the modern law of state responsibility as set out in the ILC's *Articles*.

⁸³⁰ War crimes trials have not traditionally led to compensation for the victims. Article 75 of the ICC Statute seeks to remedy this by providing for the possibility of reparations for war crimes' victims by means either of an order directly against a convicted person, or through a Trust Fund established for this purpose. The effectiveness of this mechanism remains to be seen.

CONCLUSION

We shall utterly fail to understand the true character of the law of war unless we realize that its purpose is almost entirely humanitarian in the literal sense of the word, namely to protect or mitigate suffering, and, in some cases, to rescue life from the savagery of battle and passion.

*Sir Hersch Lauterpacht*⁸³¹

Some of the rules of the law of armed conflict have an ancient pedigree, such as that prohibiting the use of poison as a weapon of war, recognized by the ancient Greeks and Romans.⁸³² But the willingness and ability of belligerents to protect the civilian population of the enemy (as opposed to certain categories of enemy civilian) from the effects of hostilities is relatively modern. It was not until the last quartile of the twentieth century that international opinion finally coalesced around the view that direct attacks against enemy civilians in their own country were not acts of war, but crimes. It was during the same period that new international rules took shape requiring states not only to criminalize deliberate attacks on civilians and non-combatants in wartime, but also to take a considerable degree of care during the conduct of hostilities to avoid causing non-combatant casualties or damage to civilian objects by accident or incidentally. The question thus arose, were the new rules capable of implementation on the modern battlefield and in wars against opponents not necessarily inhibited by the same scruples - or was signing up to them an indulgence which only those states not expecting ever to have to wage war in earnest could permit themselves?

It is submitted that in the light of legal developments and of practice during conflicts between 1980 and 2005, the following rules now not only represent customary law binding on all parties to armed conflicts, but can also be observed in practice on the modern battlefield without detriment to military effectiveness:

- Military objectives are those objectives which by their purpose, function, location or use make an effective contribution to military action and whose

⁸³¹ 'The problem of the revision of the law of war' (1952), *BYIL* 1952.

⁸³² See Coleman Phillipson, *International Law and Custom of Ancient Greece and Rome*, (London, 1911) (Vol.II), 204, 208 and 231.

partial or total destruction, capture or neutralization in the circumstances ruling at the time offers a definite military advantage. Nothing else may be attacked deliberately by whatever means. (This rule does not preclude the legitimacy of proportionate action in self-defence).

- Belligerents must do everything feasible to verify the nature of a prospective target. ('Feasible' means what is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations). If targets cannot be identified with confidence as military objectives, they should not be attacked.
- Belligerents must take all feasible precautions in the choice of methods and means of attack with a view to eliminating or minimizing collateral damage. Combatants are not obliged by law to disregard their own safety in the interests of protecting civilian life, but are required to be prepared to take some risks for the sake of carrying out an attack with discrimination.
- Attacks may not be launched which are expected to cause collateral damage clearly excessive in relation to the concrete and direct military advantage anticipated from the attack. For the purposes of assessing whether an attack would be disproportionate, 'attack' means an attack as a whole, not just an isolated part of it. It does not, however, mean 'campaign'.
- In advance of attacks liable to affect the civilian population, attacking forces must, where possible, give effective warnings to civilians to stay away from places of danger. The warnings need to be clear and specific and to allow sufficient time to be acted on. They can only be dispensed with in exceptional circumstances where they are clearly impractical and there is an immediate need for defensive action or where surprise is essential to the success of an attack.
- Those with authority over the civilian population, and civilians themselves, bear responsibility for ensuring non-combatants remain at a

relatively safe distance from objects in a conflict zone which clearly meet the above definition of a military objective. Civilian leaders have a particular responsibility to ensure that the most vulnerable members of the civilian population are adequately protected from the dangers of military operations.

These rules have implications not only for the conduct of attacking forces, but also for non-combatants themselves. Though the demands made of belligerents by modern international law are considerable, there is a limit to what can reasonably be expected of an attacking force, given the number of things that can go wrong in armed conflict, and the safety of civilians in conflict zones will not be promoted by encouraging them to expect to be able to continue going about their lives and business exactly as normal while hostilities take place with clinical precision around them.

Few if any of the examples of good practice identified in Chapters 4 and 5 could be said to be in themselves legal requirements. But while the law cannot insist on military training being carried out in a certain way, warnings being given in a particular form, or on specific procedures being adopted for the observation of targets, there are good military and political reasons for states (and armed opposition groups) to identify, adopt, promote and enforce, at their discretion, good practice with respect to precautions in attack. Not only will this pay dividends in terms of winning hearts and minds during a military campaign; it will also help sustain domestic and international support for legitimate military operations, as well as promoting and sustaining the professional self-respect of those military personnel engaged in them.⁸³³ In the case of a state party to the ECHR, it will reduce the risk of adverse rulings in Strasbourg. Systematic failure on the part of individuals or states to comply with commonly recognized rules on targeting and precautions in attack may not often lead to judicial proceedings on the international plane, but may provoke retaliation in kind, leading to bitter cycles of reprisal and counter-reprisal, in which sight of the initial political aims

⁸³³ According to modern British defence doctrine 'The combination of war-fighting skills and humanity may seem paradoxical. However, a vitally important part of motivation is the belief in what one is doing: the measured application of force requires discipline and a finely tuned sense of moral purpose' (JWP 0-01 (2nd Edition), iii).

of the resort to military force becomes lost and the prospects of reconciliation recede ever further away.

This thesis has attempted to pin down some of the practical steps that can be taken (and advocated) by combatants and civilian leaders at various levels with a view to reducing the rate of non-combatant death and injury caused unintentionally, but nonetheless avoidably, in modern armed conflicts. It has looked at the possible consequences on the international plane for individuals and for states of failure to take reasonable precautions in attack during armed conflict. Limited access to material, time constraint and the need to keep the thesis a manageable size have precluded a comprehensive review of practice worldwide in terms of taking precautions in attack, though it is hoped that the practice drawn on has been sufficient to illustrate some best practice which may remain relevant to the conduct of hostilities in both international and internal conflict for some years to come, at least. Further research could reveal more evidence of how the obligation to take precautions in attack has been implemented and enforced in recent conflicts in different parts of the world. There is also much more that could be said about the implications of the obligation under international law to take precautions in attack for research and development in the defence industry and for defence procurement. Finally, systematic collection and analysis of mortality data relating to international armed conflicts during the period under review and during an appropriate ‘recall’ period (1940-1975, for instance)⁸³⁴ might be able to give a more scientific indication than has been possible in this thesis of the extent to which the new rules on the conduct of hostilities drawn up in 1977, and the efforts of belligerents to apply them in practice, may truly have served, in the words of Lauterpacht cited at the beginning of this chapter, ‘to protect or mitigate suffering and...rescue life from the savagery of battle and passion.’

