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The Free Law Journal results of a merger with the Eastern European Law Journals. It builds upon this previous success and aims at providing the freedom of publishing juridical research from everywhere and on all subjects of law. Its goal is to promote respect of the rule of law and the fair application of justice by sharing juridical research in its pages.

Academics, post-graduate students and practitioners of law are welcome to submit in the academic section their articles, notes, book reviews or comments on any legal subject, while undergraduate students are welcome to publish in our student section. The list of fields of law addressed in these pages is ever-expanding and non-restrictive, as needs and interests arise. If a field is not listed, the author simply needs to propose the article and the field believed of law applicable; we will insure to create and list it.

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EDITORIAL

Welcome to the first Special Issue of the Free Law Journal, a print and electronic journal aiming at promoting respect of the rule of law and the fair application of justice everywhere through the sharing of juridical research.

While the Free Law Journal is a new publication as such, it builds upon the previous year of activities of the *Eastern European Law Journals*, and merged within the *Free Law Journal*. It builds upon those previous success and extends the previous purview of activities to all types of laws across the world. So far, we are receiving a high volume of articles in particular from Central and Eastern Europe. We continue to welcome those and encourage even more academics from the Middle East, the Maghreb and Northern, Central and Southern Africa to submit their articles. We desire to be truly international in scope and to offer comparative point of views in order to sustain the development and maintenance of the rule of law everywhere. As such, all articles are welcome and none are refused on principles : all that are accepted are so on merits.

Turning to our new publication, we hope that you will join the sharing of your research though us and that you will contribute to supporting the rule of law. This point is a major one as avery little step in the development of a coherent and respectful system of law counts everyday.

Indeed, the last century of development of legal systems everywhere has been truly amazing and developments under the United Nations' system in the last 60 years has provided much in way of comparaison of national and international perception of what law is and should be, in accordance with cultural imperative. Sadly, as ideas and commitment by some to the rule of law develop, there are always setbacks and attacks on the respect of human rights, the rights to a fair trial and simply the administration of proper justice within a nation and at the international levels.

Nowhere is this more true than in matters of human rights and humanitarian law. For this reason, we have decided to compile and propose a Special Issue related solely to these fields as they pertain to very important perspectives of the development of the rule of law.

We hope that this will further pass and develop the idea of the respect of human rights in periods of peace, tensions and armed conflict.

With hope,

Louis-Philippe F. Rouillard
Editor-in-Chief, Free World Publishing Inc.

THE STATUS OF THE GUANTANAMO DETAINEES

by

AGNIESZKA SZPAK*

Factual Background

On September 11, 2001, a group of men who belonged to a terrorist organisation known as Al Qaida carried out an armed attack upon the U.S. that resulted in substantial material damage and loss of life by some three thousand people mostly civilians (exactly 3063 people), coming from 80 different countries. Leaders of Al Qaida and a large part of its membership and facilities were located within the territory of Afghanistan; almost all that country was controlled by the Taliban, the de facto government of Afghanistan. The Taliban refused to stop giving sanctuary to Al Qaida and hand over Osama bin Laden. As a result, on October 7, 2001, the U.S. and its allies attacked the armed forces of the Taliban and Al Qaida. The forces of the U.S. and the U.K. working with the forces of Northern Alliance (the previous government of Afghanistan, which controlled about 22% of its territory), quickly established control over much of Afghanistan.

On December 22, 2001, an interim Afghanistan government led by Hamid Karzai was installed and a permanent government (also led by H. Karzai) was chosen in June 2002. U.S. forces remain in Afganistan today with the consent of the country's authorities.

A considerable number of soldiers belonging to both entities were killed or captured. These persons were captured in the course of international armed conflict which immediately gave rise to questions concerning their legal status and the protection to which they were entitled in accordance with international humanitarian law. On November 13, 2001, the U.S. President George W. Bush issued a Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism (Military Order)[1]. President Bush directed that any non-US citizen about whom he had made a written determination that such a person had, inter alia, engaged in, or conspired to commit, acts of international terrorism against the U.S., be detained and tried for violations of the laws of war and other applicable laws by military tribunals. The Order established Military Comissions for the purpose of such trials.

On January 11, 2002, the first group of 20 persons captured in Afghanistan arrived at the U.S. Camp X-Ray in Guantanamo Bay, Cuba. On that day the U.S. Secretary for Defence Donald Rumsfeld announced that detainees in Guantanamo would be held as "unlawful combatants" and not as prisoners of war[2]. A week later another group of detainees arrived and their number passed 600[3]. There were also persons not captured on the battlefield such as six Algerians caught in Bosnia and transferred to Guantanamo Bay under the U.S. custody by reason of their links with Al Qaida.
On February 7, 2002, President Bush determined the status of the detainees. The White House Secretary press announced that the President decided that:

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[1] Military Order available at: http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html
[2] Department of Defence (DoD) News Transcript, Secretary Donald Rumsfeld and Gen. Myers, 11 January 2002, available at: http://www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html
[3] As for September 22, 2004, the number of detainees was approximately 549, according to Department of Defence news release, available at: http://www.defenselink.mil/releases/2004/nr20040922-1310.html

- The United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate and consistent with military neccesity, in a manner consistent with the principles of the Third Geneva Convention of 1949;

- The Geneva Convention applies to the Taliban detainees, but not to the Al Qaida detainees;

- Al Qaida is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status;

- Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention the Taliban detainees do not qualify as POW's;
- Therefore, neither the Taliban nor Al Qaida detainees are entitled to POW status[4].

High-level administration officials have characterized the detainees as "the worst of the worst"; President Bush has called them "bad people" and Secretary for Defence has labeled them "hard core, well-trained terrorists"[5]. But for two years the detainees hadn't been charged with crimes or released, there had been no hearings to determine the legal status of the detainees. In short there was a legal black hole[6]. The U.S. government refused to comply with the provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War and made a blanket determination that all persons held at Guantanamo Bay were "unlawful combatants" not entitled to POW status and protection under the Geneva Convention.

Prisoner of War Status under the Third Geneva Convention.

Under Article 2 (1) common to the four Geneva Conventions, an international armed conflict exists when hostilities unfold between two or more contracting parties. It is irrelevant whether a war was declared or whether the state of war is recognized by one of the parties. It is crucial for the applicability of the provisions of the Third Geneva Convention Relative to Treatment of Prisoners of War to determine the existence of **international** armed conflict [emphasis added]. The international armed conflict occurs when a war has been declared or the hostilities commence between two or more of the contracting parties, in other words states. International armed conflict is equated with an inter-state armed conflict. In a situation of Afghanistan the declaration of war was not delivered so the commencement of hostilities is deciding.

On 7 October 2001, the US attacked Al Qaida terrorists training camps and military instalations of the Taliban regime in Afghanistan. By doing so the US chose to territorialize the conflict, thus keeping it within the legal categories of Article 2 (1) of Geneva Conventions. The U.S. response was directed against the Taliban, representing de facto Afghanistan. Al Qaida acting under the control of the Taliban became a party to the conflict. The nexus between the Taliban and Al Qaida will be explored below. Although the US did not recognize the Taliban as a government of Afghanistan it did recognize that the Taliban regime was a party to the Conventions whereas Al Qaida was treated as an

[4] White House, Fact Sheet on Status of Detainees at Guantanamo, 7 February 2002, available at: http://www.whitehouse.gov/news/releases/2002/02/print/20020207_13.html
[5] United States: Guantanamo Two Years On, available at: http://www.hrw.org/english/docs/2004/01/09/usdom6917_txt.htm
[6] The term legal black hole was invented by J.Steyn, Guantanamo Bay: Legal Black Hole in: *International and Comparative Law Quarterly*, vol.53 (2004).

international terrorist organisation. Besides the recognition of a state or a government is irrelevant and has no bearing upon the existence of international armed conflict.

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

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
> 1. To be commended by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;
> 3. To carry arms openly;
> 4. To conduct their operations in accordance with the laws and customs of war[7].

Article 2 adds a provision entitled "levee en masse", according to which:
The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneusly take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war[8].

Article 3 prescribes further:
The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

The Third Geneva Convention contains the same provisions in Article 4, which reads as follows:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
> 1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
> 2. Members of other militias and members of other volunteer corps, including those organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
> - That of being commanded by a person responsible for his subordinates;
> - That of having a fixed distinctive sign recognizable at a distance;
> - That of carrying arms openly;
> - That of conducting their operations in accordance with the laws and customs of war.
>
> 3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
> 4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
> 5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

[7] The Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land with annexed to it Regulations available at:
http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6?OpenDocument
[8] Ibidem.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneusly take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war[9].

Apart from the four conditions contained in Article 4 A(2), two further conditions can be inferred, namely:

- Belonging to an organized group;
- Belonging to a Party to the conflict[10].

Article 5 contains a very important provision:

"(1) The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and untill their final release and repatriation.

(2) Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal"[11].

Do the Taliban armed forces and Al Qaida members qualify as prisoners of war? The Taliban fighters surely do qualify as POW's within the terms of Article 4 A (1) of GC III because they are "members of the armed forces of a Party to the conflict". But despite the US acknowledgment that the Taliban were a party to the conflict, POW status was denied to those captured. This denial was based on their failure to meet so called combatancy requirements, which are:

- Being commanded by a person responsible for his subordinates;
- Having a fixed distinctive sign recognizable at a distance;
- Carring arms openly;
- Conducting their operations in accordance with the laws and customs of war.

Secretary of Defence, D. Rumsfeld, said that "the Taliban [...] did not wear uniform, they did not have insignia, they did not carry their weapons openly and they were tied tightly at the waist to Al Qaida […] they would not rise to the standard of a prisoner of war"[12]. But on the other hand, he characterized the detainees "as enemy combatants that we captured on the battlefield"[13], so in other words – POW's protected by the Third Geneva Convention.

First of all, there is an obvious misunderstanding in such an interpretation of Article 4 A(2) as those conditions apply only to irregulars but not to the armed forces of a party to the conflict. However in the case at issue, combatancy requirements were met. The circumstance that the leader of the Taliban, the Mullah Omar, is a spiritual leader does not invalidate the condition of a responsible command as long as he is able to maintain the type of discipline generally found in the armed forces. And even if the Mullah Omar did not know that the September 11 attacks would take place or did not know the

[9] The Third Geneva Convention of 1949 Relative to the Treatment of Prisoners of War available at: http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6fef854a3517b75ac125641e004a9e68?OpenDocument

[10] In the same way: J. Toman, The Status of Al Qaeda/Taliban Detainees under the Geneva Conventions, in: *Israel Yearbook on Human Rights*, vol. 32 (2002), p.290; Y.Dienstein, The Conduct of Hostilities under the Law of International Armed Conflict, Cambridge University Press, 2004, p.36.

[11] GC III, op.cit.

[12] DoD, News Transcript, Secretary Rumsfeld Media Avilability en Route to Camp X-Ray, 27 January 2002, available at: http://www.defencelink/mil/transcripts/Jan.2002/t01282002_t0127sd2.html

[13] DoD News briefing referred to in Amnesty International Memorandum. Memorandum available at http://web.amnesty.org/library/Index/ENGAMR510532002?open&of=ENG-USA

details of it, as a responsible commander he could be held responsible for failing to prevent those attacks[14].

Turning to the requirement of having a fixed distinctive sign recognizable at a distance, the Taliban wore black turbans, which could be regarded as the distinctive sign since it is fully accepted that a recognizable sign is less than a uniform[15]. Also the US Army Manual stands at the same position: "less than the complete uniform will sufice. A helmet or headdress which would make the silhouette of the individual readily distingiushable from that of an ordinary civilian would satisfy this requirement"[16]. Although those requirements are not relevant in relation to the armed forces of a party to the conflict, I think it is worth stating clearly that there were no grounds for the US administration to deny POW status to the Taliban armed forces. In case of a doubt Article 5 applies. The establishement of armed forces is part of the exercise of sovereignty and such armed forces are presumed to meet the combatancy conditions therefore the other state party to the conflict should not be able to deny the armed forces of another party the protection of POW by putting into Article 4 A(1) conditions which GC III did not put therein. The states are responsible for the conduct of force by their armed forces. When combatancy requirements seem not to be fulfilled international law holds the state responsible but does not deny that the armed forces are indeed those of that state, which means that POW status cannot be denied to such forces.

The legal status of Al Qaida members as POW's is more difficult to establish. It is mainly due to the lack of certainty on the type of links existing between Al Qaida and the Taliban. If Al Qaida members formed part of the armed forces of the Taliban, a party to the conflict, therefore they would be entitled to POW status in accordance with Article 4 A(1) of GC III. The Taliban and Al Oaida complemented each other, as bin Laden could provide resources to the Taliban while the Taliban could provide a safe haven to the former, especially that due to previous activities (series of terrorist acts[17]) Al Qaida were becoming more and more troubling to states. Despite demands made by the United Nations[18] and many states to hand over bin Laden, the Taliban refused, arguing that bin Laden was a guest and it was contrary to its religion to hand over a guest. Even after the September 11th attacks, the Taliban still refused to extradite bin Laden without evidence of his guilt. The refusal of the Taliban government to hand over Osama bin Laden for trial in the US tends to indicate the existance of a control type of relationship in the sense that the Taliban knowingly harboured bin Laden. Al Qaida's leader and Al Qaida itself were so integrated into the Taliban that it was unclear which was controlling the other. The September 11th attacks and holding the Taliban responsible for the actions of Al Qaida gives credence to the theory that they are interwined. Such equation of Al Qaida with the Taliban not only solves a practical problem concerning the POW status but also resolves the question whether the UN Charter provisions on the use of force apply to non-state entities.

Turning to Al Qaida members as POW's, it should be noticed that the declared targets of the war were the Taliban and Al Qaida. For that reason, Al Qaida became a de facto party to the conflict. Although the GC III applies only to states, from the spirit of the Convention a conclusion can be drawn that in a situation where a non-state actor is recognized as an enemy in a war, GC III would also grant its protection to such a party. During the conflict in Afghanistan the Taliban and Al Qaida were so

[14] In the same way: Luisa Vierucci, Prisoners of War or Protected Persons quo Unlawful Combatants? The Judicial Safeguards to which Guantanamo Bay Detainees are Entitled, in*: Journal of International Criminal Justice* 1 (2003).
[15] ICRC Commentary, available at:
http://www.icrc.org/ihl.nsf/WebCOMART?OpenView&Start=1&Count=150&Expand=3#3
[16] Luisa Vierucci, op.cit., p.291.
[17] For example: the 1993 New York World Trade Center bombing, the 1998 bombing at US Embassies in Kenya and Tanzania, the 2000 bombing of the US ship USS Cole in Yemen, the 1996 bombing of the Khobar military complex in Saudi Arabia.
[18] SC Res. 1267 (1999) and 1333 (2000).

integrated that they could be treated as one and the same. They fought alongside each other making it difficult to distinguish between the Taliban and Al Qaida. In the spirit of GC III the nexus between those two was sufficient to subsume Al Qaida members into the armed forces of the Taliban. From the fact that the Taliban was the de facto government of Afghanistan and exercised control over 80% of the territory, we could deduce that Al Qaida operated under the control and protection of the Taliban. If the Taliban so desired, it could have taken more adverse approach towards Al Qaida. The consequence of that equation theory would be treating Al Qaida soldiers as members of militias and volunteer corps, forming part of armed forces of a party to the conflict and granting them POW status[19]. It must also be stressed that it is not international law that determines what kind of forces constitute a regular army but national law. Every state has a right to determine the structure or composition of its armed forces. They may even consist entirely of militias or volunteer corps; it is for the states to determine the issue.

The extension of POW status to Al Qaida soldiers would not diminish their criminal responsibility for previous terrorist acts up to and including September 11th. It would only insulate them from prosecution for the mere fact of fighting in Afghanistan. Those who committed war crimes should be punished but their crimes should not be used as an excuse to deprive others of the protection due POW's. The only unfavourable implication would be that those Al Qaida members who were not involved in prior terrorist actions would be entitled to release upon cessation of hostilities in Afghanistan. But after all, it should not be too high a price for doing a right thing and complying with the principle of humanitarianism.

However, the U.S. administration refused to grant POW status to Al Qaida members. As a justification it indicated that Al Qaida soldiers did not belong to the Taliban armed forces and they could be entitled to POW status only within the scope of Article 4 A(2) as members of other militias and volunteer corps, including those organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that they fulfill so called combatancy requirements, mentioned above. The US Secretary of Defence summarized the position of Al Qaida members in the conflict in Afghanistan in a following way:

> "The Al Qaida is not a country. They did not behave as an army. They did not wear uniforms. They did not have insignia. They did not carry their weapons openly. They are a terrorist network. It would be a total misunderstanding of the Geneva Convention if one considers Al Qaida, a terrorist network, to be an army"[20].

The U.S. should follow its own example from the Vietnam War when the POW status was granted to as many captured as possible, fully in conformity with the principle of humanitarianism and values embodied in GC III[21].

Assuming that the combatancy requirements were applicable to Al Qaida soldiers, in the US view they would only meet two of them. The US position can be summarized as follows: concerning the first condition of being commanded by a person responsible for his subordinates, there seems to be no doubt that Al Qaida is an organized group with a responsible command. The solid cell structure enables mobilization of a high number of members and huge resources. The attacks of September 11th imply a strong organizational capability. But the US administration claims that on the contrary, Al Qaida fails to meet further three expressis verbis provided requirements. These conditions were not

[19] In the same way: L. Azubuike, Staus of Taliban and Al Qaeda Soldiers: Another Viewpoint, in: *Connecticut Journal of International Law*, vol. 19 (2003); also NGO's like Amnesty International, Human Rights Watch.
[20] Ibidem, p.295.
[21] G. H. Aldrich, The Taliban, Al Qaeda and the Determination of Illegal Combatants, in: *The American Journal of International Law*, vol. 96 (2002), p. 896.

fulfiled by the persons who carried out the attacks on September 11th. They did not carry their arms openly, they deliberately aimed at mixing with civilian persons. The principle of their action was to act by suprise. The Al Qaida members had no distinctive sign as they operated clandestinely. Use of such methods of combat would deprive the Al Qaida members of POW status because it also contravenes the requirement of conducting its operations in accordance with the laws and customs of war. Turning to the conditions not explicitly expressed but inferred from Article 4 (belonging to an organized group and belonging to a Party to the conflict), it must be stated that to belong to a Party to the conflict, a factual link is required.[22] According to the U.S. it would be rather difficult to furnish evidence for existence of the factual link, mentioned above. That means that the condition of belonging to a Party to the conflict was not met. Concerning the condition of belonging to an organized group, there seems to be no doubt about it being fulfilled as Al Qaida operates on a high level of organization. Although the units are independent of each other there is also a leading authority above these groups.

In short, the U.S. position is that the conditions of belonging to an organized group and being commanded by a person responsible for his subordinates were met by Al Qaida members, unlike the other requirements, which means that they are not entitled to POW status.

Are there any grounds to undermine some of the US arguments? Of course there are. US claims that Al Qaida soldiers did not have a distinctive sign but during the conflict in Afghanistan it did not disturb or prevent the American soldiers from fighting against Al Qaida by reason of not being able to distinguish between Al Qaida members and civilians. It means that the former indeed distinguished themselves from the latter. It would also imply that Al Qaida fighters carried their weapons openly and in this way contributed to being distinguishable. Reffering to the condition of belonging to a Party to the conflict I refer to the earlier remarks where I tried to prove, that there is evidence for existence of a nexus between Al Qaida and the Taliban, representing de facto Afghanistan, sufficient to make Al Qaida a party to the conflict. However, if combatancy requirements were applicable to Al Qaida soldiers – but they should not, which should be stressed once again – they would not meet the condition of conducting its operations in accordance with the laws and customs of war. Not meeting only one condition stronly calls for treating Al Qaida in a similar way as the Taliban soldiers and granting them POW status. In no way would this hinder the prosecution of those responsible for war crimes or crimes against humanity.

At this point we have come to the term “unlawful combatants”, which was used by the Secretary of Defence, D. Rumsfeld to determine the position of the Guantanamo detainees. The term is not used as such by the Geneva Conventions or other humanitarian law treaties. It was created by the US Supreme Court in 1942 Ex parte Quirin Case in order to define the status of eight German soldiers who landed and committed acts of war in civilian clothes on the US territory. The Court stated that: “lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful”[23]. It should be stressed, however, that when the concept of “unalawful combatants” was used by the US Supreme Court in Ex Parte Quirin, Geneva Convention III did not yet exist. For reasons explored above the term “unlawful combatant” has no place in international humanitarian law and the detainees should be accorded protection under the Third or the Fourth Geneva Convention. There is no intermediate status.

[22] Ibidem, p.292.
[23] Ibidem, p.295.

Article 5 Tribunals

According to Article 5 of the Third Geneva Convention "(1) the present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatration. (2) Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal".

This is an important provision which creates a temporary protection equal to that enjoyed by prisoners of war, for all persons who have committed a belligerent act and have fallen into the enemy's hands, in case of doubt as to their belonging to one of the categories enumerated in Art. 4 of GC III.

GC III gives no indication concerning the type of tribunal or the rules it should apply in the process of status determination. As we read in the ICRC Commentary to the Geneva Conventions, "at Geneva in 1949, it was first proposed that for the sake of precision the term "responsible authority" should be replaced by "military tribunal". This amendment was based on the view that decisions which might have the gravest consequences should not be left to a single person, who might often be of subordinate rank. The matter should be taken to a court, as persons taking part in the fight without the right to do so are liable to be prosecuted for murder or attempted murder, and might even be sentenced to capital punishment. This suggestion was not unanimously accepted, however, as it was felt, that to bring a person before a military tribunal might have more serious consequences than a decision to deprive him of the benefits afforded by the Convention. A furher amendment was therefore made [...] stipulating that a decision regarding persons whose status was in doubt would be taken by a "competent tribunal", and not specifically military tribunal"[24].

The composition of the tribunal, its functioning, rules it will apply are left to the discretion of each High Contracting Party to GC III. The tribunal may be military, civil or administrative in nature (even a military commission) as long as the internationally accepted judicial standards are respected. That means that, most of all, such a "competent tribunal" should be independent, fair and impartial.

Why was Article 5 adopted if the provisions of Article 4 seemed to have been precise and adequate? It is true that the status of the majority will be decided by the application of Art. 4, but some persons falling in the hands of the enemy could be in the doubtful category. Again Commentary to the Geneva Conventions provides useful guidance. The aim of Art. 5 was to address situations where doubt arises as to whether a person belongs to one of the categories in Art. 4 and to prevent such determination decisions to be made by a single person, who might often be of subordinate rank. The reason for the adoption of Art. 5 clearly refers to individual cases. Such a status determination should be made on a case by case basis.

The US government denied POW status to the Guantanamo detainees without judicial determination on the basis that no doubt existed. At first it was stated that Geneva Convention III was not applicable to all the detainees, then on 7 February 2002 the US President determined that GC applied only to members of the Taliban (but still POW status was denied). It means that there existed clear evidence of a doubt. As Richard Boucher, a spokesmen of the US Department of State, stated: "...the Geneva Convention says that if there is any doubt, then a competent tribunal should be convened to review these things. We don't think there is any doubt in this situation. The White House, in their announcements yesterday, I think, made quite clear why there is no doubt about Taliban people involved. All of these people have been screened several times before they were taken, and after they

[24] ICRC Commentary, op.cit.

were taken to Guantanamo, and we don't think there is any doubt in these cases... I think...if there is any factual or reasonable basis for doubt, then of course we would be willing to review this. But at this point, we're not aware of anything in all these interviews that raises any doubt about these people...There was nothing in that examination of the facts of the situation that raises any doubts that would lead us to believe that they might qualify, and therefore we believe firmly that they don't. Now, should something come up that would change that, I'm sure we would review it[25].

It must be stressed, however, that there is nothing in the wording of Article 5 of GC III or the official ICRC Commentary that could suggest that the doubt is limited to the one entertained by the Detaining Power. ICRC in its Commentary makes clear that the Conventions should be interpreted broadly, including Art. 5. There are some indicators in favour of strong doubt existing among numerous international bodies and scholars.

The UN High Commissioner for Human Rights stated, on 16 January 2002, that:
"All persons detained in this context are entitled to the protection of international human rights law, in particular the relevant provisions of the International Covenent on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949. The legal status of the detainees, and their entitlement to prisoner-of-war (POW) status, if disputed, must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention. All detainees must at all times be treated humanely, consistent with the provisions of ICCPR and the Third Geneva Convention. Any possible trials should be guided by the principle of a fair trial, including the presumption of innocence, provided for in the ICCPR and the Third Geneva Convention"[26]. The Inter-American Commission's on Human Rights Decision on Request for Precautionery Measures is placed in the same line of reasoning. The Commission came to the conclusion that "precautionery measures are both appropriate and necessary in the present circumstances, in order to ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights. On this basis, the Commission hereby requests that the United States take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal"[27].

The International Commission of Jurists, an international non-governmental organization consisting of judges and lawyers from all regions and legal systems of the world working to uphold the rule of law and the legal protection of human rights, stated that the 7 February 2002 decision of the President to apply Geneva Convention to the conflict in Afghanistan but to deny POW status to the detainees was "incorrect in law"[28].

Another example of existing doubts was a survey conducted, on 21 February 2002, by the War Crimes Project among the leading world experts in international humanitarian law. Its results showed that "most of the experts [...] believe that the Taliban should be granted POW status, citing Article 4 of the Third Geneva Convention, which defines prisoners of war as 'members of armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces'. Although there was disagreement about the legal status of Al Qaida who have been captured, most

[25] Quote from J.Toman, The Status of Al Qaeda/Taliban Detainees under the Geneva Conventions, in: *Israel Yearbook on Human Rights* vol. 32 (2003), p.303.
[26] Quote from the Amnesty International Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantanamo Bay, 22 April 2002. The Memorandum available at: http://web.amnesty,org/library/Index/ENGAMR510532002?open&of=ENG-USA
[27] Inter-American Commission on Human Rights, Decision on Request for Precautionery Measures (Detainees at Guantanamo Bay, Cuba) available at: http://www.humanrightsnow.org/oasconventiononguantanamodetainees.htm
[28] Quote from the AI Memorandum, op.cit.

agreed that the Administration had not taken necessary steps under international law to determine their status..."[29].

Also the most authoritative body on the provisions of the Geneva Conventions, the International Committee of the Red Cross, stated that there were "divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status"[30].

Concluding, there is strong and clear evidence that substantial doubt existed, in the form of opinion from many bodies such as the ICRC, the UNHCHR, the international humanitarian law experts surveyed by the War Crimes Project and the International Commission of Jurists. Also many non-governmental organizations, such as Amnesty International or Human Rights Watch, believe that the Guantanamo detainees should be granted POW status (the Taliban as well as Al Qaida members) and at the same time any dispute about their status must be determined by a competent tribunal, respecting due process rights and until such time the detainees must be presumed to be prisoners of war. The presidential decision of 7 February 2002 was illegal and there are no arguments to defend an opposite position. I am convinced that also Al Qaida fighters should be granted POW status also by reason of benefit of the doubt, which would in no way hinder the possibility of holding responsible those who committed war crimes or crimes agaist humanity. But despite my strong belief, in a present situation doubts and uncertainties should be clarified in accordance with Art. 5 of GC III. It is a far better, just and most of all lawful solution compared to a blatantly wrong status determination decision made by the President Bush.

The Applicability of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War

In this part of the article, I would like to analyze the applicablity of GC IV. There seems to be no doubts that members of the Taliban qualify as prisoners of war. However, controversies exist concerning the status of Al Qaida fighters. For reasons mentioned above I believe they should be granted POW status as well. But let us assume that Al Qaida members do not qualify as POW's. Does this mean that they are deprived of any protection? Is there legal vacuum? The answer if of course negative.

According to Article 4 of GC IV "persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. [...] Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [...], or by the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea [...], or by the Geneva Convention Relative to the Treatment of Prisoners of War, shall not be considered protected persons within the meaning of the present Convention"[31]. According to the ICRC Commentary "the definition of protected persons [...] is a very broad one which includes members of the armed forces – fit for service, wounded, sick or

[29] Quote from the AI Memorandum, op.cit.
[30] Quote from the AI Memorandum, op.cit.
[31] The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War available at: http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5

shipwrecked – who fall into enemy hands. The treatment which such persons are to receive is laid down in special Conventions to which the provision refers. They must be treated as prescribed in the texts which concern them. But if, for some reason, prisoner of war status – to take one example – were denied to them, they would become protected persons under the present Convention"[32].

Protected persons must fulfil certain nationality requirements. The person must not be a national of the party to the conflict under whose control he finds himself. This nationality limitation implies that civilians, nationals of US or allied forces who fall into the hands of their country's armed forces during the conflict in Afghanistan do not enjoy the full set of rights enumerated in GC IV.

A second nationality limitation is based on the existence of diplomatic relations. Pursuant to Art. 4(2) GC IV nationals of a neutral state who find themselves in the territory of a belligerent state, and nationals of a co-belligerent state, are not regarded as protected persons as long as state of their nationality maintains normal diplomatic relations with the state in whose hands they are. This provision may deprive, for example, Pakistani and British citizens in Afghanistan of the status of protected persons as long as those states maintain diplomatic relations with the US. In both exceptions those persons are subject to general protection of Part II of GC IV entitled "General Protection of Populations against Certain Consequences of War"(inter alia the establishment of hospitals and safety zones and neutralized zones, the protection of civilian hospitals, protection of medical personnel, protection of transports of sick and wounded civilians and other especially vulnerable categories of persons on land, by sea or by air, free passage of aid consingments, the special protection of children, permission to exchange family news).

Civilians may not participate in hostilities with the exception of levee en masse. In this context Art. 5 (1) and (3) provide an important provision: "(1) where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State; (3) in each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with security of State or Occupying Power[33]". This provision means that by unlawful participation in hostilities a civilian person may not "claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person be prejudicial to the security of such State". In other words, explaining this on a concrete example: during unlawful participation in hostilities the civilian forfeits his protection and exposes himself to attacks: such a civilian may no longer claim to be immune form attacks. If otherwise, we would reach a level of absurdity, when a person activily participating in hostilities, fighting without being allowed to do so, could not be attacked as a protected person. Still such an individual retains his status as a protected person and he does not become a combatant. It is expresis verbis stated in Art. 51(3) of Additional Protocol I of 1977, which reads as follows: "civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities"[34]. Although US is not a party to the Protocol this provision may be a helpful guidance for the clarification of Art. 5 of GC IV. It must be stressed that the fact that civilians have at some time taken direct part in the hostilities does not make them lose their immunity from attacks once and for all. If such civilians laid down their arms or having no longer means of defence they surrendered they must not be attacked.

[32] ICRC Commentary, available at:
http://www.icrc.org/ihl.nsf/WebCOMART?OpenView&Start=1&Count=150&Expand=4#4
[33] GC IV, op.cit.
[34] AP I, op.cit.

What should also be stressed is the possibility to punish civilians for unlawful participation in hostilities. Art. 5 in addition, permits administrative detention for imperative security reasons and derogation from protected substantive rights of civilians within the territory of a state party to the conflict. In other words, Art. 5 allows for some derogation from the protective regime of GC IV for persons unlawfully engaged in active hostilities. If such persons did not fall under the Convention, such a provision would not have been necessary. The ICRC Commentary once again proves to be useful. In the context of punishment for unlawful participation in hostilities, it reads "there are certain cases about which some hesitation may be felt. We may mention, first, the case of partisans, to which Article 4 A(2) of the Third Convention refers. Members of resistance movements must fulfil certain stated conditions before they can be regarded as prisoners of war. If members of a resistance movement who have fallen into enemy hands do not fulfil those conditions, they must be considered to be protected persons within the meaning of the present Convention. **That does not mean that they cannot be punished for their acts,** but the trial and sentence must take place in accordance with the provisions of Article 64 and the Articles which follow it"[35] [emphasis added].

In the case of qualifing Al Qaida members as protected persons the US would be responsible for unlawfully detaining civilians outside an occupied territory for about 3 years after their captive. According to Arts. 49 and 76 of GC IV "(49) individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive; (76) Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein[...]"[36]. In accordance with the said provision in our case, civilians who fall into US hands in Afghanistan may not be held in Guantanamo, but only in Afghanistan. Whereas prisoners of war may be held in every corner of the earth, civilians should remain in an occupied country.

In conclusion, all persons held in Guantanamo must be either combatants (POW's when in enemy hands) or civilians. Such a statement is emphasized in the ICRC Commentary to Art. 4 of GC IV, where we read: "Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Geneva Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution – not only satysfying to the mind, but also, and above all, satisfactory from the humanitarian point of view"[37].

[35] ICRC Commentary, op.cit. Art. 64 and the ones that follow it refer to due process rights.
[36] GC IV, op.cit.
[37] ICRC Commentary, op.cit. This position was confirmed by the International Tribunal for the Former Yugoslavia (ICTY) in its Celebici Judgement of 1998, in which the Tribunal stated: "It is important, however, to note that this finding is predicated on the view that there is no gap between the Third and the Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of war (or the First or Second Convention) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied". The judgement is available at: http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e-3.htm (paragraph 271).

