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CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE
DISCUSSION OF THE SPECIAL REPORTS :
PRELIMINARY REPORT ON INTERNATIONAL HUMANITARIAN LAW AND THE LAWS OF WAR

Secretariat memorandum
Prepared by the Directorate of Legal Affairs

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Foreword

1. Within the framework of the United Nations Decade of International Law, the Governments of the Kingdom of the Netherlands and the Russian Federation are called upon to organise and co-ordinate the Centennial of the First International Peace Conference.

2. In paragraph 3 of Resolution 52/154 of 15 December 1997 the United Nations General Assembly "encourages the competent United Nations organs, subsidiary organs, programmes and specialised agencies, including the International Court of Justice, the International Law Commission and the Secretariat, within their respective mandates, competence and budgets, as well as other international organisations:

(a) To co-operate in the implementation of the Programme of Action and to co-ordinate their efforts in this respect;

(b) To consider participation in the activities envisaged in the Programme of Action".

3. Pursuant to this Resolution and the Programme of Action (UN doc. A/C.6/52/3), the executive Secretary of the Centennial of the First International Peace Conference transmitted to the Secretariat of the CAHDI the text of the preliminary report on *International Humanitarian Law and the Laws of War* and requested its consideration by the CAHDI.

4. In addition to the CAHDI, this report was transmitted for consideration to:

- the International Court of Justice (ICJ),
- the Permanent Court of Arbitration (PCA),
- the Asian-African Legal Consultative Committee (AALCC),
- the International American Commission of Jurists of the Organization of American States (IAJC), and
- the International Law Commission (ILC).

5. The Executive Secretariat of the Centennial of the First International Peace Conference would appreciate to have the views of the members of the CAHDI in order for the rapporteurs to include them in the revision of the reports for final discussion at the expert meetings at The Hague (18-19 May 1999) and St. Petersburg (23-25 June 1999), as well as for distribution to other interested fora.

6. The reports, other relevant information and individual comments already made to the reports can be consulted at the following internet address: http://www.minbuza.nl/English/Conferences.

Action required

Members of the CAHDI are called upon to consider the attached report and to comment on it. Comments can be provided directly to the Executive Secretariat of the Centennial of the First International Peace Conference or shared with other members of the CAHDI at the next meeting.

INTERNATIONAL HUMANITARIAN LAW AND THE LAWS OF WAR

Preliminary Report for the Centennial Commemoration of the First Hague Peace Conference 1899

pursuant to United Nations General Assembly Resolution 52/154 of 15 December 1997 and UN Document A/C.6/52/3

Christopher Greenwood

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I Introduction

1 The codification and revision of the laws of war, or, to use the term more widely employed today, "international humanitarian law"[1], proved to be one of the most important parts of the work of the 1899 Hague Peace Conference (referred to herein as the Conference). When the Conference convened, the laws of war were almost all unwritten, they covered only a comparatively small part of military activity and there was considerable controversy regarding their extent and manner of application even amongst States with otherwise similar views about international law. The Conference began the process, which has gone on throughout the twentieth century, of developing a substantial body of written law for the conduct of hostilities. The results of that century of law-making are evident. In contrast to the position in 1899, most aspects of military activity are now regulated by treaty, or by rules of customary law which are authoritatively stated in treaty texts. The degree of detail is such that any collection of the relevant agreements comprises hundreds of pages.

2 The Conference was held at a time when there was great optimism about the effect which scientific progress (including developments in the science of international law) could have upon the condition of humanity. Yet, as an eminent military historian has said, the undoubted progress which the twentieth century has seen in tackling the problems of famine or sickness has not been matched by progress in reducing the threats posed by war.[2] While the subject of this Report is that part of the law which seeks to alleviate the effects of war, rather than to prevent war itself, the same note of caution applies. For all the undoubted progress which has been made during the last 100 years in developing the law in this area, the difficulty of preserving humanitarian values in time of war is, if anything, even more acute at the end of the century than it was at the beginning.

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1. Not all parts of the laws of war can strictly be regarded as humanitarian but the doctrinal debate about which rules should be characterised as humanitarian and which should not falls outside the scope of this report. For the sake of simplicity, therefore, the terms 'laws of war' and 'international humanitarian law' will be treated as synonymous in this report. The term 'law of armed conflict' is also treated as synonymous with 'laws of war.'

2. J. Keegan, *War and Our World* (BBC, 1998), 1.

3 The centenary of the 1899 Peace Conference, coinciding as it does with the 50th anniversary of the adoption of the Geneva Conventions and the end of the United Nations Decade of International Law, thus provides an excellent opportunity to reflect on the development of the laws of war. The purpose of this Report will be to recall some of the achievements and failures of the last century and to attempt to identify those parts of the laws of war which stand in greatest need of attention at the end of the twentieth century. The Report will focus on the analysis of four main subjects, or themes, which are of particular significance for the future of the laws of war. Most, though not all, of these themes were touched on at the Conference, even if developments during the succeeding hundred years have taken them in directions very different from those which might have been envisaged in 1899. The approach adopted, in respect of each of these themes, will be to conduct a stocktaking of the principal achievements and failures of the twentieth century, to identify the principal problems which remain unresolved and, where appropriate, to suggest how such problems might be addressed.

4 At the end of a century which has seen so much of war and in which the laws of war have proved so comparatively ineffectual, it seems obvious that that law must be seen as deficient and the record of the last hundred years be adjudged one of failure rather than achievement. This Report will certainly identify deficiencies in several areas of the law. Yet the principal conclusion is not that the world needs new law, or different law, but that the law which we have needs to be made more effective. As Sir Franklin Berman has put it:

> It seems to many that the problem is not to discover what the law is, or how to apply it to the particular case, or even whether the existing rule is 'satisfactory' or not, but rather how to secure or compel compliance with the law at all. It may be that we have now passed from a great phase of law-making to a period where the focus is not on new substantive law but on how to make existing law effective.[3]

5 As a preliminary to the main discussion, the Report begins (Part II) with a brief examination of the laws of war issues which came before the Conference, and its successor of 1907, and a

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3. Sir Franklin Berman, Preface to Lady Fox and M. Meyer (eds.),*Effecting Compliance* (1993), p. xii.

survey of the approach adopted at those conferences. Thereafter, the following themes will be examined in greater detail:-

1 *the scope and application of the laws of war* (Part III), a section which will examine the place of the laws of war in international law as a whole, their relationship with the prohibition on resort to force in the United Nations Charter and with other areas of law, such as the law of human rights, as well as considering the circumstances in which the laws of war become applicable.

2 *the conduct of hostilities in international armed conflicts* (Part IV), which will discuss the substantive law applicable to armed conflicts possessing an international character, in particular the law relating to belligerent occupation, weapons, targets and combatancy and the law of naval warfare.

3 *the conduct of hostilities in internal armed conflicts* (Part V), which will conduct a similar examination of the law applicable to armed conflicts occurring within a State.

4 *methods for ensuring compliance with the law* (Part VI), which will look at the means of implementing the law considered in the earlier parts of the Report.

6 Finally, a concluding section (Part VII) will make some tentative suggestions regarding what should be considered the priorities for the future in this area of the law.

7 The present Report is of a preliminary nature. It was always the intention that it would be reconsidered and revised in the light of the discussions to be held as part of the commemoration process, with a final version of the Report being produced in 1999. There is, however, an additional reason why the Report, and particularly Parts VI and VII, must be regarded as possessing a preliminary character. At the time that this Report was drafted (June 1998), the Inter-governmental Conference on the Proposed International Criminal Court was opening in Rome. The work of this Conference is likely to have a considerable impact on the laws of war and, in particular, on the methods for ensuring compliance with those laws. Until the outcome of the Rome Conference is known, it would obviously be premature to engage in any detailed comment on the law in relation to war crimes.

II. The Laws of War at the 1899 Peace Conference

II.1 Background

8 When Count Mouravieff first proposed the convening of an international peace conference,[4] the question of revision of the laws of war had been the subject of discussion in the international community for more than thirty years. A number of treaties dealing with specific topics had already been adopted. The Declaration of Paris, 1856, prohibited privateering and made a number of other provisions regarding the laws of naval warfare. The Geneva Convention, 1864, the first of the "Red Cross" conventions, established a legal regime for the protection of medical personnel in land warfare. In 1868 an attempt was made to adopt additional articles extending the 1864 Convention to naval warfare but these articles never entered into force. The St Petersburg Declaration, 1868, outlawing projectiles of under 400 grammes in weight (i.e. rifle ammunition but not artillery shells) which were explosive or charged with fulminating or inflammable substances,[5] became the first agreement of modern times to prohibit the use of a specific category of weapons.

9 Moreover, there was considerable enthusiasm for the adoption of a comprehensive code of the laws of war, at least in relation to land warfare. The United States had issued such a code to its armed forces in 1863.[6] In 1874, at the Brussels Conference, representatives of fifteen States adopted the Project of an International Declaration concerning the Laws and Customs of War on Land, although this instrument never became binding.[7] The *Institut de droit international* published a Manual of the Laws of War on

4. Letter of 24 August 1898. The texts of many of the documents concerning the Conference can be found in *The International Peace Conference*, Netherlands Ministry of Foreign Affairs, 1907, and A. Pearce Higgins, *The Hague Peace Conferences* (1909) and J.B. Scott, *The Proceedings of the Hague Peace Conferences: The Conference of 1899* (Translation into English prepared by the Carnegie Endowment, 1920).

5. In the authentic French text, 'tout projectile d'un poids inférieur à 400 grammes qui serait ou explosible ou chargé de matières fulminantes ou inflammables'

6. This was the famous 'Lieber Code' drawn up by the jurist Francis Lieber for the Lincoln Government during the American Civil War and issued as General Order 100, Schindler and Toman, *The Laws of Armed Conflicts* (3rd ed., 1988), p. 3.

7. Schindler and Toman, p. 25.

Land in 1880[8] which built upon the Brussels Declaration. All three texts were to prove influential at the Conference.

II.2 The Laws of War at the Conference

10 Although the proposal of the Russian Government for the Peace Conference originally focussed upon disarmament and the prevention of war, the detailed list of topics produced for the Conference was more heavily weighted towards the laws of war. The topics suggested for discussion were:-

1 the prohibition for a fixed term of any increase of the armed forces beyond those then maintained;
2 the prohibition of, or limitation in the employment of new firearms or explosives;
3 the restriction of the explosives already existing and the prohibition of the discharge of projectiles or explosives of any kind from balloons or by any similar means;
4 the prohibition in naval warfare of submarine torpedo-boats or similar engines of destruction, and the ultimate abolition of vessels with rams;
5 the application to naval warfare of the principles of the Geneva Convention of 1864 on the basis of the additional Articles of 1868;
6 the neutralisation of ships and boats employed in saving those shipwrecked during or after an engagement;
7 the revision of the unratified Brussels Declaration of 1874 concerning the laws and customs of war on land; and
8 the acceptance in principle of the employment of good offices, of mediation and arbitration with the object of preventing armed conflicts between nations, and the establishment of a uniform practice in their employment.[9]

12 Items 1 to 4 on this list were allocated to the First Committee of the Conference, which concentrated on disarmament. That proved to be the least productive part of the Conferences work. The two Declarations agreed in the First Committee – on the prohibition, for a

8. 5 *Ann de Ihstitut de droit international* (1881-2) 156; Schindler and Toman, p. 35.

9. Pearce Higgins, op. cit., p. 40.

period of five years, of the discharge of explosive projectiles from balloons[10] and the permanent prohibition of projectiles, "the sole purpose of which was the diffusion of asphyxiating or deleterious gases"[11] – are really laws of war instruments.[12] Items 5, 6 and 7, which clearly concerned the laws of war, were dealt with by the Second Committee, while the question of peaceful settlement of disputes was considered by the Third Committee.

13 In practice, it was in the area of the laws of war that the Conference made the greatest progress in developing the law. The foremost objective, of maintaining peace, gave rise to the Convention for the Pacific Settlement of Disputes but the undoubted importance of that Convention lay more in the creation of the institution of the Permanent Court of Arbitration than in the development of substantive law.[13] Very little was achieved in relation to disarmament. By contrast, the Conference took a number of important steps in what would now be described as the codification and progressive development of the laws of war.

14 The most striking achievement was the adoption of the Convention on the Laws and Customs of War on Land and the Regulations attached thereto. These Regulations built upon the Lieber Code, the 1874 Brussels Declaration and the 1880 Oxford Manual. The Convention was, however, much more than just an effort in codification. The task which the Conference set itself was the revision of the laws of war, with the aim both of making them more precise and laying down certain limits in order to modify the severity of war. On the whole, the Conference was successful in achieving these goals. The Regulations on the Laws and Customs of War on Land went beyond the earlier instruments in a number of ways. As one of the United States delegates put it:

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10. Declaration No. I, 1899.

11. Declaration No. II, 1899. In the authentic French text, the passage quoted reads: projectiles qui ont pour but unique de répandre des gaz asphyxiants ou délétères'

12. Captain Crozier, of the US delegation, made the point in his report that these subjects would more logically have been considerd by the Second Committee for that reason; J.B. Scott (ed.), *Instructions to the American Delegates to the Hague Peace Conferences and their Official Reports* (1916), p. 29.

13. This subject is discussed in the Joint Report of Professors Orrego Vicuna and Pinto, prepared for the 1999 Centennial Commemoration and is not discussed further in the present Report.

> The code [i.e. the Regulations annexed to the Convention] in general presents that advance from the rules of General Order 100 [the Lieber Code] in the direction of effort to spare the sufferings of the population of invaded and occupied countries, to limit the acts of invaders to those required by military necessities, and to diminish what are ordinarily known as the evils of war, which might be expected from the progress of nearly forty years thought upon the subject. [14]

15 The scope of the Regulations was ambitious, taking in most of the law of land warfare (with the exception of those issues covered by the 1864 Geneva Convention). Moreover, the fact that the Conference was not able to reach agreement on a number of important issues (noticeably, the question of combatant status for members of popular resistance movements) was mitigated by the incorporation in the Preamble of the Convention of the first version of the "Martens Clause", proposed by the Chairman of the Sub-Committee on Land Warfare of the Second Committee. This clause has attracted such a degree of attention over the course of the century that it is worthwhile reproducing it in full, together with certain other paragraphs of the Preamble:

> According to the view of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, so far as military necessities permit, are intended to serve as general rules of conduct for belligerents in their relations with each other and with populations.
> It has not, however, been possible to agree forthwith on provisions embracing all the circumstances which occur in practice.
> On the other hand, it could not be intended by the High Contracting Parties that the cases not provided for should, for want of a written provision be left to the arbitrary judgment of military commanders.
> Until a more complete code of the laws of war can be issued, the High Contracting Parties think it expedient to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established between civilised nations, from

14. Report of Captain Crozier, loc. cit. note 9, above, p. 46.

the laws of humanity, and the requirements of the public conscience.[15]

16 While the 1899 Convention and Regulations were superseded in most respects by Hague Convention No. IV, 1907, and the Regulations annexed to that Convention, they remain an important landmark in the evolution of the laws of war and many of the provisions which originated in the 1899 text and were carried over into the 1907 Regulations continue to be regarded as an authoritative statement of customary international law rules one hundred years later.

17 The Conference also adopted a Convention adapting the principles of the Geneva Convention to naval warfare, the project which States had failed to bring to completion in 1868. The Convention thus adopted was the forerunner of the Second Geneva Convention, 1949, which is still in force.

18 In addition, the Conference adopted three Declarations:-

- Declaration No. I, outlawing for a period of five years the discharge of explosive projectiles from balloons;
- Declaration No. II, prohibiting the use of projectiles, the sole purpose of which was the diffusion of asphyxiating or deleterious gases; and
- Declaration No. III, prohibiting the use of expanding bullets and other bullets which flatten easily or expand in the human body.

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15. The authentic French text stated:

Selon les vues des Hautes Parties contractantes, ces dispositions, dont la rédaction a été inspirée par le désir de diminuer les maux de la guerre, autant que les nécessités militaires le permettent, sont destinées à servir de règle générale de conduite aux belligérants, dans leurs rapports entre eux et avec les populations.

Il n'a pas été possible toutefois de concerter dès maintenant des stipulations s'étendant à toutes les circonstances qui se présentent dans le pratique.

D'autre part, il ne pouvait entrer dans les intentions des Haute Parties contractantes que le cas non prévus fussent, faute de stipulation écrite, laissées à l'appréciation arbitraire de ceux qui dirigent les armées.

En attendant qu'un Code plus complet des lois de la guerre puisse être édicté, les Hautes Parties contractantes jugent opportun de constater que, dans les cas non compris dans les dispositions réglementaires adoptées par elles, les populations et les belligérants restent sous la sauvegarde et sous l'empire des principes du droit des gens, tels qu'ils résultent des usgaes établis entre nations civilisées, des lois de l'humanité et des exigences de la conscience publique.