⁸³⁴ For an accessible introduction to the techniques of collecting and interpreting mortality data in abnormal situations, see Francesco Checchi and Les Roberts, *Interpreting and using mortality data in humanitarian emergencies: a primer for non-epidemiologists* (London, 2005).

**TABLE OF TREATIES, STATUTES AND OTHER INTERNATIONAL
LEGAL CODES***

- 1863 Instructions for the Government of Armies of the United States in the Field (Lieber Code) (reprinted in Schindler and Toman, *The Laws of Armed Conflict* (2nd Edition)).
- 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and annexed Regulations (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).
- 1907 Hague Convention VII Relating to the Conversion of Merchant Ships into War-Ships (reprinted in Schindler and Toman, *The Laws of Armed Conflict* (2nd Edition))
- 1907 Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).
- 1907 Hague Convention IX Concerning Bombardment by Naval Forces in Time of War (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).
- 1907 Hague Convention XI Relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War (reprinted in Schindler and Toman, *The Laws of Armed Conflict* (2nd Edition)).
- 1907 Hague Declaration XIV Prohibiting the Discharge of Projectiles and Explosives from Balloons (reprinted in Schindler and Toman, *The Laws of Armed Conflict* (2nd Edition)).

*Full texts of treaties on the law of armed conflict referred to in the thesis can additionally be found via the ICRC's international humanitarian law database (<http://www.icrc.org/ihl>) together with up-to-date lists of states parties and texts of reservations and statements of understandings made by states parties on signature or ratification.

- 1923 Hague Rules of Aerial Warfare (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).

- 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).

- 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 (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).

- 1944 Chicago Convention on International Civil Aviation (15 UNTS, 295)

- 1945 Charter of the United Nations and Statute of the International Court of Justice (reprinted in Brownlie, *Basic Documents in International Law* (4th Edition)).

- 1945 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 (reprinted in Schindler and Toman, *The Laws of Armed Conflict* (2nd Edition)).

- 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).

- 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).

- 1949 Geneva Convention III Relative to the Treatment of Prisoners of War (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).

- 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition))

- 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (reprinted in Ghandhi, *Blackstone's International Human Rights Documents*).

- 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and annexed Regulations (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).

- 1966 International Covenant on Civil and Political Rights (reprinted in Ghandhi, *Blackstone's International Human Rights Documents*).

- 1969 Vienna Convention on the Law of Treaties (reprinted in Brownlie, *Basic Documents in International Law* (4th Edition)).

- 1969 American Convention on Human Rights (reprinted in Ghandhi, *Blackstone's International Human Rights Documents*).

- 1977 Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).

- 1977 Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).

1980 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 Protocol I on Non-Detectable Fragments
- 1980 Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices
- 1980 Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons
- 1995 Protocol IV on Blinding Laser Weapons
- 1996 Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices
- 2003 Protocol V on Explosive Remnants of War

(all the above reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition), except for Protocol V, available via the ICRC's international humanitarian law database at <http://www.icrc.org/ihl> . Texts of the technical annexes to Amended Protocol II and to Protocol V are also available via the latter database).

1981 African Charter on Human and Peoples' Rights (reprinted in Ghandhi, *Blackstone's International Human Rights Documents*).

1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (reprinted in Rodley, *The Treatment of Prisoners under International Law* (2nd Edition)).

1993 Statute of the International Criminal Tribunal for the former Yugoslavia (reprinted in Kittichaisaree, *International Criminal Law*).

- 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (reprinted in 32 *International Legal Materials*).
- 1994 Statute of the International Criminal Tribunal for Rwanda (reprinted in Kittichaisaree, *International Criminal Law*).
- 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).
- 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).
- 1998 Rome Statute of the International Criminal Court and Elements of Crimes (reprinted in Kittichaisaree, *International Criminal Law*).
- 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).
- 1999 UN Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law (reprinted in Roberts and Guelff, *Documents on the Laws of War* (3rd Edition)).
- 2001 The International Law Commission's Articles on State Responsibility (reprinted in Crawford, *The International Law Commission's Articles on State Responsibility*).

TABLE OF CASES*

1. European Court of Human Rights

(2001). Bankovic et. al. v. Belgium et. al.. **App. No. 52207/99**

(1998). Ergi v. Turkey. **App. No. 23818/94**

(1997). Findlay v. United Kingdom. **App. No. 22107/93**

(1998). Gulec v. Turkey. **App. No. 21593/93**

(2005). Isayeva v. Russia. **App. No. 57950/00**

(2005). Isayeva, Yusopova and Bazaeva. v. Russia. **App. Nos. 57947/00, 57948/00 and 57949/00**

(2004). Issa v. Turkey. **App. No. 31821/96**

(1998) Kaya v. Turkey. **App. No. 22729/93**

(1995). McCann et.al. v. United Kingdom. **App. No. 18984/91**

(2001). McKerr v. United Kingdom. **App. No. 28883/95**

(2001). Shanagan v. United Kingdom. **App. No. 37715/97**

**Texts of judgments rendered by the International Court of Justice, the European Court of Human Rights, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda can be found on the websites of these tribunals. In the case of ECtHR judgments, these website texts may undergo editorial revision before being published in due course in final form in the ECtHR's Reports of Judgments and Decisions.*

2. Inter-American Court of Human Rights

(1988). Velasquez Rodriguez v. Honduras. Ser. C 4.

3. Inter-American Commission of Human Rights

(1997). Abella v. Argentina, Case No. 11.137. Rep. No 55/97.

(1999). Coard et. al. v. United States, Case No. 10.951. Rep. No.109/99.

4. International Court of Justice and Permanent Court of International Justice

(2004). Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. **ICJ Rep. 2004: 131.**

(1996). Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. **ICJ Rep. 1996: 226.**

(1928). Arbitral Award in the Palmas Case. **22 American Journal of International Law: 867.**

(1970). Barcelona Traction, Light and Power Company, Limited, Second Phase. **ICJ Rep. 1970: 3.**

(1986). Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (Merits). **ICJ Rep. 1986: 14.**

(2000). Case Concerning the Aerial Incident of 10 August 1999 (Pakistan v. India). **ICJ Rep. 2000.**

(1992). Certain Phosphate Lands in Nauru (Nauru v. Australia). **ICJ Rep. 1992:** 240.