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THE COMBATTANT STATUS OF THE GUANTANAMO DETAINEES

by

LOUIS-PHILIPPE F. ROUILLARD*

Following the September 11, 2001 terrorist attacks and in order to protect American lives and property, the Republic of the United States of America has undertaken several military and anti-terrorist actions in the past two years. As a result, persons connected to the Taliban regime in Afghanistan or the Al Quaeda terrorist network across the world have been killed or captured and held *incommunicado* in the US Naval Base at Guantanamo, Cuba. So far, the United States' government as refused to recognised some or all of these detainees as prisoners of war on the notion of citizenship and different interpretation of international law.

It has clearly stated its position that detainees at Guantanamo are persons associated with terrorism and therefore not entitled to either the full protection of the United States Constitution, nor to protections given by international humanitarian law. Some human rights and international humanitarian law standards have been acknowledges has basic minimum that are to be met, but no other protections were to be afforded.

This position has been presented in the medias on the basis of the notions of "enemy combatant", "unlawful combatant" and "acts of war". American civil rights activists have brought forward many questions regarding the status of these detainees, but most have done so on the basis of the right of *habeas corpus* and the Constitutional protections of the United States. But, conveniently, Guantanamo is not American soil: it is Cuban soil lent to the American government. Even the Cuban government states that it is still territory. As such, the jurisdiction of the American Constitution is claimed not to apply in this case.

Furthermore, based on notions dating from the Second World War, the US claims that there are no measures of protections that are to be afforded to the detainees. It states that international humanitarian law does not applies because the persons captured were either not party to the conflict, not combatant or not respecting the laws and customs of war. Confusing the very notion of "war" and muddling legal concepts, the US government has accomplished a most impressive act of magic: making people believe that American and international laws do not apply to these detainees. In fact, the US administration has made such a good use of confusion that hardly any article in the current literature fully addresses the international norms denied to the detainees. And of those who have dare confront the legal grounds upon which the United States government rests its case, there is such miscomprehension of humanitarian and of human rights that one is incline to question the agenda behind the writings.

The present essay will therefore analyse the notion of combatant and the status of persons captured under arms in combat actions. It will differentiate between Taliban fighters captured in Afghanistan as well as Al Quaeda fighters captured alongside them during the combat operations undertaken by American and Coalition forces in Afghanistan. It will further differentiate between Al Quaeda members captured during the so-called "war on terrorism", especially those captured outside the theatre of war that was Afghanistan, in such places as Pakistan, the Philippines or the United States. Due to the complexity of the multiple American engagement and the difference of legal regime applicable to the United States and some of its allies (in particular the First and *Second Additional Protocols of 1977* for Canada in Afghanistan and the United Kingdom in Iraq), this essays will concentrate on the sole American legal perspective, with the *Geneva Conventions of 1949* as the applicable humanitarian law.

In doing so, it is hope to deny some very disturbing twist of interpretation that the American government has tried to bring in international law and remain the United States that because they stand for higher and better values than their enemy, they must uphold the highest standard of justice and fairness – even to their most die hard enemies – by the full application of humanitarian law.

A STATE OF WAR?

The terrorist attacks of September 11, 2001 has killed an estimated 3,000 persons and wounded scores of others, not to mention the physical destruction and the psychological impact of an attack on American soil. These acts of cowardice were met with incredible courage by many. However, prejudice and racial abuse increased to unheard of level against persons of Arabic or Asian origin in North America. The US Government quickly established that the perpetrators of these terrorist attacks were members of the Al Quaeda network, a loose association of fundamentalist Islamists, guided and led by Osama Bin Laden. His whereabouts were traced to Afghanistan and the United States gave the Taliban regime, ruling Afghanistan under a fundamentalist interpretation of the Sharia, an ultimatum to deliver Bin Laden for him to be prosecuted[1].

Whether through lack of power or lack of will to do so, the Taliban regime did not deliver him. The United States subsequently invaded Afghanistan with the help of Afghan dissenting forces, in particular the Northern and Eastern Alliances. The Taliban fought a defensive campaign and was utterly crushed under the weight of American conventional weaponry and Special Forces tactics.

The first question that arises from these facts is whether a war existed at any time between September 11, 2001 and the end of combat operations in Afghanistan and its replacement by the UN-sanctioned, NATO-led peacemaking mission in Afghanistan. Indeed, the US were very quick to point out that it considered the terrorist attacks perpetrated against civilian and military targets as acts of war. Some authors definitely support the existence of a state of war from the moment these attacks were committed[2].

This interpretation is based on the chain of events leading to the September 11, 2001 attacks, including: the attempts to kill American troops in Aden on the way to Somalia in 1992, as well as the 1993 Mogadishu ambush that killed 19 US troops, the 1993 bombing of the World Trade Center, the bombing of the Khoba Towers American barracks in Saudi Arabia, the destruction of two American embassies in Africa and the bombing of USS Cole in Yemen[3]. It is also based on the perception that the scope of the act, killing more than 3,000 persons from more than 87 countries is in itself enough to warrant the interpretation of these attacks as acts of war[4]. As such, it is seen as a "war against terrorism" and the adoption of this new conception of war is deemed more expedient in dealing with the acquisition of evidence to prevent further acts of terrorism.

Such an interpretation is quite unsettling as it confuses cause and effects and certainly does not correspond to the current legal notion of war. Indeed, whether in American law or in international law, war as been defined as taken place only between States[5]. In fact, the mere proposition that war could be wage by individuals has been repeatedly and most vehemently decried by most if not all States[6].

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* Editor-in-Chief, Free World Publishing.

[1] Security Council demanded that "the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted," SC Res. 1267, UN SCOR, 4051st mtg., UN Doc. S/RES/1267 (1999) 2, and that they "stop providing sanctuary and training for international terrorists and their organizations," SC Res. 1214, UN SCOR , 3952nd mtg., UN Doc. S/RES/1214 (1998) 2, and "take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps." SC Res. 1333, UN SCOR, 4251st mtg., UN Doc. S/RES/1333 (2000) 2. Moreover, the Security Council noted that the failure of the Taliban to comply with Resolution 1214's obligation of cooperation to bring indicted terrorists to justice constituted a threat to international peace and security, thereby making Chapter VII applicable.

[2] « The New Enemy », *The Globe and Mail*, (15 September 2001) 15.

[3] Wedgwood, Ruth, « Military Commissions ; Al Quaeda, Terrorism and Military Commissions », (2002) 96 *A.J.I.L.* 328 at 330.

[4] *Idem.*

[5] Alexander, Keith S., «In the Wake of September 11th : The Use of Military Tribunals to Try Terrorists », (2003) 78 *Notre Dame Law Review* 885 at 895 as to American law : « …the Supreme Court in 1800 defined war as « every contention by force between two nations, in external matters, under the authority of their respective governments… », citing *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800). See also Drumbl, Mark A., « Victimhood in Our Neighbourhood : Terrorist Crime, Taliban Guilt, and the

Some commentators nonetheless affirm that the attacks of September 11, 2001 were of such scope and that the link between Al Quaeda and Afghanistan was such that for all effects and purposes the attacks were in fact committed by a State[7]. Failing acceptance of this interpretation, some commentators suggest that the *Charter of the United Nations* is a living document and as such can adapt itself to a new form of violence that should constitute an armed attack and therefore a an act of war[8]. This perception is supported by some commentators who argue that the nature of war has changed and therefore the legal interpretation should change with it. Such interpretation has been set upon the traditional vision of war as an extension of politics by other means, as expressed by Carl von Clausewitz is his famous – and unfinished but posthumously published in 1832 book – "On War". This definition is presented as meeting the criterion of the FBI's own definition of terrorism, therefore further supporting a redefinition of war[9].

Others further argue in favour of such a view based upon the new doctrinal views of major Western armies. These arguments are set upon confused legal and secular notions and muddle international law generally and international humanitarian law especially. For example, one author affirms that international humanitarian law defines some acts as illegal warfare and that the use of incendiary and attacks on civilians are clearly illegal under international humanitarian law. He concludes that the attacks of September 11, 2001 were severe enough to constitute war crimes[10], therefore justifying the US government in prosecuting Al Quaeda member in military commissions. That the author did not bother to prove the existence of a state of war, nor of a war, without which humanitarian law is

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Asymmetries of the International Legal Order», (2002) 81 *North Carolina Law Review* 1 at 27, interstate context may be clouded by the fact that Article 51 mentions armed attacks, not armed attacks by a state.

[6] *Ibid*., at p. 27 footnote 85. "The [U.N.] Charter was drafted on an assumption that all force was inter-state and that it governed inter-state relations ... ." citing Duffy, H., « Responding to September 11: The Framework of International Law », (Oct. 2001) 11 at http://www.interights.org. Giorgio Gaja observes: « When stating the conditions for individual and collective self-defence, neither Article 51 of the UN Charter nor Article 5 of the NATO Treaty specifies that an "armed attack" has to originate from a state. However, this condition may be taken as implicit ... . Moreover, armed attack is a subcategory of aggression, as explicitly said in the French text of Article 51 of the Charter, and also aggression clearly has to come from a state. » in Gaja, G., « In What Sense was There an "Armed Attack"? », (2002) *European Journal of International Law Discussion Forum*, at http://www.ejil.org/forum (last visited Nov. 11, 2002). See also Megret, F. « War"? Legal Semantics and the Move to Violence », (2002) 13 *European. Journa of. Internationall Law* 361 at379 (noting that "self-defence was clearly only ever meant to be against states"). One immediate exception to the interstate requirement is the fact that armed attacks can occur in internal civil war, as organized insurgency movements can initiate armed attacks against a state government. See Slaughter, A.-M. and Burke-White, W. « An International Constitutional Moment », (2002) 43 *Harvard International Law Journal* 1at 8.

[7] Dumbl, *supra*, note 5 at 27.

[8] Schrijver, Nico J., « Responding to International Terrorism : Moving the Frontiers of International Law for 'Enduring Freedom' ? », (2001) 48 *Netherland International Reviews* 271 at 284, cited in Drumbl, *supra*, note 4 at 27.

[9] Keith, *supra*, note 4 at 895. He defines terrorism as « the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives. » citing Crona, S.J. and Richardson, N.A., « Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism », (1996) 21 *Oklahoma City University Law Review* 349 at 371 quoting Terrorist Research and Analytical Center, U.S. Dept. of Justice, *Terrorism in the United States 1982-1992*, 1992 at 20. and professor Christopher Blakesley who : « identified five elements of what constitutes terrorism. They are : (1) the perpetration of violence by whatever means; (2) against "innocents"; (3) with intent to cause the consequences of the conduct or with wanton disregard for its consequences; (4) for the purpose of coercing or intimidating an enemy (government or group) or otherwise to obtain some political, military, or religious benefit; [and] (5) without justification » citing Blakesley, C.L. « Terrorism, Law, and Our Constitutional Order », (1989) 60 *Colorado Law Review* 471 at 480. Also see the *International Convention Against the Taking of Hostages*, signed at New York, December 18, 1979 ; *International Convention for the Suppression of Terrorist Bombing*, adopted by the General Assembly December 15, 1997 ; *International Convention for the Suppression of the Financing of Terrorism*, adopted by the General Assembly December 9, 1999 ; *International Convention for the Suppression of Unlawful Seizure of Aircraft* , 860 UNTS 105, entered into force Oct. 14, 1971; *International Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons*, opened for signature at New York, December 14, 1973.

[10] Evans, Christopher M., « Terrorism on Trial : The President's Constitutional Authority to Order the Prosecution by Military Commission», (2002) 51 *Duke Law Journal* 1831 at 1847.

inapplicable. It does not seem to be of any concern to him. The scope of the attack seems enough to warrant his interpretation. But that is not what international, nor have US courts determined before.

While it is true that a declaration of war is not required, the notion of war and indeed that of civil war includes some prerequisite. In the case of war, there is no doubt that the actors concerned are High Contracting Parties to the *Geneva Conventions*[11] - States that have signed the *Conventions* or the other which are not Party to the Conventions but are held accountable as to the respect of the notions of *jus cogens* contained in them[12]. Civil wars are not recognised under the *Geneva Conventions*. They are however recognised under the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*.[13] The United States of America have not ratified the *First* or the *Second Additional Protocol*. It would be rich for them to claim the existence of a state of war which they do not recognise by treaty. Furthermore, a civil war under *Protocol II* is one between the armed forces of a High Contracting Party against dissenting or other organised armed forces group. This is clearly not the case between Al Quaeda and the United States., since Al Quaeda is neither a dissenting force nor another organised armed forces group. It is a foreign organisation of a terrorist nature. Wars that include foreign factions or control from foreign countries do not remain civil war, but become "internationalised" non-international armed conflicts; in effect becoming international armed conflicts. The International Tribunal for the former Federal Republic of Yugoslavia has clearly established this in its *Tadic* case[14]. But again, that is not the case with Al Quaeda.

Such confusion is compounded by the lack of precise international definition of what terrorism is. Indeed, while there exist treaties on particular aspects of terrorism, there is no clear and large view of what constitute terrorism[15]. And this confusion is further helped by opinions of commentators that the United Nations Security Council resolution 1368, stating that this resolution clearly established the right of self-defence of the United States due to the occurrence of an armed attack against American soil[16]. That notion of self-defence and the invocation of NATO's article 5 prove for some the existence of a war since the right of self-defence is invoked. Meanwhile, it must be pointed out that none of the UNSC resolutions prior of succeeding to resolution 1368 speak of a war. Nor does the NATO press release speak of a war[17]. This intellectual gymnastic is made on an assumption.

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[11] The *Geneva Conventions* are : *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950), [hereafter First Geneva Convention]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950), [hereafter Second Geneva Convention] ; *Geneva Convention relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, entered into force Oct. 21, 1950 [hereafter *Third Geneva Convention*] ; and *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950), [hereafter Fourth Geneva Convention].

[12] See International Committee of the Red Cross, *Customary Rules of International Humanitarian Law*, Cambridge, Cambridge University Press, 2003.

[13] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 1125 U.N.T.S. 609, entered into force Dec. 7, 1978

[14] *Prosecutor v. Dusko Tadic* (1995), case IT-94-1-AR72 (International Criminal Tribunal for the former Yugoslavia, First Instance), on line at : http://www.un.org/icty/tce14.htm (last visited January 14, 2004) reversed and decided in *Prosecutor v. Dusko Tadic*, (1999), case IT-94-1-AR72, (International Tribunal for the former Yugoslavia, Appeal Chamber), on line at : http://www.un.org/icty/tadic/appeal/judgement/main.htm, (last visited January 14, 2004).

[15] Addicott, J. F., « Legal and Policy Implications for a New Era : "War on Terror"», (2002) 4 *The Scholar : St. Mary's Law Review on Minority Issues* 209 at 212. The author cites Some examples of specific antiterrorist conventions include: *The Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention)*, T.I.A.S. No. 159 (1963); *Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), 22 U.S.T. 1641*, T.I.A.S. No. 7192 (1971); *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention)*, T.I.A.S. 7570 (1973); *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York Convention)*, T.I.A.S. 8532 (1976-77); *International Convention Against the Taking of Hostages (Hostages Convention)*, 34 UN GAOR Supp. 39, UN. Doc. A/34/39 (1979) 23.

[16] Wedgwood, *supra*, note 3 at 329 citing SC Res. 1368 (Sept. 12, 2001), 40 ILM 1277 (2001).

[17] NATO, « Statement by the North Atlantic Council » , Press Release 124, (Sept. 12, 2001) in (2001) 40 *ILM* at 1267.

Finally, some authors present the war against terrorism as an actual war that requires the extension of the notion of war to terrorist attacks to protect national security, to better legislate the rule of evidence and to obtain custody of alleged terrorists as well as the protection of juror, witnesses and court personnel during prosecution. Such arguments are unconvincing. National security certainly requires protection of sensitive information, but persons in custody will be missed by their co-conspirators. Their custody is no secret. Nor is the information they hold. By definition, the terrorists will take for granted that their enemy knows what the person captured knows. It is simple and expedient logic. The source of the information may well need to be protected, but the truth is that there are not 300 persons in a secret at a time. And there are not 300 plots for 300 detainees. Therefore, it is reasonable to understand that there is no need to hold that many person *incommunicado* without access to a lawyer for fear of divulgation of information since it is what the government wants.

And historical precedents do not justify the arguments proposed. Israel has occupied Arab lands for more than 30 years and refuses to recognise a state of war with the Palestinian Authority as it is not a State. The same situation can be evoked for myriads of conflicts past and present, including the IRA in Northern Ireland.

As well, national security rarely requires the use of martial law or emergency measures. In fact, indefinite or repeated states of alert create fatigue and laxism that result in human errors and fatal mistakes. The oft-cited comparison with Pearl Harbour is indeed quite applicable in this case as the repeated alerts created a confusion in a large part to blame with the poor reaction of American forces that day. In the case of September 11, 2001, normal law enforcement agencies are very much presumed to have had enough information to act but decided not to; with the disastrous consequences of September 11, 2001. The report is due in May 2004 and there are words leaking already that evidence were of sufficient quantity and quality to obtain a warrant and to hold alleged terrorists. This would have in fact prevented the attacks. But agents either choose to ignore the evidence or did not comprehend the full powers they already had or were trying to set a trap for a bigger terrorist. Whichever is the case, the fault lies not with the system prior to September 11, 2001 but with the use of that system by persons in law enforcement agencies. Their gamble did not pay.

As for the protection of court personnel, judges, jurors and witnesses, the current situation is nothing different from trial of mafia members in Italy, nor of Columbian or Mexican drug barons. These persons must be protected, by force of arms if necessary, but that does not mean that a state of war exists between the State or the cartels, despite the term “war on drugs” and the use of armed forces of the US and of Columbia. Nor does the fact that psychopathic murderer, even of the means and obvious intelligence of a Bin Laden, claims the existence of a state of war against the United States create such a legal state of war. He is not the representative of a State. He is not associated with a State, having in fact been rejected by many and exiled as a non-citizen, and certainly his word does not carry the weight of a nation. It carries the frustrations and fears of thousands, whether real or perceived, but it remains the word of a private person who is in fact inconsequential to international actors. It is not because a maniac somewhere declares war on a State that a state of war is created. Only a maniac representing a State and empowered to do so can create a war.

TALIBAN STATUS

Taliban as combatants

The status of Taliban fighters captured during military operations in Afghanistan and now detained in Guantanamo results from article 4 of the *Third Geneva Convention*[18]. But its interpretation in US policies does not meet the spirit

[18] *Third Geneva Convention*, *supra* , note 11 at article 4: « *Article 4* : A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

nor the letter of humanitarian law. The US adopted the view that it was engaged in an international armed conflict, in accordance with article 2 common to the four *Geneva Conventions*[19], but refutes that it confronted lawful combatants or that they should be granted prisoner of war status.

Some of the Taliban personnel captured in Afghanistan were transferred to Guantanamo Bay and denied prisoner of war status even though they were "treated" as combatant. The US government defended its decision with changing discourse but finally by saying that since the US did not recognised the Taliban regime as a legitimate government, Afghanistan was not a continued party to the *Third Geneva Convention*. As a result, none of Guantanamo Bay detainees, including the Talibans, can benefit from prisoner of war status.

Such reasoning demonstrates a very poor juridical understanding of international law. The theory of *tabula rasa* in cases of State succession has long been squashed[20]. It further leads to questions as article 4(3) clearly states that the *Third Geneva Convention* applies to members of armed forces of government not recognised by the detaining Power[21].

On February 7, 2002, President Bush declared that the *Third Geneva Convention* was applicable to Taliban forces and that there existed a state of war between two parties to the *Conventions*[22]. As a result the *Conventions* were applicable to Taliban detainees, but not to Al Quaeda detainees. Yet, Taliban fighters have not been granted prisoner of war status; the extension of some humane benefits of the Conventions has been granted to them, not the protection befitting a combatant on grounds of collaborations with Al Quaeda.

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2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
(a) That of being commanded by a person responsible for his subordinates;
(b) That of having a fixed distinctive sign recognizable at a distance;
(c) That of carrying arms openly;
(d) That of conducting their operations in accordance with the laws and customs of war.
3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. (…)
B. The following shall likewise be treated as prisoners of war under the present Convention:
1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.
2. The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties (...) » .

[19] *Geneva Conventions*, *supra*, note 11 at article 2 : «Art 2. In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
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.
Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof. »

[20] Dallier, P. and Pellet, A., *Droit international public*, Paris, L.G.D.J., 2002 at 417 and 538 to 543.

[21] *Third Geneva Convention*, *supra*, note 11at article 4(3).

[22] Murphy, S.D., «Contemporary Practice of the United States Relating to International Law », (2002) 96 *AJIL* 461 at 476.

The US Administration has affirmed that Taliban fighters were unlawful combatants and therefore not granted the protections of prisoners of war. The degree of their unlawfulness depended upon the period when one asked the Administration, but three main reasons evoked were: 1) that the Taliban were not armed forces in the sense of the Geneva Conventions, 2) that they could not fall within the category of militias because they did not wear distinctive signs and 3) that they did not respect the laws of war.

In a country in the mist of a civil war for 23 years, the Taliban regime won a clear military victory in 1996, overrunning its opponents and establishing effective control over the vast majority of the country. The Taliban had a rank structure, some military training and were empowered by a government exercising effective control over the territory and population of most of Afghanistan. Their main task was obviously to protect Afghanistan from enemies – as perceived by the Taliban regime – from within and without[23]. The Taliban was not an armed force organised along modern army lines, but they were nonetheless submitted to a chain-of-command linked to the central government of the Taliban. The central command of such an entity may be argued and some may be tempted to differentiate between members of a standing army and active militias. To this end, the lack of uniform is pointed out.

But this question is a blatant technical justification that violates not only the spirit of humanitarian law, but that of common military sense. If a uniform was so definitely hard to differentiate, it then leads to ask how Coalition forces can be so certain of the body count of killed Taliban fighters when communicating the results of operations to the press. How does one see the difference between a dead Taliban fighter and a dead civilian? The answer is clearly that there is a way to distinguish them. Reports from service personnel indicates that while a modern military uniform may not be the common attire of the Taliban, they nonetheless had a distinctive garb and that the black turban was seen to be as a primarily Taliban symbol[24]. This is in itself satisfies clearly not only the spirit but the letter of article 4 of the *Third Geneva Convention*.

Furthermore, the qualification of somebody as an illegal or unlawful combatant has nothing to do with the fact that he was wearing the right uniform or not. The status of combatant is the licence of persons to kill and wound and destroy property lawfully under the laws and customs of war. Wearing the wrong uniform or no uniform at all does not make a person an unlawful combatant : it makes it a combatant and, if captured, a prisoner of war which will retain his status of prisoner of war before, during and after his trial for violations of humanitarian law. Saying that they are unlawful combatant because of their not wearing the right uniform is confusing cause and effects. And the same applies to the respect of the laws of armed conflicts.

Concerning that respect, there are many legal issues linked to this. The two most important concern: 1) the fact that there is a procedure to punish violations of the international humanitarian law which has so far not been respected, with the effect of denying prisoner of war status to combatants obviously protected by the *Third Geneva Convention*, in itself a violation; and 2) an interpretation of collective guilt is not legal under international law and not used since the International Military Tribunals of Nuremberg and Tokyo.

The presumption of guilt on account of belonging to a State organisation judged as criminal has not been done since the enactment of Article 9 of the 1945 *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*[25]. If some have revised history and seen

[23] Stein, «Artillery Lends Dignity to What Otherwise Would Be a Common Brawl : An Essay on Post-Modern Warfare and the Classification of Captured Adversaries », (2002) 14 *Pace International Law Review* 133 at 148.

[24] Broomes, J.W., «Maintaining Honor in Troubled Times: Defining the Rights of Terrorism Suspects Detained in Cuba », (2002) 42 *Washburn Law Journal* 107 at 127.

[25] *Nuremberg Rules, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 U.N.T.S. 279, *entered into force* Aug. 8, 1945 [hereafter *London Agreement*]: « … Art. 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization. After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal

this as victors' justice, it is nonetheless a fact that a law was created to severely punish the atrocities of the Second World War[26]. This has permitted a very clear precedent and a legal basis for prosecuting those accused. While the detention conditions of the high ranking members of the Party and military standing trial were certainly of a certain rude, defending parties had access to councils and were allowed more freedoms than the current detainees at Guantanamo Bay who, for all there alleged crimes, have committed nothing on the scale of Nazism and Imperialist Japan.

In fact, while the condition may have been severe in some lights, defendants at Nuremburg were given many rights, including that of counsel or to defend themselves and the right of cross-examination. Meanwhile, Taliban fighters who are nothing more than common infantrymen have been refused even access to counsel and their respective individual offences have yet to be given to them in a clear bill of charges.

It is important to bring forth a precision at this point: Taliban fighters held at Guantanamo Bay are not held for acts of terrorism. They are held for potential aid and abetting of terrorists. Their detention is theoretically in order to "…protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks…"[27], as put forth in Section 2 of *Executive Order 13* since it defines the individuals subject to this order as either a member of Al Quaeda, or persons engaged in, aiding or abetting, or conspiring to commit acts of international terrorism, or harbouring one of these persons. None of this order concerns combatants of armed forces[28].

Furthermore, this order concerning terrorism, which is in itself a matter of criminal law, as been decreed by the President of the United States of America in his authority as Commander in Chief of the Armed Forces of the United States of America. Such an order should therefore concern military matters and not criminal law. Yet, the order continues to cite that persons detained under this order shall be tried by a military commission[29].Upon seeing the inclusion of trial by a military commission, one would be inclined to think that a proper procedure determining the status of the detainee is enacted and that the spirit and the letter of humanitarian are applied. Nothing could be further from the truth. A military commission under American law is not the equivalent of a court martial. A military commission is a type of military tribunal but is governed by a specific – and *ad hoc* - set of rules and procedures. By doing so, the United States are actually taking away from the jurisdiction of the civilian legal system

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upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard… ». See also *In re Ohlendorf and Others (Einzatzgruppen Trial)*, (1948) 15 *Annual Digest* 667.

[26] Other charges made about the legitimacy of the IMT concerned the absence of presumption of innocence or that of a possibility of acquittal ; no definition of what a war of agression consisted of existed ; the laws of Germany were legal through their own system and the IMT provided for disobedience in the Armed Forces of Nations due to the refutation of the defense of superior orders (See *In re Goëring and Others*, (1946) 13 *Annual Digest* at 221, *In re Altstötter and Others*, (1947) 14 *Annual Digest* at 286 and *In re Takashi Sakai*, (1946) 13 *Annual Digest* at 223). However, in the accusation of judgement made *ex post facto*, one must point out that the Allied had since 1942 been very clear in their warning to Axis forces regarding atrocities. The declaration of President Rosevelt to punish atrocities on August 21, 1942 and repeated on October 7, 1942, and the *Moscow Declaration of October 1943*, http://www.yale.edu/lawweb/avalon/wwii/moscow.htm, (last opened 7 January, 2004), stating : «…three Allied powers, speaking in the interest of the thirty-two United Nations, hereby solemnly declare : (…) those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished (…) Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusors in order that justice may be done. » was limpid on the matter.

[27] *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, Executive order of November 13, 2001, http://www.whitehouse.gov/news/releases/2001/11/2001111327.html (last opened 2 dec 2003) [hereafter *Military Order 13*], at section 1(e).

[28] *Ibid*., at Section 2(1).

[29] *Ibid*., at Section 4.

the right of appeal and the judiciary powers of the US Supreme Court, making the President last authority for revision[30], which is not a guarantee of fairness.

That is not to say that military commission cannot be functional and impartial. In the case of the International Military Tribunal for Major War Criminals of the European Axis, the tribunals set up through the *London Agreement* of August 8, 1945 handed verdicts one year later, resulting in the death sentences of 12 former high-ranking Nazis[31]. As for the Tokyo trials, 24 of the 25 defendants were convicted and had a sentence of death carried out. While a strong majority were declared guilty, there is still a marvel in the fact that non-guilty verdicts were actually given at all. Despite the accusation of victor's justice, facts and numbers compels to marvel at an attempt to fair and full trial. Moreover, military commissions conducted for lesser war criminals led to the prosecution of 1672 cases in Europe with 1416 convictions[32] and 996 trials in Japan with 856 convictions[33]. Therefore, one could argue that military commission could be fair and just.

Still, the views of the United States on the matter and its treatment of detainees at Guantanamo do not support such impartiality. Presuming that all detainees are persons associated with the deeds deemed under the jurisdiction of a military commission as stipulated in *Military Order 13*, and that extra-territoriality of American law does apply to them, there is a disturbing confusion between naming someone a combatant and then refusing prisoner of war status on the basis of the commission of war crimes.

This is because article 5 of the *Third Geneva Convention* clearly states that in any case of doubts as to the category to which he belongs the presumption shall be that he is indeed a prisoner of war until a competent tribunal determines otherwise[34]. The unilateral declaration of Taliban fighters as unlawful combatants without even having this presented to any sort of tribunal is a violation of humanitarian law and one for which the authorities deciding it will have to be held accountable. It is not the equivalent of a grave breach as defined in article 130 of the *Third Geneva Convention*[35], but it is nonetheless a breach that leaves the US government opened to litigation in international courts.

Furthermore, article 85 of the *Third Geneva Convention* states that combatants that are prosecuted for acts committed before their capture shall retain, even if convicted, the benefits of the *Third Geneva Convention*[36]. Only the reservations to article 85 made by the USSR (now Russia by way of State succession), Poland, Hungary and the Democratic People's Republic of Korea at the time of signature concerns the refutation of the applicability of the protections of prisoners-of-war to those convicted of war crimes or crimes against humanity. Until such a conviction is declared by a competent tribunal, these countries accept the application of prisoner of war protections.

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[30] Maddox, H.A., « After the Dust Settles : Military Tribunal Justice for Terrorists After September 11, 2001 » , (2002) 28 *North Carolina Journal of International Law & Commercial Regulation* 421 at 422 and 423.

[31] In accordance with the *London Agreement*, *supra*, note 25.

[32] In accordance with *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 3 *Official Gazette Control Council for Germany* 50-55 (1946).

[33] Janik, A.A., « Prosecuting Al Quaeda : America's Human Rights Policy Interests Are Best Served By Trying Terrorists Under International Tribunals », (2002) 30 *Denver Journal of International Law and Policy* 498 at 502.

[34] *Third Geneva Convention*, *supra*, note 11 at article 5 : « *Article 5* - The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal. »

[35] *Ibid.* at article 130 : «*Article 130* - Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention. »

[36] *Ibid.* at article 85 : « *Article 85* - Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention. »

The United States can hardly claim that the situation has changed, even more so as the have never made a reservation to article 85 of the *Third Geneva Convention*.[37]

To avoid getting entangled this debate, the US government pleads that the Taliban fighters detained are not combatants in the first place and that therefore they are not protected under the terms of the *Third Geneva Convention*. While this is disproved above, let's consider this argument.

Talibans as civilians/unlawful combatants

Since the United Stated have ratified all four *Geneva Conventions* and that we are under the hypothesis that combatant and prisoner of war status are refused to the detainees, they must therefore be of a specific legal category with rights and obligations attached. Indeed, there is such a category and that is the whole of the *Fourth Geneva Convention*, relating to the protection of civilians. If one refutes the argument that Taliban fighters were combatants and argues that they are unlawful combatants, this means they are civilians who have taken up arms unlawfully. Therefore, regardless of the acts committed prior capture, they are protected by the terms of the *Fourth Geneva Convention*.

The *Geneva Conventions* are clear in the procedure and the effects of illegal combatants. While the term "unlawful" or "illegal" combatant does not exist officially in humanitarian law, it has been in use since at least the 19th century. And in conflicts before, such as the American War of Independence, militias were deemed illegal combatants by Regular officers and dealt with swiftly in many cases. Since then, and especially after the Second World War where partisans movement in Russia, Yugoslavia, Greece, France, Norway and Denmark proved very cumbersome for the occupying forces, the *Geneva Conventions* have brought new protections and the term "protected persons" to differentiate between the legal combatants and the persons not deemed combatants but to be nonetheless afforded protections under the *Conventions*. This is the case of all persons in the hands of an occupying Power[38].

One principle of humanitarian law is very simple: nobody should remains outside the law. A person detained must have a legal status[39]. And it is clear at article 5 of the *Fourth Geneva Convention* that civilians who have unlawfully participated in hostilities, whether they are saboteurs, spies or persons under definite suspicion of activities hostile to the Occupying Power, are entitled to the protections of this *Convention*[40]. And those protections include the core

[37] Sassoli, M and Bouvier A.A., *How Does Law Protect in War ?*, Geneva, International Committee of the Red Cross, 1999 at 591-592.

[38] *Fourth Geneva Convention*, *supra* note 11 at article 4(1) : «*Article 4* - Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. The provisions of Part II are, however, wider in application, as defined in Article 13.
Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.»