19 While these Declarations straddle the boundary between the laws of war and disarmament, there is little doubt that the main motive behind their adoption was humanitarian. One of the United States delegates, for example, commented on Declaration No. I that

> The action was taken for humanitarian reasons alone, and was founded upon the opinion that balloons, as they now exist, form such an uncertain means of delivery that they cannot be used with any accuracy.[16]

20 Finally, the Conference indicated, in a series of *voeux* adopted as part of the Final Act, that it considered it desirable that there should be discussion at a Second Peace Conference of a range of questions on the law of naval warfare and the law of neutrality which had not been before it in 1899, as well as suggesting a revision of the Geneva Convention, 1864.

II.3 The 1907 Peace Conference and the Laws of War

21 The 1907 Peace Conference built upon the achievements of the 1899 Conference. Both of the Conventions on the laws of war adopted by the 1899 Conference were revised. In addition, the Second Conference adopted seven new Conventions on the laws of naval warfare, a Convention on the rights and duties of neutral powers in land warfare and a Convention relative to the commencement of hostilities.

III. The Scope and Application of the Laws of War

22 In assessing the achievements of 1899 in the laws of war, two questions have to be addressed at the outset: when do those laws apply and what is their place in the structure of international law as a whole ? These are not just theoretical questions – although they have considerable theoretical significance – for the answers have important practical implications. International law is not simply a collection of rules and principles, it is a legal system, within which no one body of law can exist in isolation from the whole. While the laws

16. Captain Crozier, loc. cit. note 9, above, p. 31.

of war address the specific problems of the conduct of hostilities and are, to that extent, *lex specialis*, it is necessary to consider their relationship with the law governing the right to resort to force (the *ius ad bellum*) and also with other parts of international law which might have an impact upon the conduct of warfare, such as the law of human rights and international environmental law. Moreover, the effectiveness of the substantive laws of war will be significantly reduced if there is constant controversy about the circumstances in which those laws are applicable. This Part of the Report will therefore examine the place of the laws of war in the structure of international law and the circumstances in which the laws of war become applicable.

III.1 The Laws of War within the Structure of International Law

(a) Laws of War and Laws against War

23 Even in 1899 there was something anomalous in a Peace Conference, summoned with the objective of preventing war, devoting so much attention to devising laws for the conduct of war. In the words of one contemporary commentator:

> The Emperor of Russia might have said of it, "I labour for peace, but when I speak to them thereof, they make them ready for battle".[17]

24 Yet the delegates at the Conference evidently saw no inconsistency in seeking to prevent war while also drawing up codes of conduct for its regulation in the event that war should break out. Their attitude was succinctly stated in the Preamble to the Convention on the Laws and Customs of War on Land:

> Considering that, while seeking to preserve peace and prevent armed conflicts between nations, it is likewise necessary to have regard to cases where an appeal to arms may be caused by events which their solicitude could not avert;
> Animated also by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilisation;
> Thinking it important, with this object, to revise the laws and customs of war, either with the view of defining them more precisely, or of laying down certain limits for the purpose of modifying their severity as far as possible...

17. A. Pearce Higgins, *The Hague Peace Conferences* (1909), p. 43.

25 That approach was plainly right, both as a matter of common sense and in principle, given that international law in 1899 did not prohibit recourse to war as an instrument of national policy and that the Conference did not attempt to alter that situation.[18] However, once international law – first through the Covenant of the League of Nations and the Pact for the Renunciation of War and latterly through Article 2(4) of the United Nations Charter – developed rules which severely limited the right of States to resort to force in their international relations, such an approach became more difficult to justify.

26 In particular, three issues arise. First, should international law continue to devote so much attention to the law on the conduct of war now that it has prohibited recourse to war as an instrument of national policy ? Secondly, is it right – or even possible – to maintain the principle, which was taken for granted in 1899, that the laws of war apply equally to all the warring parties, irrespective of which is the aggressor ? Thirdly, quite apart from the principle of equal application, are the laws of war affected by the fact that they now co-exist with a law against war ?

27 With regard to the first question, there have certainly been occasions during the twentieth century when it has been argued that attention to the laws of war distracts from the more important task of preventing war or even undermines the prohibition on resort to force. That was one of the reasons why the International Law Commission did not place the reform of the laws of war on its agenda in 1949.[19] There can be no doubt, however, that the history of the twentieth century has vindicated the approach of the delegates to the1899 Conference in seeking to regulate the conduct of war at the same time as striving for its prevention. More than fifty years after the adoption of the United Nations Charter, it is all too apparent that prohibition of war has not meant prevention and that the need for legal regulation of warfare, "to serve, even in this extreme case, the

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18. The Convention for the Pacific Settlement of International Disputes merely required parties before an appeal to arms ... to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers'(Article 1).

19 *Year Book of the International Law Commission*, 1949, vol. I, pp. 51-3. A more practical reason was the fact that the Red Cross had already embarked upon a complete revision of the Geneva Conventions.

interests of humanity" is greater than ever. There is no evidence whatsoever that the existence of laws designed to achieve that goal does anything to make war more likely or to undermine the prohibition on resort to force in the Charter and other instruments. On the contrary, recent United Nations practice - in particular, the determinations by the Security Council, in respect of the former Yugoslavia and Rwanda, that better enforcement of the laws of war could assist in addressing threats to international peace and security - strongly suggests that attention to the laws of war complements, rather than distracts from, the attempts to prevent war.[20]

28 The second question poses more problems at both a theoretical and a practical level. The notion that the laws of war confer the same rights, and impose the same obligations, upon the aggressor and the victim of that aggression appears to run counter to the fundamental principle that no one should profit from their own unlawful act (*ex iniuria ius non oritur*). In particular, the laws of war confer upon belligerents extensive rights vis-à-vis not only other belligerents but also neutral States. Should a State be entitled to such rights when it has itself been responsible, in violation of its obligations under the United Nations Charter and customary law, for initiating a conflict ?

29 The idea of distinguishing in the application of the laws of war between the aggressor and the victim (or, where, the United Nations undertakes or authorises the use of force, between the forces of a lawbreaker and those seeking to restore international peace and security) has been made on several occasions since international law developed a prohibition on recourse to force. In *United States* v. *List ("the Hostages case")*, the prosecution argued that, since Germany's invasion of the Balkan States had been an illegal use of force, the subsequent occupation was illegal in its entirety and those

20. See Security Council resolution 827 (1993), establishing the International Criminal Tribunal for the Former Yugoslavia, the preamble to which states the Council's view that the prosecution of persons responsible for serious violations of international humanitarian law would contribute to the restoration and maintenance of peace. See also resolution 955 (1994), establishing the International Criminal Tribunal for Rwanda. The Council's view has also been reflected in the first decisions of the two Tribunals: *Prosecutor* v. *Tadic (Jurisdiction)* (Appeals Chamber, Yugoslav Tribunal) 105 ILR 419, decision of 2 October 1995; *Prosecutor* v. *Kanyabashi (Jurisdiction)* (Trial Chamber, Rwanda Tribunal), ICTR-96-15-T, decision of 18 June 1997.

who commanded the German forces during that occupation could not rely upon the powers given by the laws of war to a belligerent occupant as a defence.[21] At the Diplomatic Conference on Humanitarian Law in 1974, it was argued by one State that soldiers who participated in an illegal war could derive no benefit from the laws of war, because of the illegality of their States resort to force.

30 There are, however, compelling arguments, both of practice and principle, for rejecting such an approach. First, to hold that the laws of war applied in a different way to the different sides in a conflict would be likely to undermine the application of the law. As Sir Hersch Lauterpacht explained

> ... unless the aggressor has been defeated from the very outset..., it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them. Accordingly, any application to the actual conduct of war of the principle *ex iniuria ius non oritur* would transform the contest into a struggle which may be subject to no regulation at all. The result would be the abandonment of most rules of warfare, including those which are of a humanitarian character.[22]

31 Secondly, the overwhelming majority of the laws of war seek to benefit and protect not the belligerent States themselves but individuals caught up in the conflict. Even if the State to which they owe allegiance has acted unlawfully in resorting to force, the population of that State cannot be regarded as responsible for that illegality and should not, therefore, be deprived of the protection which the laws of war afford. The laws of war are directed to all individuals, in the sense that any individual at any level of authority may bear criminal responsibility for such violations of those rules as he or she may commit (e.g. the ill-treatment of prisoners or detainees), whereas the law against war is directed to the State itself and only the most senior decision-makers within a State have ever been convicted for the crime of waging aggressive war.[23]

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21. 15 *Ann Dig* 632 at 636-7.

22. H. Lauterpacht, The Limits of the Operation of the Law of War 30 BYIL (1953) 206 at 212.

23. Thus, the International Military Tribunal at Nuremberg acquitted Speer, Hitlers armaments minister, of crimes against the peace on the ground that he did not participate in taking the decisions to wage aggressive war, although he was

32 It is, therefore, one of the achievements of the twentieth century that the principle that the laws of war apply with equal force to all parties to a conflict has survived and been reaffirmed. The United States Military Tribunal in *List* rejected the prosecution argument outlined above and held that, for the purposes of a war crimes trial, no distinction was to be made between an occupation resulting from a lawful use of force and one which was the product of aggression. The same view was taken in a number of other trials at the end of the Second World War. Proposals made at the 1974-77 Diplomatic Conference to depart from the principle of equal application received almost no support and the preamble to Additional Protocol I, 1977, reaffirms the principle of equal application when it states that

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

33 Most recently, the principle of equality of application of the laws of war was tacitly recognized in the Convention on the Safety of United Nations and Associated Personnel, 1994. That Convention provides that attacks upon United Nations and associated personnel in certain categories of United Nations operation are crimes which all States have a duty to make punishable under national law.[24] The Convention thus draws a legal distinction between the use of force

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convicted of war crimes, *proceedings of the International Military Tribunal*, Part 22, pp. 521-3. Similar verdicts were reached in respect of a number of other defendants at Nuremberg. A United States Military Tribunal in *United States* v. *Von Leeb (the High Command case)* 15 Ann Dig 620 (1948) held that the members of the German General Staff were guilty of war crimes but acquitted them of crimes against the peace. Similarly, in the *IG Farben case*, the United States Military Tribunal stated that 'we cannot say that a private citizen shall be placed in the position of being compelled to determine in the heat of war whether his government is right or wrong, or, if it starts right, when it goes wrong' (15 *Ann Dig* 668 at 670). The recently established International Criminal Tribunal for the Former Yugoslavia has jurisdiction in respect of war crimes and crimes against humanity but not crimes against the peace.

24. Article 9. For discussion of the Convention, see E. Bloom, 'Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel' 89 AJIL (1995) p. 621, C. Bourloyannis-Vrailas, 'The Convention on the Safety of United Nations and Associated Personnel' 44 ICLQ (1995) p. 560, C. Greenwood, 'Protection of Peacekeepers: The Legal Regime' 7 Duke Journal of Comparative and International Law (1996), p. 185 and W.G. Sharp, 'Protecting the Avatars of International Peace and Security' loc. cit., p. 93.

by and against United Nations personnel. Article 2(2) provides, however, that the Convention does not apply to a United Nations operation, authorized by the Council under Chapter VII of the Charter, "in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies". The inference is that once a United Nations force becomes subject to the laws of armed conflict, those laws apply equally to the United Nations force and its adversaries.[25]

34 The equal application of the laws of war does not, of course, mean that the illegality of the aggressor's resort to force produces no consequences. Since the aggressor's resort to force is unlawful, it incurs international responsibility for all the consequences of its use of force. It therefore has a duty to compensate not only those who have suffered loss as a result of the violations of the laws of war committed by its forces but also those injured by acts of the same forces which were not contrary to that law. In the latter case, the illegality which gives rise to the responsibility lies in the original wrongful resort to force. Moreover, since opposition to an illegal resort to force is an entirely foreseeable consequence of that unlawful act, the aggressor can also be held responsible for damage caused by lawful acts of war on the part of its opponents. This was the approach adopted in the aftermath of the Gulf conflict, when the Security Council reaffirmed, in resolution 687 (1991) that Iraq was "liable under international law for any direct loss, damage ... or injury to foreign Governments, nationals or corporations as a result of its unlawful invasion and occupation of Kuwait".[26] That has been interpreted by the United Nations Compensation Commission as including losses caused by military action or the threat of military action by the coalition forces.[27] In addition to the ordinary responsibility of the State for its unlawful act, the act of aggression may involve the criminal responsibility of those individuals

25. The problem of determining when the law of armed conflict becomes applicable to a United Nations operation is considered below.

26. Para. 16.

27. Governing Council Decision No. 7, para. 21(a), United Nations Doc. S/AC.26/1991/7/Rev. 1, 109 ILR 586, and the Report and Recommendations of the Panel of Commissioners in the *Well Blowout Control Claim* (18 December 1996), United Nations Doc. S/AC.26/1996/5, 109 ILR 479.

responsible for taking the decision to initiate aggression and the criminal responsibility of the State itself.[28]

35 The third question posed in this section, namely whether the laws of war are affected by the fact that they now co-exist with a law against war, may also have considerable practical significance and has so far received comparatively little attention. It is clear that, under contemporary international law, the use of force by a State in its international relations will be lawful only if two requirements are satisfied:-

a the resort to force is compatible with the United Nations Charter; and

b the actual use of force is not contrary to the laws of war.

36 The first requirement will be satisfied if the resort to force is an exercise of the right of self-defence preserved in Article 51 of the Charter. For a State's use of force to constitute self-defence, however, it is not enough that the conditions for the exercise of that right existed at the time that the decision to use force was taken. The right of self-defence includes the limitations of necessity and proportionality[29] and the measures which the State actually takes must, therefore, meet the criteria of necessity and proportionality if the use of force is to be lawful. The implications were explained by Judge Ago in his Report to the International Law Commission on the law of State Responsibility, when he said that:

> In fact, the requirements of the "necessity" and "proportionality" of the action taken in self-defence can simply be described as two sides of the same coin. Self-defence will be valid as a circumstance precluding the wrongfulness of the conduct of the State only if that State was unable to achieve the desired result by different conduct involving wither no use of armed force at all or merely its use on a lesser scale.[30]

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28. International Law Commission Draft Articles on State Responsibility, Article 19. Whether the concept of criminal responsibility of the State, as opposed to the individuals, is a useful concept and what consequences follow from it are matters of controversy which cannot be considered here.

29. Case concerning Military and Paramilitary Actions in and against Nicaragua, para. 176, International Court of Justice Reports, 1996, 3 at p. 94; *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons,* International Court of Justice Reports, 1996, 225 at pp. 244-5, paras 40-41.

30. Eighth Report on State Responsibility, *Year Book of the ILC*, 1980, vol. II (i), at p. 121.

37 That does not mean that the degree of force employed in self-defence must be no greater than that used in the original armed attack. To quote Judge Ago once more:

> The requirement of the proportionality of the action taken in self-defence ... concerns the relationship between that action and its purpose, namely – and this can never be repeated too often – that of halting and repelling the attack or even, in so far as preventive self-defence is recognized, of preventing it from occurring. It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered.[31]

38 In other words, "the concept of proportionality referred to was that which was proportionate to repelling the attack, and not a requirement of symmetry between the mode of the initial attack and the mode of response".[32]

39 It then becomes necessary to determine whether the limitation of proportionality and necessity continues to apply when a State goes to war, or engages in an armed conflict, by way of self-defence. It has sometimes been suggested that "the limits inherent in the requirement of proportionality are clearly meaningless where the armed attack and the likewise armed resistance to it lead to a state of war between the two countries".[33] However, such an approach would mean that a State could free itself of some of the limitations of the right of self-defence by declaring war, or otherwise manifesting an intention to treat an attack as an act of war, something for which there is no warrant in the Charter and which would seem to be wholly contrary to principle. A further problem is that if "war" is here used as synonymous with "armed conflict" (as is now frequently the case), then the result would be that the proportionality and necessity limitation would apply only to isolated

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31. Loc. cit.

32. Dissenting Opinion of Judge Higgins, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons,* International Court of Justice Reports, 1996, 225 at 583. See also H. Waldock, The regulation of the Use of Force by Individual States in International Law,' 81 RC (1952) 451 at p. 464 and A. Randelzhofer, Commentary on Article 51 in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1994), p. 677.

33. Ago, loc. cit., para. 121. See also Y. Dinstein, *War, Aggression and Self-Defence* (2nd ed., 1994) at pp. 232-3.

and low level instances of the use of force. If, on the other hand, "war" is in some way to be distinguished from other kinds of "armed conflict" there is no agreement regarding the criteria by which that is to be done.[34]

40 Moreover, in its recent Advisory Opinion on the*Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice considered that the requirements of necessity and proportionality as elements of the right of self-defence applied "whatever the means of force employed" and were thus applicable to the use of nuclear weapons.[35] It is difficult to imagine a use of nuclear weapons which would not amount to an act of war. It is suggested, therefore, that acts of force undertaken in self-defence must still comply with the requirements of necessity and proportionality, even if they occur in time of war or armed conflict.