(1949). Corfu Channel (United Kingdom v. Albania) (Merits). **ICJ Rep. 1949:** 4.

(1927). Factory at Chorzow (Merits) (Germany v. Poland). **Series A, No. 17.**

(2001). LaGrand (Germany v. United States) (Merits). **ICJ Rep. 2001:** 466.

(1969). North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and the Netherlands). **ICJ Rep. 1969:** 3.

5. International Criminal Tribunal for the former Yugoslavia

(2000). Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Appeals Chamber.

(2000). Prosecutor v. Tihomir Blaskic; Case No. IT-95-14-T, Trial Chamber I.

(2004). Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-A, Appeals Chamber.

(1998). Prosecutor v. Zejnil Delalic et. al., Case No. IT-96-21-T, Trial Chamber II.

(2001). Prosecutor v. Zejnil Delalic et.al.; Case No. IT-96-21-A, Appeals Chamber.

(1997). Prosecutor v. Drazan Erdemovic; Case No. IT-96-22-A, Appeals Chamber.

(2002). Prosecutor v. Stanislav Galic, Motion for Acquittal, Case No. IT-98-29-T, Trial Chamber I.

(2003). Prosecutor v. Stanislav Galic; Case No. IT-98-29-T, Trial Chamber I.

(2003). Prosecutor v. Enver Hadjihasanovic (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility), Case No. IT-01-46-AR72, Appeals Chamber.

(2004). Prosecutor v. Miodrag Jokic, Case No. IT-01-42/1-S, Trial Chamber I.

(2001). Prosecutor v. Dario Kordic and Mario Cerkez, Case No. IT-95-14/2-T, Trial Chamber III.

(2004). Prosecutor v. Dario Kordic and Mario Cerkez; Case No. IT-95-14/2-A, Appeals Chamber.

(2002). Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Trial Chamber II.

(2003). Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Appeals Chamber.

(2000). Prosecutor v. Zoran Kupreskic et.al; Case No. IT-95-16-T, Trial Chamber II.

(1996). Prosecutor v. Milan Martic; Case No. IT-95-11-R61, Trial Chamber I.

(2003). Prosecutor v. Mladen Naletilic and Vinko Martinovic, Case No. IT-98-34-T, Trial Chamber I.

(2005). Prosecutor v. Pavle Strugar, Case No. IT-01-42-T, Trial Chamber II.

(1995). Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber.

(2002). Prosecutor v. Mitar Vasiljevic, Case No. IT-98-32-T, Trial Chamber II.

6. International Criminal Tribunal for Rwanda

(1998). Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Chamber.

(2002). Prosecutor v. Ignace Babilishema, Case No. ICTR-95-1A-A, Appeals Chamber.

(2000). Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Trial Chamber.

7. International Military Tribunal (Nuremberg)

(1947). Trial of the Major War Criminals before the International Military Tribunal, Nuremberg. IMT Secretariat. XXII.

8. National Courts

Australia

(1940). Shaw Savill and Albion Company Ltd. v. The Commonwealth, High Court. [1940] HCA40.

Germany

(2005) Case No. 7 U8/04, Higher Regional Court of Cologne

Italy

(2002). President of the Council of Ministers v. Markovic and Others, Order No. 8157, Court of Cassation, Italy. **85 Rivista di Diritto Internazionale**: 800.

United Kingdom

(2005). Ahmed Amin v. Brown, Chancery Division. [2005] EWHC 1670 (Ch).

(1976). Attorney-General for Northern Ireland's Reference (No. 1 of 1975), House of Lords. [1977] A.C.105.

(2002). R. (on the application of Abbasi and Juma) v. Secretary of State for the Foreign and Commonwealth Office and Secretary of State for the Home Department, Queen's Bench Division. [2002] EWHC 651 (Admin).

(2004). R. (on the application of Al-Skeini and others) v. Secretary of State for Defence, Queen's Bench Division. [2004] EWHC 2911(Admin).

(2005). R. (on the application of Al-Skeini and others) v. Secretary of State for Defence, Court of Appeal (Civil Division). [2005] EWCA Civ 1609.

(2004). Mohammed Bici and Skender Bici v. Ministry of Defence, High Court of Justice Queen's Bench Division, Leeds District Registry. [2004] EWHC 786.

(1995). R. v. Clegg, House of Lords. [1995] 1 A.C. 482.

(1967). R. v. Lamb, Queen's Bench Division. [1967] 2QB 981.

(1980). Whitehouse v. Jordan, House of Lords. [1981]1 All ER 267.

(2003). The Government of the Russian Federation v. Ahmed Zakaev, Bow Street Magistrates' Court.

United States

(1948). US v. Wilhelm von Leeb et. al., US Military Tribunal, Nuremberg. **Trials of War Criminals before the Nuernberg Military Tribunals XI.**

(1948). US v. Wilhelm List et.al., US Military Tribunal, Nuremberg. **Trials of War Criminals before the Nuernberg Military Tribunals, XI.**

(1948). US v. Ohlendorf et. al., US Military Tribunal, Nuremberg. **Trials of War Criminals before the Nuernberg Military Tribunals IV: 467.**

(1942). Ex Parte Quirin et. al., US Supreme Court. **317 US1.**

(1946). Petition to the Supreme Court of the US (Yamashita), US Supreme Court. **Law Reports of Trials of War Criminals UNWCC, IV.**

(1945). Trial of General Tomoyuki Yamashita, US Military Commission, Manila. **Law Reports of Trials of War Criminals, UNWCC, IV.**

BIBLIOGRAPHY

1. Works cited*

Abresch, W. (2005). "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya." European Journal of International Law 16.

Aldrich, G. (1981). "New Life for the Laws of War." American Journal of International Law 75.

Ambos, K. (2001). Superior responsibility. International Criminal Law: a Commentary on the Rome Statute for an International Criminal Court. A. Cassese, A. Eser and G. Gaja. Oxford, Oxford University Press.

American Law Institute (1987). Restatement (Third) of the Foreign Relations Law of the United States. Washington, American Law Institute.

Anonymous (2005). When deadly force bumps into hearts and minds. The Economist, 1 January 2005.

Aust, A. (2000). Modern Treaty Law and Practice. New York, Cambridge University Press.

Barry, J. and E. Thomas (2003). The Kosovo Cover-up. Newsweek, 15 May 2003.