[39] Pictet, J., *Commentaries* at: http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/18e3ccde8be7e2f8c12563cd004 2a50b?OpenDocument :« Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. ' There is no ' intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution -- not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view. »

[40] *Fourth Geneva Convention*, *supra*, note 11 at article 5 : «*Article 5* - Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the

protections of article 3 common to all *Geneva Conventions*[41] as well as the full rights and privileges of the *Fourth Geneva Convention*[42]. Article 3 is part of *jus cogens* and the protections of the *Fourth Geneva Convention* are *erga omnes*. However, even if *erga omnes*, a close reading of article 5 of the Fourth Geneva Convention does present some exceptions of importance: 1) 'definite' suspicion of hostile activities is enough to hold a protected person *incommunicado* as it is being done at Guantanamo Bay and 2) it presents a distinction between the rights and privileges that must be afforded to the detainee.

Presuming purity of intent on the part of the detaining Power, the case of the detainees at Guantanamo may indeed justify their being held *incommunicado*. It was the intent of the Commission drafting the article that this was meant as a security tool of the Occupying Power in order not to tip off the group with which the detainee may have been working in order to secure capture or elimination of the co-conspirators[43]. However, article 136 of the *Fourth Geneva Convention* already provides for a delay of two weeks before communication may be made by the detainee or someone on his behalf. In all probability, somebody will have noticed the absence of a person after two weeks and presumed his capture or death within his irregular formation or underground network[44].

State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.
Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.
In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be. »

[41] *Ibid.*, *supra*, note 11 at article 3 (common to all *Geneva Conventions*) : « Article 3 - In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) Taking of hostages;
(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
2. The wounded and sick shall be collected and cared for.
An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
The application of the preceding provisions shall not affect the legal status of the Parties to the conflict. »

[42] *Fourth Geneva Convention*, *supra*, note 11, article 5 *in fine*.

[43] Diplomatic Conference, *Remarks and Proposals*, Geneva, 1949 at 68, reproduced at http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/12409217ce36c309c12563cd0042a5e0?OpenDocument ; « Diplomatic Conference several delegations explained that in their opinion provision would have to be made for certain exceptions in the case of spies and saboteurs. They pointed out that the effectiveness of the [p.53] measures taken to deal with enemy agents and saboteurs depended on the secrecy of the proceedings; it was inconceivable that a State which had arrested one or more enemy agents should be obliged to announce their capture and let the persons under arrest correspond with the outside world and receive visits; the situation was the same in the case of saboteurs and also, in occupied territories, in that of members of underground organizations. »

[44] *Fourth Geneva Convention*, *supra*, note 11 at article 136.

As for the distinction between the rights and privileges, it is not worth getting into the debate of which constitutes a right and which constitutes a privilege as the obligation to treat humanely the detainee already encompasses the notions contained in articles 37 and 38 such as medical attention and chaplain visits[45]. The fact is that despite the exceptions made and the provision for the security of the occupying power, there is nothing that curtails the rights of the detainees as to the basic human rights imbedded within the *Geneva Conventions* at article 3. And these rights also contain the right to a fair and regular trial, as part of the full rights and privileges granted by the *Convention* and applicable at the earliest date consistent with the security of the Occupying Power. Under this approach, it is also clear that the detainees at Guantanamo Bay have a right to the basic norms of judicial due process. Indeed, under article 71 and 72 of the *Fourth Geneva Convention*, they have not only the right to a fair trial but also a right to have the charges against them presented to them in writing in a language they understand and the Protecting Power shall be made ware of these charges with the particulars contained in article 71 as well as a right to access legal council and have witnesses called for their defence. Moreover, the detainee convicted under such a trial as a right of appeal (article 73) and the Protecting Power has to be notified of the grounds upon which a death penalty of a sentence of imprisonment of more than two years may be given to a detainee (article 74)[46]. But even more important, detainees are to be detained in the occupied country, which is not the case at Guantanamo Bay[47].

From this comparison, it is clear that the United States have actually a vested interest in declaring these persons combatants and prisoner of war rather than "unlawful combatants", which they are not. If the United States government persist in breaching humanitarian law, cases must be taken by the Protecting Power to international instances. There is however one loophole that the American government may well desire to exploit to bring Talibans to justice, and that is the case of what it has dubbed "enemy combatants" and foreign nationals who have joined the Taliban as fighters.

Taliban as "enemy combatants"

First, it must be said that enemy combatants is not a notion of international law. It is a purely interpretative legal term of the United States Supreme Court following cases presented to it since the American Civil War. The notion of enemy combatant applies only to American nationals who have fought against the Republic of the United States of America. And this term has been applied only in the context of military commissions created by the Federal government. As for the Federal government's record on military commissions, it is spotted to say the least.

Military commissions used since Civil War have given grounds to important *stare decisis* from the US Supreme Court, but these decisions have been highly political and certainly very controversial. When the right of *habeas corpus* was suspended by the Lincoln administration and persons held *incommunicado*, Congress enacted a law to

[45] *Ibid.* at articles 37 and 38.
[46] *Ibid.*, at article 71 to 74.
[47] *Ibid*. at article 76 : «Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country.
They shall receive the medical attention required by their state of health.
They shall also have the right to receive any spiritual assistance which they may require.
Women shall be confined in separate quarters and shall be under the direct supervision of women.
Proper regard shall be paid to the special treatment due to minors.
Protected persons who are detained shall have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross, in accordance with the provisions of Article 143.
Such persons shall have the right to receive at least one relief parcel monthly. »

force the disclosure of the names of those persons[48]. And the case upon which the United States government base its right to hold its own citizens and try them in military commissions is as tenuous.

The first case applicable to this discussion, *Ex Parte Milligan*[49], concerns the authority of the President to order the creation of a military commission. The court decided that the President did indeed have that power but only if trying a civilian not a member of armed forces cannot be done in open civilian courts. Therefore, were civilian courts were open and functional, the commander of armed forces, and that includes the President as Commander-in-Chief of all American Forces, cannot order such trials. According to *Milligan*, even in war, it is only if it is impossible to administer criminal justice that a military commission may be ordered[50].

From this case, the US Administration moves to support its authority for military commissions against US citizens on the basis of *Ex Parte Quirin*[51]. It argue that the obvious case of 8 German-American saboteurs and spies brought to the continental United States by submarines and caught on that night and the following two weeks applies to nowadays American Talibans captured in the theatre of operation of Afghanistan since the US Supreme Court has clearly stated in this case that unlawful combatants are subject to trial and punishment by military tribunals for acts that renders their belligerency unlawful[52].

Under American law, this seems indeed fair. But the current administration has interpreted this decision as meaning that American nationals may be held indefinitely *incommunicado*, without formal charges, may be denied access to counsel and that the protections of *habeas corpus* does not apply to them. That is a fraudulent interpretation. In the case of *Quirin*, even with all its sordid details and the highly political implications of President Roosevelt clearly documented[53], the accused were charged formally within a month of their capture and were tried soon after their charges were given. They had a right to counsel and their petition for *habeas corpus* was revised by the Supreme Court. The Supreme Court never affirmed the right of the government to proceed on the simple affirmation that the accused were deemed enemy combatants[54]. It must also be pointed out that a determination of the status of the 8 accused was made by the Supreme Court[55], while in the case of all detainees at Guantanamo Bay no determination has been made by any judicial authority. Therefore, while the authority of the military to try persons accused of violations or humanitarian law is established, this does not translated in supplanting civilian courts where open and functional. And if the authority of the military to convene commissions after the war has been recognised[56], it does not translate in a necessity to try under military commission. Indeed, the lessons from *Milligan* and *Quirin*, as

[48] Turley, J., «Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy », (2003) 70 *George Washington Law Review* 649 at 732, citing the *Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases*, ch. 81, 2, 12 Stat. 755 (1863).
[49] *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1867)
[50] Belknap, M., «A Putrid Pedigree : The Bush Administration's Military Tribunals in Historical Perspective », (2002) 38 *California Western Law Review* 433 at 460-461.
[51] *Ex Parte Quirin*, 317 U.S. 31 at 38-40
[52] Which in this case was an arguable fact as the failure to distinguish oneself from non-combatants was not an establish or codified custom of international law Baxter, R.R., « So-Called 'Unprivileged Belligerency' : Spies, Guerillas and Saboteurs », (1951) 28 *British Yearbook of International Law* 323 at 339-340, cited in Orenlichter, D.F. and Kogod Goldman, R., «The Military Tribunal Order : When Justice Goes to War: Prosecuting Terrorists Before Military Commissions », (2002) 25 *Harvard Journal of Law and Policy* 653 at 657.
[53] Belknap, *supra*, note 50 at 472-480 : the fact is that the 'capture' for which the Coast Guard and the FBI took credit were more the matter of inefficiency and luck than one of actual competence.
[54] Rodriguez, A., «Is The War on Terrorism Compromising Civil Liberties ? A Discussion of Hamdi and Padilla », (2003) 39 *California Western Law Review* 379 at 388-389.
[55] Maddox, *supra*, note 30 at 449.
[56] *Johnson v. Eisentrager* (1950), 339 U.S. 763 (1950), concerning German soldiers convicted of continuing hostilities after the military surrender of Germany on May 8, 1945 and *In Re Yamashita*, 327 U.S. 1 (1946) concerning the validity of the creation of a military commission after the end of hostilities.

reinforced by *Duncan v. Kahanamoku* [57], it that civilian courts must be the preferred for Americans tried for breaches of humanitarian law.

Furthermore, it is interesting to see that a double standard exists in the process of the Guantanamo Bay detainees. Indeed, while the US are claiming the right to try enemy combatants under military commission, the sole American Taliban captured and tried, John Walker Lindh, has been tried in a Federal court and given a 20 years sentence for "supplying services to the Taliban" and "carrying explosives during the commission of a felony"[58]. This felony was high treason, for which he has obviously not been convicted nor sentenced in exchange for cooperating with the US government.

Opposed to this treatment is the case of Yaser Esam Hamdi, a 22 years old Louisiana-born American who moved to Saudi Arabia as a toddler and captured while fighting for the Taliban. Hamdi has not been charged and on January 8, 2003, the US Court of Appeal for the Fourth Circuit of Richmond has ruled improper for it a review of the detention of Hamdi, holding that deference must be given to the military and the Presidential decision[59].

Meanwhile, a least one commentator argues that the government's case for trying under military commissions is quite strong on the basis of article 84 of the *Third Geneva Convention* as this article clearly states that a prisoner of war shall be tried only by a military court , unless the existing laws of the Detaining Power specify otherwise[60]. Such an interpretation could be acceptable if the United States did recognize these detainees as prisoners of war. But since it does not, it is impossible to claim on the one hand the respect of humanitarian law to try these detainees under the *Geneva Conventions* while on the other hand refusing them the status allotted to them by those same conventions. To this day, it remains unclear and certainly unstipulated why there is such a gap of treatment and interpretation. The fact is that if US citizens commit high treason, they should be judged for their actions. But as it is the case with spies, it should be done in courts of law that provide for a full and fair defence, thereby not only bring justice but also being seen to bring justice without creating martyrs.

Foreign nationals in the Taliban

And as for martyrs, the last category of Taliban fighters under US detention are foreign nationals captured as Taliban fighters. This is sensitive as many a detainee of the US is a national of its allied, or at least conveniently neutral supporters, in its "war against terrorism", including the United Kingdom and Australia, as well as Canada.

Those captured under arms as Taliban fighters could have been tried as mercenaries had the United States ratified the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*[61] and its article 47 concerning mercenaries or even if it had ratified the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989*. However, since it has not, it cannot prosecuted under this guise.

Mercenaries are therefore not illegal to employ in a conflict against the United States. If they are incorporated within the rank and operational structure of the Taliban, they fought as members of a national armed force – much like United States volunteers did during the Sino-Japanese conflict prior to 1941 and in Royal Air Force units as volunteers. As such, they are not terrorists nor are they illegal or unlawful combatants. They are quite simply

[57] *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) whereby the Hawaiian Courts ruled that martial law, while authorising vigourous military actions for the defense of the Islands and the threath of invasion, was not intended to authorise the supplanting of civilian courts.

[58] Schaffer, A., «Life, Liberty and the Pursuit od Terrorists : An In-Depth Analysis of the Government's Right to Classify United States Citizens Suspected of Terrorism as Enemy Combatants and Try Those Enemy Combatants by Military Commission », (2003) 30 *Fordham Urban Law Review* 1465 at 1474.

[59] *Ibid.*, at 1473.

[60] Wedgwood, *supra*, note 3 at 333.

[61] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978.

combatants and prisoners of war once captured. If they stand accused of breaching the laws and customs of war, then have the charges drawn and the court appointed. Otherwise, these persons should enjoy the full protection of the *Third Geneva Convention*.

Still, the US government will most probably stick to its perception that these persons are unlawful combatants, they simply fall outside the scope of the *Third* and *Fourth Geneva Conventions*. Indeed, foreign nationals of parties to the conflict whose country retains normal diplomatic relations are excluded from the protections of the *Fourth Geneva Convention*, on the basis its article 4(2). This creates a very problematic situation whereby most foreign fighters would fall under this category and as a result be protected by no measures of the *Conventions*, save for article 3 providing for the minimal humanitarian and human rights. This would definitely be the sole exception where persons are not covered by a full *Convention* (with the exception of combatants, whether lawful or unlawful, convicted of war crimes in accordance with the reservations made to the Conventions and the notions of article 5 of the *Fourth Geneva Convention*) and represent a major problem. In fact, it would seem at first hand to justify United States' reasoning and treatment of these detainees.

But it does not. Indeed, very few of the United States allied or neutral State had normal diplomatic representation in Kabul at the outset of the conflict. Certainly the United Kingdom, Canada and Australia did not. Nor did Saudi Arabia. Even Iran and Iraq did not have such noral diplomatic representation. In fact, since we do not know the name and nationality of all detainees, it is impossible to assert that any detainees fall outside the scope of the *Fourth Geneva Convention* and until such time as it is proven, they must be given some judicial status under the *Conventions*. The only known country with nationals associated with the conflict that had normal diplomatic representation was Pakistan and there is no knowledge of Pakistani being held as Taliban fighters. As a result, and until proven otherwise, the *Fourth Geneva Convention* applies and the United States are bound to apply the full protection contained within it.

Even if we did know the nationality of those captured, the first question that would be asked is : Captured by whom? The question is relevant because article 4(2) does specify « …normal representation in the Sate in whose power they are. »[62]. This matters very much because if most neutral and co-belligerent States, with the notable and ironic exceptions of Iran and Iraq, had normal diplomatic relations with the United States, they did not with Afghanistan. As a result, Talibans captured by the Eastern and Northern Alliances, if refused combatant status, would automatically become protected persons under the *Fourth Geneva Conventions*. Their transfer to US forces should not affect the status they had at the moment of their capture.

Furthermore, transfer to US custody at Guantanamo Bay creates another problem for the United States : since the Administration argues that the protections of the American Constitution does not extend to the lent territory at Guantanamo Bay as it is not US territory, the fact is that the neutral and co-belligerant countries concerned do not therefore have normal diplomatic representation with the country in whose territory they are – the problem being compounded by Cuban sovereignty and American lending of the territory.

But all this does not mean that foreign national who fought as Taliban are protected from prosecution from criminal and terrorist acts. Indeed, article 70 of the *Fourth Geneva Convention* is clear that prosecution may be made for common law crimes done prior to capture and detention[63]. And if they are accused of terrorism, then by all mean

[62] *Fourth Geneva Convention*, *supra*, note 11 at article 4(2) *in fine*.

[63] *Ibid.*, note 11 at article 70 : «Art. 70. Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.
Nationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace. »

charge and try them under applicable criminal laws. But if none of these interpretation applies, these persons must be given the full extent of the protection of humanitarian and rapatriated as soon as permissible.

AL QUAEDA

The characterisation of fighters within the Taliban leads to differentiate also within the Al Quaeda structure, especially since it is not a formal and established structure, but a loose association of numerous terrorist groups – "cells" claiming to be part of Al Quaeda.

Al Quaeda in the Taliban trenches/caves

One distinction that is difficult with the detainees claiming to belong to Al Quaeda are those that were captured alongside the Taliban during the Bora Tora operations and all other military operations within Afghanistan during the international armed conflict that took place and led to the fall of the Taliban regime with subsequent mopping up operations.

Some of the fighters captured during the fight did not claim to be Talibans, but Al Quaeda fighters that joined the fight. Here, some questions of fact will influence judicial treatment of those detainees. Commentators have suggested that due to evident targeting of civilians, Al Quaeda does clearly not respect the laws of war and therefore its member could never vie for the status of combatant and even less for that of prisoner of war[64]. This again revives the notion of group criminality as presented within the Nuremberg Trials. But even the Nuremberg Trials differentiated between the whole of the Axis armed forces and particular groups such as the *Einzatsgruppen* (extermination squads), the SS, the SD and other element of the German military. Furthermore, even if a presumption of guilt was declared base upon this, there was a possibility for the defendant to clear himself (which was done at least 256 times within the military commissions brought to stand in Europe)[65]. This clearly establish a precedent that even when an international standard acknowledges criminal characterisation of a group (which has only been done by *Military Order 13*, meaning after September 11, 2001), it stands that it is the application of individuality to the violations of the laws of war that must still be prominent.

In the contemporary situation, this means that even if one was to claim an international standard declaring Al Quaeda a criminal group whose belonging to justifies a presumption of guilt to particular acts of violence, whether in criminal law or in violations of humanitarian law, an individual Al Quaeda member who has joined the Talibans and fought with them may very well be a combatant. If he as fought as part of the Talibans, been incorporated in some form of a unit and respected the laws of war, this person should and must be treated as a combatant under article 4 of the *Third Geneva Convention*. He cannot be condemned for others having breached the laws of war ; especially since the breaches alleged here were not committed in a time of war and the notion of war does not apply to terrorist attacks.

If he has breached humanitarian law during the combat operations in Afghanistan, he must retain the protections of prisoner of war and then be tried and sentences for his breaches of humanitarian law. But, there is also the question of nationality. If he is an Afghan national, member of Al Quaeda but who has joined a unit of the Taliban and was captured, he must be treated as a prisoner of war. If the United States government persists in refusing the application of the status of prisoner of war, they must then treat this person as a civilian, entitled to the protections of the *Fourth Geneva Convention* as explained above for Talibans. If he has breached humanitarian law prior to his capture and he is treated as a civilian, he must then be tried and sentenced accordingly. Even if it is a foreign national, again the United States must respect the status of combatant and prisoner of war as it does not acknowledge mercenaries.

[64] Broomes, *supra*, note 24 at 125.
[65] See *supra*, note 25.

However, if it persist not to acknowledge the status if combatant to legitimate fighters, the United States might have a recourse to tried this person for breaches of humanitarian law under article 4(2) of the *Fourth Geneva Convention* since nationals of neutral States having normal diplomatic relations with the Occupying Power are not to be considered Protected Persons under this convention[66]. If this interpretation is adopted, only the minimum protections of article 3 (common) applies, as this applies to any person not taking active part in hostilities or having ceased to take such active part[67]. Still, just as in the case of any persons about whom the status is unclear, it must be a regularly constituted tribunal that makes this decision and so far, none of the detainees at Guantanamo Bay have enjoyed such judicial determination of their status. It is clear that there remains a doubt as to the application of the *Third Geneva Convention* and the discretionary declaration of the United States government that they are civilians when the detainees claim to be combatants is not a sufficient, nor just or fair, legal decision. It is maintained here that until such determination is made, Al Quaeda fighters, whether Afghan nationals or foreigners, must be brought to face a regularly constituted tribunal providing all judicial guarantees deemed necessary to all civilised people to determine their status. Only once this has been done may a determination about breaches of humanitarian law may be made.

As for the argument that the *Third Geneva Convention* cannot apply to Al Quaeda member on the basis that it is not a State party to the Convention, it is again a very clever blurring of the spirit of the law. Nobody argues that terrorist organisations should be recognised as States. But even known terrorists, if they fight as combatants within the structure of regularly constituted (according to local standards) units and meet the requirements of the *Third Geneva Convention*, must be granted the status of prisoner of war. If they have breached humanitarian law, then they can be judged for it. If they have also committed other criminal actions, the countries where they have committed such actions can ask for extradition and try them for whichever crime they have committed.

Suicide pilots and bombers; murderers and executioners

This category of terrorists to be considered is the international terrorists in the "classical" sense: airline highjackers as well as suicide bombers and murderers. In this category, one may easily include the 19 alleged highjackers of the September 11, 2001 attacks. As well, car bombers in Saudi Arabia, Turkey, Iraq and Afghanistan may certainly be described as part of this category.

Persons taking part willingly in those activities are indeed terrorists if there aim is to force a government to do or to omit to do something by the use of terror. However, what they really is murderers, attempting murderers and all around criminals. The only differentiation of their actions is due to the political or social (including religious) aims of their actions[68]. But the *mens rea* and *actus reus* of homicide, at least involuntary as in the case of the killing of nationals of the country were the bombing are made against barracks of foreign troops, and most of the time premeditated as in the case of September 11, 2001, are both present. If the intention to commit and the actual gesture of committing the crimes are present, these persons are simply murderers.

In that case, the punishment is clearly within the realm of civilian criminal justice and should be judged according to the extent of the crime. To otherwise create a sort of "judicial" martyr by creating separate proceedings is actually lending credibility and "cause" to the persons associated with these ideas. Instead of treating such persons as special cases under the law, they should be treated like any other criminal and their crimes put in the light of acts against law and morality – not against ideas and ideology. Crimes are crimes and should be treated as such. To inflate their ideological or spiritual meaning is simply playing into the hands of publicity seeking terrorists. Any person committing acts of terror in a country of which he is not a national remains punishable under this country's laws. And this must be the legal way to try these murderers.

[66] *Fourth Geneva Convention*, *supra*, note 11.
[67] See *supra*, note 41.
[68] See definitions at *supra*, note 9.

Any persons committing acts of terror in a state of which he is a national may well be tried under criminal law or other type of applicable law. For instance, an Afghan national attempting on the life of the President of the interim Afghan government is obviously subject not only to punishment for homicide, but also for treason as he is attempting on the person of the Head of State. Any American attempting on the life of President Bush would also be a traitor under American law, as would a Canadian attempting on the life of the Queen of Canada, Elisabeth II[69].

Special legislations exist to try terrorists. The United Kingdom has enacted its very comprehensive *Anti-Terrorism, Crime and Security Act*[70] in 2001, while the United States' Congress enacted the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act* on October 26, 2001[71]. The latter act provides definition for many of the undefined international terrorist actions, including that of domestic terrorism. A terrorist organisation is deemed one that is designated so by the Secretary of State under the current law, designated by the Secretary of State for immigration purposes or a group of two or more individuals that commits terrorist activities or plans to commit such activities[72].

The problem with such laws is that they do not really solve the problem. Recent reports have indicated that many law agencies had in fact enough evidence to proceed and stop the attacks of September 11, 2001 from being made. For any number of reasons, this was not done. The conclusion is that the law did provide already the means to law enforcement officials to take steps and protect the American public. Legislations such as the *USA Patriot Act* serve not so much to fill a legal gap but more to show the public that something is being done.

The result of such calm-seeking legislation is however very important: it enlarges the government's power at the detriment of human rights. In fact, it is an obvious case of over-reaction. Following the enactment of this law – which was a wish-list of all law enforcement agencies of the Federal government and that was watered down somewhat by Congress – 1,182 persons had been detained by the Federal authorities in November 2001. The following months, the United States government refused to release the number of persons arrested[73].

The *USA Patriot Act* has granted the Attorney-General of the United States the power to detain non-citizens for 7 days before requiring that the individual be formally charged with a crime or an immigration infraction. Nonetheless many have been held for months without charges and one has been held for 119 days[74] ; and most of these charges are for immigration offences. This is not only illegal in the face of American law, but it also infringes upon all the standards agreed to by the United States, such as the *Helsinki Final Act* (tenth principle concerning the respect and good faith of international obligations)[75], *Copenhagen Document*[76], *Paris Charter*[77] and *Moscow Declaration*[78] (all three with respect to minimal judicial obligations) as well as the *United Nations Declaration of*

[69] While the Queen is Head of State of the United Kingdom, she is also separatedly the Head of State of the Canada.
[70] *Anti-Terrorism, Crime and Security Act*, ch. 24, 2001 at http://www.legislation.hmso.gov.uk/acts/acts2001/20010024.htm
[71] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act*, 115 Stat., 272 (2001).
[72] Addicott, *supra*, note 15 at 215.
[73] Fain, N., « Between Empire and Community : The United States and Multilateralism 2001-2003 : A Mid-Term Assessment : Human Rights : Human Rights Within the United States : The Erosion of Confidence», (2003) 21 *Bekerly Journal of International Law* 607 at 618.
[74] Murphy, *supra*, note 22 at 471.
[75] *Conference on Security and Co-Operation in Europe : Final Act*, 1 August 1975, reprinted in 14 I.L.M. 1292.
[76] *Document of the Copenhague Meeting of the Conference on the Human Dimension of the CSCE*, 29 juin 1990, reproduced in (1990) 29 *I.L.M.* 1305.
[77] *Conference on Security and Co-Operation in Europe : Charter of Paris for a New Europe and Supplementary Documents to Give Effect to Certain Provision of the Charter*, Paris, 21 novembre 1991, reproduced in 30 *I.L.M.* 190.
[78] *Conference on Security and Co-Operation in Europe : Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law and Procedures for Fact-Finding*, Moscou, 3 octobre 1991, 30 *I.L.M.* 1670 à la p. 1677.

Human Rights[79] and the *International Covenant on Civil and Political Rights*[80]. Furthermore, it also infringes on United Nations resolutions that fully support the continuing and full application of human rights even in times of war, even with the recognised *caveats* of situations of emergencies[81].

The case of the alleged dirty bomber, Jose Padilla, is a case in point of the new terrorism and new powers of the government. Padilla is an American citizen and alleged to be an Al Quaeda operative who tried to plant a radiological bomb in a major US city. Padilla has been declared an enemy combatant by the President on the basis of *Ex Parte Quirin*. But the question then arise to wonder how it is that a civilian, not falling under the laws of war since there is no conflict on US soil, can be deemed the equivalent of a person not respecting the laws of war. Padilla, if tried, may be found guilty of conspiracy to commit homicide and/or attempting to commit homicide. If American legislation allows it, he may also be guilty of treason against the State. And for all these, he may be passable of the death penalty. But all these are no reason whatsoever to deny the accused to meet with counsel and to be given the same minimum treatment as any other criminal. Padilla is not a member of armed forces and while he may well be a terrorist, the notion of enemy combatant – which remains a fictional notion existing only under American law – has nothing to do with him. He did not enter the United States disguised and not wearing the uniform of his armed forces since he is a civilian. He did not wage war unlawfully as there is no state of war on continental United States – nor in any other part of US territories for that matter.

In effect, Padilla is an alleged criminal accused very serious charges and even more so if he is convicted of terrorist activities. But that is not war and the notion of enemy combatant has nothing to do with this. Padilla's case is another example of the very poor understanding of humanitarian law by American courts – and the use of this ignorance by the current Administration. Indeed, nothing better shows the clever use of legal confusion created and sustained by the administration than the difference of treatment of Padilla with Timothy McVeigh – another person who tried, but in his case sadly succeeded, in creating mass death. McVeigh was tried and sentenced under federal legislations; even though he was claiming to be a member of American home-grown "rebel militias" and claimed to be waging war against the federal government. In fact, historically the USA has always viewed terrorists as common criminals to be tried in civilian courts[82]. For his mass crimes, McVeigh was put to death.

IRAQI FEYADEENS AND INSURGENTS

Another issue relating to the status of combatants is that of Iraqi Feyadeens, paramilitaries of the Baath party, and other insurgents that continue to harass US and Coalition forces in Iraq. There have been 588 deaths of Coalition soldiers since January 13, 2003[83]. Current estimates of the number of the insurgency runs at around 5000, with no precise numbers due to the flexible nature of the insurgents.

The high intensity war that ended on May 1, 2003 led to a low intensity conflict of a guerrilla nature. Since the United States are an Occupying Power, it is clear that the *Fourth Geneva Convention* applies to US and Coalition Forces toward the treatment of the civilian population of Iraq. As a result, the treatment of Feyadeens and insurgent

[79] *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc. A/810 (1948) 71, notably at article 6 (recognition before the law), 7 (equality and non-discrimination before the law), 9 (arbitrary arrest), 10 (right to public and fair trial) and 11 (right to full defense).

[80] *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 UN GAOR supp. 16, U.N. Doc. A/6316 (1966) 52, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 at article 9 (arbitrary arrest), 14(3) (right to know the charges against him), 16 (right of recognition before the law).

[81] *Basic principles for the protection of civilian populations in armed conflicts*, UN GAOR resolution 2675 (XXV), 25th sess. 1922nd plenary meeting, 9 december 1970 at 76.

[82] Janik, *supra*, note 33 at 512.

[83] « Casualties », *CNN*, (13 January 2004) at http://www.cnn.com/SPECIALS/2003/iraq/forces/casualties/, includes : «496 Americans, 56 Britons, five Bulgarians, one Dane, 17 Italians, two Poles, eight Spaniards, two Thai and one Ukrainian » since January 13, 2003 and of these all over 400 have been killed since President Bush declared the end of major combat operations on May 1, 2003.

must be the same as any other civilian taking up arms against foreign forces: they must be given the full protection of the *Fourth Geneva Convention* and are subject to accusation of having unlawfully engaged in hostile activities. Therefore, they may be accused of murder in accordance with Iraqi laws, or with occupation laws, and sentenced accordingly. But, they must retain the applicable protections discussed above in the case of Taliban fighters protected as civilians. In this particular case, there is absolutely no other legal route available to the United States. Non-respect of the *Fourth Geneva Convention* would be a material breach of the laws and customs of war. The United States are an Occupying Power and must therefore respect the *Conventions*.

Foreign nationals participating in the Iraqi insurgency

However, reports abound that foreign national are joining forces with the Iraqi insurgents to harass American and Coalition forces. These persons are not combatants under the *Third Geneva Convention* as guerrilla warfare is not recognised against an Occupying Power[84]. And since they are civilians, they fall under the term of article 4 of the *Fourth Geneva Convention*. But its second paragraph clearly states that nationals of a country retaining normal diplomatic representation with the detaining power are not to be considered protected persons under the *Fourth Geneva Convention*. An exception for Iranians would therefore exist, but for the majority only the protections of article 3 common to the *Conventions* would apply. And they may then be prosecuted for unlawful belligerency and murder.

IN FINE - SADDAM HUSSEIN & OSAMA BIN LADEN

However, it is to hope that the Iraqi conflict is on the wane. Indeed, the capture of ex-president Saddam Hussein has resulted in a sharp decrease of attacks and casualties inflicted on Coalition forces[85]. And intelligence gathered as a result of his captured as led to many more arrest and disruption of the financing and organising of attacks. And it is interesting to see that the United States have decided to consider ex-president Hussein as a prisoner of war[86], based on his former authority as commander of Iraqi forces. Of course, it is obvious that this is not an act of altruism : by doing so, the United States avoid the problem of the immunity of a head of State and can proceed with a trial for war crimes and crimes against humanity.

But it again raises the question of how can such a person, accused of killing hundreds of thousands, be provided the protections accorded to a combatant – in case not a courageous one – while Taliban fighters not even individually accused of having breached any measures of humanitarian are not afforded this status. This is further ground to demand the full respect of the Conventions and their application to those to whom it should apply.

As for Osama Bin Laden, what status would he have? This would depend on the circumstances where he was captured, but there would have to be a conflict somewhere to declare him a combatant. If American authorities capture him in a cave in Afghanistan, near the Pakistani border, Bin Laden will be a common criminal captured by forces under the mandate on the UN. Extradition to the US are fairly certain and his status will be that on an common criminal under charges of murder, attempted murder and a myriad other offences that would ultimately lead, with all probability, to a verdict of guilty and a sentence of death.

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[84] Some would argue that the United Nations' General Assembly Resolution 2676 tranform this interpretation and that indeed they could be treated as prisoners of war, but this would be difficult to support. See *Respect for Human Rights in Armed Conflicts*, UN GAOR Res. 2676 (XXV), 25th sess., 1922nd plen. mtg, (9 december 1970) 77 : « Urges that combatants in all armed conflicts not covered by Article 4 of the Geneva Conventions of 1949 be accorded the same humane treatment defined by the principles of international law applied to prisoners of war… ».

[85] « Attacks down 22% since Saddam's capture : Offensives, Arrests lessen resistance », *USA Today*, (12 January 2004) at 1. This is a month after his capture on December 14, 2003.

[86] « Hussein officially declared a POW », Globe and Mail, (January 10, 2004) at 1.

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CONCLUSIONS

This essay was concerned with the determination of combatant status in current American and Coalition military campaigns, whether for lawful combatants or unprivileged ones, deemed illegal or unlawful, or those otherwise falling outside the protections of the Geneva Conventions.