41 Self-defence is not the only justification for resort to force in contemporary international law. Force may lawfully be used if it has been properly authorized by the Security Council in the exercise of its powers under Chapter VII of the Charter, as was done in the Gulf conflict in 1990-91 when those States which engaged in military operations against Iraq did so under a mandate conferred by Resolution 678. Once again, however, the use of force will be lawful only if it is confined to what is necessary and proportionate to the achievement of the goals set out by the Security Council. In so far as other justifications which have been advanced for the use of force (e.g., humanitarian intervention) may have become part of contemporary international law (a matter which falls outside the scope of this Report), they too are subject to the principle that, since they justify the use of force only in order to achieve a particular purpose, that justification is limited to what is necessary and proportionate to the achievement of that purpose.

42 It follows that the legality of the conduct of hostilities today cannot be judged solely by reference to the laws of war. The requirements of the law restricting resort to force must also be satisfied. The fact that a particular action might be considered a

34. See C. Greenwood, The Concept of War in Modern International Law'36 ICLQ (1987) 283.

35. Loc. cit., note 16, above, at para. 41. See also para. 105 (c).

necessary and proportionate act of self-defence cannot justify it if it is contrary to the laws of war but the fact that a particular use of force does not contravene the laws of war no longer suffices to make it lawful if it fails to meet the criteria of being necessary and proportionate for the achievement of the goals of self-defence, the discharge of a Security Council mandate, or, perhaps, some other goal for which the use of force may be permitted by international law.

43 The acceptance of this principle, which was taken for granted by the Court in the *Nuclear Weapons* case, has important practical implications in several areas:-

a it has an effect upon the duration of the period within which belligerent acts may be taken. While a ceasefire or armistice does not bring an end to a formal state of war, the continued assertion of belligerent rights after the conclusion of an armistice or ceasefire will not normally be justifiable today, since it will not be a necessary measure of self-defence.[36] Even where there has been no formal armistice or ceasefire, such measures may be unjustified if hostilities have in fact ceased and there is no immediate danger of their recurrence.

b it may limit the geographical area within which hostilities may be conducted. Under the laws of war, there was a distinction between the "region of war", the area within which hostilities might lawfully take place, and the "theatre of war", within which they actually occurred. The region of war included the entire area of the high seas and the territory of the belligerents. While a State exercising a right of self-defence is not obliged to confine its activities to the theatre of war selected by its assailant if broadening the area within which hostilities occur is necessary to repel the attack or to ensure the security of the defending State and its forces, it must be questioned whether it is any longer right to assume, especially in a conflict fought for limited objectives and of short duration, that it would be justifiable to initiate a military operation anywhere within the

36. See Security Council Resolution 95 (1951) which stated that the assertion by Egypt of belligerent rights against shipping two and a half years after the conclusion of an armistice and an end of active hostilities between Egypt and Israel could not be justified as a necessary measure of self-defence, notwithstanding Egypt's assertion that it was still in a state of war with Israel and the specific measures taken were not prohibited by the armistice agreement.

traditional region of war, no matter how remote from the scene of the actual fighting already taking place.

c it may have an effect upon what is to be considered a lawful target. The laws of war already contain detailed rules regarding targeting (which are the subject of discussion in Part IV, infra) and principles drawn from the law on resort to force cannot, of course, ever justify an attack upon something which the laws of war prohibit a belligerent from attacking. However, it is possible that an attack upon a particular target which is not protected by the laws of war may nevertheless go beyond what can be considered a necessary and proportionate act of self-defence and thus be unlawful.

d it may affect the weapons and methods of warfare which may lawfully be used. While a State resorting to force in self-defence or pursuant to a mandate from the Security Council is not required to limit itself to the level of weaponry employed by its assailant, a substantial escalation of violence will be justified only if it is necessary and proportionate. That was clearly recognized by the International Court of Justice in the *Nuclear Weapons* opinion. Although the Court did not accept submissions that recourse to nuclear weapons was necessarily contrary to the principle of proportionality, it clearly considered that recourse to nuclear weapons was a step which had to be assessed by reference to the criterion of proportionality.[37]

e it will have an effect upon the relationship between belligerents and neutrals. The exact content of the law of neutrality today is, in any event, a matter for debate. Whatever that law may be, however, it is clear that it is affected in a number of ways by the principles of the Charter and the law on resort to force. Thus, where the Security Council imposes measures under Article 41 of the Charter, the obligation of States to comply with those measures [38] prevails over any inconsistent rights or obligations which may exist under the ordinary law applicable to relations between belligerents and neutrals.[39] Even where

37. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons,* International Court of Justice Reports, 1996, 225 at 245, paras. 41-43.

38. Articles 2(5) and 25 of the Charter.

39. Article 103 of the Charter. See also paragraph 4 of the resolution adopted by the *Institut de droit international* at its Weisbaden session in 1975, 56 *Ann de Ihstitut* 541.

no such measures are taken, it is probable that a belligerent may exercise against neutral States the powers accorded to it by the law of neutrality only to the extent that such action is necessary for its own self-defence and proportionate to the threat which it faces.[40]

44 While these are, in the briefest outline, some of the implications which appear to follow from the fact that, in contrast to the position in 1899, the laws of war now exist within a framework of international law which significantly restricts the right of States to resort to force, the full implications of the relationship between the contemporary *ius ad bellum* and *ius in bello* have yet to be determined. Particularly in the area of relations between neutrals and belligerents, this is a subject which would repay further study.

(b) The Laws of War and other Areas of International Law

45 The laws of war have not only been affected by the emergence of a law against war. Two other areas of international law – the law of human rights and international environmental law – have developed in a way which has potentially important implications for the laws of war.

46 While the matter is not entirely free of controversy, it appears that the principal human rights treaties were intended to apply in time of war or armed conflict, as well as times of peace. The fact that some of these treaties contain provisions permitting States to derogate from some, though not all, of their obligations under the treaties in question in time of war or other national emergency implies that the existence of a war does not automatically terminate or suspend their application.[41] In its Advisory Opinion on *Nuclear*

40. See, e.g., the statement by the United Kingdom Government following the detention by the Iranian navy of the British vessel *Barber Perseus* during the Iran-Iraq War, 47 BYIL (1986), p. 583. However, not all States took this position, see A. de Guttry and N. Ronzitti, *The Iran-Iraq War and the Law of Naval Warfare* (1993).

41. See, e.g., European Convention on Human Rights, 1951, Article 15 and the American Convention on Human Rights, 1969, Article 27. The International Covenant on Civil and Political Rights, 1966, contains a clause providing for derogation in times of national emergency but does not mention war as such (Article 4). However, in the course of the negotiation of Article 6 of the Covenant, concerning the right to life, the deprivation of life by means of *a lawful* act of war

Weapons, the International Court of Justice observed that "the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency".[42] The question, therefore, is what effect, if any, does the law of human rights have upon the application of the laws of war.

47 The effect of the law of human rights upon the conduct of hostilities is limited by two factors. First, a State party to a human rights treaty usually undertakes to ensure the rights guaranteed by the treaty only to persons in its own territory or subject to its jurisdiction. That concept is certainly broad enough to include territory occupied by a belligerent in time of armed conflict. The European Court and Commission of Human Rights have held that

> the responsibility of a Contracting Party may also arise when, as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[43]

48 It is another matter, however, to treat persons in enemy territory as subject to the jurisdiction of a belligerent simply because those persons are present in territory which that belligerent subjects to attack. To say that in early 1991 the population of Baghdad was subject to the jurisdiction of those coalition States which were engaged in aerial bombardment of targets in Iraq would be to stretch the concept of jurisdiction well beyond the normal meaning of that term.

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was given as an example of a taking of life which would not be arbitrary within the meaning of that provision.

42. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons,* International Court of Justice Reports, 1996, 225 at 240, para. 25.

43. *Loizidou* v. *Turkey (Preliminary Objections)*, 103 ILR 622 (1995); 20 EHRR 99, para. 62 (European Court of Human Rights). See also the decision of the Court in the merits phase, 108 ILR 443 (1996); 23 EHRR 513, para. 56, and the decision of the European Commission on Human Rights in *Cyprus* v. *Turkey* (25781/94) 23 EHRR 244 at 274.

49 Secondly, many provisions in human rights treaties are of a very general nature and add little or nothing to the detailed provisions of the laws of war. This is particularly true of the provisions on the right to life. Thus, in the *Nuclear Weapons* Advisory Opinion, the International Court of Justice, having stated that the right not arbitrarily to be deprived of one's life applies in hostilities continued:

> The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, though the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[44]

50 What this passage suggests is that, instead of the treaty provisions on the right to life adding anything to the laws of war, it is the laws of war which may be of assistance in applying provisions on the right to life.[45]

51 Nevertheless, there are a number of ways in which the law of human rights is likely to be of importance for the conduct of hostilities. First, the scope of human rights law is in some respects broader than that of the laws of war. Thus, the laws of war do not normally apply to a belligerent's treatment of its own nationals and some laws of war treaties do not apply to the treatment of nationals of neutral States.[46] The summary execution by a belligerent of deserters from its army or citizens accused of enemy sympathies, or the detention of nationals of a neutral State considered to favour an enemy would fall to be judged by reference to the relevant human rights law, rather than the laws of war. Secondly, some human rights provisions might be used to assist in the interpretation of laws

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44. Loc. cit. note 41, above.

45. That was the approach taken by the Inter-American Commission of Human Rights in relation to alleged violations of the right to life occurring in what it held to be an internal armed conflict; *Abella* v. *Argentina*, Report No. 55/97, para. 161.

46. For example, the definition of a protected person under Article 4 of the Fourth Geneva Convention, 1949, excludes nationals of a neutral State in the territory of a belligerent so long as the neutral State retains normal diplomatic relations with that belligerent.

of war provisions. For example, the requirement in Article 84 of the Third Geneva Convention, 1949, which stipulates that "in no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality, as generally recognized" invites reference to the law of human rights as a guide to the guarantees which are generally recognized. Thirdly, human rights law is likely to be of particular importance in the case of belligerent occupation, where, as will be seen, the laws of war are somewhat outdated. Finally, the enforcement machinery which forms part of some human rights treaties may offer an additional means for ensuring compliance with the laws of war, especially in non-international armed conflicts.[47]

52 The second area of relevance is international environmental law. There are, of course, specific provisions on the environment in the more recent treaties on the laws of war.[48] The application of principles of general international environmental law to the conduct of hostilities, however, has recently been the subject of much comment.[49] Principle 24 of the Rio Declaration states that:

> Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development as necessary.

53 This has led to suggestions that a State engaged in an armed conflict must comply in full with the provisions not only of the laws of war but also the whole body of the environmental treaties to which that State is party.

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47. This matter is considered further in Part VI of this report.

48. United Nations Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1977; Additional Protocol I to the Geneva Conventions, Articles 35(3) and 55. In addition, a number of other treaty provisions regulate matters of direct environmental concern; e.g., the prohibition of wanton destruction of property in Article 23(g) of the Hague Regulations on the Laws and Customs of War on Land and the rules on attacks on dams, dykes and nuclear electrical generating stations in Article 56 of Additional Protocol I.

49. See, e.g., United Nations General Assembly Resolutions 47/37 and 49/50, United Nations Doc. A/49/323 (Guidance for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict), G. Plant, *Environmental Protection and the Law of War* (1992) and Grunawalt, King and McClain, *Protection of the Environment during Armed Conflict* (1997).

54 In the *Nuclear Weapons* Advisory Opinion, the International Court of Justice stated that the environmental treaties were not intended to deprive a State of its right to self-defence but went on to state that:

> Nonetheless States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.[50]

55 The notion that there is a general obligation to have regard to the protection of the environment in the conduct of military operations also finds support in the new edition of the United States Naval Commander's Handbook, which states that:

> It is not unlawful to cause collateral damage to the natural environment during an attack upon a legitimate military objective. However, the commander has an affirmative obligation to avoid unnecessary damage to the environment to the extent that it is practicable to do so consistent with mission accomplishment. To that end, and as far as military requirements permit, methods or means of warfare should be employed with due regard to the protection and preservation of the natural environment. Destruction of the natural environment not necessitated by mission accomplishment and carried out wantonly is prohibited. Therefore, a commander should consider the environmental damage which will result from an attack on a legitimate military objective as one of the factors during targeting analysis.[51]

56 The evolution of the law of human rights and international environmental law are obviously two of the most important developments in international law during the course of the twentieth century. Their potential effect upon the laws of war has, however, only begun to be appreciated. It seems likely that this question is one which deserves further study if an approach is to be developed which respects the effect of those new bodies of law, while paying due regard to the special conditions of warfare.

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50. Loc. cit., note 26, above, p. 242, para. 30.

51. United States Navy, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (1997), para. 8.1.3.

III.2 The Scope of the Laws of War

57 The two Conventions and three Declarations on the laws of war concluded at the 1899 Conference were intended to apply only in a formal state of war and only as between States party to the relevant agreement. That approach is summed up in a comment made by Martens at the Conference, when he said that in order clearly to express what is, in the view of the Russian Government, the object of the Conference in this matter, I cannot find a better illustration than that of a "Mutual Insurance Society against the abuse of force in time of war".[52] The parties to each Convention or Declaration undertook to observe the provisions thereof only vis-à-vis one another and only for so long as all of the belligerents in a particular conflict were parties to the relevant Convention or Declaration.[53]

58 During the course of the century, the international community has substantially modified its approach to the scope of application of treaties on the laws of war. First, the treaties adopted since 1945 are not confined to application in a formal state of war but apply to any armed conflict, irrespective of whether a formal state of war exists or not.[54] The practice of most States has also been to treat the older treaties which are still in force and which refer to "war" as applicable to any international armed conflict. This development has been of great importance and benefit. Even in 1899, it was not always easy to determine whether a conflict amounted to war in the formal sense or not.[55] During the twentieth century, the task became increasingly difficult as hostilities were waged on a large

52. Quoted in A. Pearce Higgins, *The Hague Peace Conferences* (1909), p. 259.

53. See, e.g., Article 2 of the Convention on the Laws and Customs of War on Land and Article 11 of the Convention for the Adaptation of the Geneva Convention to Maritime Warfare.

54. See, e.g., common Article 2 of the Geneva Conventions, 1949.

55. In 1883 a United Kingdom Government committee investigating the possibility of constructing a channel tunnel was informed that out of 117 conflicts occurring between 1700 and 1870, hostilities had been preceded by a declaration of war in only ten; Maurice, *Hostilities without Declaration of War* (1883). The tunnel was not built for another hundred years. See also F. Grob, *The Relativity of War and Peace* (1949).

scale by States which denied that they were at war.[56] The emphasis on the factual concept of armed conflict has removed an argument of great technicality and simplified the application of the law of war treaties.

59 Secondly, general participation or *si omnes* clauses of the kind employed in the 1899 and 1907 treaties have not been in general use since the 1929 revision of the Geneva Conventions. Although a State party to a treaty on the laws of war is bound to apply that treaty only with regard to other States party (or, in the case of the Geneva Conventions and Additional Protocol I, States which have undertaken to apply the provisions of the relevant agreement even though they have not formally become party), the entry into a conflict of a State not party to a particular convention no longer affects the relations between those belligerents which are parties. While the older treaties of 1907 (most of which remain in force) have not been amended, their importance today is as statements of customary international law and their general participation clauses have therefore become largely irrelevant.

60 In general, the changes which have occurred in the scope of application of the laws of war have given rise to few difficulties. Nevertheless, certain matters require comment.

(a) The Concepts of War and Armed Conflict

61 The existence of a formal state of war has now become almost entirely irrelevant for the application of the laws of war, although a declaration of war by a State which does not then engage in active hostilities (as was the case with some of the belligerents in the Second World War) will have the effect of bringing into force for that State the provisions of the Geneva Conventions and other rules of the laws of war, which may be of importance if that State interns enemy aliens or takes certain measures regarding enemy property.

62 The concept of an armed conflict is not defined in any of the treaties on the laws of war. There is, however, powerful support for

56. For example, the hostilities in the 1930s between China and Japan. See Greenwood, loc. cit. note 18, above.

the view that it should be given a very broad interpretation. The authoritative commentary on the 1949 Geneva Conventions, published by the ICRC, states that:

> Any difference between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2 [common to the four Geneva Conventions], even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces...[57]

63 A similar view has been expressed by the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia in its decision in *Prosecutor* v. *Tadic (Jurisdiction)*, in which it stated that "an armed conflict exists whenever there is a resort to armed force between States".[58]

64 There is also some support for this approach in State practice. The United States, for example, considered that an armed conflict triggering the application of international humanitarian law had come into being between itself and Syria when Syrian anti-aircraft batteries in Lebanon shot down a United States naval aircraft in 1983 and captured the pilot.[59] It seems, however, that State practice is not always consistent on this point and that States have frequently disputed the existence of an armed conflict when they have been engaged in incidents of short duration involving the use of comparatively small numbers of troops.