Baumgarth, W. and R. Regan, Eds. (1988). Saint Thomas Aquinas - On Law, Morality and Politics. Indianapolis, Hackett Publishing Company.

Bellamy, C. (1982). "The Russian artillery and the origins of indirect fire." Army Quarterly.

* Dates given in brackets refer to the date of publication of the text cited.

Best, G. (1980). Humanity in Warfare. London, Weidenfeld and Nicolson.

Boelaert-Suominen, S. (2000). "Grave breaches, universal jurisdiction and internal armed conflict: is customary law moving towards a uniform enforcement mechanism for all armed conflicts?" Journal of Conflict and Security Law 5.

Boisson de Chazournes, L. and L. Condorelli (2000). "Common article 1 of the Geneva Conventions revisited: protecting collective interests." International Review of the Red Cross 82.

Bone, J. (2004). Anger at fine for 'friendly fire' pilot. The Times, 5 July 2004. London.

Bonsignore, E. and M. Annati (2003). "Non-lethal weapons: possibilities, programmes, perspectives and problems." Military Technology XXVII.

Bourbonniere, M. (2004). "Law of Armed Conflict (LOAC) and the neutralisation of satellites or *ius in bello satellitis*." Journal of Conflict and Security Law 9.

Boyle, T. (2000). Proportionality in decision-making and combat actions. Protecting Civilians in 21st Century Warfare: Target Selection, Proportionality and Precautionary Measures in Law and Practice, Nijmegen, Wolf Legal Publications.

Brownlie, I., Ed. (1995). Basic Documents in International Law, 4th Edition. Oxford, Clarendon Press.

Brownlie, I. (1998). Principles of Public International Law, 5th Edition. Oxford, Oxford University Press.

Butcher, T. (2005). Israeli soldier jailed for killing peace activist. Daily Telegraph, 12 August 2005. London.

Butler, R. J. (2002). "Modern War, Modern Law, and Army Doctrine: Are We in Step for the 21st Century?" Parameters.

Carnahan, B. (1982). "Linebacker II and Protocol I: the Convergence of Law and Professionalism." American University Law Review 31.

Caron, D. D. and B. Morris (2002). "The UN Compensation Commission: practical justice, not retribution." European Journal of International Law 13.

Celestan, G. J. (1996). Wounded Bear: the Ongoing Russian Military Operation in Chechnya.

<http://fmso.leavenworth.army.mil/fmsopubs/issues/wounded/wounded.htm>.

Checchi, F. and L. Roberts (2005). Interpreting and using mortality data in humanitarian emergencies: a primer for non-epidemiologists. London, Overseas Development Institute.

Clark, R. (2001). "The mental element in international criminal law: the Rome Statute of the International Criminal Court and the Elements of Offences." Criminal Law Forum 12.

Clark, W. (2002). Waging Modern War. Oxford, PublicAffairsLtd.

Collins, T. (2005). Rules of Engagement. London, Headline.

Cordesman, A. H. (2003). The Iraq War: Strategy, Tactics and Military Lessons. Washington, CSIS Press.

Cordesman, A. H. (2004). The Ongoing Lessons of Afghanistan. Washington, CSIS Press.

Cordesman, A. H. and A. R. Wagener (1990). The Lessons of Modern War II: the Iran-Iraq War. London, Mansell.

Coupland, G. W., Ed. (1949). Honor Bonet: The Tree of Battles. Liverpool, Liverpool University Press.

Crawford, J. (2002). The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries. Cambridge, Cambridge University Press.

Cryer, R. (2001). "The boundaries of liability in international criminal law or 'selectivity by stealth'." Journal of Conflict and Security Law 6.

Cryer, R. (2002). "The fine art of friendship: *jus in bello* in Afghanistan." Journal of Conflict and Security Law 7.

Cryer, R. (2002). "Implementation of the International Criminal Court Statute in England and Wales." International Comparative Law Quarterly 51.

Cryer, R. (2004). General principles of liability in international criminal law. The Permanent International Criminal Court. D. McGoldrick, P. Rowe and E. Donnelly. Oxford, Hart Publishing.

D'Agostino, J. (2004). Air Force Pilot Fights to Clear His Name in Friendly Fire Case. <http://www.humaneventsonline.com>.

Daoust, I., R. Coupland, et al. (2002). "New wars, new weapons? The obligation of States to assess the legality of means and methods of warfare." International Review of the Red Cross 84.

De Guttry, A. and N. Ronzitti, Eds. (1993). The Iran-Iraq War of 1980-1988 and the Law of Naval Warfare. Cambridge, Grotius Publications.

De Haan, P. (2002). 50 Years and Counting; the Impact of the Korean War on the People of the Peninsula. http://www.calvin-edu/news/releases/2001_02/korea.htm.

De la Billiere, P. (1992). Storm Command: a Personal Account of the Gulf War. London, HarperCollins.

De Vattel, E. (1775). The Law of Nations. Amsterdam.

Dekker, I. and H. Post, Eds. (1992). The Gulf War of 1980-1988; the Iran-Iraq War in International Legal Perspective. Dordrecht, Martinus Nijhoff Publishers.

Dennis, M. (2005). "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation." American Journal of International Law 99.

Detter, I. (2000). The Law of War, 2nd Edition. Cambridge, Cambridge University Press.

Dinstein, Y. (2004). The Conduct of Hostilities under the Law of International Armed Conflict. Cambridge, Cambridge University Press.

Dinstein, Y. (2005). War, Aggression and Self-Defence, 4th Edition. Cambridge, Cambridge University Press.

Donitz, K. (2000). Memoirs: Ten Years and Twenty Days. London, Cassell Military Paperbacks.

Doswald-Beck, L., Ed. (1995). San Remo Manual on International Law Applicable to Armed Conflicts at Sea. Cambridge, Cambridge University Press.

Edwards, J. (2005). The Geeks of War (the Secretive Labs and Brilliant Minds Behind Tomorrow's Warfare Technologies). New York, Amacom Books.

Eide, A., A. Rosas, et al. (1995). "Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards." American Journal of International Law 89.

Eser, A. (2001). Mistake of fact and mistake of law. International Criminal law: a Commentary on the Rome Statute for an International Criminal Court. A. Cassese, A. Eser and G. Gaja. Oxford, Oxford University Press.

Evans, M. (2005). Civilians are given role in new forces justice system. The Times, 2 December 2005. London.

Farrell, S. (2002). Woman aged 95 becomes oldest victim of intifada. The Times, 4 December 2002. London.