The general conclusion is that apart from the very specific exceptions of article 4(2) of the *Fourth Geneva Convention*, any person at any time and in any place is to be covered by the *Geneva Conventions* during times of armed conflicts. Even those not covered by a specific convention continue to retain the minimal protections of article 3 common to all four *Geneva Conventions*. Furthermore, it is not because a combatant is accused of breaching the laws and customs of war that he looses his protection as prisoner of war : on the contrary, as this essay demonstrates, the protections remains until such a conviction has been legally given by a competent, fair and impartial tribunal in the cases of countries having made reservations to the *Third Geneva Convention* and remains even after such a conviction in the case of States not having made such a reservation, including the United States.

It is the conclusion of this essay that Taliban fighters are to be given combatant and prisoner of war status and that those held at Guantanamo Bay should be informed of the charges against them, given access to counsel and tried in the speediest delays. These delays are not a matter of months: it is a matter of days as the determination of their status should have been made months ago. It is also the contention of this essay that for those people who accompanied the Taliban or who have no proof of their prior belonging to Afghan armed forces but captured in combat should be given the protection of the Fourth Geneva Convention and tried only if accused of breaching the laws and customs of war. As for foreign nationals having joined and fought with the Taliban, their incorporation into Afghan armed forces, including militias, should be enough to secure for them the right of prisoner of war. If the United States persist in denying this right, it should at the very least consider them as civilian and afford the protection of the *Fourth Geneva Convention*, thereby respecting the spirit and the letter of humanitarian law concerning the inclusion of all persons in a theatre of war under the protection of the *Geneva Conventions*.

It also concludes that similar treatment of Al Quaeda detainees must be afforded based upon the particular of their captured. If their captured was made while fighting with the Taliban, they should be given the protections of prisoner of war. If not, they should be given the protection of civilians.

As for foreign nationals of Al Quaeda captured in Afghanistan, they should be given at the protections of article 3 common to the *Geneva Conventions* and tried under civilian criminal laws. Feyadeens and Iraqi insurgents must be given the protections of the *Fourth Geneva Convention* as civilian and judged for their breaches of the laws and customs of war if accused of such breaches. As for foreign nationals fighting with the insurgency, this article also recommends treating them according to those protections and judging them as Iraqi insurgents. Failing this, the protection of article 3 common to the *Geneva Conventions* must be given and the must still be tried and sentenced under fair and impartial tribunals. So far, the United States has respected only one clause of the determination of combatant status by declaring Saddam Hussein a prisoner of war: and this was made to facilitate his trial for war crimes and crimes against humanity.

Nobody can deny that the events of September 11, 2001 were of the most atrocious and disgusting kind. And many will support the right of the United States to counter this growing threat to its citizens with vigorous and indeed forceful measures, including the use of force. But that does not mean that the United States are above international norms or international law. It does not follow that they have a blank check to repudiate humanitarian law or to breach it and use it only for it own purpose.

The United States are and must remain a society toward which Nations may look to leadership and higher values. To continue to disrespect in own international engagement and to pervade the international standards created to protect all victims of armed conflict does not help its final strategic goal. The United States may defend themselves with force against force; but the only solution to any war has been diplomatic. Twisting international and

repudiating international standards leads to force countered only by force and a cycle of violence. It provides arguments and martyrs for its enemies.

And it certainly provides arguments for future belligerents against the United States not to respect the laws of war; with the evident effects most feared by Secretary of State Colin Powell that American service personnel will someday pay the price of those political and legal decisions when they will be captured by their enemies.

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WHAT LAW APPLIES TO THE CONFLICT IN CHECHNYA

THE LEGAL GAP OF CONTEMPORARY INTERNATIONAL HUMANITARIAN LAW OF NON-INTERNATIONAL ARMED CONFLICTS

by

YURY SCHERBICH*

Introduction

What law applies to the situation in Chechnya? The determination of this question revolves around the issue whether or not armed conflict exists in Chechnya. On the one hand, if the situation in Chechnya has not reached the threshold of armed conflict, then it can be described as purely within the ambit of human rights law and thus domestic law enforcement measures come into play. On the other hand, if the threshold of armed conflict has been crossed that then international humanitarian law would govern the situation in Chechnya. In the last latter case the problem lies in the traditional dichotomy between international and internal armed conflicts and divergent extent of rules applicable to each situation. Although internal armed conflicts present the same horrors as international ones, they are governed by only a few, largely ineffective provisions in the Geneva Conventions of 1949 and their Additional Protocol II of 1977.[1]

These provisions offer little protection to combatants and civilians in internal strife, resulting in an unfortunate disparity between the protections afforded during international and internal conflicts. The States' concerns about sovereignty, and a lack of overall political will to create a satisfactory international law of internal conflicts, has blocked any substantial progress in addressing the horrors of such armed conflicts. Rather than accept the argument that civil conflicts are subject only to Article 3 common to four Geneva Conventions ("Common Article 3") and Protocol II, this thesis proposes, relying on new trends in international humanitarian law, that it is imperative for humanitarian law to be expanded to address such conflicts.

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[1] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Person in Time of War, August 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] [collectively referred to hereinafter as "Geneva Conventions"]; Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 12, 1977, U.N. Doc. A/32/144, Annexes I, II, 1977, *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II]; Protocol Additional to the Geneva Convention of August 12 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, U.N. Doc. A/32/144, Annexes I, II, 1977, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

In chapter I of this thesis I will provide the general framework of international humanitarian law applicable to international and non-international armed conflicts within context of the Geneva Conventions and will assess material scope of law in Common Article 3 and Protocol II. Then I will then address the weakness of humanitarian law in non-international armed conflicts and illustrate the legal gap in its provisions compared to international armed conflicts. I will discuss the main flaws of the law of internal armed conflict – an absence of legal definition in the text of Common Article 3 of what constitutes an "armed conflict" and the restrictive criteria in Protocol II defining an "armed conflict" that insurgent groups cannot objectively fulfil in most cases. Guided by jurisprudence of the International Criminal Tribunal for Former Yugoslavia ("ICTY"), particularly in *Tadic* case,[2] and by the Statute of International Criminal Court ("ICC Statute"),[3] I will address the question of defining what an "armed conflict" is. Then I will discuss the restrictive character of the human rights regime applicable during internal armed conflicts and will conclude that its standards are insufficient to provide enough legal protection to the conflict's actors and civilian population.

In chapter II I will describe background of the conflict in Chechnya, its main actors and current human rights situation in the region. I will assess whether conflict in Chechnya constitutes struggle of national liberation within the meaning of Protocol I or a non-international armed conflict within the meaning of Protocol II or Common Article 3. I will conclude that due to restrictive qualifications in the aforementioned instruments, the situation in Chechnya can only be governed by Common Article 3. I will explore how Chechnya has fallen into legal gap of the law of internal armed conflict, with several vital areas of international humanitarian law, such as the protection of civilians, combatant status, methods and means of warfare, the respect for the International Committee of the Red Cross ("ICRC") and some others, finding no place in internal armed conflict in Chechnya. In doing so, I will argue that such state of affairs is unsatisfactory and inadmissible since the legal protection provide in such situations is usually only that which is circumscribed by Common Article 3. Finally, following recent developments in international humanitarian law, I will suggest some recommendations that can narrow legal gap in the regulation of internal conflicts and what possibly can be done in the future to enhance the legal protection of those who get stuck in these conflicts.

1.1 APPLICATION OF INTERNATIONAL LAW TO ARMED CONFLICTS

Traditionally, international humanitarian law has sought to regulate the conduct of hostility and damage caused between rather than within States. The distinction was based on the premise that internal armed violence raises questions of sovereign governance, and domestic law regulation. On that basis, the 1899 and 1907 Hague Conventions respecting the Law and Customs of War on Land applied solely to international armed conflicts. An armed challenge to the established authority within a State was characterised by reference to three different stages, depending upon the scale and intensity of conflict: rebellion, insurgency and belligerency. The prevailing view was that humanitarian law was applicable to internal situations only upon the recognition of belligerency by the parent government or by some third

[2] *Prosecutor v. Tadic*, No. IT-94-1-AR72 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Oct. 2, 1995), reprinted in 35 I.L.M. 32 (1996) [hereinafter *Tadic* Case].

[3] See Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 52d Sess., Annex II, U.N. Doc. A/CONF.183/9 (1998), reprinted in The Statute of the International Criminal Court: A Documentary History (M. Cherif Bassiouni ed., 1998) [hereinafter ICC Statute].

State.[4] The absence of the recognition of belligerency in an internal conflict meant that international humanitarian law was not applicable and that the State could deal with rebellion at its discretion. This regulatory gap persisted until the end of World War II despite the considerable efforts of the ICRC and the Institute of International Law to draft and promote rules applicable in all armed conflicts.[5]

The atrocities perpetrated by the Nazi regime before and during World War II clearly demonstrated that internal matters presented grave threats to humanitarian principles.[6] The Spanish Civil conflict, which broke out in 1936, also made clear that the "recognition of belligerency" doctrine inadequately regulated internal armed conflicts[7] and that continuation of this policy would have held many dangers for the protection of those embroiled in internal hostilities. Against the backdrop of these events and the general humanitarian trajectory of international humanitarian law,[8] broad support for some sort of international regulation of internal armed conflicts crystallized prior to the Diplomatic Conference in Geneva in 1949.[9] In 1948 the ICRC presented a report recommending that the Geneva Conventions apply the full extent of international humanitarian law "[i]n all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts or wars of religion, which may occur in the territory of one or more of the High Contracting Party".[10] However, due to the fear of States that insurgent groups could claim international recognition and invoke equal status in relations with the States, this recommendation was declined. Thus, when the final draft was adopted at the Diplomatic Conference in 1949, it continued to very heavily favor regulation of inter-State rather than domestic warfare.

The vast majority of the substantive provisions contained in the Geneva Conventions applying solely to international armed conflicts, which are defined under Article 2, common to all four Geneva Conventions ("Common Article 2") as "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties".[11] Because this definition is confined to conflict between High Contracting Parties, a conflict within the territory of one High Contracting Party, namely non-international armed conflict, is excluded by definition from the reach of most of the Geneva Conventions.

Only Common Article 3 applies in the case of an "armed conflict not of international character". This article extends the most basic principles of humanitarian protection to those persons taking no active part in hostilities and placed hors de combat.[12] Common Article 3 prohibits: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages

[4] This amounted to a declaration by the recognizing party that the conflict has attained such a sustained level that both sides were entitled to be treated in the same way as belligerents in an international armed conflict. Lindsay Moir, *The Law of Internal Armed Conflicts* 4 (2002).

[5] *Id*, at 19-22; *See also* Georges Abi-Saab, *Non-International Armed Conflicts, in International Dimensions of Humanitarian Law* 218-222 (1988).

[6] *See*, e.g., Ratner & Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 5-14 (2d ed. 2001) (describing the importance of these events for the development of international humanitarian law).

[7] Vernon A. O'Rourke, *Recognition of Belligerency and the Spanish War*, 31 Am. J. Int'l L. 398 (1937).

[8] *See*, Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int'l L. 239 (2000).

[9] *See, e.g.*, Abi-Saab *supra* note 5, at 219 (stating that prior to the drafting of the Geneva Conventions, "it was strongly felt that a minimum of humanitarian legal regulations should apply in all armed conflicts, regardless of their internal or international character").

[10] J. Pictet, *Commentaries on the Geneva Conventions of 12 August 1949* 31 (1960).

[11] Geneva Conventions *supra* note 1, art. 2. "High Contracting Parties" refers to the signatory States of the Geneva Conventions.

[12] Geneva Conventions *supra* note 1, art. 3.

upon personal dignity, in particular, humiliating and degrading treatment.[13] Common Article 3(2) also requires treatment for the wounded and sick.[14]

The Additional Protocols of 1977 to the Geneva Conventions continued the distinction between international and non-international armed conflicts. Protocol I, dealing with national liberations movements, sought to reaffirm and develop rules affecting the victims of international armed conflicts, specifically indicating in Article 1 that "[t]his Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions".[15] Although the extensive provisions of Protocol I apply exclusively to the victims of international conflicts, Protocol II does attempt to address the inadequacies of Common Article 3 by enhancing the protection available for victims in internal armed conflicts.

The fundamental guarantees for civilians provided by Protocol II both reaffirm the rules set forth in Common Article 3 and expand their protection to include the prohibition of collective punishment, acts of terrorism, slavery, pillage, rape, and "threats to commit any of the foregoing acts."[16] Protocol II further advances the protection of civilians by prohibiting any "order that there shall be no survivors,"[17] and by proscribing the starvation and forced movement of civilians.[18] The Protocol elaborates upon the general obligation imposed by Common Article 3 to treat persons "humanely,"[19] and provides safeguards for "persons whose liberty has been restricted," such as mandatory medical examinations, decent working conditions, and the freedom to practice religion.[20] Protocol II also expands the protection and care for the wounded, sick, and shipwrecked,[21] and provides for the protection of medical and religious personnel,[22] and, for the first time, children.[23]

Hence, as a result of two Additional Protocols, international humanitarian law now recognizes and regulates four distinct categories of armed conflict: inter-State armed conflict under Common Article 2; internal "struggle of national liberation" as defined in Protocol I; internal armed conflict as defined in Protocol II; and "armed conflicts not of an international character" under Common Article 3.

1.2 WEAKNESS OF HUMANITARIAN LAW IN INTERNAL ARMED CONFLICTS

With internal armed conflicts dominating the world stage,[24] reliance on the Geneva Conventions, developed for international armed conflicts, is extremely misplaced. Because only a minority of the

[13] *Id.*
[14] *Id.*
[15] Protocol I *supra* note 1, art. 1.
[16] Protocol II *supra* note 1, art. 4(2)(h).
[17] *Id*, art. 4(1).
[18] *Id*, art. 14.
[19] Geneva Conventions *supra* note 1, art. 3(1).
[20] Protocol II *supra* note 1, art. 5.
[21] *Id*, art. 7-8.
[22] *Id*, arts. 9-11.
[23] *Id*, art. 4(3).
[24] *See*, Ernie Regehr, *Warfare's New Face: Civil War Has Become the Norm in Warfare*, World Press Rev., Apr. 1994, at 14 ("Since 1980, the only truly interstate wars have been Britain's war with Argentina over the Falklands; Iraq's wars with Iran and Kuwait, both ostensibly over border disputes; and China's border skirmish with Vietnam.").

protections provided in the Geneva Conventions and Protocols apply to civil conflicts,[25] civilians and combatants are not afforded the same protections as those involved in international armed conflicts. In addition, the law of The Hague, addressing methods and means of combatants of armed groups in the fields, is not applicable in internal armed conflicts.[26]

A literal interpretation of the Geneva Conventions and Protocols would suggest that a range of very significant disparities between the two regimes exists.

Firstly, Common Article 3 and Protocol II do little to protect civilians against the effects of hostilities. For example innocent civilians may be detained arbitrarily without the right to receive visitors from the ICRC and there are no safeguards that can prevent the arbitrary detention of civilians. The ICRC, therefore, does not have any absolute right to intervene in order to provide humanitarian aid to detainees; instead, relief actions, such as the monitoring of detention centers, are only possible with the consent of the parties.[27] By contrast, if this same scenario occurred during an international conflict, the detaining forces would be in violation of several provisions of the Geneva Conventions.[28]
Secondly, Common Article 3 fails to define rules of distinction between military and civilian targets and makes no mention of the principle of proportionality in target selection.[29] Although Protocol II does address the protection of civilian population and objects indispensable to the survival of the civilian population, its coverage does not compare to the prohibitions on indiscriminate attack, on methods and means of warfare causing unnecessary suffering and on damage to the natural environment, that are applicable under Protocol I.[30]

Thirdly, there is no requirement in either Common Article 3 or Protocol II that affords combatants prisoners-of-war status in internal armed conflicts, nor is the anything preventing parties from prosecuting enemy combatants in those circumstances for having taking up arms. The Third Geneva Convention and Protocol I, with detailed provisions for the protection of prisoners-of-war in international conflicts, define them as combatants "who fall into the power of an adverse Party"[31] and include members of "all organized armed forces, groups and units" even if those forces represent a government or an authority not recognized by the adverse Party.[32] Prisoners-of-war may only be sentenced by military authorities and courts for acts that would be punishable if committed by a member of the armed forces of the Detaining Power.[33] The most salient feature of the system of prisoners-of-war protection is the prohibition of punishment solely on the grounds that a person has taken part in the hostilities, provided that the person in

[25] The Geneva Conventions and the Protocols contain close to 600 Articles, of which only Common Article 3 and 28 Articles of Protocol II apply to internal conflicts. *See*, Sonja Boelaret-Suominen, *Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for All Armed Conflicts?* 5 J. Conf. and Sec. L. 63 (2000).
[26] *Id*.
[27] Protocol II, *supra* note 1, art. 18 ("If the civilian population is suffering undue hardship ... relief actions for the civilian population ... shall be undertaken subject to the consent of the High Contracting Party concerned.").
[28] During an international armed conflict, "the internment or placing in residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary." *See* Geneva Convention IV, *supra* note 4, art. 42 In addition, "the representatives of religious organizations, relief societies, or any other organizations assisting the protected persons, shall receive from these Powers, for themselves or their duly accredited agents, all facilities for visiting the protected persons." *Id.* art. 142
[29] James G. Stewart, *Towards a Single Definition of Armed Conflict in International Law: A Critique of Internationalized Armed Conflict*, 85 IRRC 313, 320 (2003).
[30] *Id*.
[31] Protocol I, *supra* note 1, art. 44(1),
[32] *Id*, art. 43(1),
[33] Geneva Convention III, *supra* note 1, art. 8, 6

question has behaved in accordance with the laws of warfare. For example, under the Geneva Conventions, a State would not be able to prosecute a prisoners-of-war for treason because only war crimes, as opposed to warlike acts, are punishable with criminal sanctions. If the status of any combatants is in doubt, they "shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."[34]

Proposals that prisoners-of-war status be granted to combatants in internal conflict did not survive the drafting of either Common Article 3 or Protocol II.[35] As a result, States are not required to extend combatants' privileges to dissident armed forces in internal conflicts. Most significantly, rebels do not acquire prisoners-of-war status upon capture or defeat, and therefore may be tried under domestic treason law. Governments, particularly those that may be affected by an emerging dissident or separatist movement, are unwilling to concur in any rule of international law that, in effect, would repeal their treason laws and confer on their domestic enemies a license to kill, maim, or kidnap security personnel and destroy security installations, subject only to honorable detention as prisoners of war until the conclusion of the internal armed conflict.[36]

Although governments have argued that combatants' privileges would encourage rebellion by reducing the personal risk to the rebels and grant them a license to attack the governments security personnel and property,[37] the current system, under which insurgents are afforded none of the protections of international humanitarian law, is even more troubling. "Without the combatants' privilege and prisoner-of-war status, there is very little incentive for insurgents to comply with ... [the Geneva Conventions and Protocols] other than the realization that atrocities are politically and militarily counterproductive."[38] By refusing to accord the protections of the Geneva Conventions to insurgents, governments may well be ensuring that rebels will use brutal tactics against government troops and pro-government civilians. After all, if the usual protections against prosecution for treason do not apply to the rebels, then the usual criminal responsibility for violation of the Conventions is also inapplicable. Rebels therefore must win at all costs in order to avoid prosecution by their government for treason; without the Geneva Conventions either to protect them or restrain them, there is no reason for insurgents to comply with any of the Conventions' humanitarian provisions.

Fourthly, the acts prohibited by by the law governing non-international conflicts, compared with its international counterpart, are not designated as grave breaches giving rise to criminal sanctions. The ICC Statute reinforced this cumbersome international/ non-international legal differentiation. The ICC Statute limits the grave breaches regime to international conflicts. The serious violations of provisions of Common Article 3 that are applicable in “armed conflict not of an international character”, on the other hand, are both different and less comprehensive than their international counterparts.[39]

[34] *Id*, art. 5, 6.
[35] Asbiorn Eide, *The New Humanitarian Law in Non-International Armed Conflict*, in The New Humanitarian Law of Armed Conflict 277, 288 (Antonio Cassese ed., 1979) (noting that rejection of proposals occurred in part because "many governments ... considered it abhorrent to provide immunity to persons who had taken up arms against the government side").
[36] Waldemar A. Solf, *The Status of Combatants in Non-international Armed Conflicts Under Domestic Law and Transnational Practice*, 33 Am. U. L. Rev. 53, 59 (1983).
[37] See Waldemar A. Solf, *Problems with the Application of Norms Governing Interstate Armed Conflict to Non-international Armed Conflict*, 13 Ga. J. Int'l & Comp. L. 291, 292 (1983)
[38] *Id*.
[39] Stewart *supra* note 29, at 321.

Lastly, and more importantly, the application of Common Article 3 and Protocol II is complicated due to ambiguity of the material scope of application in these instruments, namely the "armed conflict" threshold. The characterization of the conflict, or the thresholds, determines which rules of international humanitarian law, if any, will be applicable. While criteria for identifying international "armed conflict" is not usually a problem simply because "any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 [of the Geneva Conventions], even if one of the Parties denies the existence of a state of war",[40] the determination of threshold of internal "armed conflict" is more problematic.

The situation is markedly different in internal armed conflict because State's position in internal affairs is not analogous to its international relations. It is clearly unusually for a State to employ force in its relations with other States. In contrast, force is frequently used within the State's own territory and against its own citizens, ranging from everyday police law enforcement actions against common criminals to large-scale operations aimed at quelling riots or other civil disturbances.

1.3 INTERNAL ARMED CONFLICT DEFINITION

The text of Common Article 3 states that it is applicable "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties".[41] The text, however, do not provide a definition of "armed conflict". There is, as yet, no universally accepted definition of the term, and Common Article 3 helps only in so far as it defines those conflicts to which it applies in negative way, stating what they must not be (i.e. "international in character") without offering further guidance as to their precise definition.[42] The vital question is, therefore, what is exactly is meant by "armed conflict not of an international character"?[43]

Protocol II arguably clarified the meaning of internal "armed conflict" by providing a more developed definition of the concept in the treaty's text. On its terms, Protocol II is applicable to armed conflicts between forces of a High Contracting Party and other armed forces that are "under responsible command, [and] 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."[44] The scope of Protocol II is further clarified in Article 1(2), which provides: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[45]

A careful analysis of the criteria established in Article 1 Protocol II indicates that it has a very high threshold of application and that the instrument is inapplicable to most internal armed conflicts. Analysis of the conflict in Chechnya will reaffirm this below. As one commentator suggests, "it is perhaps cynical, but doubtless true, to comment that this narrow applicability of Protocol II explains why there are now

[40] Jean C. Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Volume 1, 32 (Geneva, 1952).
[41] Geneva Conventions *supra* note 1, art. 3.
[42] Moir *supra* note 4, at 32.
[43] Geneva Conventions *supra* note 1, art. 2. *See also* Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1 (2003) (arguing that hostilities between States are governed by the Geneva Conventions irrespective of intensity, duration or scale of conflict).
[44] Protocol II *supra* note 1, art. 1(1).
[45] Protocol II *supra* note 1, art. 1(2).

147 States party to it".[46] The ineffectiveness of Protocol II definition of armed conflict lies in the upper threshold of its applicability which is so high and qualified that it is objectively unlikely ever to be crossed by insurgent parties. As some delegates stated during the Diplomatic Conference 1974-1977, Protocol II "include[s] no safeguard clause providing for a mechanism or reasonable objective parameters for determining in each case whether the conditions for the application of the Protocol has been met".[47] Such rigorous conditions, as for example, the ability to implement the Protocol's provisions[48] and responsible command (i.e. ability of the insurgent's leader to impose internal discipline among subordinates) can lead to a government's easy contest of its application. In doing so, it leaves the State authorities a wide margin of discretion in assessing situations such as riots or internal disturbance. In effect, therefore, Protocol II is so narrowly construed that it eliminates its usefulness.

It must be submitted that two important recent legal developments have arguably clarified the definition of "non-international armed conflict": the judgment of the ICTY in *Tadic* case and the ICC Statute.

1.3.1 ICTY Appeals Chamber Judgment in Tadic case

In *Tadic* case, the Appeals Chamber defined the contours of the "armed conflict" requirement within the meaning of the Geneva Conventions. Specifically, the Appeals Chamber held that:
"Armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups … within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal armed conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."[49]

Three aspects of this definition could be understood to represent important contributions to the definition of "armed conflict." First, the definition might be read to imply that an "armed conflict" exists if the insurgent group is an organized armed group. One might assume, taking into consideration the humanitarian purpose of Common Article 3, that a minimum level of organization is required to meet the threshold, excluding random groups of looters, rioters and mere banditry. Second, the definition might be read to classify internal hostilities as an "armed conflict" only if the armed violence is "protracted." Requirement that violence must be protracted hints that it must have reached a certain level of intensity, although expressed in terms of duration rather than the scale of violence.[50] Third, regarding the territorial field of application, the Appeals Chamber underlined that humanitarian law applies only in the territory under control of insurgent party. Literal interpretation of Appeals Chamber decision implies in my view that in those parts of the territory that is under exclusive control of the government authority, humanitarian law is inapplicable. Such interpretation is based on the words that "international humanitarian law continues to apply … in the case of internal conflicts, [in] the whole *territory under the*

[46] George H. Aldrich, *The Laws of War on Land*, 94 Am. J. Int'l L.42, 60 (2000).
[47] From the explanation of vote by Argentina, CDDH/SR.49 Annex.
[48] It is unclear whether ability to implement Protocol II implies total obedience by its provisions and any single act of murder of civilian by rebels will automatically render Protocol II inapplicable. Protocol II also fails to clarify whether dissident armed forces must apply the Protocol or if their mere capacity to apply it is sufficient to trigger Protocol II's protections.
[49] *Tadic* case *supra* note 2, para. 70.
[50] Moir, *supra* note 4, at 43.

control of a party"[51] (emphasis added). The word "party" supposedly refers to insurgent group but not to State. The test employed by Appeals Chamber is ambiguous and obscure. Territorial control in fact is a very subjective condition, providing government with considerable room to maneuver. States may contest the claim by insurgents that a territory has come under their control. The absence of a fact finding body competent to ascertain the facts of the situation, may encourage the game of claim and counter claim of controlling territory, only for the sole political motivation – do not recognize the existence of armed conflict within State. Internal armed conflict situations are characterized by high mobility and territorial control changing hands, sometime alternatively between day and night to the point becoming meaningless. Is it necessary that insurgents have gained a certain degree of stability in controlling the area? If territorial control had once been fulfilled and international humanitarian law was supposedly applied, would it later cease to apply if the insurgents lost control of the territory? The Appeals Chamber judgment does not provide the answer on these questions. It is also unclear whether territorial control is analogous to that required by international law for the application of the laws of occupation, i.e. should there be some kind of administration set up in occupied territory?

The internal armed conflicts, as a rule, involve military and organizational superiority on the side of government troops. It is also true that insurgent party are frequently reluctant to engage in direct military hostility and traditional methods of warfare, prefering to employ guerilla tactics,[52] and as a matter of tactical advantage do not seek to attach themselves to any specific area. It is unlikely that territorial control requirement implies permanent physical or military presence of insurgent party or their *de jure* administration of the territory. Therefore, territorial control is *de facto* effective control.

In my view if insurgents can influence a territory's population, and have support among them with the latter demonstrating some level of loyalty to insurgent party, one can argue the insurgents' effective control. Limitation of government authorities' access to the territory under the question and their loss of ground control can also demonstrate that the insurgents exercise control over the area. In the case of Northern Ireland the question was raised of whether or not effective control was exercised by Irish Republican Army in limiting the capacity of the State, by forcing its agents to limit their mode of operation in the area.[53] It was questionable in certain areas, where normal community policing was suspended, alternative mechanisms of social control such as paramilitary punishment shootings replaced law enforcement, and the social order was partially controlled by paramilitary organizations. The British army felt it unsafe for its personnel to travel overland through parts of the country even in armoured vehicles. And the view has been advanced that the building of numerous watchtowers on the hilltops of the region bordering the Irish Republic throughout the 1980s, to which soldiers were ferried into and out by military helicopters, was a response to the fear that a claim might be made for loss the ground control.[54]

All three requirements – organization of insurgents, protracted armed violence and effective control test - would impose restrictions on the conditions under which Common Article 3 applies, although not so onerous as under Protocol II.

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[51] *Tadic* case *supra* note 2, para. 70.

[52] Abi-Saab describes the aspect of guerilla warfare as follows:"[g]uerilla tactics being based on invisibility and mobility, the freedom fighters have to hide among the masses and depend on their passive support by not being denounced by them, and on the active support of the most politically conscious and active segment of the population in the form of food, shelter and information as well as new recruits". Statute of International Criminal Court ("ICC Statute"). Abi-Saab, *Wars of National Liberation and the Laws of War*, 3 Annales d'Etudes Internationales 93, 114 (1972).

[53] Fionnula Ni Aolain, *The Politics of Force. Conflict Management and State Violence in Northern Ireland* 238 (2000).

[54] *Id*, 237-238.

First, the Appeals Chamber's definition neither requires that armed groups exercise control over the whole territory within the State nor that territorial control enable them to carry out sustained and concerted military operations and implement humanitarian law.

Second, the "protracted" armed violence requirement, properly understood, does not restrict the application of humanitarian law in any appreciable way. The nature of the finding contemplated by the ICTY Appeals Chamber suggests that most instances of internal strife would satisfy this requirement. Whether internal armed violence is "protracted" or not is assessed by reference to the entire period from the initiation to the cessation of hostilities. Few, if any, putative internal armed conflicts would fail to satisfy this requirement. Moreover, jurisprudence of the International Criminal Tribunal for Rwanda ("ICTR") suggests that armed violence extending over only a few months satisfies the "protracted" requirement and given the intensity of the violence, it constitutes an "armed conflict" within the meaning of Common Article 3.[55]

Third, the Appeals Chamber definition does not include "ability to implement relevant humanitarian provisions" and "responsible command" upon insurgent party. Indeed, whether armed conflict exists should not depend on whether the insurgent party is able to implement humanitarian law, that in itself depends on the content of the latter. As one commentator argues:

The actual provisions of the [humanitarian law] thus have a major effect on the threshold of its application, confusing the issue of [armed conflict's] threshold with the [humanitarian law] content. [The condition] therefore seems to shift the onus unnecessarily onto the dissidents, instead of both sides being obliged to afford maximum protection to non-combatants at all times.[56]

1.3.2 ICC Statute

The ICC Statute also provides a more elaborate definition of internal "armed conflict" than Common Article 3. The ICC Statute identifies several acts as war crimes when committed in internal armed conflict. Specifically, the Statute criminalizes "serious violations of Common Article 3" committed in "armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."[57] The Statute also criminalizes a much broader range of conduct characterized as "other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law."[58] The criminal prohibitions identified in this provision apply in:
"Armed conflicts not of an international character and […] [They apply] to armed conflicts that take place in the territory of a State when there is protracted armed violence between governmental authorities and organized armed groups or between such groups."[59]

The ICC Statute's approach in identifying internal "armed conflict" is important. It adopts ICTY Appeals Chamber "protracted armed violence" and "organized armed groups" formulation but does not require

[55] See, e.g., *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, paras. 619-27 (Judgment) (Int'l Crim. Trib. for Rwanda Trial Chamber II Sept. 2, 1998), available at http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/j udgment/akay001.htm.
[56] Moir *supra* note 4, at 108.
[57] ICC Statute, *supra* note 36, art. 8(2)(d).
[58] ICC Statute, *supra* note 36, art. 8(2)(e).
[59] ICC Statute, *supra* note 36, art. 8(2)(f).

insurgents to exercise effective control into the State's territory. It also defines lower threshold of internal "armed conflict", codifying the Protocol II view that internal "armed conflicts" do not include "situations of internal disturbances and tensions, such as riots, [and] isolated and sporadic acts of violence."[60]

CONCLUSION

Guided by the ICTY jurisprudence in *Tadic* case and ICC Statute one may formulate a definition of non-international armed conflict. Such definition must contain upper and lower thresholds. At the lower spectrum of this definition are cases of internal disturbances and tensions, such as riots, mere acts of banditry and other isolated and sporadic acts of violence. As these are precluded from the regulation of international humanitarian law, they are the concern of domestic law enforcement measures. At the upper threshold there are cases of protracted armed violence, involving organized non-governmental armed groups who exercise some level of effective control over territory. These cases, having attributes of internal "armed conflict", must be governed by humanitarian law standards. The presence of such circumstances as insurgent's responsible command, the death toll, the level of violence and human rights abuses can be supplementary indicators of the existence of armed conflict in the territory of State.

1.4 Human rights law restrictions

As has been mentioned above, contemporary humanitarian law is inadequately governing situations of internal armed conflict in comparison to international armed conflict. If this is so, would it be a better to apply a human rights regime in situations where internal armed conflict exist? Of course, there is considerable legal authority establishing that the promotion and protection of fundamental human rights are always and everywhere matters of international concern. However, reliance on the protection of human rights law during armed conflicts is illusory and deceptive for the following reasons.