(b) United Nations Operations

65 The question whether there is an armed conflict is particularly likely to cause difficulty when United Nations forces are involved. The applicability of international humanitarian law to United Nations forces has been debated for many years. There are obvious difficulties in that the United Nations is not a party to any of the Conventions on the laws of war and that, not being a State, it lacks

57. J.S. Pictet (ed)., *Commentary on Geneva Convention III* (Geneva, ICRC, 1960), p. 23.

58. Decision of 2 October 1995, 105 ILR 419 at 453, para. 70.

59. *Digest of United States Practice in International Law* 1981-88, volume III, p. 3456.

the capacity to carry out some of the obligations of the laws of war itself. For example, the United Nations has no courts or criminal law of its own and cannot itself punish a member of a United Nations force for a violation of the laws of war. Instead, it has to depend upon each State contributing troops to a United Nations operation to enforce the law amongst the members of its own contingent.

66. Nevertheless, it appears that there is no longer any doubt that the laws of war apply to a United Nations enforcement action which is designed to engage in hostilities in order to restore international peace and security. In the Korean conflict, after some initial hesitation, the United Nations Unified Command instructed its forces to comply with all four Geneva Conventions, notwithstanding that they were not then in force for some of the contributor States. While there remained an element of doubt as to whether the United Nations considered that its forces were bound by these treaties or were merely required to comply with the principles and spirit of the Conventions,[60] a leading study has pointed out that "there is, in fact, no known case in which the United Nations Command ever claimed exemption from any of the accepted rules of the laws of war, customary or conventional".[61] Since the time of the Korean conflict, the applicability of the laws of war to cases in which United Nations forces are a party to an international armed conflict has been generally accepted.[62] Similarly, when the United Nations authorizes military action (as in the Gulf conflict) by States which themselves

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60. S. Bailey, *How Wars End* (1982), vol. II, p. 444.

61. D. Bowett, *United Nations Forces* (1964), p. 56.

62. It is tacitly recognized by Article 2(2) of the Convention on the Safety of United Nations and Associated Personnel, 1994, which provides that:

> This Convention shall not apply to a United Nations operation authorised by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and *to which the law of international armed conflict applies*. (emphasis added)

See also Bowett, op. cit., pp. 484-516, ICRC, *Symposium on Humanitarian Action and Peace-Keeping Operations* (Geneva, ICRC, 1994), D. Shraga in L. Condorelli and others, eds., *The United Nations and International Humanitarian Law* (1996), p. 321 and the two resolutions adopted by the Institut de droit international, Resolution on the Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces may be Engaged, adopted at Zagreb in 1971, 54 (II) *Annuaire de Ihstitut de droit international* (1971), p. 465, and the resolution on the Conditions of Application of Rules other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces may be Engaged, adopted in Wiesbaden in 1975, loc. cit., vol. 56 (1975), p. 540.

become party to an armed conflict, there is no doubt that those States are subject to the laws of war.

67 The problem lies in determining when a United Nations force should be regarded as a party to an armed conflict. This task has become increasingly difficult as the United Nations has embarked upon operations which have elements of both enforcement action and more traditional peacekeeping. In some of these operations (noticeably those in the former Yugoslavia and Somalia), United Nations forces, and national or NATO forces associated with them, became involved in fighting on a scale which would undoubtedly have constituted an armed conflict under the criteria set out in the preceding section of this Report if States alone had been involved. There was, nonetheless, great uncertainty regarding whether the United Nations forces and those associated with them were party to an armed conflict and, if they were, whether that armed conflict was international in character, given the status of the forces against which the United Nations contingents were engaged.

68 The reluctance to acknowledge that a United Nations force has become engaged in an armed conflict is likely to be increased by the entry into force of the 1994 Convention on the Safety of United Nations and Associated Personnel. In most circumstances, the effect of Article 2(2) of that Convention is that if the law of international armed conflict (i.e. the main body of the laws of war, as opposed to the much shorter body of law applicable to non-international conflicts) applies to a United Nations operation, then the Safety Convention will not apply. Since that Convention is designed to protect United Nations and associated personnel from attacks, there will be an understandable reluctance to admit that a United Nations force has become involved in fighting to such an extent that the laws of war have become applicable and the protection afforded by the Convention has thus been removed.

69 The United Nations has accepted that United Nations forces should at all times comply with the "principles and spirit" of humanitarian law. This approach is now embodied in the model agreement drawn up for use between the United Nations and the States contributing contingents to the force. Article 28 of the model agreement provides that the operation:

> ... shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel. The international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of Armed Conflict. [The contributor State] shall therefore ensure that the members of its national contingent serving with the [operation] be fully acquainted with the principles and spirit of these Conventions.[63]

70 The same agreement requires the contributing State to "exercise jurisdiction with respect to crimes or offences which may be committed by its military personnel" serving with the operation.[64] This requirement would include violations of the principles and spirit of the Conventions listed in Article 28.

71 More recently, the United Nations has included in the Status of Forces Agreements which it has concluded with host States in respect of certain operations a clause by which both the United Nations and the host State agree to act in accordance with the principles and spirit of these Conventions. The Agreement between the United Nations and the Government of the Republic of Rwanda on the Status of the United Nations Assistance Mission for Rwanda (UNAMIR) of 5 November 1993, provided that:

> Without prejudice to the mandate of UNAMIR and its international status:
> (a) The United Nations shall ensure that UNAMIR shall conduct its operations in Rwanda with full respect for the principles and spirit of the general conventions applicable to the conduct of military personnel. These international conventions include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of Armed Conflict;
> (b) The Government undertakes to treat at all times the military personnel of UNAMIR with full respect for the principles and spirit of the general conventions applicable to the conduct of military personnel. These international conventions include

63. UN Doc. A/46/185 (23 May 1991). Similar provisions had been included in earlier agreements; see, e.g., the Exchange of Notes between the United Nations and Canada regarding the participation of Canadian units in UNFICYP, 1966, 555 UNTS 120.

64. Art. 25.

the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977;
UNAMIR and the Government shall therefore ensure that members of their respective military personnel are fully acquainted with the principles and spirit of the above-mentioned international instruments.[65]

72 Similar provisions have subsequently been included in agreements with Haiti, Angola and Croatia.

73 There are, however, certain difficulties inherent in this approach. First, if events have reached the point at which a United Nations force is a party to an armed conflict, then it should apply the whole of the laws of war, not simply the principles and spirit of the Conventions cited. Secondly, it is not clear exactly what the duty to observe the principles and spirit of the Conventions means and how, if at all, it differs from the normal duty to comply with the Conventions in their entirety. Thirdly, the Conventions referred to in the model agreement and the status of forces agreements quoted above are not the whole of the laws of war. The model agreement and status of forces agreements are silent on the question whether there is a duty to comply with, for example, the customary law of war.

74 Several attempts have been made to give greater content to the undertaking to respect the "principles and spirit" of the international humanitarian law conventions. In 1995 the Special Committee on Peace-keeping Operations requested the Secretary-General to draw up a code of conduct for peace-keeping personnel consistent with applicable international humanitarian law, so as to ensure the highest standards of conduct.[66] That same year, a meeting of Experts convened by the ICRC produced a preliminary report on the subject.[67] In 1996 the ICRC submitted to the

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65. Quoted in Shraga, loc. cit. note 46 above, at p. 325, note 16. The Agreement was also communicated to the Rwanda Patriotic Front (at that time the forces fighting the Government of Rwanda, the RPF overthrew the then Government in 1994) which confirmed its readiness to co-operate in the implementation of its provisions, Report of the Secretary-General of the United Nations, UN Doc. S/26927, 30 December 1993, para. 7.

66. UN Doc. A/50/230, 22 June 1995.

67. ICRC, *Report of a Meeting of Experts on the Applicability of International Humanitarian Law to United Nations Forces* (Geneva, ICRC, 1995).

Secretary-General a 32 paragraph set of draft guidelines based on the proposals of the Meeting of Experts. Those guidelines in turn formed the basis for a draft directive on international humanitarian law prepared by the Secretariat of the United Nations in 1997. The draft directive has not yet been issued in final form.

75 The number of United Nations operations in the last ten years and the complexity of some of them mean that uncertainty about the legal regime applicable is potentially dangerous. It is suggested that the law applicable to United Nations military operations should be reconsidered. In particular, the priority should be:-

a to clarify the circumstances in which a United Nations force is to be regarded as party to an armed conflict and to reaffirm that when it is to be so regarded, it is subject to the whole of the laws of war; and

b where a United Nations force is not party to an armed conflict but is nevertheless engaged in hostilities, to give the greatest possible content to the obligation to observe the principles and spirit of humanitarian law.

IV. The Conduct of Hostilities in International Armed Conflicts

76 The 1899 and 1907 Conferences considered almost the entire field of the law applicable to international armed conflicts. Much of that law was subsequently revised and refined in the 1949 Geneva Conventions and Additional Protocol I, 1977. For the most part the detailed legal regimes for the wounded, sick, shipwrecked and prisoners of war, which are now contained in the first three 1949 Conventions, have given rise to few problems and the development of this body of law can reasonably be regarded as one of the achievements of international law during the century which succeeded the 1899 Conference. A particularly important development in this regard was that it became established that the Conventions conferred rights upon the individuals whom they sought to protect and not just upon the States on whom those individuals depended.

77 While it is not pretended that these Conventions are perfect, there is no need for any radical revision at this point in time. Such weaknesses as exist in this area of the law stem not from a deficiency in the basic legal regime itself but rather from the difficulty of ensuring compliance with that regime. The issue of compliance is considered in Part VI of this Report. It is not proposed, therefore, to consider the first three Geneva Conventions further in this Part of the Report.

78 Instead, attention will be focussed upon five areas of the law which were the subject of much discussion in 1899 and which continue to give rise to difficulties today:-

(1) the entitlement to combatant status;
(2) the law of weaponry;
(3) the law of targeting;
(4) belligerent occupation; and
(5) naval warfare.

IV.1 Entitlement to Combatant Status

79 In considering the question who is entitled to take a direct part in hostilities and, consequently, to be treated as a prisoner of war upon capture, the 1899 Conference faced a dilemma which still exists today and which has become no easier to resolve. On the one hand, a clear distinction between combatants and civilians is essential if the latter are to receive the protection which the law requires. On the other hand, many States, especially those with comparatively small armed forces, rely upon popular resistance to an invader or an occupation army for their defence. Resistance movements of that kind are not organized in the same way or to the same degree as regular armed forces and frequently cannot be distinguished from the civilian population to the same extent. Should they, therefore, be treated as lawful combatants.

80 The 1899 Conference was unable to reach full agreement on this question. The test of combatancy which was laid down in Articles 1 and 2 of the Regulations on the Laws and Customs of War on Land made some concessions to the concept of popular resistance. Article 1 provided that:

The laws, rights and duties of war apply not only to the army but also to militia and corps of volunteers, fulfilling the following conditions:-

1. that of being commanded by a person responsible for his subordinates;
2. that of having a distinctive emblem fixed and recognizable at a distance;
3. that of carrying arms openly; and
4. that of conducting their operations in accordance with the laws and customs of war.[68]

81 In addition, Article 2 recognized the combatant status of members of a *levée en masse,* in territory not yet occupied, who "spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1", provided that they respect the laws and customs of war. Nevertheless, more ambitious proposals to recognize the combatant status of irregulars in a wider range of circumstances were not adopted and it was the failure to agree upon these latter proposals which particularly prompted the inclusion in the Preamble of the Martens Clause.[69] Moreover, the extension of combatant status to volunteer groups and other irregulars in Article 1 is less significant than it might appear, since the conditions which that Article requires irregular combatants to meet are so exacting that few resistance movements have ever been able to comply with them.

81 The 1899 test of combatancy survived largely unchanged until 1977. The 1907 Regulations did not alter Article 1 but added the further requirement in Article 2 that members of *alevée en masse* had to carry arms openly. The Third Geneva Convention, 1949, Article 4A, added that persons who met the criteria in Article 1 of the Regulations were entitled to be treated as prisoners of war on capture even if the movement to which they belonged was operating

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68. The authentic French text reads:
Les lois, les droits et les devoirs de la guerre ne sappliquent pas seulement à larmée, mais encore aux milices et aux corps de volontaires réunissant des conditions suivantes:-
1. davoir à leur tete une personne responsible pour ses subordonnés;
2. davoir une signe distinctif fixe et reconnaissable à distance;
3. de porter les armes ouvertement; et
4. de se conformer dans leurs opérations aux lois et coutumes de la guerre.

69. See page 8, above.

in occupied territory.[70] In practice, however, this change was of little importance, since the criteria in Article 1 have usually been interpreted in such a way that few, if any, guerrilla groups or resistance movements could comply with them. The British *Manual of Military Law*, for example, interpreted the requirement of a fixed, distinctive sign as meaning that "something less than a complete uniform will suffice", but went on to state that:

> ... it is reasonable to expect that the silhouette of an irregular combatant in the position of standing against the skyline should be at once distinguishable from the outline of a peaceful inhabitant, and this by the naked eye of an ordinary individual at a distance at which the form of an individual can be determined.[71]

82 It is difficult to imagine any guerrilla movement being able to comply with this requirement and survive.

83 Additional Protocol I, 1977, adopted an entirely new approach. It abolished the formal distinction between regular and irregular armed forces and provided that "the armed forces of a party to a conflict consist of all organized armed forces, groups and units which are under a command responsible for its subordinates".[72] Article 44(3) then went on to provide:

> In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
>
> (a) during each military engagement, and
>
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.
>
> Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

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70. The decision in *United States* v. *List,* 15 *Ann Dig* 632, had cast doubt upon the applicability of Article 1 to groups in occupied territory, although it is only Article 2 which expressly excluded such groups.

71. *Manual of Military Law, Part III* (1958), para. 92. This passage had first appeared just after the 1899 Conference.

72. Article 43(1).

84 The second sentence of this Article was the product of a last minute compromise negotiated between delegations which otherwise had little in common. It has been widely criticised both for its cumbersome structure and for reducing the requirement for a combatant to distinguish himself from the civilian population. Much of that criticism is justified. The two tier test in the two sentences of Article 44(3) is cumbersome. It leaves important questions about when the lower standard in the second sentence is applicable and what it actually requires. That has prompted some States to make declarations, upon ratification, that the second sentence is applicable only in occupied territory or wars of "national liberation"[73] and that sub-paragraph (b) applies to the time when the combatant is moving to a place from which an attack is to be launched.[74] Others have argued for a wider interpretation.

85 Nevertheless, the new Article 44(3) is not unworkable. The lower standard in the second sentence is not of general application, for it operates only in conditions where compliance with the stricter requirements of the first sentence is impossible. Even where the standard in the second sentence is applicable, it requires that the irregular carry arms openly during an attack and for some time prior to the attack. The interpretation, advanced by some groups, that all that is required is to produce weapons immediately before opening fire has no basis in law and is clearly contrary to the text. Moreover, if the provisions of Article 44(3) go too far in relaxing the requirements of combatancy and may thus be said to endanger the civilian population, the 1907-1949 test was also inadequate to protect that population, because it imposed conditions with which irregulars could not comply and thus offered no inducement to comply with other aspects of the law. It must also be borne in mind that the new rules on combatancy do not involve any acceptance of terrorist methods of warfare – attacks upon the civilian population and indiscriminate attacks are outlawed by Article 51 of the Additional Protocol as well as by customary international law. It is important not to confuse the question of who may lawfully engage in

73. As defined in Article 1(4) of Additional Protocol I.

74. See, most recently, the statements to this effect by the United Kingdom when it ratified the Protocol on 28 January 1998.

hostilities with the quite different question of what methods of warfare they may employ when they do so engage.

86 The standards laid down in the Additional Protocol on this question have not really been tested in practice. While the second sentence of Article 44(3) is far from ideal, the record of the negotiations of the Protocol suggests that it would be extremely difficult to secure agreement upon a better text today. Since the text is not unworkable, it is suggested that the best course is to leave it alone, seeking to interpret it in a rational way and to ensure that all combatants are encouraged to comply with the basic requirement to distinguish themselves from the civilian population during military operations. The controversy over Article 44(3) shows that what was an intractable problem in 1899 remains difficult a century later.

IV.2 The Law of Weaponry

87 The development of the law of weaponry and methods of warfare played an important part at the 1899 Conference.[75] In addition to the three specific Declarations (on asphyxiating gases, expanding bullets and projectiles discharged from balloons)[76] and the prohibition of poison and poisoned weapons (in Article 23(a) of the Regulations on the Laws and Customs of War on Land), the Regulations on the Laws and Customs of War on Land stated three general principles:-

a that belligerents do not have an unlimited right to choose the means of injuring the enemy;[77]

b that belligerents are forbidden to employ treacherous means of killing or injuring the enemy;[78] and

75. For an historical survey, see F. Kalshoven, Arms, Armaments and International Law'191 RC (1985-III) 185.

76. See Part II, above.

77. Article 22. The French text states: 'les belligérants nont pas un droit illimité quant au choiz des moyens de nuire à lennemi'

78. Article 23 (b).

c that belligerents are forbidden to employ arms, projectiles or material of a nature to cause superfluous injury or unnecessary suffering. [79]

88 This statement of the general principles remains important and has been reaffirmed in Additional Protocol I, Articles 35 and 37. Although it did not include a provision to this effect in the Regulations, the Conference evidently considered that weapons which were inherently indiscriminate should also be prohibited and it was on this basis that it adopted the prohibition on projectiles discharged from balloons. [80]

89 Subsequent years saw the adoption of the Geneva Chemical and Bacteriological Weapons Protocol, 1925, prohibiting the use of asphyxiating, poisonous or other gases, all analogous liquids, materials or devices, and bacteriological methods of warfare. This prohibition on the use of chemical and biological weapons was reinforced many years later by the Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological and Toxin Weapons, 1972, which prohibited the possession of bacteriological and toxin weapons, and the Chemical Weapons Convention, 1993, which prohibited the possession and use as a means of warfare of chemical weapons. The United Nations Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, 1977, prohibited the use of weapons intended to change the environment through the deliberate manipulation of natural processes.