Farrell, S. (2004). Leave Najaf or die, militiamen told. The Times, 11 August 2004. London.

Fenrick, W. (1997). "Attacking the Enemy Civilian as a Punishable Offence." Duke Journal of Comparative and International Law 7.

Fidler, S. (2002). US military looks again at non-lethal weapons. Financial Times, 5 December 2002. London.

Fleck, D., Ed. (1995). The Handbook of Humanitarian Law in Armed Conflicts. Oxford, Oxford University Press.

Fleck, D., Ed. (2001). The Handbook of the Law of Visiting Forces. Oxford, Oxford University Press.

Fletcher, G. P. (1998). Basic Concepts of Criminal Law. New York, Oxford University Press.

Forage, P. (2002). "Bombs for peace: a comparative study of the use of air power in the Balkans." Armed Forces and Society 28.

Freedman, L. and E. Karsh (1994). The Gulf Conflict 1990-1991: Diplomacy and War in the New World Order. London, Faber and Faber.

Freinberg, T. and S. Rayment (2004). Microwave gun to be used by US troops on Iraq rioters. Sunday Telegraph, 19 September 2004.

Frulli, M. (2003). "When are states liable towards individuals for serious violations of humanitarian law?" Journal of International Criminal Justice 1.

Gaeta, P. (1996). "The armed conflict in Chechnya and the Russian Constitutional Court." European Journal of International Law 7.

Gall, C. and T. de Waal (1997). Chechnya: a Small Victorious War. London, Pan Books.

Garraway, C. (2002). "Training: the whys and wherefores." Social Research 69.

Gehring, R. (1978). "Protection of Civilian Infrastructures." Law and contemporary Problems, school of Law, Duke University XLII.

Ghandhi, P. R., Ed. (1995). Blackstone's International Human Rights Documents. London, Blackstone Press Ltd.

Gilbert, G. (1990). "The criminal responsibility of states." International Comparative Law Quarterly 39.

Gillard, E.-C. (2003). "Reparation for violations of international humanitarian law." International Review of the Red Cross 85.

Glaser, M. (2005). Humanitarian engagement with non-state armed actors. London, Overseas Development Institute.

Glover, J. (2001). Humanity; a Moral History of the Twentieth Century. London, Pimlico.

Glover, M. (2001). The Peninsular War 1807-1814. London, Penguin.

Graditzky, T. (1998). "Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts." International Review of the Red Cross.

Grant, R. (2003). "The Re-definition of Strategic Airpower." Air Force Magazine 86.

Graves, R. (1960). Goodbye to All That. London, Penguin.

Gray, C. (2000). International Law and the Use of Force. Oxford, Oxford University Press.

Green, L. C. (1989). "Superior Orders and Command Responsibility." Canadian Yearbook of International Law 27.

Green, L. C. (1995). "Command Responsibility in International Humanitarian Law." Transnational Law and Contemporary Problems 5.

Green, L. C. (2000). The Contemporary Law of Armed Conflict, 2nd Edition. Manchester, Manchester University Press.

Greenwood, C. (1993). "Command and the laws of armed conflict." Strategic and Combat Studies Institute(Occasional paper no. 4).

Greenwood, C. (1998). The Law of Weaponry at the Start of the New Millenium. International Law Studies. M. N. Schmitt and L. C. Green. Newport, RI, Naval War College. 71.

Greenwood, C. (2004). "Command responsibility and the *Hadjihasanovic* decision." Journal of International Criminal Justice 2.

Grunawalt, R. (1988). "The Rights of Neutrals and Belligerents." Ocean Development and International Law 19.

Hampson, F. (1989). "Fighting by the rules: instructing the armed forces in humanitarian law." International Review of the Red Cross.

Hampson, F. (1993). Means and methods of warfare in the conflict in the Gulf. The Gulf War in International and English Law. P. Rowe. London, Routledge.

Hanke, H. M. (1993). "The Hague Rules of Air Warfare." International Review of the Red Cross.

Hanzhang, T., Ed. (1993). Sun Tzu: The Art of War. Ware, UK, Wordsworth.

Harden, T. (2004). Fallujah will be your Stalingrad, Americans told. Daily Telegraph, 26 April 2004. London.

Hector, M. and M. Jellema, Eds. (2001). Protecting Civilians in 21st Century Warfare; Target Selection, Proportionality and Precautionary Measures in Law and Practice. Nijmegen, Wolf Legal Publications.

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

Herby, P. and A. Nuiten (2001). "Explosive remnants of war: protecting civilians through an Additional Protocol to the 1980 Convention on Certain Conventional Weapons." International Review of the Red Cross 83.

Herthel, T. J. (2001). "On the Chopping Block: Cluster Munitions and the Law of War." Air Force Law Review 51.

Hider, J. (2004). Rules get ragged as death comes from all quarters. The Times, 15 April 2004. London.

Higgins, R. (1998). Problems and Process: International Law and How We Use it. Oxford, Clarendon Press.

Hills, A. (2004). Future War in Cities: Rethinking a Liberal Dilemma. London, Frank Cass.

Infeld, D. (1992). "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." George Washington Journal of International Law and Economy 26.

Jaber, H. (2004). Suicide squads await US troops' assault on Falluja. Sunday Times, 7 November 2004. London.

Jesdanum, A. (2003). Satellite Phones in Iraq Could Become Beacons for Bombs. Associated Press, 21 March 2003.

Kalshoven, F. (1984). The soldier and his golf clubs. Studies and Essays on International Humanitarian Law in Honour of Jean Pictet. C. Swinarski. Geneva, International Committee of the Red Cross.

Kalshoven, F. (1991). "State responsibility for warlike acts of the armed forces." International Comparative Law Quarterly 40.

Keen, M. (1984). Chivalry. London, Yale University Press.

Keen, M. (1965). The Laws of War in the Late Middle Ages. Chatham, Routledge and Kegan Paul.

Keeva, S. (1991). "Lawyers in the Storm." ABA Journal.

Kilner, P. (2002). "Military Leaders' Obligation to Justify Killing in War." Military Review.

Kittichaisaree, K. (2001). International Criminal Law. Oxford, Oxford University Press.

Krulak, C. C. (1999). "The Strategic Corporal: Leadership in the Three Block War." Marines Magazine.

Lauterpacht, H., Ed. (1952). Oppenheim's International Law, Volume II (War), 7th Edition. London, Longman.

Lauterpacht, H. (1952). "The problem of the revision of the law of war." British Yearbook of International Law.