First, in the Advisory Opinion of the International Court of Justice ("ICJ") in the 1996 Nuclear Weapons Case[61] ("the Advisory Opinion"), while determining that human rights law continues to apply during armed conflict**,** the ICJ gave formal primacy to international humanitarian law, acting as *lex specialis*. It means that human rights standards are applied during armed conflicts as far as they do not contradict to the Geneva Conventions and Protocols to them.

Second, international humanitarian law directly regulates the conduct of non-state actors.[62] While substantial evidence suggests that human rights law is evolving to cover private conduct in some circumstances, current human rights treaties directly regulate State action only.[63] As human rights obligations supposedly have no binding force for insurgents, this addresses the concern for the protection of government troops at the hands of insurgents.

[60] Protocol II *supra* note 1, art. 1(2).
[61] *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226.
[62] See e.g., *Abella v. Argentina* (Report No. 55/97, Case 11.137, Inter-American Commission on Human Rights Annual Report 1997 (were the Commission stated in paragraph 174 that "Unlike human rights law which generally restraints only the abusive practices of State agents, Common Article 3's mandatory provisions expressly bind and apply equally to both parties to internal conflicts, i.e., government and dissident forces").
[63] See, e.g., International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 2(1), S. Exec. Doc. E, 95-2, at 1 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

Third, most human rights can be suspended through the mechanism of derogation, which permits States to avoid certain human rights obligations for reason such as national security or a declared state of emergency. Although no derogation is possible from, e.g. right to life and freedom from torture, neither International Covenant on Civil and Political Rights nor European Convention on Human Rights make the right to a fair trail, freedom of movement and protection from arbitrary detention non-derogable. This means that, if a situation of internal conflict justifies invoking the derogation clauses (i.e., a threat to the organized life of the community of which the State is composed), there is the possibility that States may legitimately restrict the exercise of human rights. Humanitarian law rules, on the other hand, cannot be derogated under any circumstances and it is impossible for States during armed conflicts to make a case for not upholding all of the protection of Geneva Conventions.

Fourth, human rights law neither contains provisions that describe methods and means of warfare causing unnecessary suffering nor mentions rules of distinction and principle of proportionality.

Finally, the extent to which the military are educated on the provisions of each regime are also differs. Troops are generally educated to some degree on the content of international humanitarian law, representing the rules of engagement by which the military operations are to be carried out. The level of education afforded on the protection of human rights is significantly lower, and the majority of the low rank armed forces probably know relatively little of human rights law except to the extent that it happens to coincide with international humanitarian law.

It follows that the normative framework and context of application of human rights standards cannot fully replace humanitarian provisions in the times of internal armed conflict in order to adequately regulate such situations. Clearly, both, human rights law and Common Article 3/Protocol II do not offer a rational answer as to how to prevent infringements on the basic dignity and integrity of all people in times of internal armed conflict. The shortcomings of the law of internal armed conflicts are more strikingly illustrated with crisis in Chechnya, where the Russian forces and Chechen fighters have been committing abuses and crimes against each other and against the civilian population with impunity and no humanitarian law mechanism exists to restrict such behavior.

2.1 BACKGROUND OF THE CHECHEN CONFLICT

2.1.1 Russia and Chechnya: a history of conflict

The Chechen Republic is situated in Southern Russia and North-Eastern part of the Caucasus, with a mostly Muslim population of approximately 1.1 million.[64] It neighbors the Russian Republics of Ingushetia, North Ossetia, and Dagestan and shares its Southern border with Georgia.

The Chechens are a native nation of the Northern Caucasus and there is a long history of tension and outright hostility between the Russia and Chechnya, from invasion and conquest during the Tsarist era through mass deportations and repression under Stalin.[65] Russia annexed the territory of Chechnya in 1859 after almost thirty years of fierce fighting. During the Second World War, Stalin accused the Muslim populations of the Caucasus region of collaborating with the Nazis and deported over 380,000 Chechens

[64] Estimated population is drawn on the basis of the census results of October 2002. *See*, Moscow Helsinki Group, *Chechnya 2003: Political Process Through the Looking Glass* 154 (2004)
[65] Mathew Evangelista, *The Chechen Conflicts: Will Russia Go the Way of the Soviet Union* 12 (2002).

in 1944 to Central Asia. Approximately 200,000 people perished during these years of exile, which lasted until 1957.[66]

The question of Chechnya's independence resurfaced in the context of the Soviet Union dissolution. In October 1991, Djokhar Dudaev, a former general in the Soviet Army, was elected president of Chechnya and unilaterally proclaimed Chechnya's independence in November 1991. During the following three years Moscow made some attempts to force Chechnya back into the Russian Federation but could not do anything due to the unwillingness of the Chechen government to make any compromise with the Russian authorities about independence. In 1994, the internal situation prevailing in Chechnya was close to an armed conflict between Dudaev's supporters and pro-Russian groups supported by both the Russian government and the Russian Secret Service.

2.1.2 The first conflict in Chechnya

In December 1994, after the failure of a Russian supported attempt by the pro-Russian opposition to overthrow the separatist regime, a regular Russian army entered Chechnya in an attempt to restore Russian sovereignty over the territory. The conflict that ensued was devastating for Chechnya and it lasted for almost two years due to the strong resistance by Chechen fighters. This conflict had almost unanimous support among Chechen population for the reason of aspiration of a majority of Chechens for complete independence from Russia and was absolutely unpopular among the Russian people for the reason of casualty tolls.[67] From the beginning the conflict had quite clearly developed into open warfare. Estimates report that around 400,000 persons were displaced, while the conflict led to massive destructions of Chechens towns and villages. The destruction of the capital, Grozny, has since been widely compared to the battle of Stalingrad in the Second World War.[68] In figures released by the Russian's Human Right's Commissioner, Sergei Kovalev, the Chechens suffered 24,000 civilian casualties over the course of two months from 25 November 1994 to 25 January 1995.[69] The fighting between Russian and Chechen forces continued until August 1996. During the fighting between 30,000 and 90,000 civilians died.[70] It was during this period that human rights violations peaked.[71] Both sides fought without regard to the safety of civilians. Indiscriminate use of air and artillery bombardment left the capital, Grozny, in ruins. Eventually the Russian forces suffered a humiliating defeat and on 31 August, 1996, the Khasavyurt Peace Agreement brought an end to the hostilities. The agreement provided for the retreat of Russian troops from the Chechen territory and the final settlement of the status of Chechnya by 31 December, 2001. Between January 1997 (when the last Russian troops left Chechnya) and October 1999, Chechnya enjoyed self-rule and *de facto* independence. In January 1997 the Chechen Chief of Staff, Aslan Maskhadov, was

[66] *Rebel Chechnya - A Thorn in Russia's Flesh*, Reuters World Service, Dec. 1, 1994, *available in* LEXIS, World Library, Curnws File.

[67] The Russian army lost between 4,000 and 10,000 soldiers. *See Chechnya: No Means to Live* 16 (Geneva, 2004).

[68] *See*, Glen Howard, *Chechnya: Quo Vadis?* Presentation at the Central Asia Caucasus Institute. Johns Hopkins University SAIS (1999).

[69] *Telephone Interview with Eric Engleman*, Moscow Correspondent, Monitor Radio (Feb. 22, 1995).

[70] Wendy Atrokhov, *The Khasavyurt Accords: Maintaining the Rule of Law and Legitimacy of Democracy in the Russian Federation Amidst the Chechen Crisis*, 32 Cornell Int'l L. J. 367,369 (1999).

[71] *See* Human Rights Watch. *Memorandum on Accountability for Humanitarian Law Violations in Chechnya* (20 October 2000), *at* www.hrw.org/campaigns/eu-summit/chech-memo-1020.htm (noting numerous human rights violations perpetrated by the Russian military against Chechen civilians).

elected as president of the Chechen Republic, in an election judged "free and fair by the [Organization for Security and Co-Operation in Europe] observers".[72]

A Peace Treaty was signed by Maskhadov and former Russian President Yeltsin in May of the same year. However, due to the devastation brought about by the armed conflict, external meddling by Islamic radicals, escalating crime and inter-Chechen rivalries, Chechnya degenerated into chaos and state of lawlessness. During this period, Chechnya experienced rising crime rates, corruption, kidnapping (some of the victims were Chechens themselves) and hostage-takings (including foreigners). Many of the leading Chechen field commanders refuse to support Maskhadov or recognize his authority despite the fact that he was elected by the majority of the population. The inability of Maskhadov to control the situation in Chechnya undermined his legitimacy as a sovereign. By 1998 was the growth of a movement by the groups of international Muslim radicals in alliance with a number of Chechen commanders led by Shamil Basayev, basically to carry the "holly war" against Russia beyond Chechnya's borders and to conduct a jihad for the liberation of the Muslim parts of the North Caucasus from Russian rule and creation of a Dagestani/Chechen Islamic Republic. Chechen "field commander" Basayev and his foreign brother-in-arms al-Khattab, in August 1999, lead an attack into neighbouring Dagestan in order to support radical Islamic groups there and with the declared purpose of establishing a Dagestani/Chechen Islamic Republic.

2.1.3 The second conflict in Chechnya

The second armed conflict broke out in September 1999 in the wake of August invasion by Shamil Basaev and al-Khattab's troops in Dagestan, along with a series of bombings, attributed to Chechen "terrorists" that took place in Moscow and other parts of Russia. The Russians alleged that the Chechen government had connections to the group that invaded Dagestan and stated that the invasion and the bombings were the work of "Chechen terrorists". As such, the second armed conflict was presented as an "anti-terrorist operation". Unlike the first armed conflict in Chechnya – which very nearly led to the former President Yeltsin's impeachment – this one was popular among Russians.[73] Support for the conflict effort stemmed first from its apparent defensive origins and second from the fact the Chechen invasion coincided with a series of terrorist bombings on Russian territory.[74]

The second conflict has been described as occurring in several phases. The first phase, beginning in September 1999, witnessed the massive mobilisation of at least 100,000 Russian troops and indiscriminate bombing of Chechnya with extreme casualties suffered by the civilian population.[75] During this phase the Russian forces relied on heavy armor, artillery and ground attack aircraft. By March 2000, the conflict had entered a second phase where the bombing campaigns decreased but the military attacks remained constant. The Russian forces were present in all parts of Chechen territory but had not succeeded in gaining effective control over the area. In the third and more recent phase, since 2002, when the Federal Security Service ("FSB", former KGB) took control from the military army over operations in Chechnya, the Russian government has been claiming that the situation in Chechnya is "normalised". In efforts to

[72] Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, 40 Va. J. Int'l L. 117, 134 (1999-2000).
[73] Evangelista, *supra* note 65, at 64.
[74] *Id.*
[75] *See* Human Rights Watch, *Glad to be Deceived: the International Community and Chechnya* (World Report 2004), *at* http://www.hrw.org/wr2k4.htm. It must be acknowledged that the information about the death toll during the two armed conflicts is very vague and contradictory. Chechens Rebel sources have argued about 250,000 civilians of Chechnya died (25% of the population). *See e.g.*, *Russian People Pay the Price of War They Permit, Rebel Chechen Site said, available at* Lexis, BBC Monitoring International Reports, 10 Feb. 2004. Moscow Helsinki Group claims approximately 70,000 civilians died. Moscow Helsinki Group, *Chechnya 2003: Political Process through the Looking Glass* 12 (2004).

assert effective control over Chechnya and to demonstrate that the region has returned to normality, two votes have been organized over the past year in Chechnya. In March 2003, there was a constitutional referendum, which approved a constitutional establishing Chechnya as an autonomous Republic within the Russian Federation. The legitimacy of the referendum has been doubted by some experts and Organization for Security and Cooperation in Europe ("OSCE") declined to send election observers. A presidential election followed this referendum in October 2003, resulting in the election of Moscow's supported candidate Akhmad Kadyrov as president of Chechnya.[76]

However, despite declaration that the conflict is over and won by Moscow, reports indicate that the current situation in Chechnya is anything but normal, with continued "cleansing" operations, arbitrary arrest, torture and disappearances, on the side of the Russian forces, as well as guerrilla warfare including assassinations of civil servants cooperating with the pro-Moscow Chechen administration of Chechnya, ambushes and detonation of land mines against federal soldiers, on the side of the Chechen fighters.

2.1.4 The main actors of the conflict in Chechnya.

There are at least three main actors who operate in Chechnya at the present phase. First, FSB, which officially took over control from the military army as the organ heading up the operation in Chechnya. Second, Chechen civilian administration supported by Moscow and represented by recently assassinated Chechen President Kadyrov. This actor was accused with growing regularity of being responsible for human rights abuses and disappearances of dozens of Chechens, backed by attempts to build regime based more on fear and resignation than positive feelings.[77] Disproportionate brutal attacks targeting civilians, tortures, disappearances and other atrocities committed by abovementioned actors has actually been generating more and more hostility among ordinary Chechens and mean that they have created more and more enemies within Chechnya.

The third (non-State) actor, namely Chechen fighters, mainly consists of two factions: (1) moderate Chechen separatists, headed by Aslan Maskhadov; and (2) Islamic extremists, headed by Shamil Basaev and until recently by al-Khattab, who was killed by Russian forces. Having common purpose – to create independent Chechen Republic, these factions are distinguished by the means employed to achieve the goal. The former waging guerrilla warfare against Russian Federal forces and Moscow's influenced civil administration in Chechnya by the means that mostly are not prohibited by the international law during the armed conflict.[78] The later uses the tactics of terrorism, hostage-taking and killing of the civilian population, and targeting Muslim clerics belonging to the traditional religious establishment.[79] However, as a result of success of the Russian army intervention and the need for unified coordinated command against Russian troops, commentators suggest that modern Chechen separatists and Islamic extremists are intertwined and in alliance.[80]

[76] Similarly, doubts were expressed about this election as many of the serious opposition candidates were forced out of the race. The number of voters was determined on the basis of 2002 Census, the results of which had been overstated. With respect to the actual process there were no election monitors because OSCE and Council of Europe refused to send international observers and the UN Human Rights Committee noted that the elections did not meet relevant international standards. *See generally, Chechnya 2003: Political Process through the Looking Glass, supra* note 75.
[77] *Kadyrov's death poses questions for the Kremlin*, Financial Times, 10 May 2004, at 6.
[78] E.g., killing of the soldier of the opposite side is not unlawful under Geneva Conventions.
[79] CW Blandy, *Chechnya: Federal Retribution "Encirclement, Forceful Intervention and Isolation* 7 (March 2001).
[80] *Id.*

2.2 CLASSIFICATION OF THE CONFLICT IN CHECHNYA UNDER INTERNATIONAL HUMANITARIAN LAW

Determining whether conflict in Chechnya can be classified at all under humanitarian law, two questions must be clarified. First, whether conflict in Chechnya is armed conflict. This question is difficult because it touches upon a complex political problem. The political problem arises around States resistance of any international regulation of internal strife. States are eager to classify such situations as mere banditry or terrorist activity and thus shielding it from scrutiny of international community. Chechnya is a clear example of Russian's reluctance to recognize the existence of armed conflict within the meaning of international law. The political atmosphere around Chechnya has changed dramatically after the 11 September, 2001 attacks in the United States. Russia, which had since 1999 called the conflict in Chechnya a "counter-terrorist operation", soon began to argue that the conflict in Chechnya was its contribution to the United States-led global campaign against terrorism. Furthermore, if in 2000 and 2001 the UN described violence in Chechnya in the terms of the "provisions of Common Article 3 and Protocol II",[81] that in succeeding years it failed to pass any resolution condemning international humanitarian law abuses in the rebellion region. For instance, on 20 April 2004 the UN in a report on children exploited by armies, guerillas and terrorists granted the Russia's demand to describe the situation in Chechnya as "not an armed conflict" within the meaning of international law.[82] Following the Russian demands for change, the UN also altered its reference in the report to "Chechen insurgency groups" to read "Chechen illegal armed groups".[83]

Second, if it is armed conflict that within which of four categories it falls: inter-State conflict; or struggle of national liberation; or internal armed conflict as defined by Protocol II; or armed conflict within the meaning of Common Article 3.

2.2.1 Existence of armed conflict in Chechnya.

Despite the political reluctance of the Russian State and the UN to recognize the situation in Chechnya as "armed conflict" I argue that if the formal threshold of "armed conflict" has been crossed, existence of "armed conflict" in Chechnya in legal sense is proved.

The ICTY Appeals Chamber in *Tadic* case has identified three elements - protracted character of armed violence, organization of the insurgent groups and insurgents effective control under territory, as the key criteria signaling the existence of armed conflict. There is no doubt that current state of affairs in Chechnya satisfies the criteria of the protracted violence and the minimum organization of insurgents.[84] There is no doubt that the resistance of Chechen fighters' is not the actions of isolated individuals but rather of collective character. Obviously the scale and intensity of the conflict in Chechnya is very high.

[81] *See* The Situation in the Republic of Chechnya of the Russian Federation, UN Doc. E/CN.4/RES/2000/58, UN Doc. E/CN.4/RES/2001/24.

[82] The UN initially said that Chechnya is an area in Russia where "Chechen insurgency groups" recruit or use children in armed conflict. But Russia objected to this qualification, saying its forces merely respond in Chechnya to attack by "terrorists". *See e.g.*, Lawrence Uzzell, *Moscow Pressures UN over Chechen Conflict*, Chechnya Weekly, 17 Mar 2004.

[83] *Id.*

[84] *See* e.g., Nezavisimaya Gazeta, No 200 (2015), 23 Oct. 1999, at 2 (claiming that Chechen armed formations in the region consisted of 20,000 men, 15 tanks, 3 artillery SP equipments, 5 Grad systems, up to 40 missile complexes and around 500 antitank means).

The Russian Government failed to resolve the crisis rapidly and in order to suppress the rebellion has exercised large-scale military operations in Chechnya.

The total Russian casualties from August 1999 to August 2002 were officially acknowledged to be 4302 killed and 12417 wounded; of those 2486 dead and 6192 wounded belonged to Ministry of Defense units.[85] The character of the violence is neither sporadic nor isolated but rather sustained, widespread and multitudinous, with both sides responsible for numerous human rights abuses. It also has lasted since 1994, except for the term of truce between 1996 and 1999.

A more problematic issue is to determine whether Chechen fighters possess territorial control. In my view there is no doubt that insurgents have exercised effective control during the first armed conflict and the first and second phases of the second armed conflict in Chechnya. Whether they exercise control over the areas during the current, third phase is questionable. One cannot seriously take into account presidential elections and referendum that occurred in the region in 2003 simply because the results could not be free and fair in the environment of the *de facto* existing state of emergency and the Russian military presence in the region.[86] The Chechen civil authority, the *de jure* administration in Chechnya, is dependent on Russian military presence in the region and does not possess credible legitimacy among population. An important factor in determining the effective control exercised by the Chechen fighters is the level of abuse committed by Russian troops against civilians. Virtually all observers agree "that the continuing abuse of civilians by the Russian military and security forces is the main source of support for the rebel movement – helping it to recruit more young men and women to fight for the cause to revenge dead relatives".[87] The more Russians forces oppress local population and make their lives unbearable, the more they turn the population against their presence and increase the legitimacy of Chechen fighters in the region. Chechen fighters are also capable to organizing permanent military counter-offensive in the region against Russian soldiers and strategic objects. They have also successfully executed assassinations of top officials. The latest example is of the bomb blast targeting the Chechen President Kadyrov in May 2004.[88]

It is hard to believe that without public support among Chechen population such actions of the Chechen fighters could have ever been happened. Another factor that may indicate Chechen fighters' territorial control is the suggestion that Russian forces have lost ground control in some of the areas. Credible information exists to suggest that Russian soldiers are transferred from Russian airbases to Chechen area by helicopters and fixed-wing aircrafts do not land on Chechen soil because of the direct threat posed by insurgents.[89] Within those areas, the Chechen fighters have virtually complete control and use this territory to launch attacks on Russian military objects and neighboring Russian territories. Hence, there is no doubt that Chechen fighters exercise *de facto* control over Chechnya, which at least tacitly allowed by Chechen civilian population.

The extradition case of the Chechen deputy Prime Minister Akhmed Zakaev illustrates the attitude of the British judge toward the existence of the armed conflict in Chechnya. The Russian Federation had sought before the Bow Street Magistrate's Court to extradite Zakaev on a series of charges including murder.[90]

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[85] Jane's Defense Weekly, 18 Sept. 2002.

[86] *See also supra* note 76 and accompanying text.

[87] Crimes of War Project, *Chechnya: The World Looks Away* 6 (2002), *available at* http://www.crimesofwar.org/chechnya.

[88] *See*, *President of Chechnya is Assassinated in Bomb Blast*, Financial *Times*, 10 May 2004, at 6.

[89] See Felgenhauer, *Combatants or Civilians?* Moscow Times, 7 Aug. 2003 (Felgenhauer gives an example when in 2002 the Chechen fighters shot down a large military Mi-26 transport helicopter as it approached the Chechen zone with the loss of some 130 lives and argues that since then only smaller Mi-8s helicopters that carry up to 10 passengers fly inside Chechnya).

[90] The original decision of the Bow Magistrate Court *available* at http://eng.kavlaz.memo.ru/print/enganalytics/id/611249.html.

The crimes were allegedly committed in 1995-1996 during the first conflict in Chechnya. The British judge needed to examine whether the charges were extraditable offences under European Convention on Extradition and whether the conduct for which Mr. Zakaev was to be extradited amounted to crimes in the United Kingdom.[91] The defence argued that the charge of murder could not stand if an armed conflict took place in Chechnya. This is because the killing of combatants in times of armed conflict would not amount to the crime of murder and consequently cannot be prosecuted. Therefore, the Magistrate Court needed to examine whether an armed conflict occurred in Chechnya in 1995-1996. The Court pointed at the "scale of the fighting", "the recognition of the conflict in the terms of cease fire and peace treaty" and that "the alleged victims in those cases should have had the protection of Article 3 of the Geneva Convention in so far as they were civilians." The Chief Magistrate said, in particularly:

I am quite satisfied that the events in Chechnya in 1995 and 1996 amounted in law to an internal armed conflict. Indeed, many observers would have regarded it as a civil war. In support of that decision I have taken into account the scale of fighting - the intense carpet bombing of Grozny within excess of 100,000 casualties, the recognition of the conflict in the terms of a cease fire and a peace treaty. I was unable to accept the view expressed by one witness that the actions of the Russian Government in bombing Grozny were counter-terrorist operations.[92]

The Court concluded that "those crimes which allege conspiring to seize specific areas of Chechnya by the use of armed force or resistance are not extraditable crimes because the conduct in those circumstances would not amount to a crime in this country." Finally, the judge stated that he believed that Mr. Zakaev would be subjected to torture if return to Russia and declared that Mr. Zakaev should not be returned to face trial in the Russian Federation.

Acknowledgement of the existence of armed conflict in Chechnya is implicit in the opinion of the Russian Parliament legislators. In the law providing additional compensation for servicemen on mission to particularly dangerous and arduous areas, adopted prior the first Chechen conflict and then amended in 1997 to include those military who "carried out assignments under the conditions of a non-international *armed conflict* in the Chechen Republic".[93]

Another point which deserves to be highlighted is the decision of the Constitutional Court of the Russian Federation where the Court scrutinized the constitutionality of the former Russian President Yeltsin's Decrees and Resolution of the central government in the execution of the first Chechen conflict.[94] The Court determined that at the international level the provisions of Protocol II were binding on both parties to the *armed conflict* and that the actions of the Russian armed forces in the conduct of the Chechen

[91] Extradition is allowed only if the acts, stipulated in the request, are also categorised as criminal by the domestic law of the requested State. *Id.*

[92] *Id.*

[93] Federal Law of the Russian Federation № 146-FZ of 19 Nov. 1997, in *Sobraniye Zakonodatelstva Rossiyskoy Federatsii* № 47, Art. 5343, 24 Nov. 1997.

[94] Decision of the Constitutional Court of the Russian Federation on the constitutionality of Presidential Decree № 2137 of 30 November 1994 on measures for restoration of the Constitution and the rule of law on the territory of the Chechen Republic, of Presidential Decree № 2166 of 9 December 1994 on repression of the activities of illegal armed units within the territory of the Chechen Republic and in the zone of the Ossetino-Ingushetian conflict, of Resolution № 1360 of 9 December 1994 on ensuring the security and territorial integrity of the Russian Federation, the principle of legality, the rights and freedoms of citizens, and disarmament of illegal armed units within the territory of the Chechen Republic and contiguous regions of the Northern Caucasus, and of Presidential Decree № 1833 of 2 November 1993 on the basis provisions of the military doctrine of the Russian Federation, in *Sobranie Zakonodatelstva Rossiyskoy Federatsii*, 1995, № 33, Art. 3424.

conflict violated Russia's international obligations under Protocol II.[95] The Court, however, did not specify why in its view the Chechen conflict came within the scope of Protocol II and did not dwell on this matter. Despite the Court's decision surrounding controversy of whether first Chechen conflict had fulfilled the conditions required by Article 1 Protocol II, the Court clearly spelled out that actions of the Russian government was not merely *"counter-terrorist" operation* but *armed conflict.*

It is therefore no doubt about existence of armed conflict in Chechnya. Whether Chechen fighters are terrorists or not is a political motivated subjective-value judgment, wholly immaterial to the determination of the existence of armed conflict within the meaning of international humanitarian law. What is needs to be done next is to examine under which category of armed conflict it can be attributed.

2.2.2 Is it inter-State conflict, struggle of national liberation, internal armed conflict as defined by Protocol II or armed conflict within the meaning of Common Article 3?

It must be clear from the beginning that conflict in Chechnya is not an international armed conflict. First, according to paragraph 1 Article 2 of the Geneva Convention, "[t]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two … High Contracting Parties".[96] In the case of Chechnya, only Russia qualifies as a High Contracting Party, having signed and ratified the Geneva Conventions as well as both Protocols.[97] Secondly, by ratifying the Geneva Conventions**,** a State agrees to apply the Conventions' standards in armed conflicts with a "Power" not a party to the Conventions if the latter accepts and applies the relevant provisions.[98] Despite Russia's ratification to the Geneva Conventions, its provisions are not applicable if the adversary party, namely Chechen fighters, do not constitute "Power" under international law. The *travaux preparatoires* of the Geneva Conventions and scholarly opinion both indicate that a "Power" refers only to States,[99] although it also could refer to a civil conflict if the legitimate government recognizes a state of belligerency.[100] As Russia has never recognized a state of belligerency with Chechen fighters, the question of recognition of the Chechen insurgents as a "Power" revolves around determination of whether an entity like Chechnya is an independent State.

Despite the fact that Chechnya unilaterally declared independence from the Russian Federation in 1991, there are rationales that explain why Chechnya does not constitute State under international law.

Chechnya is a historical integral part of Russia since 1864 when it was incorporated into Russian empire. Russia acquired the territory of Chechnya as a result of conquest when the Chechen State had not existed.[101] It appears plausible that because of the length of time Russia had control over the area, the

[95] The Court however excuse the failure to respect the rules of Protocol II because unduly national implementation of its provisions. *Id.* The Court also declined to examine the concrete actions of the parties during first conflict from the point of view of respect of Protocol II due to the lack of competence. *Id.*

[96] Geneva Conventions *supra* note 1,art. 2(1).

[97] *See* 15 Hum. Rts. L.J. 56, 62-63 (1994) (listing Russian ratifications to Geneva Conventions and both Protocols).

[98] *See* Geneva Conventions**,** *supra* note 1, art. 2.

[99] Gerald I. A. Draper, *The Red Cross Conventions of 1949*, 16-17 (1958).

[100] Some scholars also argue that where recognition of belligerency of the insurgents has been awarded by the legitimate Government, the conflict becomes subject to all four Geneva Conventions. Lassa F.I. Oppenheim, *International Law* (1952). Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements, 45* (1988).

[101] Thomas D. Grant, *Current Development: Afghanistan Recognizes Chechnya*, 15 Am. U. Int'l Rev. 869, 878-879 (2000) (noting that while it is unclear whether Muslim States expressly recognized Chechnya, it is clear that no western State recognized the nineteenth century Chechen claim to statehood).

absence of protest by Chechen authorities[102] and third States[103] over this time regarding Russian rule, and taking into consideration that acquisition of the territory by the use of force was not illegal under the law of nineteenth century (compare to contemporary law forbidding the use of force in international relations), Russia gained legal title to the Chechen lands in the middle of the nineteenth century.[104] Recent developments in international law and State practice do not recognize a general right to unilateral secession.[105] Furthermore, it seems hard to maintain the presence of statehood in this case while the secession of Chechnya from the Russia has never been recognized by the international community.

No country officially recognized Chechnya as an independent State and in fact most States and key international organizations made it clear that they recognized that Chechnya belonged to the Russian federation and that they respected the territorial integrity of Russia. The UN Commission on Human Rights in calling for a cease-fire indicated that any resolution of the conflict would have to respect the territorial integrity and the Constitution of Russia.[106] From the beginning of the conflict, world leaders have maintained that "(Chechnya) is an internal Russian affair,"[107] and that Russia has the right to defend its territorial integrity.[108] The Kasavyurt Agreement of 1996 and Peace Treaty of 1997 signed by Russian authorities with Chechen separatist leader, Maskhadov, postponed the question of the status of Chechnya until 31 December, 2001. These documents stipulated that Russia and Chechnya would regulate relations in accordance with international law. Lanskoy argues what Maskhadov probably was suggesting at the time of signing the Peace Treaty, for Chechnya to be a part of the Russian Federation and at the same time a subject of international law.[109] This status would be similar to that enjoyed by Ukraine and Belarus during the Soviet period – not an independent State, but sovereign republic within Soviet Union, recognized in the UN and having international representation.[110] Finally, the referendum on the status of the region that was held in 2003 reiterated the status of Chechnya as a federal part of a Russia.[111]

Even supposing that Chechnya somehow qualifies as a State under Common Article 2 of the Geneva Conventions, it still has to meet the second criteria: accept and apply the provisions of the Geneva Conventions. There are two conditions must be fulfilled under this criteria - (a) acceptance and (b) the *de-*

[102] Protest might be identified in continuing armed resistance to Russian control since conquest, but historical records seems to show that the twenties century witnessed at least some periods of quite in the region. Grant *supra* note 72, at 161 ("If resistance did in fact at times wane, the element of persistence required for protest to defeat title would be lacking").

[103] Grant argues that review of the history during Tsarist and Soviet periods does not reveal any third State protest. Gtant *supra* note 72, at 163.

[104] *See* Grant *supra* note 72, at 153-175.

[105] *See generally* Reference re secession of Quebec, [1998] 2 S. C. R., 295 (Can.) (Examining the relationship between the two competing concepts, self-determination and territorial integrity, the Court came to a conclusion that the latter override the former).

[106] *See* The Situation in the Republic of Chechnya of the Russian Federation, *supra* note 86.

[107] Charles Hecker, *Europe Condemns Slaying of Civilians*, Moscow Times, Jan. 5, 1995, *available in* LEXIS, News Library, MOSTMS File (statement by French Foreign Minister Alain Juppe).

[108] *Remarks at White House Conference on Trade and Investment in Central and Western Europe in Cleveland*, Ohio, 31 Weekly Comp. Pres. Doc. 51, 54 (Jan. 13, 1995). Clinton compared the conflict in Chechnya with American civil conflict where "Abraham Lincoln gave his life for that no state had a right to withdraw from our union". *Quoted in* David Hoffman and John Harris, Clinton, *Yeltsin Gloss over Chechen War*, The Washington Post, Apr. 22, 1996, at A1.

[109] Miriam Lanskoy, *Chechnya's Internal Fragmentation, 1996 -1999*, 27 Fletcher F. World Aff. 185, 188 (2003).

[110] Ukraine and Belarus, though no independent States, had occupied UN seats in their own names since 1945 upon Soviet Union insistence and were original parties to the UN Charter. *Id.*

[111] *Vote for the Devil*, The Economist, 11 Oct., 2003, at 53 (96% voted *"pro"*, as well as 95% turnout). The referendum was very controversial and was strongly opposed by human rights groups and international organisations. Several international organisations, among them the OSCE, declined to send observers. *Chechnya 2003: Political Process Through the Looking Glass supra* note 75, at 14-20.

facto application of the Geneva Conventions.[112] The ICRC argues that "acceptance" can be explicit declared by a non-contracting State as well as by tacit intention.[113] Maskhadov in his letter to the Sweden Federal Council on May 2001 stated that the Republic Chechen-Ichkeria is a party to the Articles and Protocols of the Geneva Convention and the Chechen armed forces would abide by the principles of humanitarian law.[114] However, in terms of whether Chechen fighters actually applied the Geneva Conventions, it is reported by Human Rights Watch and other competent sources that Chechen fighters not only targeted civilians with ambushes, bombs, land-mines and hostage-taking,[115] but also used captured soldiers as shields during the Russian attacks.[116] As a result, despite Chechen insurgents' *de jure* acceptance of the Geneva Conventions, there're is sufficient proof that actual application of the standards enumerated in the four Geneva Conventions was ignored by them.