90 Finally, a United Nations conference held in 1980 adopted the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, 1981, the three original Protocols to which prohibited the use of weapons which injured with

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79 Article 23(e), the French text of which reads:
Outre les prohibitions établies par des Conventions spéciales, il est notamment interdit:-
(e) dèmployer des armes, des projectiles ou des matières propres à causer des maux superflus.
The French term 'maux superflus' has sometimes been translated as 'superfluous injury' and at other times as 'unnecessary suffering'. The English text of Additional Protocol I, Article 35(2), which reaffirms the principle in Article 23(e) of the Regulations on the Laws and Customs of War on Land, employs both terms.

80. See page 10, above.

fragments which cannot be detected by x-rays (Protocol I) and imposed certain restrictions on the use of mines and booby traps (Protocol II) and incendiary weapons (Protocol III). A subsequent review conference in 1995-96 adopted an amended Protocol II on mines and a new Protocol IV on laser weapons. Finally, a convention outlawing anti-personnel land mines (which for some States will supersede the amended Protocol II to the Weaponry Convention) was adopted in 1997.

91 This record is not particularly impressive. In the century since the 1899 Conference, the advances in military technology have been enormous. The law, however, has changed little. Apart from the important developments of the law in relation to chemical and biological weapons (by the treaties of 1925, 1972 and 1993) and the recent developments in restricting or prohibiting the use of anti-personnel land mines, the treaty law has added little to the general principles. The general principles have remained significant and their continued validity was recently reaffirmed by the International Court of Justice in the *Nuclear Weapons* Advisory Opinion. Yet a 1973 survey of the law on weaponry by the United Nations Secretariat cited bayonets or lances with barbs, irregular shaped bullets and projectiles filled with glass as examples of weapons considered to be outlawed by the unnecessary suffering principle.[81] Scarcely standard weapons at the beginning of the twentieth century, these were museum pieces by its end. Similarly, leading text books still refer to the unnecessary suffering principle as meaning that "cannons must not be loaded with chain shot, crossbar shot, red-hot balls, and the like".[82] Such examples suggest that the law is firmly rooted in the nineteenth century.

92 Yet it would be wrong to underestimate what has been achieved. The use of chemical weapons was widespread during the First World War and the threat of biological weapons was a very real one. Although such weapons have not yet wholly disappeared from the battlefield, the record of compliance with the 1925 Protocol has been better than that of most treaties on the laws of war. Moreover,

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81. *Respect for Human Rights in Armed Conflicts: Existing Rules of International Law concerning the Prohibition or Restriction of the Use of Specific Weapons*, United Nations Doc. A/9215, vol. I, p. 204 (1973).

82. H. Lauterpacht, *Oppenheim's International Law* (7th ed., 1952), vol. II, pp. 34-1.

the 1972 and 1993 Conventions, with their provisions for disarmament and (particularly in the 1993 Convention) verification measures, offer a real prospect that these weapons of mass destruction can now be completely removed.[83]

93 The new regime for chemical and biological weapons is not only intrinsically important, it also suggests that the most effective way to proceed in seeking to rid the world of weapons which are particularly inhumane is by means of a disarmament approach, rather than a simple ban on use or restriction on the manner in which a weapon is used. Only in this way can States be given sufficient confidence that an agreement to relinquish a particular category of weapons will be honoured. While the complex and intrusive regime of the Chemical Weapons Convention is likely to prove acceptable only for weapons of mass destruction and other weapons of particular military importance, the willingness of the international community to accept such a regime in respect of chemical and biological weapons and the insistence of the Security Council on Iraq's compliance with the disarmament requirements of Resolution 687 is an indication of what can be achieved.

94 It would also be wrong to dismiss the general principles as ineffective. While it is difficult to point to any weapon with real military utility which it is generally agreed has been outlawed by the unnecessary suffering principle, it must be remembered that this principle requires a balancing of the military advantage which may result from the use of a weapon with the degree of injury and suffering which it is likely to cause. As a Japanese court has stated "the use of a certain weapon, great as its inhuman result may be, need not be prohibited by international law if it has a great military effect".[84] The prohibition of weapons and methods of warfare the cruelty of which is not matched by the military advantages which they offer is an important step in preserving humanitarian values in war. The principle has also served as the inspiration for some of the specific prohibitions (such as those on blinding laser weapons and

83. This issue is to be dealt with at greater length in the reports on disarmament prepared as part of the Centenary Commemoration.

84. *Shimoda* v. *The State* 32 ILR 626 at 634; see also the Opinion of Judge Higgins in the *Nuclear Weapons* case, International Court of Justice Reports, 1996, at pp. 583-5.

weapons which injure with fragments which cannot be detected by x-rays) which have been adopted.

95 With regard to the general principles, an important development was the articulation, in Article 36 of Additional Protocol I, of a duty for each State to examine proposals for new weapons and methods of warfare in order to determine whether their use would violate the principles of the laws of war. For this to be done effectively, it would be advantageous to have a clearer idea of the relevant considerations which have to be taken into account in assessing whether or not the employment of a particular weapon would be likely to cause unnecessary suffering. The unnecessary suffering test calls for a weighing of the military advantages offered by a particular weapon against the medical and other effects which that weapon produces. The debates on this subject amongst the Committee of Experts convened by the International Committee of the Red Cross at Lucerne in 1974 and Lugano in 1975[85] demonstrated considerable disagreement about the factors to be taken into account on either side of this equation.

96 A report published in 1997 by the International Committee of the Red Cross attempts to specify more precise criteria for determining whether a particular weapon causes unnecessary suffering.[86] The approach taken in this Report is to study the medical effects of existing weapons, the degree to which they cause death or particular types of injury and to suggest four criteria to be used in determining whether a new weapon is one which violates the unnecessary suffering principle:-

a does the weapon foreseeably cause specific disease, specific abnormal physiological state, specific abnormal psychological state, specific and permanent disability or specific disfigurement ?

b does the weapon foreseeably cause a field mortality of more than 25% or a hospital mortality of more than 5% (figures substantially in excess of those caused by weapons in use at present);

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85. International Committee of the Red Cross, *Report of the Conference of Government Experts on the Use of Certain Conventional Weapons, 1st and 2nd Sessions* (Geneva 1975 and 1976).

86. R. Coupland (ed.), *The SIRUS Project: Towards a Determination of Which Weapons Cause Superfluous Injury or Unnecessary Suffering* (1997).

c are the weapons designed to cause particularly large wounds; or

d does the weapon foreseeably exert effects for which there is no well recognized and proven treatment ?

97 The identification of these criteria and the medical study on which they are based is of considerable value in helping to show how the balancing act required by the unnecessary suffering principle can be made more precise and less anecdotal than at present. It is, however, important to realize that the fact that a particular weapon meets one of these criteria is not, in itself sufficient to brand it as unlawful without consideration of the military advantages which that weapon may offer. For example, the fact that soldiers cannot take cover from a particular type of weapon will, as the report points out, heighten the reaction of abhorrence produced by such a weapon[87] but it is also the very inability of soldiers to take cover that means that the weapon will, in the language of the 1868 Declaration, disable the greatest possible number of enemy combatants and which thus gives it its military effectiveness when compared with other weapons. Moreover, the Report considers only the "medical" or "humanitarian" side of the balance. Greater precision is also needed in determining what are the relevant factors to be taken into account on the military side of the equation.[88]

IV.3 The Law of Targeting

98 The question of what is a legitimate target in warfare is obviously closely related to that of weaponry and methods of warfare. The 1899 Conference, however, had less to say on this subject. Articles 25-27 of the Regulations on the Laws and Customs of War on Land prohibited the attack or bombardment of undefended towns, villages or buildings (Article 25), imposed a limited obligation upon a commander to warn the authorities of a town before bombardment (Article 26) and required him to take all necessary steps to spare certain objects (e.g. hospitals, schools and charitable institutions) in the course of a bombardment (Article 27).

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87. Op. cit., p. 27.

88. See M. Bothe, J. Partsch and W. Solf, *New Rules for Victims of Armed Conflicts* (1982), pp. 196-7.

These provisions are very limited in their scope and difficult to apply. The effectiveness of Article 25 is less than might appear, because a town can only be regarded as undefended if it is open to capture by the enemy without opposition. The provision is therefore inapplicable to towns situated behind enemy lines, because, even if they have no defences of their own, these cannot be occupied without sending forces through areas where resistance can be expected. Articles 26 and 27 have proved almost wholly ineffective.

99 The 1907 Conference left these provisions largely unchanged and the Fourth Geneva Convention, 1949, made only minor changes, designed to facilitate the creation of hospital and safety zones and neutralized zones.[89] Even this modest objective has not been realized, since almost no use has been made of such zones since 1949. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, and the Protocol thereto, built on the provisions of Article 27 of the Regulations on the Laws and Customs of War on Land but it was not until the adoption of Additional Protocol I that the customary law rules on targeting were reduced to writing and supplemented by the adoption of a number of new (and sometimes controversial) provisions.

100 It had long been accepted that the customary laws of war contained two cardinal principles regarding targeting:-

a that attacks should be directed only at military objectives and not at civilians or civilian objects ("the principle of distinction"); and

b that in attacks upon military objectives there was a duty to avoid causing disproportionate civilian casualties and damage ("the principle of proportionality").[90]

101 The record of compliance with those principles during most of the twentieth century has been dismal. They were almost universally disregarded during the Second World War and in most of the conflicts thereafter.

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89. Fourth Convention, Articles 14 and 15.

90. See, e.g., the statement by the United Kingdom Prime Minister, Neville Chamberlain, at the time of the Spanish Civil War, 337 House of Commons Debates (21 June 1938), cols 937-8 and United Nations General Assembly resolution 2444 (1968).

102 Additional Protocol I attempted to give greater precision to these principles in a number of respects:-

1 Articles 48, 51 and 52 reaffirm the principles themselves – an important step in view of the scale of violations which had occurred;

2 Article 52 attempts to put flesh on the bare bones of the principle of distinction by defining what is meant by a military objective:

> Insofar as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

103 This definition avoids the pitfalls of the approach taken in, for example, the 1923 Draft Rules on Air Warfare[91] of seeking to list categories of military objectives.[92] Instead, it lays down a two stage test: (1) does the object make an effective contribution (actual or potential) to the enemy's military action; and if so (2) is it, in the circumstances ruling at the time, one whose destruction, capture or neutralization would offer a definite military advantage. The reference to the circumstances ruling at the time is particularly important as it should avoid the approach of treating entire categories of items (such as bridges) as military objectives in all circumstances.[93]

104 3 The Protocol also codifies the principle of proportionality, although it does not use that term. Article 51(5)(b) defines as an indiscriminate attack (and therefore as one prohibited by Article 51(4)),

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

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91. Roberts and Guelff, p. 121.

92. For criticism of the text in Article 52(2) as too vague and open-ended, see A. Randelzhofer, Civilian Objects in Bernhardt (ed.), 3 EPIL 93 (1982).

93. Kalshoven, 9 Neths YBIL (1978) 107 at 111.

105 This provision was welcomed at the time as a useful codification of the principle of proportionality.[94] While any attempt to determine the content of this principle is problematic, not least because it requires that a balance be struck between two such different considerations as military advantage and civilian losses,[95] the approach taken in the Protocol represents an advance in that it emphasizes that the military advantage must be "concrete and direct". Nebulous factors such as "breaking the morale of the enemy State" are not enough.[96]

106 4 Article 57 translates these principles into a set of questions which must be asked by a commander in deciding whether, and how, to launch an attack.

107 Although Additional Protocol I was not, as such applicable in the 1990-91 Gulf Conflict (since Iraq was not a party to the Protocol), the Coalition States treated the provisions set out above as declaratory of rules of customary international law and announced that their targeting policy would comply with them. While this is not the place to evaluate that claim, the experience of the Gulf conflict suggests that the provisions on targeting in Additional Protocol I are workable. Rather, therefore, than seeking to refine those principles further at this stage, it is suggested that priority should be given to ensuring better compliance with them.

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94. See, eg, the statement by the United Kingdom Representative, VI*Official Records* 164.

95. The test is always a relative one in which the harm to the civilian population must be weighed against the military advantage. There is no justification for the attempt in the ICRC *Commentary* to introduce an absolute ceiling beyond which civilian casualties can never be justified. The passage in the*Commentary* which states that
> "The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 ' (Basic rule) ' and with paragraphs 1 and 2 of the present Article 51 . The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive." (para. 1980)
>
> is misleading because it appears to confuse the term 'extensive' which suggests an absolute test, with 'excessive' a term which is clearly relative. However attractive the view in the*Commentary* may be from a humanitarian viewpoint, it does not accurately reflect the text of the Protocol or the underlying principle of customary law.

96. Breaking the morale of the enemy's armed forces, so that they will be less able to resist an attack is a different matter.

108 In this respect, an important step forward is the increased likelihood that those who violate the law relating to targeting, particularly those who deliberately target civilians, will face prosecution for those acts. The International Criminal Tribunal for the Former Yugoslavia already has jurisdiction over such acts[97] and it is likely that the International Criminal Court will also do so if that body is established.

109 In passing, it should also be noted that the principles on targeting stated in the Protocol apply to any warfare which may affect the civilian population on land. Although usually discussed in the context of air bombardment and the use of regular forces, the duty to distinguish between the civilian population and the military and the requirement to observe the principle of proportionality apply just as much to those conducting guerrilla warfare as they do to the air force or artillery of the regular armed forces. Thus, the prohibition in Article 51(2) of attacks "the primary purpose of which is to spread terror among the civilian population" applies to the planting of a car bomb as well as to the activities of a strategic air force.

IV.4 The Law of Belligerent Occupation

110 The elaboration of a code for the government of occupied territory was one of the principal achievements of the 1899 Conference. Articles 42-56 of the Regulations on the Laws and Customs of War on Land, which were largely unchanged in 1907, laid down a framework of principles within which a belligerent occupant was required to act in governing occupied territory. Chief among these were:-

1 the occupant acquired only temporary control over the territory, not sovereignty, and was entitled, and required, to exercise the powers of government while respecting, unless absolutely prevented, the laws already in force (Articles 42-3);

2 the population of the occupied territory did not owe allegiance to the occupying power and could not be required to swear

97. See, e.g., the Rule 61 decision in *Prosecutor* v. *Martic* 108 ILR 39. At the time of writing , the Tribunal was hearing a case against *Blaskic* which involved allegations of unlawful bombardment.

an oath (Articles 44-5), their lives, honour and property were to be respected (Articles 46-7); and

3 the power of the occupant to take or use public and private property in the occupied territory were restricted by Articles 48-56.

111 The underlying principle was that the *status quo* should be preserved as much as possible, so as not to prejudice either the population or the displaced sovereign in advance of the conclusion of a peace treaty, which would determine the future of the territory.

112 The emphasis in the Regulations on the Laws and Customs of War on Land was on the governance of the occupied territory and the powers of the occupant with respect to property, rather than the protection of the civilian population as such. The inadequacy of that approach was graphically demonstrated by the abuses committed by occupying powers during the Second World War (although the regime did not work particularly well during the First World War either). The Fourth Geneva Convention 1949 attempted to address this problem by adding a number of provisions (Articles 27-34 and 47-78) regarding the treatment of the population of occupied territory. These provisions prohibit reprisals against the population, collective punishments, deportations, hostage-taking and a number of other practices and are designed to give the civilian population and individual civilians a series of fundamental guarantees relating to freedom from arbitrary arrest and detention, conditions of detention, fair trial and the like.

113 The Fourth Convention does not, however, address the underlying questions about the governance of occupied territory or the powers of the occupant to requisition or make use of property in the occupied territory. On these questions, the 1899 and 1907 Regulations on the Laws and Customs of War on Land remain important as a statement of the customary international law.