LeBlanc, D. (2003). Friendly Fire Pilots to Escape Harsh Penalties. The Globe and Mail, 20 June 2003.

Levie, H. (1998). "Command Responsibility." Journal of Legal Studies 8.

Lieven, A. (1999). Chechnya: Tombstone of Russian Power. New Haven London, Yale University Press.

Lloyd Roberts, D. (1999). Staying Alive: safety and security guidelines for humanitarian volunteers in conflict areas. Geneva, International Committee of the Red Cross.

Loye, D. (1997). "Making the distinctive emblem visible to thermal imaging cameras." International Review of the Red Cross.

Luttwak, E. N. (2001). Strategy: the Logic of War and Peace. Cambridge, Mass., Belknap Press of Harvard University Press.

Malanczuk, P., Ed. (1997). Akehurst's Modern Introduction to International Law, 7th Edition. London, New York, Routledge.

Maresca, L. and S. Maslen (2000). The Banning of Anti-Personnel Weapons. Cambridge, Cambridge University Press.

Massie, R. (2004). Castles of Steel. London, Jonathan Cape.

Matheson, M. (1987). The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions. Humanitarian Law Conference, Washington, American University Journal of International Law and Policy.

McCarthy, C. (2005). "The paradox of the international law of military occupation: sovereignty and the reformation of Iraq." Journal of Conflict and Security Law 10.

McClelland, J. (2003). "The review of weapons in accordance with article 36 of Additional Protocol I." International Review of the Red Cross 85.

McCoubrey, H. (1997). "Due process and British courts-martial: a commentary on the Findlay case." Journal of Armed Conflict Law 2.

Meron, T. (1993). Henry's Wars and Shakespeare's Laws. Oxford, Clarendon Press.

Meron, T. (1995). "The Extraterritoriality of Human Rights Treaties." American Journal of International Law 89.

Mettraux, G. (2004). International Crimes and the Ad Hoc Tribunals. Oxford, Oxford University Press.

Meyer, J. M. (2001). "Tearing Down the Facade; a Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine." Air Force Law Review 51.

Michaelsen, C. (2003). "Maritime exclusion zones in times of armed conflict at sea: legal controversies still unresolved." Journal of Conflict and Security Law 8.

Moir, L. (2002). The Law of Internal Armed Conflict. Cambridge, Cambridge University Press.

Mullerson, R. (1997). "International humanitarian law in internal conflicts." Journal of Armed Conflict Law 2.

Munoz-Rojaz, D. and J.-J. Fresard (2004). "The roots of behaviour in war: understanding and preventing IHL violations." International Review of the Red Cross 86.

Norton, C. (2002). "Operation Allied Force." Royal Air Force Air Power Review 5.

O' Donnell, B. T. and J. C. Kraska (2003). "Humanitarian law: developing international rules for the digital battlefield." Journal of Conflict and Security Law 8.

Pape, R. A. (1996). Bombing to Win: Air Power and Coercion in War. New York, Cornell University Press.

Parks, W. H. (1973). "Command Responsibility for War Crimes." Military Law Review 62.

Parks, W. H. (1989). "Executive Order 12333 and Assassination." The Army Lawyer.

Parks, W. H. (1990). "Air War and the Law of War." Air Force Law Review 32.

Parks, W. H. (1998). "The Protection of Civilians from Air Warfare." Israeli Yearbook on Human Rights.

Partsch, K. J. (1984). "Remnants of War as a Legal Problem in the Light of the Libyan Case." American Journal of International Law 78.

Pellet, A. (1999). "Can a state commit a crime? Definitely, yes!" European Journal of International Law 10.

Pengelly, R. (2000). "French Army in profile: hollow force to hard core." Jane's International Defence Review 6.

Phillipson, C. (1911). International Law and Custom of Ancient Greece and Rome. London.

Pictet, J., Ed. (1952). Commentary on the Geneva Conventions of 12 August 1949. Geneva, International Committee of the Red Cross.

Rayment, S. (2004). Mission possible day or night for pilotless attack helicopter. Sunday Telegraph, 17 October 2004.

Reed, J. (1969). Insurgent Mexico. New York, International Publishers.

Reid, T. (2002). The inside story of the US war cabinet at war. The Times, 23 November 2002. London.

Reisman, W. M. (1997). "The Lessons of Qana." Yale Journal of International Law 22.

Richards, D. (1994). RAF Bomber Command in the Second World War: the Hardest Victory. London, Penguin.

Roach, J. A. (2000). "The Law of Naval Warfare at the Turn of the Two Centuries." American Journal of International Law 64.

Roberts, A. (1990). "The laws of war and the Gulf conflict." Oxford International Review 2.

Roberts, A. (1999). "The role of humanitarian issues in international politics in the 1990s." International Review of the Red Cross 81.

Roberts, A. (2002). "Counter-terrorism, armed force and the laws of war." Survival 44.

Roberts, A. (2005). "The end of occupation: Iraq 2004." International Comparative Law Quarterly 54.

Roberts, A. and R. Guelff, Eds. (2000). Documents on the Laws of War, 3rd Edition. Oxford, Oxford University Press.

Robertson, H. (1998). The Principle of the Military Objective in Armed Conflict. International Law Studies. Newport, RI, US Naval War College. 72.

Rodley, N. (1999) The Treatment of Prisoners Under International Law, 2nd Edition. Oxford, Clarendon Press.

Rogers, A. P. V. (2000). "Zero casualty warfare." International Review of the Red Cross 82.

Rogers, A. P. V. (2004). Law on the Battlefield, 2nd Edition. Manchester, Manchester University Press.

Rowe, P., Ed. (1993). The Gulf War in International and English Law. London, Routledge.

Rowe, P. (2000). "Kosovo 1999: The air campaign - have the provisions of Additional Protocol I withstood the test?" International Review of the Red Cross 82.

Rowe, P. (2004). War Crimes. The Permanent International Criminal Court. D. McGoldrick, P. Rowe and E. Donnelly. Oxford, Hart Publishing.

Ruley, J. (2003). GPS Jamming. <http://www.av.web.com/news/avionics/182754-1.html>.

Runciman, S. (1951-1954). A History of the Crusades. Cambridge, Cambridge University Press.

Russo, F. (1992). Targeting Theory in the Law of Armed Conflict at Sea: the Merchant Vessel as Military Objective in the Tanker War. The Gulf War of 1980-1988: the Iran-Iraq War in International Legal Perspective. I. Dekker and H. Post. Dordrecht, Martinus Nijhoff Publishers.