One could still consider the Chechen conflict as an international armed conflict under the provisions of Protocol I, if the fighting in Chechnya constitutes a struggle of national liberation. Article 1(4) Protocol I describes the conflict of national liberation as "[a]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (the "Declaration on Friendly Relations") in accordance with the Charter of the United Nations."[117]

This definition requires 4 conditions to be met: 1) existence of armed conflict; 2) existence of a group of distinct people; 3) this people are fighting against decolonisation, foreign occupation and racist regimes; 4) people must possess a right of self-determination as enshrined in the Declaration on Friendly Relations and UN Charter.

The first condition, namely the existence of armed conflict in Chechnya has been examined and acknowledged in the previous Chapter.

It might be suggested that Chechens are a "group of people" under the second condition. Indeed, they have an ethnic, religious and linguistic identity distinct from the rest of Russia. Officially Russian State religion is Russian Orthodox Christianity. Chechens, on the other hand, belong to Islam and practice Sunni Islam.[118] Unlike the Russian people, Chechens are not Slavs. They distinguished themselves from Russian people and call themselves *vainakh*, translated "our people".[119] They speak a distinctive

[112] *See ICRC Commentaries on the Geneva Conventions and Additional Protocols* (ICRC, Geneva), *available at* www.icrc.org [hereinafter ICRC Commentaries].
[113] *Id.*
[114] *See* Human Rights Watch, *"Welcome to Hell" Arbitrary Detention, Torture, and Extortion in Chechnya* (October, 2000).
[115] Le Monde, Oct. 17, 2002, at 23. Chechens rebels were widely believed to be responsible for a wave of assassinations of local civil servants and religious leaders who were reported targeted for their cooperation with the Russian government. *See*, Human Rights Watch, *World Report: Russia Federation*, February, 2002. In 2001, those murdered included at least 18 leaders of districts and town administrations, at least 5 religious leaders and numerous police officers, teachers, and lower ranking civil servants. *Id*.
[116] In treatment of captured soldiers, separatists did not actually conform to the rules for international conflicts relating to prisoners of war. *See Human Rights Body Rebukes Both Sides in Chechnya*, Reuters World Service, Jan. 19, 1995, *available in* LEXIS, World Library, Curnws File
[117] *See* Protocol 1, *supra* note 1, art. 1.
[118] See Grant *supra* note, at 120-124.
[119] *Id.*

Caucasian language which is different from both the Slavic and the Turkish languages prevalent in the area. Further, the Chechen culture and traditions are different from those of the Russians.[120]

The third condition requires the fighting of people against specific dominance regimes. Article 1(4) covers all possible circumstances in which people are struggling for the exercise of their right to self-determination.[121] The list includes three cases: decolonisation, foreign occupation and racist regimes. The ICRC describes them as follows:
"[c]olonial domination" certainly covers the most frequently occurring case in recent years, where a people has had to take up arms to free themselves from the domination of other people; it is not necessary to explain this in greater detail here. The expression "alien occupation" in the sense of this paragraph -- as distinct from belligerent occupation in the traditional sense of all or part of the territory of one State being occupied by another State - covers cases of partial or total occupation of a territory which has not yet been fully formed as a State; finally, the expression "racist régimes" covers cases of régimes founded on racist criteria. The first two situations imply the existence of distinct peoples. The third implies, if not the existence of two completely distinct peoples, at least a rift within a people which ensures hegemony of one section in accordance with racist ideas."[122]

As one can see from the above clarification the case of "racist regimes" clearly does not fit the conflict in Chechnya. The drafters of Article 1(4) listing "racist regime" intended to cover the situations such as in South Africa where the black, indigenous people were oppressed by a white minority. Chechnya is absolutely different case. There cannot be racial oppression in the Chechen case simply because both peoples (Russian and Chechens) belong to the same race.

The threshold requirement for colonial status is that the territory in question (1) be geographically separate from the metropolis and (2) be inhabited by the "people".[123] The Chechens have a strong case for the latter requirement, but geography distinguishes Chechnya from every situation addressed under UN decolonization law. Therefore under UN practice and law to date, Chechnya is not territorial unit eligible for treatment under "colonial occupation" definition.

ICRC opinion regarding "alien occupation" is a quite vague. What ICRC meant referring to "cases of partial or total occupation of a territory which has not yet been fully formed as a State"[124] is unclear. Does it cover, for example, the cases when people are suffering from economic exploitation? Cassese argues that in practice, States have agreed to limit the concept of "alien occupation" to intervention by use of force and military occupation.[125] The support of this position can be found in *travaux preparatories*. In the course of the drafting of the Protocol I, the inclusion of the phrase "alien domination" in Article 1(4) was replaced, at the instigation of the Latin States, by the more restrictive "alien occupation".[126] Although,

[120] Traditional social organization among Chechens is patriarchal, clan-based, as distinct from hierarchical, due to the absence of feudalism in Chechen history, and has the practice of blood feuding. *See, generally* Grant *supra* note 72, at 120-124.
[121] However, Australian delegation at the Diplomatic Conference in the explaining their vote that their supported Article 1 Protocol I, declared that the enumeration of the three categories was not exhaustive. *See* CDDH/SR. 22, para. 14.
[122] ICRC Commentaries, *supra* note 112, at 54.
[123] *See e.g.*, Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 (e) of the Charter of the United Nations, G.A. Res. 1541, UN Doc. A/4684 (1960). Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 ICJ 16.
[124] ICRC Commentaries, *supra* note 112, at 54.
[125] Cassese, *Self-Determination of Peoples*, 92-94 (1995).
[126] See G. Abi_Saab, *Wars of National Liberations in the Geneva Conventions and Protocols*, 165 HR 395 (1979-IV).

when some delegates during the Diplomatic Conference in 1974-1977 raised the question that the term of "alien occupation" is ambiguous and had not defined in international law, the Romanian delegation suggested that the word "foreign occupation" meant military occupation.[127] Furthermore, the careful reading of the ICRC Commentaries[128] suggests that ICRC implied the cases when the territory in question (non-State entity) was involved in the belligerency and was later occupied in the course of this belligerency. In other words, "alien occupation" duplicate the case enumerated in paragraph 2 Article 2 of the Geneva Conventions (occupied territories), expanding the scope of the application of the later to the situations when the occupied, subjugated territory is not High Contracting Party to the Geneva Conventions. It must not be forgotten the times when the Protocol I was drafted – during the escalation of Arab-Israel conflict – and the pressure that was put by the Arabs States to cover the struggle of the people in Palestine/ Occupied Territories ("P/OT") within the ambit of Protocol I as much as possible. Indeed, the situation in P/OT excellently fit into the definition of "alien occupation"[129] - Israel State dominates the people of a P/OT using military means; there was no Palestinian State prior to occupation; and the P/OT can be regarded "alien", i.e. without legal title, relative to Israel State because the law when the P/OT were seized forbade acquisition of territory by the use of force. So, if one can show similarity between PO/T and Chechen case, it may manifest as a strong evidence of labeling conflict in Chechnya as a struggle of national liberation.

The legal status of the P/OT has been in dispute ever since Israel first occupied the West Bank and Gaza in 1967 after the Arab-Israel conflict. As the sovereignty of Jordan over the West Bank was questionable and Egypt never asserted sovereignty over Gaza, the Government of Israel took the view that there was no sovereign power at whose expense it would occupy these territories. As for the P/OT right to self-determination, the Israel position was that the Palestinians Arabs have already achieved their self-determination in their own State, namely Jordan; consequently, it is false to maintain that the Palestinian Arabs do not have a State of their own and the demand for establishing "Palestinian State" would amount to requesting the creation of "a second Palestinian Arab State".[130] In the view advanced by the Palestinians after the 1967 conflict, Israel illegally occupied Arab territories, which are now subject to foreign domination.[131] The position of the UN was expressed in numerous UN Resolutions, recognizing the right of the Palestinian people to self-determination and proclaiming that the people of Palestine were "entitled to equal rights and self-determination, in accordance with the Charter of the UN".[132]

Notwithstanding the question of whether Palestinian people have the right to self-determination it seems undisputable that P/OT can be regarded as "alien occupation" within the meaning of Article 1(4) Protocol I.

Article 2(4) of the UN Charter, adopted before occupation of the P/OT forbids the use of force or threat of force in international relations. Accordingly, acquisition of P/OT in the course of warfare, by the use of force is illegal under the UN Charter. It appears, moreover, that acquisition of territory by force is illegal

[127] Levie I., Howard S., *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977*, vol.1, 16 (1979).
[128] ICRC Commentaries, *supra* note 112, at 54.
[129] It is curiously to note that the Palestinian-Israel conflict has been bracketed with the anticolonial cases in some UN resolutions, despite the fact that contestable territory bordered upon Israel State. See UN Res. 2787, 26 UN GAOR Supp. (29) at 16, UN Doc. A/8429 (1972).
[130] Cassese *supra* note 125, at 235-236 (citing the opinion set out by the Israel delegate, Professor Blum, in his speech of 2 December 1980 to the UN General Assembly)
[131] *Id*, 238
[132] See UN Resolutions 2672/C(XXV) of 8 December 1970, 3089D(XXVIII) of 7 December 1973.

in any form, even when the use of force was arguably lawful in its first instance (i.e., cases of self-defense or anticipatory self-defense). The Declaration on Friendly Relations provides: "The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal"[133] and Security Council Resolution 242, adopted during the Arab-Israel conflict, stressed "the inadmissibility of the acquisition of territory by war".[134] The law is clear today that Israel could have not acquired legal title to West Bank and Gaza through the use of force and thus the status of P/OT may describe as "alien occupation".

It follows that the crucial moment in determining of whether or not Chechen case constitutes "alien occupation" depends on the issue of possession of legal title by Russian Federation over Chechnya. A widespread, though not unanimous view, is that questions of territorial status are decided on the basis of the law in force at the time the status was established. According to Jennings, the current disposition of vast territories would be thrown into doubt, if the view were accepted that changes in the rules governing territorial acquisition had retroactive effect on acquisitions accomplished under older rules.[135] Thus, territorial acquisition by methods that violate today's law would nonetheless be treated as valid if done at a time when those methods were legal. In other words, an act that would not convey valid title under modern rules might have conveyed valid title under older rules.[136] It is a foundation principle that law should lend stability to human relations. Nobody doubts acquisition of Australian lands from indigenous peoples and westward expansion of the United States into native lands. Given the fact that Russia conquered Chechnya around 1859 and that the law to be applied in assessing whether Russia's title in Chechnya was created by conquest is the law of mid-nineteenth century and that the law of mid-nineteenth century allowed creation of title by use or threat of force one can argue that Chechnya is not the case of "alien occupation".

The fourth condition refers to right to self-determination as defined in Declaration on Friendly Relations and UN Charter. Both documents take a restrictive approach to the issue, limiting the right to self-determination to the context of decolonization and the only situation in which self-determination has unambiguous legal status is that of non-self-governing territories (non-contiguous, separate territorial units).[137] To date the non-self-governing territories regime has never been extended to territories geographically integral to a State.[138] It has been restricted to non-contiguous colonial possessions.[139] The

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[133] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, U.N. GAOR, 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8028 (1970) [hereinafter Declaration on Friendly Relations].

[134] *See* S.C. Res. 242, UN SCOR 22d Sess. 1382 mtg., at 8-9, UN Doc. S/8247 (1967)

[135] Robert Jennings, *Acquisition of Territory in International Law* 53-56 (1963).

[136] This view was supported by the ICJ in the *Western Sahara* Advisory Opinion, Western Sahara, 1975 ICJ, at 12.

[137] Duncan B. Hollis, *Accountability in Chechnya - Addressing Internal Matters with Legal and Political International Norms*, 36 B. C. L. Rev 793, 820 (1995). Other UN documents and state practice have adopted a similar approach, such that a people's right to self-determination now requires a connection to a defined space of territory, separated from an already sovereign state. *See, e.g.*, Heather A. Wilson, *International Law and the Use of Force by National Liberations Movements* 88 (1990) (concluding that trust territories, mandates, non-self-governing territories and geographically distinct territories possess right to self-determination); R. Emerson, *Self-Determination*, 65 Proc. A. S. I. L. 459 (1971) (stating that self-determination applies only to overseas colonialism and that all peoples do not have the right); Laurence S. Hanauer, *The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case*, 9 Emory Int'l L. Rev. (1995) (in addition to being ethnically or culturally distinct, people possessing right to self-determination must also possess connection to defined territory, which is not organized within already sovereign state); Hurst Hannum, *Rethinking Self-Determination*, 34 Va. J. Int'l L. 1, 32-33 (1993) (only situations where European Power dominated non-contiguous territory in which a majority of population was indigenous or non-metropolitan, has that territory been considered to have absolute right of self-determination).

[138] Grant *supra* note 72, at 177

Declaration on Friendly Relations does not, however, extend this right to minority groups living within an established State possessing a representative government because of the principle of *uti posseditis juris* - the notion that the territorial integrity of existing States must be maintained.[140] As the former UN Secretary General Boutros Boutros-Ghali stated that "if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve."[141] Minority group may enjoy international legal protection, including a right to internal self-determination (e.g., to enjoy their own culture, to use their own language), but a right to external self-determination is not one of them.

It also must be submitted that most commentators, describing Chechnya in the context of right to self-determination, concluded that Republic does not have such a right.[142] Ahrens defining the right of self-determination points out that although all peoples may have a right of internal self-determination – right to enjoy some level of autonomy within a parent State – only in rare, extreme circumstances (e.g., control by a colonial power, human rights abuses) will that translate into a right to secede – a right to external self-determination.[143] He contends even though there may be a right to secede for Chechen people subject to significant human rights violations in the past, it seems that right exists only after the exhaustion of remedies short of full independence (i.e., exploring opportunities for significant levels of autonomy within the parent State).[144] By the time the Soviet Union collapsed, Russia purportedly was ready to offer its constituent part a substantial part of autonomy.[145] Chechnya did not agree and unilaterally declared independence.[146] Ahrens argues that given that Russia was and is willing to give Chechnya a significant degree of autonomy, the Chechens do not have a legal right of self-determination under UN Charter.[147] Only if Russia's offer of autonomy proves to be illusory would the Chechen people perhaps gain such a right.[148] Ahern concludes:

If the Chechens have been denied their right of internal self-determination, their use of some level of force in order to assert that right would be legitimate. Whether their current use of force is illegal is not satisfactory addressed by international law. Because their declaration of independence from Russia was ultra vires, they are still part of the Russian Federation under international law. Therefore the armed conflict is an internal affair.[149]

On the basis of this analysis, one can conclude that the fighting in Chechnya does not constitute the struggle of national liberation. Chechnya lacks the specific dominance regimes and the right to self-

[139] *Id.*
[140] Duncan *supra* note 137, at 819-820
[141] *Agenda for Peace*, U.N. Doc. S/24111, P17 (1992) (Boutros Boutros-Ghali).
[142] *See e.g.*, Jonathan I. Charney, *Self-Determination: Chechnya, Kosovo and East Timor*, 34 Vand. J. Transnat'l L. 455 (2001), Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, 40 Va. J. Int'l L. 117 (1999-2000), Duncan B. Hollis, *Accountability in Chechnya - Addressing Internal Matters with Legal and Political International Norms*, 36 B. C. L. Rev. 793 (1995).
[143] Brandt Ahrens, *Chechnya and the Right of Self-Determination*, 42 Colum. J. Transnat'l L. 575 (2004).
[144] *Id*, at 608.
[145] The success of the Russian federal relationship with Tatarstan, when substantial autonomy was granted, suggests that it may be a useful model for an eventual settlement with Chechnya. *Id*, at 613.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id*, at 609. *See* also Federal Germany Government Reply on Chechnya to the German Bundestag, Document 13/718, 13th legislative period, 9 March, 1995, *cited in* Marco Sassoli, *How Does Law Protect in War* 1404 (ICRC, 1999) (where the Federal Germany Government rejects the idea that Protocols I applies to the situation in Chechnya).

determination under Article 1 (4) Protocol I to invoke the set of provisions provided by Protocol I. This conclusion does not mean, however, that no rules of international humanitarian law apply to the fighting in Chechnya. Both Protocol II and Common Article 3 establish international legal standards of conduct for non-international armed conflicts.

The conditions to be met to fulfill the material requirement of applicability of Protocol II are as follow:

1) an armed conflict that is taking place in Chechnya is between State's armed forces and dissenting organized armed groups;
2) the dissident organized armed groups are:

a) under responsible command;
b) able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and
c) able to implement Protocol II.[150]

I will examine only two conditions that in my view dissident armed groups, namely Chechen fighters, failed to meet: responsible command and ability to implement Protocol II.

Responsible command means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a *de facto* authority.[151] As submitted by most commentators, Maskhadov is the man who represents *de facto* authority of Chechen fighters. Despite the fact that Maskhadov's authority is capable to planning and carrying out sustained military operations it is less certain that he is imposing discipline on individual insurgent groups. Data that appears reliable does not prove that individual armed groups opposing Russian forces are capable of coordinated actions and submitting themselves to Maskhadov de facto authority. These armed groups of fighters were loyal primarily to particular field commanders but not Maskhadov's authority.[152] An example of this is when Chechen fighters, led by field commanders Shamil Basaev and Khattab, had invaded Russian territory in Dagestan in August 1999.[153] This operation was initiated without the knowledge of Maskhadov and was condemned by him.[154] However, he failed to impose any disciplinary actions and heavily relied subsequently on Basaev and Khattab in Chechen insurgency.[155] Another example is developments in October 2002 when Chechen fighters seized a theatre and took 900 people hostage. Basaev, a Chechen commander, asserted responsibility for the theatre attack. However, the leader of Chechen separatists, Maskhadov, disavowed such an attack.[156] At this point one can argue that Chechen insurgency does not possess the sufficient level of responsible command to meet the criteria of Protocol II.

According to ICRC, the insurgents must be in position to implement Protocol II.[157] Cassese argues that Protocol II begins to apply when rebels prove to able to, and do in fact, implement it.[158] This condition is

[150] Protocol II *supra* note 1, art. 1.
[151] ICRC Commentaries *supra* note 112, at 1353.
[152] Miriam Lanskoy, *Chechnya's Internal Fragmentation, 1996 – 1999*, 27 Fletcher F. World Aff. 185, 190 (2003)
[153] Evangelista *supra* note 65, at 63-65. The Russian authorities initiated the second Chechen war as a result of this incursion. *Id.*
[154] *Id*, at 68 (The Chechen president had attempted to discredit the supporters of the incursion into Dagestan. In particular, he issued a degree removing Basaev's ally Udugov from Chechnya's National Security Council).
[155] *Id*, at 69. Author admitted that Maskhadov was powerless to do something because field commanders dominated considerable influence. *Id.*
[156] Peter Baker, *In Russia, Terrorism becomes a fact of life*, Washington Post, 19 Dec. 2003, *available in* LEXIS, Major World News. The paper claims many analysts said they believe Maskhadov does not control all of the movement's factions. *Id.*
[157] ICRC Commentaries *supra* note 112, at 1354

too onerous for the insurgent and I have some doubt whether it can ever be met in practice. Even ICRC Commentary acknowledges that threshold seems fairly high.[159] In practice, insurgents are not willing to live up to international standards they have not accepted. And even if the obligations are not particularly onerous for the insurgents in the sense of compliance, "they will still see a certain lack of reciprocity in the government's having been afforded the opportunity to determine whether to assume the obligations of the Conventions while they, the rebels have not been given the occasions for a like decision".[160] The tactic of kidnapping for ransom, the use of civilians and captured Russian soldiers as shields, taking of hostages and acts of terrorism, including suicide attacks, more than indicate the Chechen rebels' inability to abide by Protocol II. As Kawai suggests, "the willingness of the [Chechen] rebels to observe Protocol II remained somewhat obscure, and therefore the Protocol might not have been applicable".[161]

Clearly Chechen fighters do not satisfy at least two objective conditions required by Article 1 Protocol II and it becomes apparent that no legal basis exists for labeling the Chechen conflict as an internal armed conflict within the meaning of Protocol II.

It seems that considering a collective character of organized Chechen resistance, existence of protracted armed violence and ability of Chechen fighters to exercise effective control within Chechnya, the only humanitarian law provision applicable to Chechnya is Common Article 3.

2.3 LEGAL GAP OF HUMANITARIAN LAW IN THE CONTEXT OF CHECHNYA

Chechen conflict does not fit comfortably into the framework of the Geneva Conventions and Protocols. Clearly, from the point of view of the actual or potential victims, this is an unsatisfactory state of affairs. Material scope of Common Article 3 is narrow and inadequate, with several vital areas of humanitarian law, such as the protection of civilians, methods and means of warfare, the respect for the ICRC and some others, finding no place in its provisions.

According to Common Article 3, Russian forces are not explicitly obliged to distinguish between civilians and combatants and between civilian objects and military objectives and direct their operations only against military objectives, the principle enshrined in Article 48 Protocol I. Russian military tactics adhere to a pattern of directly targeting civilians. As has been stated by Human Rights Watch, three massacres occurred in Chechnya during the second conflict, which have taken at least 130 peoples.[162] In 2003 local officials also admitted the existence of 49 mass-graves containing the remains of 3,000 civilians.[163]

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[158] Antonio Cassese, *The Status of Rebels under 1977 Geneva Protocol*, 30 Int'l and Comp. L. Q. 416, 424 (1981).

[159] ICRC Commentaries *supra* note 112, at 1354. *Travaux preparatoires* clearly indicate States intention to make the threshold of the application of Protocol II as high as possible by qualifying it "to the ability to implement Protocol II". *Id.* A number of States led by Columbia and Brazil wanted Protocol II to apply only when, in addition to the other conditions specified in the final version, the established government expressed its acceptance to the application of the Protocol II. *See*, CDDH/I/SR.29, at 4ff and CHHH/SR.49, at 11ff. Moreover, some delegates such as Pakistan thought a heavy obligation would fall on dissident parties to apply the law first, as an inducement for the government to apply Protocol II. *See*, CDDH/I/SR.23, at 20.

[160] Baxter, *Jus in Bello Interno: the Present and the Future Law in Law and Civil War in the Modern World* 528 (1974).

[161] Kawai, *1977 Protocol II Additional to the 1949 Geneva Conventions and Customary International Law* (May 2001). *See also Chechnya and the Laws of War, available at* http://www.crimesofwar.org/chechnya (Tuzmukhamedov tended towards the view that Protocol II was probably not applicable, doubting whether the Chechen fighters met the necessary requirements, in particularly, willingness to implement Protocol).

[162] Human Rights Watch, *Glad to be Deceived: the International Community and Chechnya* (2004), *available at* http://www.hrw.org

[163] *Id.*

However, in practice, there are no international rules that prohibit such behavior of the Russian troops in internal armed conflict.

According to Chechnya's insurgent Health Minister Russian forces has been using weapons of mass distruction against Chechen fighters and civilians.[164] In particularly, it was alleged that military troops had used bombs packed with poisonous substances, vacuum bombs and mines, which detonations have caused health suffering to civilians.[165] Despite rules in Article 35 Protocol I that ban "to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering",[166] there are no corresponding rules in the context of internal armed context that prohibit similar behavior.

Both sides in the conflict between Chechnya and Russia have alleged ill-treatment and summary executions of captured combatants.[167] Because humanitarian law does not discern the status of prisoner of wars in internal armed conflicts, such ill-treatment, however, would not be considered a violation of Common Article 3.

One can only guess how to protect people who are the subject of widespread so-called cleaning up or mopping operations, conducted by Russian forces in Chechnya and resulted in arbitrary detention and disappearances. Such mopping operations, when a Chechen town or village is completely surrounded and blocked off and house-to-house searches and ID checks are conducted, may smoothly fall within law enforcement measures prescribed by domestic law but absolutely intolerable under Geneva Conventions and Protocol I.

Indiscriminate attacks are prohibited by the law of international armed conflicts. These include attacks not directed at a specific military target as well as attacks by means which cannot be limited to military targets. An attacks which may be expected to cause civilian loses that are "excessive in relation to the direct and concreted military advantage anticipated"[168] is considered to be indiscriminate. Most if not all of these rules appear to have been violated by Russia's bombardment of Grozny – often at night and with weapons that lack pinpoint accuracy. Furthermore, once an attack is launched, it must be cancelled or suspended if it becomes apparent – as in Grozny – that civilian losses are excessive in relation to military gain. In other words, acting within its own borders, Russian forces can pound civilian cities without clear violations of international humanitarian law.

In addition, Common Article 3 does not contain provisions governing their enforcement and implementation. The text of Common Article 3 is silent about of whether sanctions against lawbreakers can be enforced at all in internal armed conflict. The law of international armed conflicts, in contrast, requires States-Party "to provide effective penal sanctions for persons committing or ordering to be committed, any of the grave breaches" listed in the Geneva Conventions and Protocol I and "to search for persons alleged to have committed or to have ordered to be committed, such grave breaches and shall

[164] *Chechen Minister Accuses Russians of Using Chemical Weapons against Civilians*, BBC Monitoring Int'l Reports, 23 Nov. 2003.
[165] *Id.*
[166] Protocol I *supra* note 1, art. 35.
[167] See Alessandra Stanley, *Rebels' Hopes for a Truce with Moscow Collapsing*, N.Y. Times, Jan. 19, 1995, at A6 ("There are no reliable estimates of the number of Russian and Chechen prisoners of war, but each side has accused the other of summary executions and ill-treatment.").
[168] Protocol I *supra* note 1, art. 51.

bring such persons, regardless of their nationality, before [their] own courts".[169] The Russian authorities have perfectly availed of this loophole in practice. As Human Rights Watch points out, Russia "has refused to establish a national commission to investigate charges of serious abuses by Russian troops against Chechen civilians" and "has directly flouted the resolutions of the UN Commission on Human Rights, including by refusing to allow UN monitors access to Chechnya".[170] As far as is known, no high-ranking Russian officer has been meaningfully punished for the participating in the abuse of civilians or the mistreatment of Chechen fighters who have been taken prisoner. In December 2002 the most publicized and celebrity case of a Russian officer to face charges over conduct in Chechnya – the prosecution of the tank brigade Commander Colonel Yuri Budanov, accused of raping and strangling to death an 18-year old Chechen girl – ended with the defendant acquitted on the ground of temporary insanity.[171]

It is obvious that the law of Common Article 3 cannot effectively address the behavior of the actors in Chechnya. This ambiguity has lead to the point when violations and abuses became the norm in the ravage region. Both sides employ the methods of conduct that are illegal within the context of an international armed conflict but are not explicitly prohibited in an internal armed conflict. The conflict in Chechnya reveals the undesirable state of humanitarian law today that there are different laws between international and non-international armed conflicts. This is a strange phenomenon, considering the fact that international humanitarian law should be applicable equally. What is the sense then of Geneva Conventions and Protocols if people in Chechnya during armed conflict can be abused and deprived of their lives with impunity and there are no clauses that outlawing such behavior? The equal treatment to all persons affected by an armed conflict, enshrined in Article 2 Protocol II, sounds futile when there is discrimination in treatment among victims suffered from international armed conflicts and those from internal armed conflicts defined by Common Article 3 and Protocol II.

2.4 NEW TENDENCY IN HUMANITARIAN LAW AND RECOMMENDATIONS

Like all international treaties, Geneva Conventions and Protocols were products of their period about the nature of conflict. Dichotomy contains significant gap lines that limit their effectiveness in restraining the excesses of contemporary conflict. The shifting nature of armed conflicts means that the Geneva Conventions cannot address much of the atrocities committed in internal conflicts – and where Geneva Conventions do address it, some of their inherent weaknesses are particularly exposed.

A recent and welcome trend is blurring the difference of international and internal armed conflicts. The legal commentators argue that distinction is arbitrary and no more reflects the needs of the involved actors and civilian population as well.[172]

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[169] Roberts and Guelff, *Documents on the Laws of War* 16 (2000).
[170] *Cited* from Evangelista *supra* note 65, at 155
[171] *See* Evangelista *supra* note 65, at 152 (describing Budanov case).
[172] *See e.g.*, Stewart *supra* note 29, at 341 ("The absence of any coherent basis for determining the temporal or territorial scope of humanitarian law in territories containing conflicts … stems from uncomfortable relationship between the standards applicable in international and non-international armed conflict"); Boelaert-Suominen *supra* note 25, at 69 ("It is common ground that there is a wide regulatory gap between the two main categories of armed conflicts. The number speaks for themselves: the 1949 Geneva Conventions and the 1977 Protocols alone contain close to 600 articles; of these only [Common] article 3 …, and the 28 articles of [Protocol II], apply to internal conflicts"); Michael W. Reisman and J. Silk, *Which Law Applies to Afghan Conflict?* 82 Am. J. Int'l L. 465 (1988) ("The "distinction" between international wars and internal conflicts is no longer factually tenable or compatible with the thrust of humanitarian law…[P]aying lip service to the alleged distinction simply frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs").

The ICRC study on rules of customary humanitarian law, for example, makes only the basic distinction between international and non-international armed conflicts and seeks a broader recognition that many rules are applicable to both international and non-international conflicts.[173] Most military manuals do not explicitly distinguish between rules applicable in non-international conflicts and in international conflicts and expands the provisions of the Geneva Conventions to internal conflicts.[174] Some armed forces now recognize that the same rules of international humanitarian law should be applicable in all situations involving armed conflict. Thus, an instruction issued by the chairman of the U.S. Joint Chiefs of Staff states that the "Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized."[175]

The recent regulations promulgated by the Secretary-General of the United Nations on the observance by United Nations forces of international humanitarian law[176] restate a broad set of protective norms borrowed from the Geneva Conventions without making any distinction between the international and non-international conflicts in which UN forces are involved.

Strikingly but this modern approach is reflected in the attitude of many of the delegations to the Diplomatic Conference 1974-1977 during the drafting of Protocols to the Geneva Conventions. For example, the Finnish delegate argued that “the same level of protection should be given to the civilian population in all conflict situations … [and] whenever possible the two Protocols should be on identical lines”.[177] The Swedish delegate was of the same view that “all armed conflicts, whatever their magnitude, should be subject to the same humanitarian rules”.[178]

In recent years, remarkable progress has been made in the identification of customary rules and the willingness of States to recognize the extension of Geneva Conventions rules to non-international armed conflicts**.** This progress is mostly attributable to the ICTY, which suggested that customary rules had developed to govern both the internal and international armed conflicts.[179] The Appeals Chamber of the ICTY in the *Tadic* case held that customary rules governing internal conflicts include:
“protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.”[180]

[173] Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int’l L. 239, 262 (2000).
[174] In the *Tadic* case the Appeal Chamber cited provisions from 1992 German Military Manual to illustrate, *inter alia*, that Germany considers violations of Common Article 3 by their army punishable as grave breaches. *See Tadic* case, *supra* note 2, at para. 131.
[175] Chairman, Joint Chiefs of Staff, Instruction 5810.01, Implementation of the DOD Law of War Program (1996), quoted in Corn, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War,* ARMY LAW., June 1998, at 17.
[176] UN Secretary-General, Bulletin on the Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13, *reprinted in* 38 ILM 1656 (1999).
[177] CDDH/SR.18, at para. 15.
[178] CDDH/SR.14, at para. 7. See also the Norwegian delegate at CDDH/SR.10, at para. 3.
[179] *Tadic* case, *supra* note 2, at para. 127
[180] *Id.*

It also held that prohibition of these customary rules entail individual criminal responsibility regardless of the nature of the conflict.[181]

The Martens clause, which originally appeared in Hague Convention IV of 1907 and now incorporated in Geneva Conventions and Protocols refers to the "protection and authority of the principles of international law derived from established custom".[182] ICRC explains that the "principles of international law apply in all armed conflicts according to Martens clause"[183] and whether or not there is the Martens clause in humanitarian treaty, custom is applicable to all States.[184] What are these "principles of international law"? Rogers describes them as military necessity, humanity, distinction and proportionality.[185] The "general principles of international law" can play an important part in ameliorating victims of internal strife. The significance of these principles that they can be applicable to areas of internal conflict which are not regulated by specific rules based on Common Article 3/ Protocol II.

The then President of the ICTY, Antonio Cassese, opined that "there has been a convergence of the two bodies on international law with the result that internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts…".[186] This position reflects the reality that national legislation,[187] international legal instruments[188] and judicial decisions[189] all show that the disparity between the laws applicable to international and non-international armed conflicts is becoming outmoded and eroding. Indeed, as Moir points out "what will matter as regards legal regulation will not be whether an armed conflict is international or internal, but simply whether an armed conflict exists *per se*".[190]

It follows that if intensity of armed conflict similar to those adopted by *Tadic* case or ICC Statute has been triggered, the whole body of humanitarian law must be applied. This approach would exclude internal disturbance, riots and mere banditry from the scope of single body of international humanitarian law, preserving the State's ability to maintain law and order by the means of police law enforcement means, while still including high level intensity conflicts between government forces and insurgents. Furthermore, parties to the conflict will be restricted by the methods and means of conducting warfare, as well as by prohibition of indiscriminate attacks against non-military objects (including civilians). Since the threshold of armed conflict is crossed, insurgent party members should be allowed a specific status, such as exists in international armed conflicts (i.e., combatants and prisoners-of-war).