114 The law of belligerent occupation has had a poor record of compliance for most of the twentieth century. The principal problem has been the reluctance of States to admit that the law applies at

all.[98] Particularly since the end of the Second World War, States which have occupied territory in the course of a military operation have denied that their subsequent governance of that territory was subject to the law of belligerent occupation on a number of grounds. In many cases, the State concerned maintained that it had a superior claim to title to the territory than did the State which it had displaced, so that far from becoming a belligerent occupant, it was merely regaining possession of its own territory. It was on this ground that Iraq denied the applicability of the law of belligerent occupation to its occupation of Kuwait in 1990-91, notwithstanding the universal opposition of the international community to its claims.[99] Similarly, Israel has denied the applicability *de iure*, of the Fourth Geneva Convention to the West Bank and the Gaza Strip on the grounds that it did not accept that those territories had been part of the territory of another State prior to 1967. Israel has, however, agreed to apply the humanitarian provisions of the Convention on a voluntary basis.[100] The Security Council has, however, insisted that the Convention is applicable as a matter of law and has made a number of calls for Israel to comply with its provisions.[101]

115 If the applicability of the law of belligerent occupation were to be dependent upon the resolution of the underlying question of title to the territory concerned, it would almost never be applicable. In fact, neither the Fourth Convention nor the Regulations on the Laws and Customs of War on Land makes it a precondition of the applicability of the law of belligerent occupation that the territory which is occupied must have been part of the territory of the displaced sovereign prior to the commencement of the occupation.

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98. A. Roberts, What is a Military Occupation ?'55 BYIL (1984) 249; E. Benvenisti, *The International Law of Occupation* (1993).

99. Iraq maintained that it had entered Kuwait at the invitation of the Provisional Government of Free Kuwait and that it had subsequently annexed the territory in accordance with the wishes of that government and to give effect to its own claims to title to Kuwait; see the Memorandum of the Government of Iraq, 12 September 1990, in E. Lauterpacht and Others (eds), *The Kuwait Crisis: Basic Documents*, vol. I (1991), p. 73. The annexation was condemned as invalid by the Security Council in Resolution 662 (1990). The Council repeatedly insisted that Iraq should comply with the relevant provisions of the law of belligerent occupation, especially the Fourth Geneva Convention; see, e.g., Resolutions 666, 670 and 674.

100. E. Playfair, *International Law and the Administration of Occupied Territories* (1992).

101. See, e.g., Resolutions 605 (1987), 607 (1988), 636 (1989), 672 (1990), 681 (1990), 694 (1991). There are numerous other resolutions to this effect.

Article 2(2) of the Fourth Convention appears to point to such a conclusion:

> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

116 That provision is, however, a residual one, since the applicability of the Fourth Convention is primarily determined by Article 2(1), which provides that the Convention shall apply to "all cases of declared war or of any other armed conflict". In the event that, during an armed conflict, a State takes control, by military force, of territory which was not under its control prior to the conflict, then the Fourth Convention is applicable, whatever the underlying disputes about title. The same is true of the Regulations on the Laws and Customs of War on Land. Although the section on occupation is entitled "Military Authority over the Territory of the Hostile State", there is no requirement, express or implied, that the hostile State's title to the territory must be unchallenged or authoritatively established as a precondition to the application of this section of the Regulations.

117 The problem, therefore, is not one of a deficiency in the law but rather of the refusal of States actually to apply that law. Any significant improvement, therefore, requires not new law but better enforcement of the law which already exists.

118 That is not to say that the law on belligerent occupation is entirely satisfactory. Two deficiencies are particularly apparent. First, the law of belligerent occupation, aiming as it does at a preservation of the *status quo* pending the conclusion of a peace settlement, is in some respects ill suited to the conditions of a prolonged occupation. It is difficult to see, however, how this problem can be addressed. Changes in the law to give the occupying power greater scope to change the law and practice in the occupied territory to take account of social, political and economic changes occurring during the occupation are unlikely to prove acceptable and would, in any event, come close to substituting the occupant for the displaced sovereign as the sovereign power. Substitution of a concept of trusteeship of the occupied territory for the existing regime of belligerent occupation seems likely to prove unworkable, given the inescapable fact that, unlike any normal concept of trusteeship, the relationship between the occupying

power and the territory (as well as its population) rests on the successful use of force. In so far as prolonged occupations are to be allowed to occur at all (a question which falls outside the terms of reference for this Report), the best that can be said is that the basic principles in the Regulations on the Laws and Customs of War on Land are sufficiently elastic to allow for a degree of evolution within the framework of an occupation regime which must be regarded as temporary. Accommodation of change in the case of a prolonged occupation must be within the framework of the core principles laid down in the Regulations on the Laws and Customs of War on Land and the Fourth Convention, in particular, the principle underlying much of the Regulations on the Laws and Customs of War on Land, namely that the occupying power may not exploit the occupied territories for the benefit of its own population.

119 Secondly, the provisions on the taking of property in occupied territory are now distinctly archaic. The rigid distinction between the powers of the occupant with regard to public property and private property is more difficult to apply in an era when the role of the State, both as owner and regulator, has become far greater than it was a century ago. The provision, in Article 55 of the Regulations on the Laws and Customs of War on Land, that the occupying power shall have the powers of a usufructuary of much public property[102] is exceptionally difficult to apply in the modern context. Again, however, it is unlikely that agreement could be reached about a new body of law which would inevitably place considerable power in the hands of a belligerent occupant. Though less than satisfactory, the existing law is probably the best that can be obtained and the real challenge is to improve the record of compliance with it.

IV.5 The Law of Naval Warfare

120 The nature of naval warfare in the eighteenth and nineteenth centuries was such that a substantial and sophisticated body of customary international law had already developed by 1899, in part due to the jurisprudence of prize courts. Under that law, belligerents could conduct hostilities everywhere except in the waters of neutral

102. LEtat occupant ne se considéra que comme administrateur et usufruitier des édifices publics, immeubles, forêts et exploitations agricoles appartenant à Etat ennemi et se trouvant dans le pays occupé. Il devra sauvegarder le fonds de ces propriétés et les administrer conformément aux règles de l'usufruit.

States. Most of the law concerned the circumstances in which it was legitimate for belligerent warships to capture enemy and neutral merchant vessels. So far as enemy merchant vessels were concerned, the better view (in spite of the strong opposition of the United States of America) was that enemy merchant vessels and their cargo were liable to capture and condemnation in prize. Neutral vessels, however, were liable to capture only in limited circumstances, such as when running a blockade. The emphasis was on capture rather than attack and the distinction between enemy and neutral shipping and waters was central to the operation of the law.

121 The 1899 Conference took almost no action on this subject, beyond adopting the Convention for the Adaptation of the Principles of the Geneva Convention to Maritime War. It did, however, suggest that the question of naval warfare be considered at a subsequent Peace Conference. The 1907 Conference considered the law of naval warfare at length and, as well as revising the 1899 Convention on the wounded and sick, adopted seven new Conventions:-

- Hague Convention No. VI relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities
- Hague Convention No. VII relating to the Conversion of Merchant Ships into Warships
  Hague Convention No. VIII relating to the laying of Automatic Submarine Contact Mines
- Hague Convention No. IX concerning the Bombardment by naval Forces in Time of War
- Hague Convention No. XI relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War
- Hague Convention No. XII relative to the Creation of an International Prize Court (which never entered into force) and
- Hague Convention No. XIII concerning the Rights and Duties of Neutral Powers in Naval War.

122 While these treaties lay down a detailed code of rules, they have proved to be far from satisfactory. Parts were already anachronistic when they were drafted and they were largely disregarded in both World Wars, when the doctrine of reprisals was invoked to justify widespread departures from their provisions. Since only a minority of States are parties to the treaties themselves, it becomes important to know which provisions are to be regarded as

declaratory of customary international law. That, however, is no easy task, given the comparative paucity of State practice which can be relied upon (much of the practice which does exist being referable to the reprisals claims and thus an uncertain guide). The only treaty for which substantial support can be found is the Mines Convention, which the International Court of Justice has held is based upon "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war".[103] In the *Nicaragua* case, the Court held that these principles prohibited the laying of mines without warning or notification in waters to which the vessels of another State had rights of access or passage.

123 There are several reasons why the law of naval warfare as stated in the 1907 treaties is difficult to apply in modern conditions. First, it presupposes a clear distinction between belligerents and neutrals. That distinction is far harder to draw today, since declarations of war or neutrality have been almost unknown since World War Two and States not directly involved in a conflict have frequently been strong supporters of one side or other in that conflict. In addition, the massive increase in the popularity of flags of convenience has meant that a very large part of the world's merchant shipping has come to fly the flags of States which are unlikely ever to be active belligerents, while the main naval powers are no longer the States with the larger merchant fleets. A further complicating factor, which has already been considered in Part III, is that the traditional concept of neutrality is difficult to reconcile with the law of the United Nations Charter in a number of respects.

124 Secondly, the Hague Conventions were based upon the assumption that the only part of the seas which was closed to belligerent naval operations was the waters of neutral States. While that proposition remains true today, the extent of those waters has greatly increased. Not only has the extent of territorial waters undergone a substantial increase since the Second World War, the concept of archipelagic waters means that large areas of what were formerly the High Seas are now considered to be part of the waters

103. *Corfu Channel Case* International Court of Justice Reports, 1949, p. 22; *Military and Paramilitary Activities in and Against Nicaragua*, International Court of Justice Reports, 1986, p. 112.

of the coastal State and thus, arguably, off limits to belligerents in a case where the coastal State is not directly involved in hostilities. Conversely, a practice of belligerents in recent naval conflicts has been to proclaim exclusion zones, or war zones, in areas of the High Seas of strategic importance to them and to claim increased rights to control, and sometimes to attack, shipping within those zones.

125 Thirdly, the Hague Conventions treat interception, visit and search as the normal means of exercising belligerent rights in respect of merchant shipping. A merchant ship is treated as a legitimate target for attack only in exceptional circumstances (such as when resisting visit and search or travelling under convoy of enemy warships). Yet visit and search at sea is seldom a realistic option for States without substantial surface fleets and in an era of container shipping, visit and search at sea is unlikely to be particularly useful, since the contents of containers cannot be inspected without taking the ship into port. The Iran-Iraq War, in particular, saw both belligerents take a very broad view of the circumstances in which a merchant ship, even a neutral merchant ship, was a legitimate target. While some of these claims – for example, Iraq's claim that neutral merchant ships carrying exports of Iranian oil were a legitimate target for attack on sight – were almost certainly unjustified, there was a widespread feeling that uncertainty regarding the content of the law made it more difficult to resist such attacks.

126 These factors have led to a number of influential calls for a full-scale revision of the law of naval warfare.[104] That the 1907 treaties no longer provide sufficient guidance on their own is clear. That does not mean, however, that no satisfactory guide to conduct exists in the customary law. A recent initiative by the International Institute for Humanitarian Law has led to the publication of a restatement of the existing customary law in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*.[105] This Manual addresses the question of targeting by employing principles

104. See, e.g., N. Ronzitti, The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for its Revision in Ronziti (ed.), *The Law of Naval Warfare* (1988), pp. 1-58.

105. The Manual, which was published in 1995, was edited by Louise Doswald-Beck, Legal Adviser to the International Committee of the Red Cross, and prepared by international lawyers and naval experts convened by the Institute.

of targeting developed in the context of land warfare[106] and adapting them to the different context of naval warfare. It sets out the extent to which the law of neutrality at sea is still to be regarded as effective and it examines the question of where naval operations may lawfully be carried out in the light of the modern law of the sea.

127 While the case for a major revision of the law of naval warfare remains a strong one, any attempt to address this issue by means of an international conference would present considerable difficulties and would be doomed to fail unless it had the active support of the major naval States. In the circumstances, the personal view of the Rapporteur is that revision of the law of naval warfare, although desirable in the longer term, should not be considered an immediate priority. Instead, international efforts should be directed towards the further refinement of the customary law, using the *San Remo* statement as a starting point, and attempts to improve compliance with that law.

V. Internal Conflicts

128 The 1899 Conference was concerned with the law applicable to conflicts between the States party to the Conventions which were there adopted and, ironically in view of the influence of the Lieber Code, which was drafted for use in the American Civil War,[107] did not concern itself with conflicts occurring within a State.[108] One hundred years later, such conflicts have a far more prominent place on the international agenda, for it is here that the laws of war are arguably at their weakest and the case for revision consequently most pressing.

129 The existing treaty law on this subject is mainly contained in common Article 3 of the Geneva Conventions, 1949, and Additional Protocol II, 1977, although a number of other treaties are also

106. See Part IV, Section 3, of this report.

107. R. Abi-Saab, Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern in A. Delissen and G. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead* (1991), 209 and *Droit Humanitaire et Conflits Internes* (1986).

108. See Part II, above.

applicable to internal conflicts.[109] Common Article 3 was adopted in 1949 after it became clear that a far more ambitious proposal that the four Conventions should extend in their entirety to civil wars would not be acceptable to the majority of States. The Article stipulates that in "armed conflict not of an international character occurring within the territory of one of the High Contracting Parties", the parties to the conflict (government and insurgent) were required to apply "as a minimum" certain basic humanitarian standards which are detailed in the Article. Article 3 also provided that "an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict". That provision was undoubtedly a major step forward but the skeletal nature of common Article 3 is immediately apparent. The minimum humanitarian standards which it requires the parties to observe are concerned entirely with the protection of persons taking no active part in hostilities; there are no provisions on the actual conduct of hostilities and a single sentence – "the wounded and sick shall be collected and cared for" – does the work which in the case of international conflicts was done by two entire Conventions.

130 Common Article 3 was supplemented by Additional Protocol II in 1977. As in 1949, the original proposal from the International Committee of the Red Cross was more extensive than the text eventually agreed at the Diplomatic Conference. Additional Protocol II is, however, far more detailed than common Article 3 and includes provisions for the conduct of hostilities, although almost all of these are designed to protect civilians rather than combatants.[110] It also lays down more detailed rules for the treatment of the wounded and sick and the protection of medical personnel,[111] as well as a series of provisions on basic humanitarian guarantees drawn from international humanitarian law and human rights law.[112]

131 It appears that there is also a body of customary international law applicable to non-international armed conflicts. Common

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109. See, in particular, the Hague Convention for the Protection of Cultural Property, 1954, Article 19, the amended Protocol II to the Conventional Weapons Convention, the Chemical Weapons Convention, 1993, and the Land Mines Convention, 1997.

110. Articles 491) and (2) and Articles 13-18.

111. Articles 7-12.

112. Articles 4-6.

Article 3 was itself treated as declaratory of custom by the International Court of Justice in the *Nicaragua* case,[113] although the basis for this finding has been questioned.[114] In addition, at least some of the provisions in Additional Protocol II are also declaratory of customary international law. Far more striking, however, has been the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor* v. *Tadic (Jurisdiction),*[115] which found that there had developed an extensive body of customary international law applicable to non-international armed conflicts.

132 While these developments have meant that the law applicable to non-international armed conflicts has advanced considerably since 1899 (if, indeed, any such law existed at that date), a number of serious problems remain to be addressed.

V.1 The Scope of Application of the Law on Internal Conflicts

133 The first such problem concerns the circumstances in which the law on internal armed conflicts becomes applicable. Common Article 3 merely refers to "armed conflict not of an international character", without any indication of what that term might mean. The term is, therefore, capable of a broad interpretation but it is clear that it does not apply to isolated acts of violence, such as sporadic acts of terrorism, or rioting. In that respect, Article 1(2) of Additional Protocol II is probably stating the general law, when it provides that "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" are not armed conflicts. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Tadic* considered that there was an internal armed conflict whenever there was "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[116]

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113. International Court of Justice Reports, 1986, p. 114, paragraph 218.

114. See, e.g., the dissenting opinion of Judge Sir Robert Jennings, loc. cit., p. 537.

115. 105 ILR 419.

116. Loc. cit., p. 488, para. 70.

134 Additional Protocol II, however, is subject to a higher threshold, Article 1(1) providing that the Protocol applies to armed conflicts

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

135 The requirement of territorial control means that the majority of internal armed conflicts fall outside the scope of Additional Protocol II, the application of which is confined to full scale civil wars of the kind which occurred in Nigeria in the late 1960s.[117] In addition, unlike common Article 3, Additional Protocol II does not apply to conflicts between warring factions within a State when none of these factions constitutes the government of that State.

136 The threshold for the application of the law of internal armed conflicts is unsatisfactory in a number of respects. First, it is difficult to find any justification today for the higher threshold for the application of Additional Protocol II. The provisions of Additional Protocol II are exclusively humanitarian in character. The provisions on the care of the wounded and sick should be uncontentious in any conflict, irrespective of its level of intensity. Those relating to fundamental guarantees are drawn in large part from human rights provisions, which are intended to apply in circumstances of normality, and the principles of common Article 3, which apply at the lower threshold in any event. The provisions on the conduct of hostilities are somewhat different, since these are derived from those of Additional Protocol I. Nevertheless, they are intended exclusively for the benefit of the civilian population and the limitations which they would impose upon government forces seeking to suppress a rebellion are minimal. There is no reason why a government should be obliged to observe these restraints towards its civilian population only in the circumstances specified in Article 1 of Additional Protocol II and not in all those to which common Article 3 applies and which are closer to a situation of normality within a State.