Sandoz, Y., C. Swinarski, et al., Eds. (1987). Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. Geneva, Martinus Nijhoff Publishers.

Sarzanini, F. (2004). Spari e regole d'ingaggio, indaga Roma. Corriere della Sera, 8 April 2004. Milan.

Sassoli, M. (2000). "State responsibility for violations of international humanitarian law." International Review of the Red Cross 84.

Sassoli, M. and A. Bouvier, Eds. (2003). Un Droit Dans la Guerre? Geneva, International Committee of the Red Cross.

Schindler, D. and J. Toman, Eds. (1981). The Laws of Armed Conflict, 2nd Edition. Geneva, Henry Dunant Institute.

Schmitt, M. N. (2002). "Wired warfare: computer network attack and *jus in bello*." International Review of the Red Cross 84.

Shefi, D. (1983). "The Status of the Legal Adviser to the Armed Forces: His Functions and Powers." Military Law and Law of War Review XXII.

Shelton, D. (2002). "Righting Wrongs: Reparations in the Articles on State Responsibility." American Journal of International Law 96.

Smidt, M. L. (2000). "Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations." Military Law Review 164.

Smith, J. C. (2003). Smith and Hogan: Criminal Law, 10th Edition. London, LexisNexis.

Stewart, J. G. (2003). "Towards a single definition of armed conflict in international humanitarian law: a critique of internationalized armed conflict." International Review of the Red Cross 85.

Sumption, J. (1999). The Hundred Years War, Vols. I and II. London, Faber and Faber.

Tucker, R. W. (1957). The Law of War and Neutrality at Sea. Washington, US Government Printing Office.

Turns, D. (2000). "Some reflections on the conflict in Southern Lebanon: the 'Qana incident' and international humanitarian law." Journal of Conflict and Security Law 5.

Turns, D. (2004). Aspects of national implementation of the Rome Statute: the United Kingdom and selected other states. The Permanent International Criminal Court. D. McGoldrick, P. Rowe and E. Donnelly. Oxford, Hart Publishing.

Tusa, A. and J. Tusa (1995). The Nuremberg Trial. London, BBC Books.

Van Damme, B. (2002). "Moscow Theatre Siege: a Deadly Gamble that Nearly Paid Off." Pharmaceutical Journal 269.

Vereshchetin, V. (1996). "New constitutions and the old problem of the relationship between international law and national law." European Journal of International Law 29.

Veuthey, M. (1983). Guerilla et Droit Humanitaire. Geneva, International Committee of the Red Cross.

Veuthey, M. (1983). "Guerilla warfare and humanitarian law." International Review of the Red Cross.

Walzer, M. (2000). Just and Unjust Wars, 2nd Edition. New York, Basic Books.

Warden, J. (1995). "The Enemy as a System." Airpower Journal.

Watkin, K. (2004). "Controlling the Use of Force: a Role for Human Rights Norms in Contemporary Armed Conflict." American Journal of International Law 98.

Webster, C. and N. Frankland (1961). The Strategic Air Offensive Against Germany 1939-1945. London, HMSO.

Wedgwood, C. V. (1992). The Thirty Years War. London, Pimlico.

Werle, G. and F. Jessberger (2005). "Unless otherwise provided: Article 30 of the ICC Statute and the mental element of crimes under international criminal law." Journal of International Criminal Justice 3.

White, M. (2005). Death Tolls for the Major Wars and Atrocities of the Twentieth Century. <http://users.erols.com/mwhite28/warstat2.htm>.

Williams, R. (2001). Air Strikes Target Caves, Tunnels, Troops. American Forces Information Service, 29 October 2001.

Wilson, H. (1988). International Law and the Use of Force by National Liberation Movements. Oxford, Clarendon Press.

Woodward, J. and P. Robinson (1992). One Hundred Days: the Memoirs of the Falklands Battle Group Commander. London, HarperCollins.

Zegveld, L. (1998). "The Inter-American Commission on Human Rights and international humanitarian law: a comment on the Tablada case." International Review of the Red Cross.

Zegveld, L. (2000). Armed Opposition Groups in International Law: the Quest for Accountability. Rotterdam.

2. Governmental publications and documents

Australian Ministry of Defence (1994). Defence Force Manual.

Ministère de la Défense (France) (2001). Manuel de Droit des Conflits Armés.

Somalia Commission of Inquiry (Canada) (1997). Dishonoured Legacy: the Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia. Ottawa, Minister of Public Works and Government Services, Canada.

Thomas, A. and J. Duncan, Eds. (1999). Annotated Supplement to the Commander's Handbook on the Law of Naval Operations NWP 1-14M. Newport RI.

UK Ministry of Defence (1958). Manual of Military Law III. London, HMSO.

UK Ministry of Defence (1981). The Law of Armed Conflict D/DAT/13/35/66.

UK Ministry of Defence (1996). British Defence Doctrine, JWP 0-01.

UK Ministry of Defence (2001). British Defence Doctrine JWP 0-01, 2nd Edition.

UK Ministry of Defence (2003). Operations in Iraq: First Reflections.

UK Ministry of Defence (2003). Operations in Iraq: Lessons for the Future.

UK Ministry of Defence (2004). Peace Support Operations, JWP 3-50, 2nd Edition.

UK Ministry of Defence (2004). Manual on the Law of Armed Conflict. Oxford, Oxford University Press.

UK Permanent Representative to the United Nations (1982). Letter of 28 April 1982 (notification of Total Exclusion Zone). President of the UN Security Council, 53 British Yearbook of International Law, 542.

US Center for Law and Military Operations (2000). Rules of Engagement (ROE) Handbook for Judge Advocates.

US Department of Defense (1992). Conduct of the Persian Gulf War, Final Report to Congress, Appendix O. Washington DC.

US Department of State (1999). Message of 17 June 1999 (bombing of Chinese Embassy). Government of the People's Republic of China, 94 American Journal of International Law (2000), 128-131.

US Department of the Air Force (1976). Air Force Pamphlet 110-31.

US Department of the Air Force (1993). Air Force Policy Directive 51-4.

US Department of the Air Force (1994). US Air Force Instruction 51-402.

US Department of the Air Force (1998). US Intelligence Targeting Guide (Air Force Pamphlet 14-210).

US Department of the Army (1956). Field Manual 27-10.

US Department of the Army (1976). Field Manual 27-10, Change No. 1.

US Department of the Army (2002). Operational Law Handbook 2002.

US Department of the Army (2004). Operational Law Handbook 2004.

US Department of the Army (2005). Operational Law Handbook 2005.