As has been mentioned in previous Chapter, unlike during inter-State conflict, where captured members of armed forces are entitled of prisoner-of-war status, insurgents may face penal punishment under domestic

[181] *Id*, para. 129.
[182] Protocol I *supra* note 1, preamble.
[183] ICRC Commentary, para. 4435
[184] *Id*, para. 56.
[185] A.P.V. Rogers, *Law on the Battlefield*, 1-26 (1996).
[186] Memorandum of 22 March 1996 to the Preparatory Committee for the Establishment of the International Criminal Court, *cited in* Moir, 51.
[187] *See* Belgium Law of 16 June 1993 concerning repression of grave breaches of the Geneva Conventions and their Additional Protocols; Spain Codigo Penal Law 1995;Article 6 of the United States War Crimes Act 1996; The Dutch Law of War Crimes 1952; Chapter 22, Section 11, of the Swedish Penal Code 1986, *all cited in* Boelaert-Suominen *supra* note 25, at 89-93.
[188] The amended Protocol II of 1996 to the 1980 UN Weapons Convention, the 1997 Ottawa Convention on the Prohibition of Anti-Personnel Mines and the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict all apply equally to international and non-international armed conflicts.
[189] *See* Boelaet-Suominen *supra* note 25, at 93-96.
[190] Moir *supra* note 4, at 51.

law for mere participation in the internal conflict. This leaves little incentive for the insurgents like Chechen fighters to attempt to abide by international humanitarian law. Rather, they will be more likely to use whatever means necessary to "win" the conflict in the hope that as the victorious party they will avoid punishment, both for participating in the conflict and for any violations they might commit along the way. Granting prisoner-of-war status to insurgents would imply that better protection of States' own soldiers can be expected. The governments could also appeal to the international community by stating that it treats captured insurgents humanely in accordance with humanitarian treaties, thereby enhancing their public support in waging internal conflict. It is important to consider the possibility of a granting immunity for participation in the armed conflict. As ICRC report indicates this may be achieved through the granting combatant status or amnesty for insurgents.[191] Alternatively, during a trial of insurgent members, the level of respect for humanitarian law may be taken into consideration when deciding upon punishment or sentences. The granting of these kinds of benefits to insurgents inevitably lead to enhance compliance by non-State actors with humanitarian law and save lives of civilians. Otherwise, if one did not afford Geneva Conventions' protection to those who got stuck in internal conflicts, the governmental authorities would be feeling free to conduct hostility by whatever means they want, to restrict civil liberties and impose arbitrary punishments. There is no valid reason for denying the civilian population protection of the whole body of the Geneva Conventions and Protocols simply because the conflict in which they have found themselves has not met objective criterion of the material scope of application. As ICTY stated in *Tadic* case regarding blurring the line between inter-State and civil conflicts:

Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.[192]

If the conflict in Chechnya achieves nothing else besides civilian suffering, let at least apply the same humanitarian rules to all armed conflicts, internal as well international. Whether or not borders are crossed, the color of the blood is the same.

[191] *Improving Compliance with International Humanitarian Law*, ICRC Expert Seminar (Oct., 2003)
[192] *Tadic* case *supra* note 2, para. 97.

CONCLUSION

The purpose of this thesis was to show, by the example of the Chechen conflict, inadequacy of contemporary international humanitarian law applicable to internal armed conflicts. Because Chechen fighters cannot satisfy the criterion of "High Contracting Party" within the meaning of Common Article 2 of the Geneva Conventions, definition of "national liberation movement" within the meaning of Article 1 Protocol I and failed to meet threshold of Article 1 Protocol II, the Chechen conflict get stuck into legal gap of Common Article 3. Clearly, the only way to give the real international legal protection for those find themselves in ravage Chechnya is in rejecting the traditional dichotomy between international and internal armed conflicts and favoring the application of uniform set of rules applicable in all armed conflicts, regardless of their nature. Otherwise, in the age of increasing numbers of internal conflicts and decreasing numbers of inter-State conflicts, there is a danger that Geneva Conventions and Protocols will be absolutely useless documents and violations of international humanitarian law will became something exceptional, giving to States legal and moral justification in attempt to excuse tremendous atrocities committed during internal conflicts. Hence in the perspective the revision of international humanitarian law should be achieved (e.g. through the adoption of new humanitarian treaties), and in the process of revision, the distinction between international and non-international armed conflicts should be abolished.

ARE THE ATROCITIES IN CHECHNYA GENOCIDE?

by

YURY SCHERBICH*

INTRODUCTION

The armed conflict that the Russian Federation is conducting against the people of Chechnya has already been in progress for more than nine years with a two-year break in the middle. This unbelievably harsh, profoundly destructive and completely amoral conflict has led, in the opinion of some human rights defenders, to virtual genocide of the Chechen nation. In a written statement submitted by the Society for Threatened People to the UN Commission for Human Rights, the Society openly accused the Russian Army and the government of violating the Convention on the Prevention and Punishment of the Crime of Genocide[1] ("Convention" or "Genocide Convention").[2] Another non-governmental organization, the Committee on Conscience at the US Holocaust Memorial Museum has placed Chechnya on its Genocide Watch List.[3]

This means that there is serious potential for genocide and related crimes against humanity. The Committee's concern about genocide in Chechnya is based on the past persecution of the Chechen people,[4] the demonization of Chechens as a group within Russian society[5] and the level of violence directed against Chechen civilians by Russian armed forces.[6] Meanwhile, the situation in Chechnya has never been officially recognised by the United Nations or Western governments as genocide of the Chechen people. At best, the United Nations carefully modulated statements of "alarm" and "concern" about what was going on. And what is more, the UN Human Rights Commission hasn't adopted any resolution condemning Russian authorities for abuses in Chechnya since 2001.

Is the United Nations reluctance to pass a resolution condemning Russia for the genocide of the Chechen people an official confirmation of the fact that the United Nations deliberately encourages the genocide

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[1] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951) [hereinafter Genocide Convention].

[2] E/CN.4/2001/NGO/171.

[3] Committee on Conscience U. S. Holocaust Memorial Museum, *Genocide Watch: Chechnya*, *at* http://www.ushmm.org/conscience/chechnya/pdf/chechnya.pdf.

[4] *See supra* note 40 and accompanying text.

[5] The Committee asserted that "persons of Caucasian nationality", and Chechens in particularly often are referred to pejoratively as "blacks" and are assumed by virtue of their ethnicity to be criminals or terrorists. Throughout the Russian Federation, particularly in larger cities, Chechens suffer discrimination in housing and employment and are subject to arbitrary arrest and harassment. Committee on Conscience U. S. Holocaust Memorial Museum, *Genocide Watch: Chechnya*, *at* http://www.ushmm.org/conscience/chechnya/pdf/chechnya.pdf.

[6] *See* Human Rights Watch "Welcome to Hell: Arbitrary Detention, Torture and Extortion in Chechnya" (October, 2000), "Glad to be Deceived": the International Community and Chechnya" (World Report 2004), *available at* http://www.hrw.org (describing human rights violations against Chechen people).

and helps the Russian authorities to commit the unprecedented massacre of the entire nation? Or perhaps the accusations of genocide in Chechnya are exaggerated and politically and ideologically motivated? To clarify these and other questions about the possible crime of genocide in Chechnya, the author of this Essay will undertake a legal analysis of the situation, set out below.

HISTORY OF THE ARMED CONFLICT IN CHECHNYA

To understand the current crisis in Chechnya and to grasp the significance of the human rights violations and possible existence of a claim of genocide, it is helpful to outline the history of the armed conflict in Chechnya. When the Soviet Union dissolved in late 1991, Chechnya (until then the major part of the Chechen-Ingush Autonomous Republic in Northern Caucasus) declared itself independent. During the following three years Moscow made some attempts to force Chechnya back into the Russian Federation but could not do anything due to the unwillingness of the Chechen government to make any compromise with the Russian authorities about independence. Then in December 1994, after the failure of a Russian supported attempt by the pro-Russian opposition to overthrow the separatist regime, a regular Russian military intervention took place. In figures released by Russian's Human Right's Commissioner, Sergei Kovalev, the Chechens suffered 24,000 civilian casualties over the course of two months from 25 November 1994 to 25 January 1995.[7]

By February 1995, the capital city of Grozny had fallen to Russian troops. The destruction of Grozny has since been widely compared to the battle of Stalingrad in the Second World War.[8] The fighting between Russian and Chechen forces continued until August 1996. During the fighting between 30,000 and 90,000 civilians died.[9] It was during this period that human rights violations peaked.[10] Both sides fought the war without regard to the safety of civilians. Indiscriminate use of air and artillery bombardment left the capital, Grozny, in ruins. Eventually the Russian forces suffered a humiliating defeat and the Khasavyurt Peace Agreement brought an end to the hostilities. In January 1997 the Chechen Chief of Staff, Aslan Maskhadov, was elected as president of the Chechen Republic. A Peace Treaty was signed by Maskhadov and former Russian President Yeltsin in May of the same year. However, due to the devastation brought about by the armed conflict, external meddling by Islamic radicals, escalating crime and inter-Chechen rivalries, Chechnya degenerated into chaos. The inability of Maskhadov to control the situation in Chechnya undermined his legitimacy as a sovereign. Chechen "field commander" Shamil Basayev and his foreign brother-in-arms al-Khattab, in August 1999, lead an attack into neighbouring Dagestan in order to support radical Islamic groups there and with the declared purpose of establishing a Chechen-Dagestani Islamic Republic.

The attack was repelled by Russian and local Dagestani forces. However, the attack against Dagestan and series of apartment bombings that terrorised Russian citizens provided Moscow with justification to launch another armed conflict against the Chechen republic in 1999. Five months of indiscriminate

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[7] *Telephone Interview with Eric Engleman*, Moscow Correspondent, Monitor Radio (Feb. 22, 1995).

[8] Glen Howard, *Chechnya: Quo Vadis?* Presentation at the Central Asia Caucasus Institute. Johns Hopkins University SAIS, 12 May 1999.

[9] Wendy Atrokhov, *The Khasavyurt Accords: Maintaining the Rule of Law and Legitimacy of Democracy in the Russian Federation Amidst the Chechen Crisis*, 32 Cornell Int'l L. J. 367,369 (1999).

[10] *See* Human Rights Watch. *Memorandum on Accountability for Humanitarian Law Violations in Chechnya* (20 October 2000), *at* www.hrw.org/campaigns/eu-summit/chech-memo-1020.htm (noting numerous human rights violations perpetrated by the Russian military against Chechen civilians).

bombing and shelling in 1999 and early 2000 resulted in thousands of civilian deaths.[11] This time the Russian government claimed success. Large-scale combat operation ended in Chechnya in 2000 and Russian troops controlled nearly all of the republic's territory.[12] In March 2003, a referendum "reiterated Chechnya's status as part of Russia".[13] A presidential election followed this referendum in October 2003, resulting in the election of Moscow's supported candidate Akhmad Kadyrov as president of Chechnya.[14] However, despite declaration that the armed conflict is over and won by Moscow, hostilitie continue in the form of guerrilla warfare with considerable losses on both sides and with no prospects for any peaceful solution.

IS THERE A CASE CLAIMING FOR THE CRIME OF GENOCIDE IN CHECHNYA?

In August 2000 the so-called Ministry of Foreign Affairs of the Chechen Republic of Ichkeria issued a press release indicating the Chechen Republic of Ichkeria had instituted legal proceeding against the Russian Federation before the International Court of Justice for violating every substantive provision of the Genocide Convention.[15] It alleged, in particular, that for the past six decades the Russian Federation and the former Soviet Union have ruthlessly implemented a systematic and comprehensive military, political, and economic campaign with the intent to destroy in substantial part the national, ethnical, racial and religious group known as the Chechen People and requested provisional measures of protection against the genocidal behavior of the Russian Federation.[16] Apparently the legal grounds for beginning of the proceedings are contained in Article IX of the Convention, which confer the right to the Contracting Parties to submit the disputes relating to the interpretation, application or fulfillment of the Convention or state responsibility for genocide to the International Court of Justice.[17]

Obviously such a legal claim has never been tried at the International Court of Justice because the Chechen Republic is not an independent state recognized by the United Nations and correspondingly cannot be a Contracting Party to the Genocide Convention.[18] However, such an allegation of genocide is serious one and should not be made lightly. If allegations satisfy the requirements of the genocide definition in Article II of the Convention, that means that theoretically any Contracting Party to the Convention could bring legal proceeding against the Russian Federation. Furthermore, possible crimes of genocide in Chechnya could indicate the existence of a threat to world peace and security under Chapter VII of the United Nations Charter and accordingly could justify international intervention in Chechnya under the auspices of the United Nations. Recent developments in Rwanda, Bosnia and Kosovo support this.

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[11] *See* Human Rights Watch, *Glad to be Deceived: the International Community and Chechnya* (World Report 2004), *at* http://www.hrw.org/wr2k4.htm. It must be acknowledged that the information about the death toll during the two armed conflicts is very vague and contradictory. Chechens Rebel sources have argued about 250,000 civilians of Chechnya died (25% of the population). *See e.g.*, *Russian People Pay the Price of War They Permit, Rebel Chechen Site said, available at* Lexis, BBC Monitoring International Reports, 10 Feb. 2004. Moscow Helsinki Group claims approximately 70,000 civilians died. Moscow Helsinki Group, "*Chechnya 2003: Political Process through the Looking Glass"*, p.12.

[12] Paul Starobin, *Life is Horrible*, Business Week, 16 December 2002, at 52.

[13] *Vote for the Devil*, The Economist, 11 October 2003, at 53.

[14] *Id.*

[15] *See* Press Release Ministry of Foreign Affairs of the Chechen Republic of Ichkeria, № 10-683, 1 August 2000, *available at* http://www.idee.org

[16] *Id.*

[17] *See* Geneva Convention, art. IX, *supra* note 1.

[18] Only States can be Parties to the United Nations Conventions.

Indeed, although the Genocide Convention is principally about the punishment of the crime, the treaty also imposes an obligation of "prevention" upon States.[19] Therefore it is important to clarify the issue of whether or not genocide has been committed against the Chechen people during the two armed conflicts.

DOES THE CHECHEN PEOPLE CONSTITUTES A GROUP PROTECTED BY THE CONVENTION?

Polish law professor Raphael Lemkin contemplated genocide as "directed against the … group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the … group".[20]

The chapeau of article II of the Convention states that the intent to destroy must be directed against one of four enumerated groups: national, racial, ethnical or religious. The list is exhaustive and does not refer to any other kind of groups such as "political", "linguistic" or "economic". For Schabas, the meaning of "racial group" encompasses national, religious and ethnic groups as well as those defined by inherited physical characteristics.[21] Such a broad definition implies that when considering whether the Chechen people constitute a racial group, the question must be envisaged in conjunction with the issue of whether they are a distinct national, religious and ethnic group.

According to the ICTR, the term "national group" refers to "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties".[22] Based upon this definition Chechen people can be referred to as a Russian national group because they possess Russian citizenship. However, killing of members of the perpetrator's own group or auto-genocide is unlikely to constitute genocide under the Convention's provisions. Firstly, that is because the purpose of the Convention was to protect national minorities from hatred crimes. Secondly, it is hard to imagine that perpetrators would kill members of their group having the intention to destroy their own group's existence.[23]

In the *Kayishema and Ruzindana* case, the International Criminal Tribunal for Rwanda ("ICTR") asserted that a "religious group includes denomination or mode of worship or a group sharing common beliefs".[24] Thus identifying Chechen people as a "religious group" involves identifying their religion. Officially Russian state religion is Russian Orthodox Christianity. Chechens, on the other hand, belong to Islam and practice Sunni Islam.[25] However, these characteristics do not render the Chechens to be "religious group" pursuant to Article II of Convention. The protected group must distinguish themselves from the rest of the population of the Russian Federation. In other words, Chechens would not be a "religious group" for the purposes of genocide if among the Russian population there are people who practice the same religion as Chechens but clearly were not targeted during the armed conflict. Ingush people who inhabit Ingushetia

[19] Schabas, *Were the Atrocities in Cambodia and Kosovo Genocide?* Paper presented at the conference "International Jurisdiction: Myths, Realities and Prospects", New England School of Law, November 3, 2000, p.16.
[20] Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington, 1944). p. 79.
[21] Schabas, *Genocide in International Law*, p. 123.
[22] *Prosecutor v. Akayesu* (Case № ICTR-96-4-T), Judgement, 2 September, 1998, para.511.
[23] An example of killing members of the group, to which perpetrators themselves belong, can be seen in the atrocities committed by the Khmer Rouge in Cambodia. According to Schabas, mass killing along the line of the crimes committed by the Khmer Rouge might be qualified as crimes against humanity but not genocide. Schabas, *Genocide in International Law*, p. 118-120.
[24] *Prosecutor v. Kayishema and Ruzindana* (Case № ICTR-95-1-T), Judgement, 21 May 1999, para. 98.
[25] See Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, 40 Va. J. Int. 115, 120-124 (1999-2000).

on the border of Chechnya belong to the Chechens' religious group by virtue of their practice of Sunni Islam.[26] However, in contrast to the Chechens, Ingush always have been loyal to the Russian authorities and have not been prosecuted either during Stalin's repressions in 1944[27] or during armed conflict in Chechnya. Hence, it can not be said that Chechens are the object of genocide for religious motives because of their practice of Sunni Islam.

Still "ethnic group" criterion may be relevant. The ICTR wrote: "An ethnic group is one whose members share a common language and culture; or a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).[28] The Chechens are believed to have inhabited the North Caucasus for thousands of years.[29] Unlike the Russian people, Chechens are not Slavs. They distinguished themselves from Russian people and call themselves *vainakh,* translated "our people".[30] They speak a distinctive Caucasian language which is different from both the Slavic and the Turkish languages prevalent in the area. The Chechen tongue is part of the Ibero-Caucasian group.[31] Further, the Chechen culture and traditions are different from those of the Russians.[32] In addition, as was mentioned above they practice Sunni Islam.

Chechens are closely related to the Ingush but still belong to a different ethnic group. Despite being descended from the eastern branch of the *vainakh* people, the Chechens throughout history have distinguished themselves as *noxchi* and the Ingush as *galgai*.[33] Furthermore, Russians through early encounters with them observed differences in the two dialects of the *vainakh* and referred to them by different names.[34] The aforementioned indicates that the Chechen ethnic group has an objective existence.

In the opinion of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") "[i]t is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community."[35] In the eyes of the Russians, Chechens often are referred to pejoratively as "blacks" and are assumed by virtue of their ethnicity to be criminals, terrorists or bandits.[36] Therefore, one can argue that the subjective approach, favored by the ICTY, is met as well.

Hence, it can be said that Chechens accord to objective and subjective criteria, to constitute a distinct ethnic group in Russian society and can be contemplated as a protected group pursuant to Article II of the Convention.

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[26] *Id.*
[27] For the discussion of the Stalin's repressions, *see supra* notes 40-44 and accompanying text.
[28] Prosecutor v. Kayishema and Ruzindana, para. 98.
[29] Anna Zelkina, *Islam and Society in Chechnya,* 7(2) Journal of Islamic Studies 240 (1996)
[30] Thomas D. Grant, *A Panel of Expert for Chechnya: Purposes and Prospects in Light of International Law,* p. 120-124.
[31] *Id.*
[32] Traditional social organization among Chechens is patriarchal, clan-based, as distinct from hierarchical, due to the absence of feudalism in Chechen history, and has the practice of blood feuding. *See, generally* Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law,* p. 120-124. V.B. Vinogradov & N.P. Gritsenko, *Chechen-Ingush Autonomous Soviet Socialist Republic*, 29 Great Soviet Encyclopedia (Macmillian, Inc. trans., 1982), p. 79.
[33] Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law,* p. 120-124.
[34] *Id.*
[35] *Prosecutor v. Jelisic* (Case № IT-95-10-T), Judgment, 14 December 1999, para 70.
[36] *See supra* note 5.

Actus reus of genocide

Article 2 of the Convention comprises five exhaustive acts constituting the crime of genocide:

(a) Killing members of the group;
(b) Causing seriously bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent birth within the group;
(e) Forcibly transferring children of the group to another group.[37]

The Russian Criminal Code adds to the above list the forcibly resettling of the protected group.[38] This mainly reflects the stigmatization by Russian authorities of the historical events that occurred in the Soviet Union during Stalin's regime when people were forcibly deported from their homes to Central Asia and Siberia. Chechens were one of the groups who did not escape Stalin's great terror which virtually eliminated the educated leadership of Chechnya.[39] After Stalin ordered the deportation of Chechens en masse to Central Asia in 1944, as many as three out of every ten Chechens died during the transport, resettlement and first years of exile.[40] Not until 1957 were Chechens allowed returning home.[41] Such actions were subsequently condemned by the international community and the Russian State. These acts undisputedly constitute the crime of genocide, given the fact of mass extermination of the entire Chechen population and Stalin's intention to destroy Chechens as a whole.[42]

From the standpoint of the present armed conflict in Chechnya at least two acts constituting material elements of genocide may be imputed to Russian military forces – those listed in paragraphs (a) and (b) of Article II of Convention. Associating the acts of murder and causing seriously mental or bodily harm is not problematic, since according to different media and non-governmental reports numerous killings were committed by Russian forces against both Chechen insurgents and the civilian population.[43] Indiscriminate bombing and shelling during the first armed conflict and at the beginning of the second armed conflict resulted in thousands of civilian deaths.[44]

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[37] Genocide Convention, art. 2

[38] Russian Criminal Code, art. 347.

[39] John B. Dunlop, *Russia Confronts Chechnya: Roots of Separatism Conflict*, p. 39-56. The period of forced collectivization had a great impact on the Chechen population. The all-union census figures for 1937 and 1939 illustrate that in 1937 the figure for Chechens living in the Soviet Union was 435,992. Just two years later that figure had diminished to 400,344. *Id*, p. 56. The more terrible events happened during the second World War when Chechens organized an insurgence in an attempt to support the Nazis. *Id*, p. 58. As punishement Stalin decided to deport the Chechens en mass to Central Asia. *Id*, p. 61-72. He justified his action by claiming that all Chechens (not just the participants in the insurrection) were traitors and had supported the Nazis – an obviously false claim, particularly given that thousands of Chechens actively had enlisted in the Red Army. *Id*, p. 58-59.

[40] "*Genocide Watch: Chechnya*", Committee on Conscience, US Holocaust Memories Museum, *available at* www.ushmm.org/conscience/chechnya.

[41] *Id.*

[42] The European Parliament on 26 February 2004 adopted a declaration which officially recognized Stalin's deportation of the Chechen people on 23 February 1944 as an act of genocide. *Rebel President Urges Europe to Recognize Chechen War as Genocide, available at* Lexis, BBC Monitoring International Reports, 18 March 2004.

[43] Human Right Watch asserts three massacres have occurred in Chechnya that took the lives of at least 130 people. Human Right Watch, "*Glad to be Deceived": the International Community and Chechnya*" (World Report 2004), available at http://www.hrw.org

[44] *Id.*

Also serious bodily and mental harm to members of the Chechen ethnic group was caused by arbitrary detention, ill-treatment and torture.[45] Such violent acts, and case law of international tribunals confirm it, may fall within the ambit of paragraph (b) of Article II, namely causing seriously bodily or mental harm to members of the Chechen group.[46]

Paragraphs (a) and (b) of Article II of the Convention specify that the victim must be a member of the protected group that is the target of the genocide in question. If the abovementioned acts were committed against individuals who were not members of Chechen ethnic community (e.g. Russian or Ingush ethnic group) the perpetrators would not be held responsible for genocide but for ordinary crimes under domestic law.

MENS REA OF GENOCIDE

Article 30 of the Rome Statute declares that the mens rea or mental element of genocide has two components: knowledge and intent.[47] According to the Statute "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.[48] Thus, the accused must have knowledge of the circumstances of the crime and for genocide to take place there must be a plan.[49] In Kayishema and Ruzindana, the ICTR assured that "although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out genocide without a plan or organization".[50] The requirement implies that at least a general plan to destroy the Chechen population exists and this plan must be known to the competent Russian authorities including top military personnel who were responsible for the operation in Chechnya. However, to the knowledge of the author of this Essay, there is no evidence that a plan to commit genocide in Chechnya has ever existed. Furthermore, the Russian policy in Chechnya during the first and second armed conflict was built on a plan to preserve Russia from disintegration and impose order and discipline in the region. In the absence of plan to commit genocide in Chechnya, in practice it would be impossible to prove knowledge/ awareness of the circumstances.

The second element of mens rea of genocide is intent. The Statute of the International Criminal Court states that a person has intent where, in relation to conduct, that person means to engage in the conduct; in relation to the consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.[51] But the words "with intent" that appear in the chapeau of Article II of the Genocide Convention do more than simply reiterate that genocide is a crime of intent.[52] Article II of the Genocide Convention introduces a precise description of the intent, namely "to destroy, in whole or in

[45] *Id.*
[46] See, e.g. *Prosecutor v. Akayesu* (Case № ICTR-96-4-T), Judgment, 2 September 1998, para. 503 (the ICTR ruled the term "serious bodily or mental harm to mean act of torture, be they bodily or mental, inhumane or degrading treatment, persecution").
[47] "Rome Statute of the International Criminal Court", UN Doc. A/CONF.183/9, art. 30
[48] *Id*, art. 30 (3).
[49] William A. Schabas, *Genocide in International Law, Cambridge*, Cambridge University Press, 2000, p. 207. The requirement of a plan is supported by case law. In ruling on the sufficiency of evidence in the case law of *Karadzic and Mladic*, who were charged with genocide, the ICTY spoke of a "project" or "plan". *Prosecutor v. Karadzic and Mladic* (Case № IT-95-R61, IT-95-18-R61), Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para.94.
[50] *Prosecutor v. Kayishema and Ruzindana* (Case № ICTR-95-1-T), Judgement, 21 May 1999, para. 94.
[51] "Rome Statute of the International Criminal Court", UN Doc. A/CONF.183/9, art. 30 (2).
[52] . Schabas, *Genocide in International Law, Cambridge*, p. 214.

part, a national, ethnical, racial or religious group, as such".[53] The reference to "intent" in the text indicates that the prosecution in the alleged case of genocide in Chechnya must go beyond establishing that Russian authorities meant to engage in the unlawful act, and meant to cause victims' death or mental (or bodily) harm. The offender must also be proven to have a "specific intent" or *dolus specialis*[54] which means the specific intent to destroy, in whole or in part, the Chechen ethnic group by the acts specified in Article II of the Convention. Although some aspects of Russian actions seems to fall within the parameters of the genocide definition (e.g. material element of the crime), there was no indication that Russian decision-makers of the "counter-terrorism operation" in Chechnya possessed the requisite specific intent. Russian authorities deliberately targeted and exterminated Chechen fighters but not the civilian population. According to Margelov, the Russian spokesman on the conflict in Chechnya, "[w]hat Russia does in Chechnya is not fight against Chechens as a nation; it is to fight against terrorism".[55] Civilians were indiscriminately killed because they were suspected of being Chechen fighters or because they were in areas thought to be supporting guerrilla forces. Media and NGO reports confused the false proposition that the Russian armed forces killed Chechen civilians because they were Chechens with the true proposition that Chechen civilians were killed because they were in the way of the Russian armed forces or simply ignored the warnings about the evacuation from zones of combat.[56] Undoubtedly indiscriminate killings of civilians are illegal but it is the mental element that distinguishes genocide from homicide. The systematic and intentional murder of ethnic minorities, absent the intent to exterminate such group, remains punishable as mass murder under domestic law and as a crime against humanity and war crime under international law.

To some extent the fact that Russian authorities investigated and opened cases against those members of Russian armed forces who committed war crimes and crimes against humanity, indicates the lack of the intention to destroy the Chechen ethnic group.[57] The government blamed many of the crimes on soldiers' drunkenness, denying that their activities received any official authorization. In the view of the author of this Essay the killings of civilians occurred mainly due to the irresponsibility of the Russian military command, lack of elementary military preparation and insufficient training for troops. Even Russian president Putin admitted that many of the losses could have been avoided in Chechnya with better discipline, professionalism and responsibility.[58]

The mental state of mind of the Russian armed forces can be described as recklessness (or *dolus eventualis*) which is definitely excluded from the crime of genocide.[59] Recklessness is a state of mind where the person foresees that his action is likely to produce its prohibited consequences, and nevertheless takes the risk of so acting.[60] The scale of killings among Chechen civilians might indicate that the Russian authorities were aware of and consciously disregarded a substantial risk that result, namely the destruction

[53] *Id*.
[54] *Id.*
[55] BBC News, *Chechnya: Is Russia in the Wrong?*, at http://www.genocideprevention.org/
[56]Such as in December 1999, before bombing Grozny, Russian aircrafts dropped leaflets over the city, warning civilians the Russian military would consider those remaining past December 11, "terrorists and bandits [who] will be destroyed by artillery and aviation" and suggesting their leave via "safe corridors". Abraham, Shara, *"Chechnya: Between War and Peace"* (2001) 8 Human Right Brief 9, p. 10.
[57] Lieutenant General Yury Jakovlev, first deputy prosecutor for the Ministry of Defense, claimed in October 2001 that his office had reviewed 1,700 criminal cases since the start of the second armed conflict. Evangelista, p.150.
[58]Crimes of War Project, *Chechnya: the World Looks Away*, p.7, available at http:// www.crimesofwar.org/archive/archive-russia.html
[59] See, e.g. Schabas, *Genocide in International Law*, p. 212. Antonio Cassesse, International Criminal Law (Oxford: Oxford University Press, 2003), p. 103.
[60] Antonio Cassesse, International Criminal Law, p.168.

of the Chechen ethnic group, would occur. In the view of the Essay, Russian military forces envisaged this result as possible or likely and took the risk of doing so; however they did not desire the result. The intent pursued by the Russian actors was the complete destruction of the Chechen rebel forces (not civilians) and they knew that they would achieve it by their actions. Hence, it can be proved that Russian forces intended to exterminate Chechen fighters;[61] however, there is absolutely no proof that killings of civilians was a "specific intent" to annihilate the whole Chechen population. So, can one argue that genocidal intention towards only Chechen fighters and their leaders is sufficient to produce the crime of genocide within the meaning of the Genocide Convention? In other words is it conceivable that an intention to destroy the group "selectively" by directly targeting exclusively Chechen insurgents is a crime of genocide?

The sentence of Article II of Convention says that an act of genocide must be committed with the intent to destroy a protected group in "whole or in part". The preparatory work of the Convention provides little guidance as to what the drafters meant by "in part". The French delegation argued that crime of genocide occurred as soon as an individual became the victim of acts of genocide.[62] New Zealand suggested that "in whole or in part" might imply genocide had been committed even where there was no intention of destroying a whole group.[63] The United States delegation, on the other hand, worried about "broadening" the concept of genocide to cases where "a single individual was attacked as a member of a group".[64] When it eventually ratified the Convention, in 1988, the United States attached a declaration affirming that the meaning of Article II is "in whole or in substantial part".[65]

The position of the United States was reproduced recently in the case law of the ICTY and ICTR. In *Kayishema and Ruzindana* the ICTR said "that "in part" requires the intention to destroy a considerable number of individuals".[66] Two cases from the ICTY have required that the alleged acts for which a defendant stands trial affect a "reasonably substantial number of the group relative to its total population" prior to making any inference of the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such."[67] It further divided "in whole or in part" into two possible forms. "In part" first refers to "desiring the extermination of a very large number of the members of the group" and/or secondly to "the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group."[68] The first form (quantitative dimension) would constitute an intention to destroy a group en masse.[69] That is exactly what happened in 1944 when Stalin deported entire Chechen people to Central Asia. However in the present case, as has been mentioned above, Russian authorities intended to destroy only Chechen fighters and their leaders. This select group constitutes a tiny proportion of the whole Chechen ethnic population and sources suggest they composed approximately 10,000-20,000 members. According to the 1989 census the total population

[61] In an interview on the Russian television network RTR, Putin claimed that "[T]his people [Chechen fighters] must be destroyed. There simply is no other response." Robyn Dixon, *Caucasus: as Tensions Mount, Putin Says '96 Peace Deal With Republic was a Mistake and Fighters Must be Crushed,* Los Angeles Times, 20 Sept. 1999, at A1. *available in* Lexis, Major World Newspapers.

[62] UN Doc. A/C.6/224. France's proposal "had the advantage of avoiding a technical difficulty … namely that of deciding the minimum number of persons constituting a group". UN Doc. A/C.3/SR.73 (Chaumont, France).

[63] UN Doc. A/C.6/SR.73 (Reid, New Zealand).

[64] UN Doc. A/C.6/SR.73 (Gross, United States).

[65] *See generally* Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding,* 78 Am. J. Int'l L. 369 (1984) (describing the complicated history of ratification in the United States).