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117. The Russian Constitutional Court, in its Judgment of 31 July 1995, considered that the Protocol had been applicable to the conflict in Chechnya.

137 The higher threshold in Article 1(1) of Additional Protocol II is, of course, justified in the test of that provision by reference to the need for an insurgent movement to control an area of territory in order to enable it to implement the Protocol. There is some force in that argument, since the provisions of the Protocol, like most of international humanitarian law, are more easily applied by those who have a territorial base than by forces which are constantly on the move. That is not to say, however, that the provisions of the Protocol cannot be implemented by an insurgent force which does not control a clearly defined area of territory. Control of territory was not, for example, considered necessary for a national liberation movement to be able to apply the far more substantial provisions of the Geneva Conventions and Additional Protocol I.[118] Moreover, in any guerrilla conflict (and almost all internal conflicts are guerrilla conflicts for at least much of the time), the notion of territorial control is difficult to pin down. As a leading commentator has explained, it may vary between day and night.[119] In such circumstances, the existence of territorial control is thoroughly unsatisfactory to serve as a condition for the applicability of rules of international humanitarian law.

138 Secondly, contrary to what is provided in Additional Protocol II, it is important that the whole of the law of internal armed conflicts should be applicable to fighting between different non-governmental groups and not just to fighting between government and insurgent forces. In cases of civil war it is frequently difficult to determine which, if any, group can properly be regarded as the government of the State concerned.[120] Unlike Additional Protocol II, the test in common Article 3 avoids the need to address this question as a precondition for the applicability of international humanitarian law. Moreover, some of the most vicious internal conflicts of recent years have occurred between factions none of which could plausibly be regarded as the government of a State, the government either having ceased to exist or being unable to act.

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118. Additional Protocol I, Articles 1(4) and 96(3).

119. G. Abi-Saab, Wars of National Liberation" 165 RC (1979-IV) 353. The remark was made in the context of an Article 1(4) conflict under Additional Protocol I but is equally applicable to internal conflicts.

120. That was the case, for example, during part of the civil war in Liberia.

139 Thirdly, with both common Article 3 and Additional Protocol II, there is a problem that, even where the conditions for their application have been met, governments are reluctant to admit that this is so. This reluctance is particularly evident in relation to Additional Protocol II, since for a government to admit the applicability of the Protocol is to concede that it has lost control of part of its territory. It has, however, also been a feature of conflicts under common Article 3. As Judge Kooijmans has pointed out, this is a major weakness of the system of rules designed for internal armed conflicts.[121] In the absence of an acceptance on the part of the government, or of faction leaders, that an armed conflict exists, it is obviously less likely that the law will in fact be applied (although some governments have agreed to apply the standards in common Article 3 while denying that there is an armed conflict occurring on their territory). Yet the acceptance by a government that an armed conflict exists is not a legal prerequisite for the applicability of common Article 3 of Additional Protocol II. Both are stated to be applicable provided that certain objective criteria are met. It is therefore important that governments should not be allowed to escape their obligations by denying the existence of an armed conflict in circumstances where those criteria are met.

140 Finally, the comparatively high threshold for the applicability of the law of internal armed conflicts has opened up the threat of a gap between the coverage of human rights treaties and the rules of that law. Most human rights treaties permit derogation in cases of national emergency.[122] The question of exactly what constitutes such an emergency has frequently proved controversial but it is clear that the situation within a State can reach the stage at which that State may invoke the derogation clauses of the human rights treaties but still not amount to an armed conflict within the generally accepted sense of that term. It is possible, therefore, that a State might legitimately invoke the derogation provisions of the human rights treaties to which it is a party and thus remove some (though

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121. P. Kooijmans, 'In the Shadowland between Civil War and Civil Strife' in A. Delissen and G. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead* (1991), 225 at 228-9.

122. See, e.g., International Covenant, Article 4(1) ('public emergency which threatens the life of the nation'), European Convention, Article 15(1) ('war or other public emergency threatening the life of the nation'), American Convention, Article 27(1) ('war, public danger, or other emergency that threatens the independence or security of a State Party').

not all) of the protections afforded by those treaties, while still not being required to observe the limitations of the laws of war. There is no logical justification for this state of affairs, since there is no reason why, in a state of emergency falling short of an internal armed conflict, a State should be permitted to engage in conduct which is forbidden to it in normal times and in the more serious conditions of civil war. The obvious desirability of closing that gap has led to the production of the Declaration of Minimum Humanitarian Standards ("the Turku Declaration") and other moves to elaborate a set of non-derogable standards drawn from both human rights law and the laws of war.[123]

141 It is suggested, therefore, that the protection afforded to those not taking part in hostilities – and, in particular, to the civilian population caught up in an internal armed conflict – would be greatly enhanced if the international community were willing to take the following steps:-

1 make the threshold for the applicability of Additional Protocol II the same as that which currently exists for common Article 3;
2 ensure that the threshold which will then be applicable to both sets of provisions is faithfully applied; and
3 harmonise the law of internal armed conflicts with the law of human rights by the adoption of a set of standards common to human rights law and the law of internal conflicts which are to be applied at all points on the spectrum of internal unrest.

142 It is accepted that these proposals would involve a reversal of positions taken only just over twenty years ago when Additional Protocol II was adopted and would be seen by some States as a threat to sovereignty. In practice, however, no such threat would be involved. Violations of the law would not, of themselves, furnish a justification for intervention.[124] The restriction on the freedom of action of States would be small and the humanitarian gain potentially very considerable.

123. See, e.g., Meron and Rosas, A Declaration of Minimum Humanitarian Standards' 85 AJIL (1991) 375.

124. Additional Protocol II, Article 3.

V.2 The Substantive Law Applicable to Internal Armed Conflicts

143 A second problem concerns the comparative paucity of the substantive law applicable in internal armed conflicts. Even after the adoption of Additional Protocol II, this body of law is very limited, especially when one compares it with the substantive law applicable to international conflicts. There are indications that some States are prepared to apply the whole of the law of international armed conflict to internal armed conflicts as well.[125] The Appeals Chamber in *Tadic*, however, denied that the customary law of internal armed conflicts had yet reached the point where it was identical to that for international armed conflicts.[126] Moreover, some features of the law of international armed conflict – such as the law of belligerent occupation – are inappropriate for application in non-international conflicts and it is unlikely that the majority of States would be willing to accept the application of, for example, the underlying premise of the Prisoners of War Convention, that prisoners of war may not be subjected to punishment for the mere act of participating in hostilities, in conflicts between government and insurgent forces.

144 Nevertheless, there are other, less controversial principles of the law of international armed conflicts which could be applied to conflicts occurring within a State. The most obvious candidate is the provisions of the First and Second Geneva Conventions. Although Additional Protocol II, Articles 7-12, set out the main principles for the treatment of the wounded and sick and the protection of medical personnel, those provisions lack the detail of the First Convention, some of the provisions of which could usefully be extended to internal conflicts. Additional Protocol II has no equivalent of the provisions of the Second Convention. While internal conflicts seldom have a naval dimension, it is not impossible that they might do so, in which case the extension of the principal provisions of the Second Convention to internal conflicts would be of great value.

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125. See D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1995), p. 48, reproducing para. 211 of the German manual of the laws of war issued to the Bundeswehr.

126. Loc. cit., para. 126.

145 The law of internal armed conflicts also contains very few provisions on the conduct of hostilities themselves. Article 13 of Additional Protocol II states the basic principle that "the civilian population, as such, as well as individual civilians, shall not be the object of attack". This replicates the provision of Article 51(2) of Additional Protocol I. However, unlike Additional Protocol I, Additional Protocol II contains no definition of the civilian population, a significant and damaging omission, since the distinction between civilians and combatants tends to be more difficult to draw in an internal conflict. There is no protection for civilian objects (other than that in Article 14 for objects indispensable for the survival of the civilian population). There is no definition of a legitimate military objective, comparable to that in Article 52(2) of Additional Protocol I. Moreover, while outlawing attacks directed specifically against civilians, Additional Protocol II does not incorporate the principle of proportionality, i.e. that attacks may not be launched against a military objective if that attack 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".[127]

146 Another important distinction between Additional Protocol II and Additional Protocol I is that Additional Protocol I includes two provisions – Articles 57 and 58 on precautions in attack and defence respectively – which translate the main principles regarding the protection of civilians and civilian objects into rules of conduct for commanders. Article 57 is a particularly valuable provision, setting out, as it does, a "check list" for those who order an attack, to ensure that the provisions on the protection of the civilian population are properly observed. There are no comparable provisions in Additional Protocol II. Since, however, commanders in internal armed conflicts are required to observe the principles set out in Articles 13 to 16 of Additional Protocol II when they order an attack, a similar check list may of great value in helping to develop a culture of compliance.

147 The evidence of the last fifty years is that the civilian population suffers at least as much in internal as in international conflicts. The extension to internal conflicts of more of the principles

127. Additional Protocol I, Article 51(5)(b).

and rules for the protection of the civilian population from the effects of hostilities would offer a significant advance without unduly restricting the ability of a State to combat rebellion within its territory.

148 The laws of internal armed conflict also lack provisions for the protection of combatants. Apart from Article 4(1) of Additional Protocol I, which prohibits orders not to give quarter, the only provisions regarding the treatment of combatants concern their treatment after capture. The logic which lies behind the unnecessary suffering principle, however, is equally applicable to internal conflicts and it should be made clear that this principle is also applicable there. There is also good reason to apply to internal armed conflicts more of the provisions on weapons and methods of warfare which apply in international conflicts. As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has said:

> ... elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.[128]

149 Several of the more recent treaties on weaponry – the Chemical Weapons Convention, 1993, the amended Protocol II to the Weaponry Convention and the Land Mines Convention, 1997 – are applicable in internal armed conflicts. The older treaties, however, are not, for the most part specifically applicable in internal conflicts (although the 1925 Chemical and Biological Warfare Protocol has been treated as laying down standards which are also applicable to conflicts within a State).

150 There is, therefore, a strong case for saying that these principles on the protection of the wounded and sick, the protection of the civilian population from the effects of hostilities and the law of weaponry should be applicable in internal armed conflicts. Whether it is necessary to extend them by treaty is another matter. The decision in *Tadic* suggests that many of them may already be applicable as part of customary law. Since it is more than likely that the jurisprudence of the International Criminal Tribunal for the

128. Loc. cit., para. 119.

Former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as the International Criminal Court (if that body is established) will lead to the further elaboration of those customary rules, a treaty may well be unnecessary.

151 If, however, it is accepted that the principles considered in this section of the Report should be applied in internal armed conflicts, there are certain advantages to achieving this goal by means of a new treaty, since that would make possible a systematic approach to the revision and codification of the law and would help in eliminating some of the uncertainty which undoubtedly exists at present regarding the content of the customary law.[129] It is noticeable, for example, that only a year before the decision of the Appeals Chamber in *Tadic*, the Commission of Experts appointed to investigate violations of international humanitarian law in the former Yugoslavia took a far more restricted view of the content of the customary law applicable to internal conflicts than that which was subsequently adopted by the Chamber. [130] It is also open to question whether, as Sir Hersch Lauterpacht commented many years ago, criminal trials are the best forum in which to resolve difficult questions about the content of the law regarding weapons, targets and the conduct of hostilities.[131]

V.3 Compliance with the Law of Internal Armed Conflict

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129. The Appeals Chamber in *Tadic* noted that:

> The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted.: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full an mechanical transplant of those rules to internal conflicts; rather the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts. (Loc. cit., para. 126)

130. The Commission stated in its Final Report that:

> The treaty-based law applicable to internal armed conflicts is relatively recent and is contained in common article 3 of the Geneva Conventions, Additional Protocol II, and article 19 of the 1954 Hague Convention on Cultural Property. It is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find its root in these treaty provisions. (United Nations Doc. S/1994/674, para. 52.)

131. H. Lauterpacht, The Law of Nations and the Punishment of War Crimes'21 BYIL (1944) 58 at p. 75.

152 The most serious problem with the law of internal armed conflict is, however, the very poor record of compliance. A marked improvement in compliance with the existing law would be a more significant step forward than would the revision of that law along the lines which have just been suggested. The topic of compliance with the laws of war in general is considered in Part VI. There are, however, a number of issues peculiar to compliance in internal conflicts which require brief comment here.

153 First, it is only recently that it has been established that individuals who commit serious violations of the laws of internal armed conflict are guilty of war crimes under international law. As recently as five years ago, this proposition was doubted and when the Security Council established the International Criminal Tribunal for Rwanda in 1994, giving it jurisdiction over violations of common Article 3, this act was described by the Secretary-General as an innovation, which "for the first time criminalises common Article 3".[132] Since then, however, the fact that both the Yugoslavia and Rwanda tribunals have clearly been given jurisdiction over such offences by a Security Council which considered that it was acting within the existing law and respecting the principle *nullum crimen sine lege*, the decisions of the International Criminal Tribunal for the Former Yugoslavia,[133] and the widespread acceptance of this principle in the negotiations for the establishment of an international criminal court make it difficult to argue convincingly that the concept of war crimes does not extend to internal conflicts.

154 What does not so extend, however, is the special machinery for addressing grave breaches of the Geneva Conventions[134] and, in particular, the duty (as opposed to the right) of all States to make such conduct criminal under their own law, investigate alleged violations and, if there is sufficient evidence, to prosecute or extradite.[135] This part of the machinery for ensuring compliance with the laws of internal armed conflict would be greatly strengthened if (a) serious violations of the laws of internal armed conflict are

132. United Nations Doc. S/1995/134, para. 12.

133. In addition to *Tadic*, see *Prosecutor* v. *Martic*, 108 ILR 39.

134. *Tadic*, loc. cit., paras 79-85.

135. See, e.g., Geneva Convention III, Articles 129-30.

included in the jurisdiction of the International Criminal Court, if that body is established, and (b) the machinery for the national prosecution of such offences were strengthened.

155 Secondly, it would be easier to develop and foster a culture of compliance with the law of internal armed conflict if there was a greater degree of external monitoring of compliance during a conflict (as opposed to prosecution of violations, which normally occurs after the conflict has ended and, in any event, long after the alleged violation has been committed). Two steps could be taken in that regard. First, the right of initiative which the International Committee of the Red Cross currently possesses under common Article 3 could be strengthened. In particular, States could be required to accept the offer of the International Committee of the Red Cross's services, as is already the case in international conflicts,[136] if they have not accepted some other form of international supervision. Secondly, the jurisdiction of the Fact-Finding Commission established by Article 90 of Additional Protocol I could be extended to internal conflicts.[137]

156 Finally, as mentioned in Part III of this Report, it is possible that the monitoring mechanisms of human rights conventions could be used in an indirect way to assist in ensuring compliance with the law applicable in internal conflicts. While it is clear that a human rights monitoring body established by treaty possesses only the jurisdiction conferred by that treaty, the relationship between the law of human rights and the law applicable in internal armed conflicts is a close one. A human rights tribunal investigating alleged violations of the right to life in an internal armed conflict is likely, therefore, to be investigating conduct which will also involve alleged violations of the laws of armed conflict.

157 The potential for action of this kind is illustrated by the decision of the Inter-American Commission of Human Rights in the case of *Abella* v. *Argentina*, which concerned the fighting that followed a take-over of an army barracks. The Commission there stated that:

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136. See, e.g., Geneva Convention III, Article 10.

137. It is understood that the Chairman of the Commission has already been invited to act in respect of an internal conflict by the government of the State concerned, although the Commission itself was not formally involved.

> ... the Commission's ability to resolve claimed violations of this non-derogable right [to life] arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations.[138]

158 This approach, which builds upon the common ground between the law of human rights and the law of internal armed conflict should be encouraged as an aid to ensuring compliance, although, of course, it should be noted that human rights tribunals normally possess jurisdiction only in respect of alleged violations committed by the State.

VI. Improving Compliance with the Laws of War

159 The principal theme of this Report has been that, whatever the shortcomings of the laws of war, the most important objective is now to improve compliance with those laws, for it is here that the greatest weakness lies.[139] The recent fighting in the former Yugoslavia, Rwanda and Somalia, to take just three notorious examples, have shown the extent to which the most fundamental principles of the laws of war are disregarded in practice. While the substantive law is certainly capable of improvement, as this Report has endeavoured to show, it is curbing this tendency to flout the law which must be the priority. This Part of the report will therefore concentrate on some of the ways by which this might be done.

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138. Report No. 55/97, para. 161.

139. See the recent studies by H. Fox and M. Meyer,*Effecting Compliance* (1993) and European Commission, *Law in Humanitarian Crises: How Can International Law be Made More Effective in Armed Conflicts* (1995).

VI.1 Prosecution of War Crimes

160 The most obvious, and currently the most studied, way in which the international community could improve compliance with the laws of war would be through strengthening the system for the prosecution of war crimes to the point where the likelihood of being brought to justice acted as a real deterrent to those contemplating the commission of war crimes.