US Department of the Navy (1997). Commander's Handbook on the Law of Naval Operations.

US President Ronald Reagan (1987). Letter of Transmittal. Senate of the United States, 81 American Journal of International Law (1987), 910-912.

3. Publications of Parliamentary bodies

Hamilton, A., MP (1992). Friendly Fire in the Gulf: Board's Findings. UK House of Commons, Army Quarterly Defence Journal.

UK House of Commons Defence Committee (1991). 10th Report; Preliminary Lessons of Operation Granby. (HC 287, Session 1990-1991)

UK House of Commons Defence Committee (2000). 14th Report; Lessons of Kosovo. (HC 347, Session 1999-2000)

UK House of Commons Defence Committee (2003). 3rd Report; Lessons of Iraq. (HC 57, Session 2003-2004)

4. United Nations documents

ICTY Expert Committee (2000). Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia.

UN Congress on the Prevention of Crime and the Treatment of Offenders (1990).
UN Basic Principles on the Use of Force and Firearms by Law Enforcement
Officials. Havana.

UN General Assembly (1968). UNGA Resolution 2444.

UN General Assembly (1970). UNGA Resolution 2675.

UN General Assembly (1999). UNGA Resolution 54/182.

UN General Assembly (2001). UNGA Resolution A/RES/56/83.

UN Secretary General (1991). S/22559.

UN Secretary General (2001). S/2001/789.

UN Security Council (1981). UNSCR 487.

UN Security Council (1991). UNSCR 705.

UN Security Council (1991). UNSCR 692.

UN Security Council (1991). UNSCR 687.

UN Security Council (1992). UNSCR 780.

UN Security Council (1992). UNSCR 788.

UN Security Council (1992). UNSCR 794.

UN Security Council (1993). UNSCR 814.

UN Security Council (1993). UNSCR 993.

UN Security Council (1994). UNSCR 940.

UN Security Council (1995). UNSCR 1031.

UN Security Council (1995). UNSCR 986.

UN Security Council (1998). UNSCR 1214.

UN Security Council (1999). UNSCR 1270.

UN Security Council (1999). UNSCR 1244.

UN Security Council (2003). UNSCR 1503.

UN Security Council (2003). UNSCR 1483.

UN Security Council (2004). UNSCR 1556.

UN Security Council (2004). UNSCR 1534.

Von Kappen (1996). UN Doc. S/1996/337 (Report Dated 1 May, 1996 of the Secretary General's Military Adviser Concerning the Shelling of the United Nations Compound at Qana on 18 April 1996).

5. Publications of non-governmental organisations

Amnesty International (1993). Sri Lanka: An Assessment of the Human Rights Situation.

Amnesty International (1996). Israel/Lebanon: Unlawful Killings During 'Operation Grapes of Wrath'.

Amnesty International (2000). NATO/Federal Republic of Yugoslavia: 'Collateral Damage' or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force.

Amnesty International (2004). Iraq: Killings of Civilians in Basra and al-Amara.

Greenpeace International (1991). On Impact: Modern Warfare and the Environment: A Case Study of the Gulf War.

Human Rights Watch (1991). Needless Deaths in the Gulf War: Civilian Casualties During the Air Campaign and Violations of the Laws of War.

Human Rights Watch (1997). Israel/Lebanon.

Human Rights Watch (2000). Civilian Deaths in the NATO Air Campaign.

Human Rights Watch (2001). Under Orders - War Crimes in Kosovo.

Human Rights Watch (2002). Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan.

Human Rights Watch (2003). Off Target: the Conduct of the War and Civilian Casualties in Iraq.

Human Rights Watch (2004). Cluster Munitions Too Costly: Department of Defense FY Budget Requests Related to Cluster Munitions.

Human Rights Watch (2005). States Parties Responses to 'International Humanitarian Law and ERW' Questionnaire.

International Committee of the Red Cross (2003). Explosive Remnants of War: the Lethal Legacy of Modern Armed Conflict.

Landmine Action (2005). Explosive Remnants of War and Mines Other than Anti-Personnel Mines: Global Survey 2003-2004.

Landmine Action (2005). Out of Balance: the UK Government's Efforts to Understand Cluster Munitions and International Humanitarian Law.

Memorial (1995). Vsyemi Imyeushchimisya Sredstvami (By all available means).

6. Electronic resources*

Amnesty International <http://web.amnesty.org>

BBC online news reports <http://bbc.news.co.uk>

Canadian Department for National Defence <http://www.dnd.ca>

Center for Strategic and International Studies, Washington <http://www.csis.org>

European Court of Human Rights <http://cmiskp.echr.coe.int>

Greenpeace International <http://www.greenpeace.org/international/>

Hansard <http://www.parliament.uk/hansard>

Haaretz <http://www.haaretzdaily.com>

Human Rights Watch <http://www.hrw.org>

** Websites drawn on in this thesis and listed here are those of public bodies, such as international tribunals and organizations, NGOs recognized by the United Nations' Economic and Social Committee, governmental departments, parliamentary bodies, academic institutes, and news agencies. Very occasionally, material which appears to have been posted on the internet by private individuals or organizations of unclear status has been drawn on. In such cases, URL details and visiting dates are indicated in the footnotes.*

International Committee of the Red Cross <http://www.icrc.org>

Inter-American Commission on Human Rights <http://www.cidh.org>

Israeli Ministry of Foreign Affairs <http://www.israel-mfa.gov.il>

Israel Defence Forces <http://www1.idf.il>

International Criminal Tribunal for the former Yugoslavia
<http://www.un.org/icty>

International Criminal Tribunal for Rwanda <http://un.org/icttr>

International Court of Justice <http://www.icj-cij.org>

Landmine Action <http://www.landmineaction.org>

Ministry of Defence (UK) <http://www.mod.uk>

Ministere de la Defense (France) <http://www.defense.gouv.fr>

National Institute for Military Justice <http://www.nimj.com>

Permanent Court of Arbitration <http://www.pce-cpa.org>

Radio Free Europe <http://rfel.org>

Shreveport Times <http://shreveporttimes.com>

United Nations documents database <http://www.un.org/Docs>

US Department of Defense, Center for Law and Military Operations

<https://www.jagcnet.army.mil/CLAMO>

US Department of Defense news briefings <http://www.defenselink.mil/news>

US Navy Fact File <http://www.chinfo.navy.mil>

US Air Force publications <http://afpubs.hq.af.mil>

University of Minnesota Human Rights database <http://www1.umn.edu/humanrts>