161 At the time of writing, the Inter-Governmental Conference at Rome was in the process of negotiating a Statute for a permanent International Criminal Court. If these negotiations are successful, they will significantly strengthen the existing prosecution system, both by introducing the prospect of trial before an international tribunal and, indirectly, by leading States to take more seriously their own responsibilities to bring such cases before their national courts. It would be pointless to embark upon a substantial discussion of these possibilities until the outcome of the Rome negotiations is known. This Part of the Report will, therefore be revised in the light of those negotiations after they conclude in July 1998.

162 It is, however, important to bear in mind that, even if the Rome negotiations are successful and an effective International Criminal Court with jurisdiction over war crimes is established, the creation of that Court and its subsequent use will not be sufficient by itself. Prosecution for violations of the law may be an effective means of enforcement but it is neither the only, nor necessarily the most effective, means of ensuring compliance. War crimes prosecutions are themselves an admission of failure in that they necessarily occur only after an offence has allegedly been committed. A strategy for improving compliance with the laws of war must pay at least as much attention to the prevention of crime as to its punishment. There are a number of other areas in which action could be taken, often without the need for any change in the law, to ensure the better implementation of that law.

VI.2 Peacetime Measures

163 Compliance with the law in relation to any activity is likely to be enhanced if those who engage in that activity are aware of their legal responsibilities and the steps which they must take to discharge them, in short, if a "culture of compliance" is developed, in which respect for the law is seen as a normal and essential part of behaviour.[140] The development of such a culture can be a far more important factor in ensuring that the law is respected than the threat of prosecution. For example, Articles 48-57 of Additional Protocol I require that a commander who orders an attack should attempt to ensure that the target is a legitimate military objective, that civilians are not themselves targeted, that certain other objects subject to special regimes of protection (e.g. under Articles 54-56) are not attacked, that the attack will respect the requirement of proportionality and that, in choosing the methods and means by which the attack is to be carried out, he selects those which will be likely to avoid, or at least minimise, the civilian casualties. While prosecutions for failure to comply with these requirements are possible, it is likely to be far more difficult to bring a successful prosecution for, e.g., failure to comply with the proportionality principle or the selection of the wrong method or means of attack than for a crime such as the murder of prisoners. The best hope of ensuring that a commander will respect those principles laid down in Additional Protocol I (or the largely similar principles in customary law, where Additional Protocol I is not applicable) is if the commander is sufficiently well aware of his responsibilities that he or she instinctively takes such considerations into account in planning and taking decisions.

164 Central to the creation of such a culture of compliance amongst the military is the proper dissemination of the laws of war and training in their application in particular circumstances. The 1899 Conference recognized this need. Article 1 of the Convention on the Laws and Customs of War on Land, to which the Regulations are annexed, requires States to "issue to their armed forces

140. L. Henkin, *International Law: Politics, Values and Functions* 216 RC (1989-IV), pp. 67-87.

instructions which shall be in conformity with the Regulations".[141] The duty of States to disseminate the provisions of the relevant agreements to the members of their armed forces and their civilian populations is also stipulated in the Geneva Conventions and Additional Protocol I.[142]

165 Measures of this kind cannot be left until after the outbreak of a conflict, for then the belligerent States tend to have other priorities. It is important that all States provide appropriate education and training in the laws of war for the members of their armed forces in time of peace. That can, of course, be supplemented if the State concerned becomes involved in hostilities but a culture of compliance cannot be created overnight and, at least with regular armed forces, peacetime instruction is essential. In particular, that instruction has to be more than simply a presentation of the rules of the laws of war; it has to demonstrate how those laws form an integral part of military life and the business of fighting. It is therefore important that assistance be given to those States which lack the resources to mount programmes of this kind or whose governments are unsure of what is required. The International Committee of the Red Cross, especially through its new Advisory Service,[143] and the International Institute of Humanitarian Law already perform valuable work in this respect. The expansion of these and similar programmes – something which would require greater resources – would be a simple and undramatic yet potentially very effective method of improving compliance with the laws of war.

166 Other measures which need to be taken in peacetime include, *inter alia*:-

a the scrutiny of new developments in weapons and methods of warfare to ensure that they will comply with the requirements of the laws of war (Additional Protocol I, Article 36);

b taking into account, in decisions about planning, the obligation in Additional Protocol I, Article 58(b) to "avoid

141. 'Les Hautes Parties Contractantes donneront à leurs forces armées de terre des instructions qui seront conformes au Règlement ...'

142. See, e.g., Geneva Convention III, Article 127; Additional Protocol I, Article 88.

143. P. Berman, The International Committee of the Red Cross's Advisory Service on International Humanitarian Law' 26 Int Rev of the Red Cross (1996) 338.

locating military objectives within or near densely populated areas"; and

c the establishment of systems for handling prisoners of war and other detainees in the event of armed conflict.

167 States need to be encouraged to take such measures and, where necessary, assisted to do so. In this context, one possibility which could be considered is the establishment of a system of periodic reporting to an impartial body (comparable to the system of periodic reporting to the United Nations Human Rights Committee by States party to the International Covenant on Civil and Political Rights, 1966), although it must be recognized that the sensitivity of much military information is such that any such requirement would necessarily have to be limited in scope.

VI.3 The Protecting Power and the Role of the International Committee of the Red Cross

168 The law is more likely to be respected if there is effective monitoring of compliance and if discreet pressure can be brought to bear upon States not to commit, or to tolerate the commission by those under their control, of violations. In particular, access to prisoner of war camps and detention centres, the exchange of reliable lists of prisoners of war and the fact that prisoners of war, detainees and the population of occupied territory have recourse to some outside body for their protection are all measures likely to encourage compliance with the laws of war. The Geneva Conventions and Additional Protocol I contain provision for the appointment by belligerents of protecting powers – neutral States which will oversee the treatment of prisoners of war and other nationals of one belligerent by its adversary. Protecting powers played an important role, especially in relation to prisoners of war, during the Second World War.

169 The system of protecting powers has, however, scarcely been used at all since 1945. In part, the problem has been that a belligerent State is under no obligation to accept the nomination of a protecting power by its adversary. Article 5 of Additional Protocol I attempted to strengthen the system by providing for a series of steps

to be taken in the event that agreement on the appointment of a protecting power proved difficult but it stopped short of imposing upon States a duty to accept a protecting power.

170 The international climate has undergone great changes since 1977 and some things which were unthinkable then are commonplace today. In particular, there appears to be a greater readiness to accept a degree of third party settlement and outside intervention. It may be, therefore, that the imposition of such a duty is no longer unthinkable. If that is the case, it would be a valuable change in the law. If, however, it is necessary to work within the existing legal framework, much could still be done to encourage a far more widespread acceptance of the protecting power system. If life can be breathed back into this system, the machinery for ensuring compliance with the laws of war would be significantly strengthened.

171 In the absence of a protecting power, the Conventions and Additional Protocol I require belligerents to accept the services of the International Committee of the Red Cross, or another international humanitarian organization. It is, however, notorious that this is not always done. It is of the utmost importance that the international community makes clear that denial of access to the International Committee of the Red Cross on the part of a State is both unlawful and wholly unacceptable. It has already been suggested, in Part V of this Report, that the duty to accept the services of the International Committee of the Red Cross should be extended to internal armed conflicts.

VI.4 The Fact-Finding Commission

172 Article 90 of Additional Protocol I established a Fact-Finding Commission with competence to:-

(i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;
(ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.

173 The competence of the Commission exists in respect of States which have made a declaration accepting the competence of

the Commission to enquire into allegations by any other Party accepting the same obligation.

174 This is a modest but important measure, for the establishment of the facts, in the case of an alleged violation of the law, by the decision of an authoritative and impartial body may be of great assistance in putting an end to a continuing violation or in preventing a repetition of that violation. It is, therefore, a matter for great regret that, at the time of writing this Report, fewer than one in three of the States party to Additional Protocol I had made declarations accepting the competence of the Commission. In these circumstances, it seems unlikely that any proposal that acceptance of the Commission's competence should be made compulsory would be accepted. Nevertheless, States should be encouraged to accept the competence of the Commission at the earliest possible date and initiatives to that effect should be taken through the United Nations and regional organizations.

VI.5 The Role of States and the United Nations

175 An important means of persuading belligerent States to demonstrate a greater respect for the laws of war is through the pressure of international public opinion. In part, this factor is a product of media coverage, the activities of non-governmental organizations and the interest of the public at large. Adverse publicity for violations of humanitarian law can sometimes have considerable influence. This is obviously a desirable development which should be encouraged wherever possible (e.g. through the enforcement of rules of law designed to protect journalists covering armed conflicts).

176 All States, however, have a measure of responsibility for ensuring compliance with the laws of war, even in conflicts in which they are not directly involved. Common Article 1 of the Geneva Conventions (and the corresponding provision in Additional Protocol I) provides that "the High Contracting Parties undertake to respect *and to ensure respect*" for the Conventions in all circumstances. While it may be going too far to read this provision as imposing a legal obligation on neutral States to intervene in order to prevent or remedy violations of the Conventions, it does at least

suggest that a neutral State has the right, or standing, to make representations to a belligerent suspected of violations of the Conventions (or, as the case may be, of the Protocol).

177 In addition, Article 89 of Additional Protocol I provides that:

> In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

178 A more rigorous application of this provision could provide an effective means of improving compliance with the laws of war. There are indications, for example, that the inquiries conducted by the United Nations into conditions in prisoner of war camps during the Iran-Iraq war and into the use of chemical weapons by Iraq had an effect in improving conditions in the camps and (although this is obviously less susceptible of proof) in deterring further use of chemical weapons.

179 In part, the effectiveness of such measures lies in the generation of adverse publicity, acting as a catalyst for international political pressure on the law breaker. In recent years, however, the Security Council has gone further. In addition to condemning violations of the laws of war and calling upon the States concerned to respect the law, the Council has, on a number of occasions, determined that violations of the laws of war themselves constitute a threat to international peace and security and that measures to prevent or punish those violations have been ordered by the Council in the exercise of its powers under Chapter VII of the Charter.[144] Such action on the part of the Security Council, though obviously possible only in cases of particularly serious violations, is potentially a particularly powerful means of enforcement.

144. See, in particular, the Council's resolutions on the former Yugoslavia, especially Resolutions 808 and 827.

VI.6 State Responsibility

180 Although not discussed in 1899, the question of State responsibility and the liability to pay compensation for violations of the laws of war was considered at length at the 1907 Conference, which added to the Convention on the Laws and Customs of War on Land a new Article 3, which provided that:

> A belligerent party which violates the provisions of the [Regulations on the Laws and Customs of War on Land] 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.

181 Remarkably, it appears that this provision was not intended to be confined to claims between States but was to extend to a direct right to compensation for individuals.[145] This measure was seen at the time as an important inducement to States to comply with the Regulations and to ensure compliance by their forces.

182 In practice, however, the payment of compensation for violations of the laws of war has been rare, most conflicts leaving the defeated party in such a weak economic state that it has not been considered feasible to press for compensation. The Gulf Conflict of 1990-91, however, is an exception. Iraq's duty to compensate those who suffered loss as a direct result of its invasion of Kuwait[146] includes (though it is not limited to) the payment of compensation for violations of the laws of war. For example, in the case of claims from members of the Coalition armed forces, the Governing Council of the United Nations Compensation Commission has held that such claimants are eligible for compensation only if they were prisoners of war and their loss or injury "resulted from mistreatment in violation of international humanitarian law (including the Geneva Conventions of 1949)".[147] Members of the civilian population in Kuwait are also eligible for compensation in respect of loss or injury resulting from violations of the laws of war by Iraqi forces.

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145. F. Kalshoven, State Responsibility for Warlike Acts of the Armed Forces'40 ICLQ (1991) 827.

146. Security Council Resolution 687 (1991), para. 16.

147. Governing Council Decision No. 11, United Nations Doc. S/AC.26/1992/11; 109 ILR 612. It is not clear why members of the armed forces who were the victims of violations of the laws of war while not prisoners of war are excluded.

183 The duty of States to compensate the victims of their violations of the laws of war – quite apart from being something which should be enforced for its own sake – could prove to be an important means for encouraging compliance with the laws of war if States considered that there was a substantial likelihood of their being required to pay. While the mechanism established by Resolution 687 is likely to prove unique, consideration should be given to finding other means of ensuring that the normal duty of a State to compensate for its violations of international law is properly applied in the context of armed conflict.

VI.7 Human Rights Mechanisms

184 Finally, it is possible that the various mechanisms for the enforcement of international human rights law may be able to offer a measure of assistance in improving compliance with the laws of war. Although such bodies have no jurisdiction to apply the laws of war as such, it is possible that in cases involving allegations of human rights violations during an armed conflict (international or internal), a human rights tribunal will look to the laws of war for guidance in relation to such issues as whether the deprivation of life in a particular case was arbitrary.

185 That is what the Inter-American Commission of Human Rights did in its recent decision in *Abella* v. *Argentina*. The Commission was there faced with allegations that there had been violations of the right to life on the ground that the Argentine army had used excessive force in overpowering a group who had seized control of an army barracks. The Commission found that there had been an internal armed conflict and stated that:

> ... the Commission's ability to resolve claimed violations of this non-derogable right [to life] arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative

guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations.[148]

186 It is not intended to comment here on the facts of that case or the Commission's findings in respect of them. The Commission's approach to the relationship between human rights law and the laws of war is, it is submitted, in accordance with that of the International Court of Justice in the *Nuclear Weapons* Advisory Opinion[149] and it is likely that a similar approach will be taken by other international human rights bodies. Provided that the relevant material on the laws of war and appropriate legal arguments are put before such a tribunal, this approach may provide a further inducement to States to comply with the laws of war.

VII Conclusions

187 This Report has not attempted to cover the whole of the laws of war. Some of the issues omitted from this Report, for reasons of space, are the subject of consideration elsewhere as part of the Commemoration process. The conclusions of the Report can be briefly stated.

188 1 The 1899 Conference began a great era of law making in relation to the conduct of warfare. The fact that the high hopes of a century of peace, which were entertained at that Conference, have been so cruelly and extensively disappointed by the realities of the twentieth century should not be allowed to blind us to the achievements of that law-making process. As a result of the 1899 and subsequent conferences, the laws of war at the end of the twentieth century are far more advanced than they were at its outset. Moreover, although this Report has emphasised the violations of those laws during the last hundred years, violations of the law have by no means been universal – the record of compliance is poor but it is not non-existent. Where the laws of war have been implemented, they have in large measure achieved the goal of the

148. Report No. 55/97, para. 161.

149. See pp. 22-25 of this Report.

1899 Conference "to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilisation".[150]

189 2 Nevertheless, the considerable achievement in law-making has not been matched by one of law enforcement. While the laws of war undoubtedly have their defects and difficulties, the most important weakness in the laws of war today lies not in their substance but in their implementation. It has therefore been the principal theme of this Report that the most urgent priority for the international community in relation to the laws of war is not the revision of that law but improving the record of compliance. To that end, the Report has made a number of suggestions in Part VI, although the subject is also considered throughout the Report.

190 3 The one area of substantive law which, it is suggested, is in urgent need of revision is that relating to the conduct of internal armed conflicts, where Part V of the Report has made a number of proposals for consideration. Even here, however, revision of the substantive law is less important than achieving an improvement in compliance with the law which already exists. A substantial improvement in compliance even with the skeletal provisions of common Article 3 would do more to achieve humanitarian goals in internal armed conflicts than would the mere adoption of a new treaty, no matter how much that treaty improved the substance of the law.

191 4 The Report has also suggested that there is a need for further study (though not necessarily for a revision of the law) of the relationship between the law of the United Nations Charter and the laws of war. That need exists at two levels. First, the implications of the Charter for the conduct of warfare by States calls for further thought. There remains a tendency to assume that the Charter has an impact only upon whether it is lawful for a State to resort to force, whereas the limitations inherent in the right of self-defence and the obligations flowing from the decisions of the Security Council also have serious implications for the way in which force is employed. Secondly, a more immediate concern is to determine and clarify the law applicable to the conduct of military

150. Preamble to the Hague Convention with respect to the Laws and Customs of War on Land, 1899.

operations by the United Nations itself. Both of these issues are considered in Part III of this Report. Further work upon these issues has the advantage that it will not require any change in the law or, therefore, the convening of a major international conference.

192 5 With regard to the law applicable to the conduct of hostilities in international armed conflicts, the Report suggests that the two areas in which the strongest case can be made for revision are the law of naval warfare and the law of belligerent occupation. These matters have been considered in Part IV. In each case, however, the Report suggests that, while it may be desirable to attempt a revision of the law at a later date, attempts to draw up a new body of law on either of these subjects is likely to prove of considerable difficulty. There is a consequent danger that a failed attempt at law reform may serve only to undermine the law which we already possess. The Report suggests that revision of the law in these two areas should not be regarded as a priority at the present time.

193 6 The law relating to nuclear weapons is the subject of discussion in other Reports. The present Rapporteur would, however, like to record his own view that this issue can be tackled only through the disarmament process.

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