[66] *See Prosecutor v. Kayishema and Ruzindana*, *supra* note 51, paras.81-2.

[67] *Prosecutor v. Sikirica* (Case № IT-95-8-PT), Judgment, 3 September 2001, paras. 67-75 (analyzing genocidal intent of the defendant under ICTY Statute). *See* also *Prosecutor v. Jelisic*, *supra* note 36, paras. 66-77.

[68] *Prosecutor v. Jelisic*, *supra* note 36, paras. 81-82.

[69] *Id*.

of the Checheno-Ingush Autonomous Soviet Socialist Republic was made up of 1,275,500 people.[70] Out of the total population of 1,275,500, 734,500 were Chechens. There is no exact data about the ethnic composition of the population of Chechnya proper as of 1989. Cherkasov estimates this as 715,000.[71] A number of approximately 10,000-20,000 Chechen fighters out of total population 715,000 in the Chechen Republic would represent between 1,39% and 2,79% of the Chechens in the region. Can one argue that between 1,39% and 2,79 % potential victims may refer to substantial number of the Chechen group relative to its total population? As one can see the number of potential victims of genocide is negligible and it is very unlikely that such portion of the people can be regarded as substantial part of the whole ethnic group. In much the same way in the *Sikirica case* the ICTY considered that the number of victims "[b]etween 2% and 2,8% of the Muslims … would hardly qualify as a "reasonably substantial" part of the Bosnian Muslim group…".[72]

The second form of "in part" (qualitative dimension) requires a "significant section of a group such as its leadership" to be destroyed to constitute genocide.[73] Thus, it is important to determine whether discriminatory extermination of Chechen fighters would have an impact on the survival of the Chechen ethnic group as such. Obviously such people must be distinguished people of their nation (political, administrative, intellectual or religious leaders) whose killings would inevitably result in the physical disappearance of the Chechen ethnic population in Chechnya. The Chechen separatists represent the most radical group of the total ethnic group. Can one say that people who practice acts of terrorism[74], hostage taking (including foreign nationals)[75], kidnappings, drug trafficking and other criminal acts strictly prohibited under domestic and international laws are leaders of the Chechen nation? The level of violence committed by the Russian military forces is undeniable but the Chechen separatists were not better in their tactics. If nations associate themselves with criminal elements who are eliminating another nation it is hard to perceived that such a nation would have the right of self-existence in the eyes of the international community. The recent presidential elections in Chechnya proved somewhat different. In the course of election in Chechnya in 2003, the victorious candidate who won with 82,5% of the votes, opposed the Islamic extremism and terrorism and was unofficially supported by Russian authorities.[76] Doubts about the legitimacy of these elections were raised in media reports.[77] The most international organizations, e.g. OSCE, did not participate in observations and declined to send election observers. Despite this fact, the election results were not openly declared as unfair and invalid by international community. On the assumption that elections were legitimate and democratic, since it is not officially submitted otherwise, one can argue that the result of the elections proved that the Chechen people, tired by the conflict, at least distanced themselves from Chechen separatists. Many Chechens who formerly supported the Maskhadov regime have been alienated by the growing foreign Islamist influence in the insurgents' camps. They have voted for new political leaders. These elections, at some level, prove that the Chechen people do not

[70] Alexander Cherkasov, "Book of Numbers – Book of Lost" in *Chechnya 2003: Political Process Through the Looking Glass* (Moscow Helsinki Group, 2004), p. 155-156.
[71] *Id.*
[72] *Prosecutor v. Sikirica*, para. 72.
[73] *Prosecutor v. Karadzic and Mladic* (Case № IT-95-18-R61, IT-95-5-R61), Transcript of hearing of 27 June 1996, p.15.
[74] Thus, the explosions of apartment houses in autumn 1999 in Buinaksk, Moscow and Volgodonsk resulted in mass human casualties of over 1500 people. Ushakov, Yury V., "*Humanitarian and Legal Aspects of the Crisis in Chechnya*" (1999-2000) 23 Fordham International Law Journal 1155, 1161.
[75] According to the Ministry of the Interior, by the end of 1999 the number of hostages had totalled 506 persons,including 53 women, 8 children, and foreign nationals from six countries. Between 1991 and 1999, 46,000 were abducted and enslaved. Ushakov, Yury V., "*Humanitarian and Legal Aspects of the Crisis in Chechnya"* (1999-2000*)* 23 Fordham International Law Journal 1155, 1158.
[76] *See generally,* Moscow Helsinki Group, *"Chechnya 2003: Political Process through the Looking Glass",(*Moscow, 2004)
[77] *Vote for the Devil*, The Economist, 11 October 2003, p. 53.

regard the Chechen fighters as the leaders of the nation. Thus, the Chechen fighters cannot constitute the "significant section of a group" and their extermination by the Russian forces does not impact upon the mental element of the crime of genocide.

Another obstacle to holding Russian authorities culpable for the crime of genocide is a motive. There is no explicit reference to motive in Article II of the Genocide Convention, however, the words "as such" are meant to express the concept.[78] During the drafting of the Convention, the Soviet Union delegation stated that "a crime against a human group became a crime of genocide when that group was destroyed for national, racial or religious motives".[79] In the *Jelesic case*, the ICTY addressed this issue when it refered to "[a]cts committed against victims because of their membership in a national, ethnical, racial or religious group".[80] In other words, the crime must be motivated by hatred of the group.[81] The Russian government repeatedly insists it is conducting an anti-terrorist operation in Chechnya and preserving territorial integrity in the State. Even assuming that the intention of the Russian authorities is to destroy the Chechen ethnic group, it is more likely that such crimes are motivated by political ambitions (electorate support, etc.), economic (Chechnya is too rich in oil to abandon, etc.) and strategic interests (control over Caucasus region) in the region. Indeed, after the humiliating defeat in the first armed conflict, the second conflict in Chechnya was accompanied by strong public support among the Russian population. The Russian territory was invaded by the Chechen separatists. This invasion was accompanied by acts of terrorism against Russian citizens. Public opinion held the government had a legal and moral right to crush the enemy. Obviously, those Chechen separatists, linked with international terrorist organizations, presented a real threat to Russian statehood and the security of Russian citizens. Therefore the motive for the crimes that Russia are committing in Chechnya every day is not reasoned by hatred to the Chechen people but grounded upon political and economic expediency to end the conflict. When people are targeted because of the political or economic interests of those who govern the State, it is not genocide. In particularly, Persecution on political grounds, on condition that other criterions are met, is a crime against humanity.

KOSOVO AND CHECHNYA: ARE THERE ANY DIFFERENCES?

In the view of the author of this Essay there is no clear parallel between genocide in Kosovo and the situation in Chechnya. Firstly, in Kosovo, Serbian leader Slobodan Milosevic basically ran the whole population out of the country based on their ethnic origin. In Chechnya**,** Russian military forces deliberately executed Chechen separatists and those associated with them. The war on terror and State sovereignty rather than ethnic origin is the motive of the crime in Chechnya. While there are no doubts that Muslims in Kosovo fought against the Serbians and that ethnicity largely divided the parties, it is more likely that the motive for action was the extermination by one of the other. Instead, it is entirely conceivable that the conflict, as in Chechnya, was a result of a nationalist agenda and an effort by the dominant Government to maintain control of a crumbling nation against increasing state defections.[82] Also, using the tactics, such as terrorism and hostage takings, the Chechen fighters provoked the Russian authorities into revenge against the Chechen population. Bill Clinton, when he made the distinction between the situation in Chechnya and Kosovo, underlined that rebellion forces "bear their share of

[78] Schabas, *Genocide in International Law*, p. 245.
[79] UN Doc. A/C.6/SR.75 (Morozov, Soviet Union).
[80] *Prosecutor v. Jelisic*, *supra* note 36, para. 66.
[81] Schabas, *Genocide in International Law*, p. 255.
[82] Geoff Larson, *The Right of International Intervention in Civil Conflict: Evolving International Law on State Sovereignty in Observance of Human Rights and Application to the Crisis in Chechnya*, 11 Transnat'l L. & Contemp. Probs. 252, 274 (2001).

responsibility. . . . I think some of them actually wanted the Chechen civilians attacked."[83] Secondly, the Russians have not gone from village to village rounding up civilians and forcing them to leave. They have instead bombed and shelled villages and cities from afar. One can argue that the effect has been much the same. However, similar tactics were used by NATO forces during the bombing campaign of the Former Yugoslavia. The result is well-known – the International Court of Justice declined to condemn such actions as genocide. Thirdly, unlike in Kosovo, there have been no reports of Russians massacring Chechen prisoners or civilians. At best, the data collected by the credible organizations may indicate torture and rape of Chechen prisoners.

CRIMES AGAINST HUMANITY AND WAR CRIMES?

Even if genocide has not been committed by the Russian authorities, crimes against humanity and war crimes may have been. Murder, torture, rape, enforced disappearance, lacking specific genocidal intent, when committed as a part of widespread and systematic attack on the civilian population, are listed as crimes against humanity in the Rome Statute of the International Criminal Court. The Russian Federation has signed the Statute but not ratified it. So, the International Criminal Court can not exercise jurisdiction over any crimes committed in Chechnya. Meanwhile, Russia is a party to the Geneva Conventions of 1949 and Additional Protocols to them. As a non-international armed conflict, the violence in Chechnya falls under Common Article 3 of the Geneva Conventions, which forbids the killing, ill-treatment and torture of those not taking part in hostilities. In addition, armed conflict in Chechnya is quite possibly covered by Additional Protocol II to the Geneva Conventions of 1977.[84] This forbids violence against those not taking part in hostilities, collective punishments, outrages against personal dignity and pillage.

CONCLUSION

As has been shown above there are no legal grounds to claim that the crimes committed by Russian forces amount to genocide. It is important to underline that by this statement the author of the Essay does not justify or try to excuse the atrocities committed by the Russian troops in Chechnya. Those specific acts, while horrible, do not rise to the threshold of genocide enshrined in the Article II of the Genocide Convention. Obviously, NGO and media reports are tempted to call Russian actions in Chechnya genocide because they are outraged by the level of violence against civilians, the number of dead and the methods employed by the military forces (e.g. aerial bombardment, etc.). However, in the case under discussion – Chechnya – the debate is about the use of the term genocide, and not about whether or not terrible atrocities have taken place. As any crime, the crime of genocide has a material and mental element. Meanwhile, the accusations of genocide in Chechnya are reasoned mainly by the material element – killings, torture, disappearance, etc. This Essay argues that atrocities in Chechnya lack a sufficient proof of intent to destroy the Chechen ethnic group in whole or in part to be labelled as a crime of genocide. In addition, this Essay claims the existence of legal grounds to claim that the systematic and widespread character of the crimes committed in Chechnya may be qualify as crimes against humanity or at least war crimes.

[83] Clinton interview with CNN.com, *cited at* The Washington Post, 20 Feb., 2000, at B07.
[84] For discussion of the law that applies to the Chechen conflict, *see* Crimes of War Project: Expert Analysis, *Chechnya and the Laws of War*, *available at* http://www.crimesofwar.org/expert/chechnya.html

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LES CONFLITS ARMÉS À CARACTÈRE NON-INTERNATIONAUX « INTERNATIONALISÉS »

par

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L'arrestation de Slobodan Milosevic, ex-président de la Serbie, le samedi 31 mars 2001, démontre le développement radical du droit international humanitaire applicable dans les conflits armés depuis les dernières dix année. Une différence marquée dans l'application du droit apparaît ainsi d'une manière contrastante si l'on compare le travail des tribunaux de juridiction internationale tels le Tribunal pénal pour l'ex-Yougoslavie (TPIY) et le Tribunal pénal international pour le Rwanda (TPIR) avec les travaux de la Commission sur la responsabilité de la guerre (1919) qui déclara que le Kaiser Wilhelm II n'était pas coupable de crime de guerre mais d'un crime moral contre l'humanité. Pour le seul TPIY, 58 accusés sont mis au banc.

Toutefois, ces actions juridiques de la communauté internationale ne sont font pas sans heurts. En effet, le TPIY et le TPIR sont confrontés à plusieurs difficultés. Ils doivent adopter des solutions nouvelles du fait de l'évolution du droit international humanitaire, particulièrement avec l'application des *Conventions de Genève du 12 août 1949* et de leurs *Protocoles additionnels de 1977*. Ceux-ci divisent les régimes de droit applicables en deux catégories qui, si elles représentaient la réalité lors de leurs rédactions, ne se conforment que partiellement à la réalité de la période de l'après-guerre froide.

Cette problématique s'est imposée au TPIY dans l'affaire *Le Procureur c. Dusko Tadic alias « Dule »*[1]. Confronté à une situation où le régime de droit applicable dépendait du type de conflit armé en cause, le TPIY a dû longuement déterminer les faits de l'affaire en vue de pouvoir établir si l'accusé était coupable de violations graves des *Conventions de Genève*. La détermination de la Chambre d'appel, dans son arrêt[2], fut la qualification de l'existence d'un conflit armé non-international « internationalisé » par l'intervention de tiers-États.

Si ce jugement ne compromet pas la nature des conflits décrits dans les instruments de droit international humanitaire, il porte néanmoins le problème de la détermination de la nature du conflit à un niveau beaucoup plus technique. Or, le type de conflits tels que ceux qui ont ravagés et ravagent toujours les Balkans sont le prototype même des conflits inter-ethnies qui secouent plusieurs autres régions du monde. Pour ces raisons, la compréhension du conflit armés à caractère non-international « internationalisé » s'avère d'une importance majeure puisque ce sera en toute probabilité le type de conflit prédominant des vingt prochaines années.

Pour être en mesure de connaître le régime de droit international humanitaire applicable, un examen approfondie de ce nouveau genre de conflit, dit « mixte », la présente recherche visera à établir les situations où il est applicable. Dans ce but, il sera d'abord examiné les deux catégories de conflits armés reconnus dans les instruments de droit international humanitaire et leurs régimes respectifs. Ensuite, le développement d'un conflit armé non-international « internationalisé » sera analysé au travers de la doctrine, puis au travers de l'affaire du *Nicaragua*. Finalement, l'affaire *Tadic* sera

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[1] *Procureur c. Dusko Tadic* (1995), Affaire n° IT-94-1-AR72 (Tribunal Pénal International pour l'ex-Yougoslavie, Chambre de 1ère instance), en ligne : Nations Unies <http://www.un.org/icty/tce14.htm> (date d'accès : 28 novembre 2000) [ci-après *Tadic*].

[2] *Procureur c. Dusko Tadic*, (1999), Affaire n° IT-94-1-AR72, (Tribunal Pénal pour l'ex-Yougoslavie, Chambre d'appel), en ligne : Nations Unis <http://www.un.org/icty/tadic/appeal/judgement/main.htm>, (date d'accès : 30 novembre 2000) [ci-après *Tadic, Chambre d'appel*].

analysée au regard de la jurisprudence précédente pour expliquer les éléments qui composent le conflit armé à caractère non-international « internationalisé ».

LE RÉGIME APPLICABLE DANS LES CONFLITS ARMÉS INTERNATIONAUX ET NON-INTERNATIONAUX

Le droit international humanitaire n'est pas chose nouvelle : depuis le *General Order no. 100*[3], aujourd'hui appelé « Code Lieber » du nom de son auteur, des efforts constants de codification des us et coutumes de la guerre ont été fait pour limiter les souffrances résultant de l'usage des armes lors de conflits[4]. Le développement du droit de la Haye[5], concernant les règlements des méthodes et moyens de combat et du droit de Genève[6], concernant quant à lui la protection des victimes des conflits armés, démontre toutefois que ces efforts de codification concernaient principalement les conflits armés opposant des États entre eux, même si les conventions de la Haye ont abordé succinctement la question des combattants irréguliers[7].

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[3] *Instruction for the Government of Armies of the United States in the Field*, Washington, 24 avril 1863.

[4] Le code Lieber fut en large partie l'élément déclencheur du développement du droit international humanitaire. Son influence sur le *Projet de Déclaration de Bruxelles concernant le droit et la coutume de la guerre*, Bruxelles, 27 Août 1874 et de celle-ci sur les *Conventions de la Haye de 1899* (*Acte final de la Conference Internationale de la Paix*), 26 Martens Nouveau Recueil (sér. 2) 258 est claire.

[5] Dont les conventions aujourd'hui applicables sont principalement : *Déclaration à l'effet d'interdire l'usage de certains projectiles en temps de guerre. Saint Petersbourg*, 18 Martens Nouveau Recueil (sér. 1) 474, 138 R. T Consol. 297, entré en vigueur le 29 Novembre/11 Décembre, 1868 *Convention (IV) concernant les lois et coutumes de la guerre sur terre et son Annexe: Règlement concernant les lois et coutumes de la guerre sur terre*, 3 Martens Nouveau Recueil (sér. 3) 461, 187 R. T. Consol. 227, entrés en vigueur le 26 janvier 1910 ; *Règles concernant le contrôle de la radiotélégraphie en temps de guerre et la guerre aérienne fixées par une Commission de Juristes à La Haye, décembre 1922 - février 1923* ; *Protocole concernant la prohibition d'emploi à la guerre de gaz asphyxiants, toxiques ou similaires et de moyens bactériologiques*, Genève, 94 R.T.S.N. 65, entré en vigueur le 8 février 1928 ; *Procès-verbal concernant les règles de la guerre sous-marine prévues par la Partie IV du Traité de Londres du 22 avril 1930*, 173 R.T.S.N. 353, entré en vigueur le 6 novembre 1936 ; *Convention pour la prévention et la répression du crime de génocide*, 78 U.N.T.S. 277, entré en vigueur le 12 janvier 1951 ; *Convention pour la protection des biens culturels en cas de conflit armé*, La Haye, 14 mai 1954 ; *Convention sur l'interdiction de la mise au point, de la fabrication et du stockage des armes bactériologiques (biologiques) ou à toxines et sur leur destruction. Ouvert à la signature à Londres, Moscou et Washington*, 10 avril 1972; *Convention sur l'interdiction d'utiliser des techniques de modification de l'environnement à des fins militaires ou toutes autres fins hostiles*, 10 décembre 1976; *Convention sur l'interdiction ou la limitation de l'emploi de certaines armes classiques qui peuvent être considérées comme produisant des effets traumatiques excessifs ou comme frappant sans discrimination*, Genève, 10 octobre 1980 (et ses protocoles) ; la Convention sur l'interdiction de la mise au point, de la fabrication, du stokage et de l'emploi des armes chimiques et sur leur *destruction*, Paris, le 13 janvier 1993 et le *Convention sur l'interdiction de l'emploi, du stockage, de la production et du transfert des mines antipersonnel et sur leur destruction, 18 septembre 1997.*

[6] Dont les conventions aujourd'hui applicables sont principalement : *Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne*, 75 U.N.T.S. 31, entrée en vigueur le 21 octobre1950 ; *Convention de Genève pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer*, 75 U.N.T.S. 85, entrée en vigueur le 21 octobre 1950 ; *Convention de Genève relative au traitement des prisonniers de guerre*, 75U.N.T.S. 135, entrée en vigueur le 21 octobre 1950 ; *Convention de Genève relative à la protection des personnes civiles en temps de guerre du 12 août 1949*, 75 U.N.T.S. 287, entrée en vigueur le 21 octobre 1950 [ci-après *les Conventions de Genève*]; *Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I)*, 1125 U.N.T.S. 3, entrée en vigueur le 7décembre 1978; *Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II)*, 1125 U.N.T.S. 609, entrée en vigueur le 7 décembre 1978 [ci-après *les Protocoles additionnels*].

[7] *Règlement concernant les lois et coutumes de la guerre sur terre*, 3 Martens Nouveau Recueil (sér. 3) 461, 187 R. T. Consol. 227, entré en vigueur le 26 janvier 1910, arts. 1, 2 et 3. Ceux-ci reprennent *verbatim* le contenu des mêmes trois articles de la *Convention (II) concernant les lois et coutumes de la guerre sur terre et son Annexe: Règlement concernant les lois et coutumes de la guerre sur terre*, 26 Martens Nouveau Recueil (sér. 2) 949, 187 R.T. Consol. 429, entrée en vigueur le 4 septembre 1900 qui édictent :

« Article 1 - Les lois, les droits et les devoirs de la guerre ne s'appliquent pas seulement à l'armée, mais encore aux milices et aux corps de volontaires réunissant les conditions suivantes :

1°. d'avoir à leur tête une personne responsable pour ses subordonnés ;

2°. d'avoir un 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.

Au sortir de la deuxième guerre mondiale, cet état du droit se voit confirmer dans les *Conventions de Genève du 12 août 1949*. Ainsi, la première résolution de la Conférence diplomatique de 1949 affirme clairement le caractère international des conventions en encourageant les Hautes Parties Contractantes à régler leurs différents par le processus judiciaire de la Cour Internationale de Justice[8]. Les Hautes Parties Contractantes n'étant que les États, l'intention d'appliquer ces conventions entre eux est sans conteste. De plus, les conventions déclarent leurs champs d'application au travers des articles 1 et 2 communs aux quatre *Conventions de Genève* dans les mêmes termes[9]. Suivant l'article 1, ce sont donc les Hautes Parties Contractantes qui ont l'obligation de respecter et de faire respecter ces conventions. Ces conventions, en vertu de l'article 2, s'appliquent dès le temps de paix et en temps de guerre ou de conflit armé, déclaré ou non, même si l'état de guerre n'est pas reconnu, ou encore lors de l'occupation de tout ou d'une partie du territoire d'une Haute Partie Contractante. Toutefois, le paragraphe 2 de cet article spécifie clairement que les conventions ne sont applicables que si cet état de guerre ou de conflit armé surgit entre deux ou plusieurs Hautes Parties Contractantes. En conséquence, les conflits internes où seule une Haute Partie Contractante est confrontée à un conflit armé impliquant des forces organisées composées de ressortissants de cet État ne peuvent être considérés comme soumis aux pleines règles des *Conventions de Genève*.

Le droit de Genève reconnaît donc *a priori* les conflits armés à caractère internationaux et en font l'objet premier de son régime juridique. Subsidiairement, les *Conventions de Genève* reconnaissent l'existence de situation ou les parties au conflit ne rencontrent pas les critères de l'article 2 commun à ces conventions. Ainsi, à l'article 3 commun aux quatre conventions, on retrouve les « …conflit armé ne présentant pas un caractère international et surgissant sur le territoire de l'une des Hautes Parties contractantes… »[10]. On retrouve donc deux catégories distinctes de conflit : les conflits armés

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Dans les pays où les milices ou des corps de volontaires constituent l'armée ou en font partie, ils sont compris sous la dénomination ' d'armée '.

Article 2 - La population d'un territoire non occupé qui, à l'approche de l'ennemi, prend spontanément les armes pour combattre les troupes d'invasion sans avoir eu le temps de s'organiser conformément à l'article premier, sera considérée comme belligérante si elle respecte les lois
et coutumes de la guerre.

Article 3 - Les forces armées des parties belligérantes peuvent se composer de combattants et de non-combattants. En cas de capture par l'ennemi, les uns et les autres ont droit au traitement des prisonniers de guerre. »

[8] *Résolutions de la conférence diplomatique*, Genève, 12 août 1949 à la résolution 1.

[9] *Les Conventions de Genève, supra*, note 6, aux articles 1 et 2 communs aux quatre conventions :

« Article 1 - Les Hautes Parties contractantes s'engagent à respecter et à faire respecter la présente Convention en toutes circonstances. »

« Article 2 - En dehors des dispositions qui doivent entrer en vigueur dès le temps de paix, la présente Convention s'appliquera en cas de guerre déclarée ou de tout autre conflit armé surgissant entre deux ou plusieurs des Hautes Parties contractantes, même si l'état de guerre n'est pas reconnu par l'une d'elles.

La Convention s'appliquera également dans tous les cas d'occupation de tout ou partie du territoire d'une Haute Partie contractante, même si cette occupation ne rencontre aucune résistance militaire.

Si l'une des Puissances en conflit n'est pas partie à la présente Convention, les Puissances parties à celle-ci resteront néanmoins liées par elle dans leurs rapports réciproques. Elles seront liées en outre par la Convention envers ladite Puissance, si celle-ci en accepte et en applique les dispositions. »

[10] *Ibid*, à l'article 3: « Article 3 En cas de conflit armé ne présentant pas un caractère international et surgissant sur le territoire de l'une des Hautes Parties contractantes, chacune des Parties au conflit sera tenue d'appliquer au moins les dispositions suivantes:

1) Les personnes qui ne participent pas directement aux hostilités, y compris les membres de forces armées qui ont déposé les armes et les personnes qui ont été mises hors de combat par maladie, blessure, détention, ou pour toute autre cause, seront, en toutes circonstances, traitées avec humanité, sans aucune distinction de caractère défavorable basée sur la race, la couleur, la religion ou la croyance, le sexe, la naissance ou la fortune, ou tout autre critère analogue. A cet effet, sont et demeurent prohibés, en tout temps et en tout lieu, à l'égard des personnes mentionnées ci-dessus: a) les atteintes portées à la vie et à l'intégrité corporelle, notamment le meurtre sous toutes ses formes, les mutilations, les traitements cruels, tortures et supplices; b) les prises d'otages; c) les atteintes à la dignité des personnes, notamment les traitements humiliants et dégradants; d) les condamnations prononcées et les exécutions effectuées sans un jugement préalable, rendu par un tribunal régulièrement constitué, assorti des garanties judiciaires reconnues comme indispensables par les peuples civilisés.

2) Les blessés et malades seront recueillis et soignés. Un organisme humanitaire impartial, tel que le Comité international de la Croix-Rouge, pourra offrir ses services aux Parties au conflit. Les Parties au conflit s'efforceront, d'autre part, de

internationaux et les conflits armés à caractère non-international. Or, il est important de cerner avant toute autre chose ce qu'est un conflit armé. Selon la Chambre d'appel du TPIY, un conflit armé est : «… un recours à la force armé entre États ou un conflit prolongé entre les autorités gouvernementales et des groupes armés ou entre de tels groupes au sein d'un État. »[11]

Ceci porte à distinguer le type de conflit selon la qualification des parties qui y prennent part. Il ressort clairement de cette définition qu'un conflit armé, qu'il soit à caractère international ou non, se caractérise à la base par une lutte prolongée dans le temps et l'espace, en termes de *rationae temporae* et *loci*. Il doit concerner l'intérêt d'au moins une partie possédant la pleine capacité juridique internationale[12].

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Dans le cas de conflit armé international, le régime de l'article 2 commun aux quatre conventions prévoit la pleine application de ces instruments. À ceci doit s'ajouter le premier *Protocole additionnel de 1977*. Celui-ci s'applique dans toutes les situations prévues à l'article 2 commun des *Conventions de Genève de 1949*[13]. À ces applications, on doit aussi ajouter les situations spécialement prévues par le paragraphe 1(4) du Protocole 1, qui permet l'application de l'ensemble des Conventions de Genève et du premier Protocole additionnel lors de conflit armé en vue de l'exercice du droit à l'autodétermination des peuples. Ces conflits sont concernant un peuple lutte contre la domination coloniale et l'occupation étrangère et contre les régimes racistes[14]. Bien que le conflit puisse avoir lieu sans la présence de deux ou plusieurs Hautes Parties Contractantes, le régime en place combattu par un peuple dans les situations précitées est considéré comme une puissance étrangère occupant le territoire. Cette logique s'inscrit dans le cadre de la situation d'occupation de tout ou partie du territoire de l'article 2 commun aux quatre *Conventions de Genève* et permet ainsi l'application de l'ensemble des conventions ainsi que du premier *Protocole additionnel*. Les conflits armés internationaux peuvent donc être subdivisés entre ceux où seules les *Conventions de Genève* sont applicables, ceux où les *Conventions de Genève* et le premier *Protocole additionnel* sont applicables du fait de son article 1 au paragraphe 3 pour les États qui l'ont ratifié et finalement ceux où les *Conventions de Genève* et le premier *Protocole additionnel* sont applicables du fait de son article 1 au paragraphe 4 permettant l'exercice du droit à l'autodétermination. Dans tous ces cas, le régime applicable prévoit une obligation de respecter et de faire respecter ces conventions et ce protocole et sanctionne criminellement sous le titre de violations graves les transgressions à ces obligations[15]. Ces violations sont donc des crimes de guerre.

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mettre en vigueur par voie d'accords spéciaux tout ou partie des autres dispositions de la présente Convention. L'application des dispositions qui précèdent n'aura pas d'effet sur le statut juridique des Parties au conflit. »

[11] *Tadic, Chambre d'appel*, *supra*, note 2 au par. 561.

[12] K. Boustany, « La qualification des conflits en droit international et le maintien de la paix », (1990) 6 Rev. Québ. D. Int'l. à la p. 51.

[13] *Protocole 1*, *supra*, note 6 au paragraphe 3 de l'article 1 : « 3. Le présent Protocole, qui complète les Conventions de Genève du 12 août 1949 pour la protection des victimes de la guerre, s'applique dans les situations prévues par l'article 2 commun à ces Conventions. »

[14] *Ibid*., au paragraphe 4 de l'article 1 : « 4. Dans les situations visées au paragraphe précédent sont compris les conflits armés dans lesquels les peuples luttent contre la domination coloniale et l'occupation étrangère et contre les régimes racistes dans l'exercice du droit des peuples à disposer d'eux-mêmes, consacré dans la Charte des Nations Unies et dans la Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations Unies. »

[15] Les violations graves sont celles énumérées aux articles : 50 de la première Convention, 51 de la deuxième Convention, 130 de la troisième Convention et 147 de la quatrième Convention pour les quatre Conventions de Genève. Ces violations graves diffèrent quelque peu suivant le champ d'application de la convention, mais elles regroupent principalement : 1) dans le cas des blessés, malades et naufragés « …l'homicide intentionnel, la torture ou les traitements inhumains, y compris les expériences biologiques, le fait de causer intentionnellement de grandes souffrances ou de porter des atteintes graves à l'intégrité physique ou à la santé, la destruction et l'appropriation de biens, non justifiées par des nécessités militaires et

LES CONFLITS ARMÉS À CARACTÈRE NON-INTERNATIONAL

La situation diffère largement dans le cas de conflits armés à caractère non-international. D'abord, parce que l'article 3 commun aux quatre *Conventions* présente une définition *a contrario* de ce qu'est un conflit armé à caractère non-international. Ce type de conflit n'est pas expliqué en soit et doit se comprendre comme n'ayant pas deux ou plusieurs Hautes Parties Contractantes qui y prennent part et nécessite une interprétation de l'intensité du conflit et de l'organisation des parties qui distancent l'usage de la force armée du banditisme, d'insurrections inorganisées et de courte durée ou d'activités terroristes qui relèvent quant à eux du droit interne[16]. L'ensemble de ces facteurs est interprété sur la base de la territorialité, puisque ce conflit doit prendre part sur le territoire d'une partie contractante, contrairement au conflit armé international qui s'analyse en vertu de la pluralité des Hautes Parties Contractantes comme belligérants. L'article 3 commun aux *Conventions de Genève* ne considère pas la qualité des parties comme facteurs de détermination, autre que du fait qu'il n'y a pas plus d'une Haute Partie Contractante prenant part au conflit. Des groupes sectaires, politiques ou militaires organisés sont tous sujets aux obligations et protections de cet article, pour autant que le conflit rencontre l'intensité requise pour en justifier l'application. Or, cette intensité est définie comme rencontrée dès

exécutées sur une grande échelle de façon illicite et arbitraire… » ; 2) dans le cas des prisonniers de guerre « …l'homicide intentionnel, la torture ou les traitements inhumains, y compris les expériences biologiques, le fait de causer intentionnellement de grandes souffrances ou de porter des atteintes graves à l'intégrité physique ou à la santé, le fait de contraindre un prisonnier de guerre à servir dans les forces armées de la Puissance ennemie, ou celui de le priver de son droit d'être jugé régulièrement et impartialement… » ; et 3) dans le cas des personnes protégées « …l'homicide intentionnel, la torture ou les traitements inhumains, y compris les expériences biologiques, le fait de causer intentionnellement de grandes souffrances ou de porter des atteintes graves à l'intégrité physique ou à la santé, la déportation ou le transfert illégaux, la détention illégale, le fait de contraindre une personne protégée à servir dans les forces armées de la Puissance ennemie, ou celui de la priver de son droit d'être jugée régulièrement et impartialement selon les prescriptions de la présente Convention, la prise d'otages, la destruction et l'appropriation de biens non justifiées par des nécessités militaires et exécutées sur une grande échelle de façon illicite et arbitraire… ». À toutes ces violations graves doivent être adjointes celles du *Protocole 1*, soient : « qu'ils entraînent la mort ou causent des atteintes graves à l'intégrité physique ou à la santé, sont considérés comme des infractions graves au présent Protocole :

a) soumettre la population civile ou des personnes civiles à une attaque; b) lancer une attaque sans discrimination atteignant la population civile ou des biens de caractère civil, en sachant que cette attaque causera des pertes en vies humaines, des blessures aux personnes civiles ou des dommages aux biens de caractère civil, qui sont excessifs au sens de l'article 57, paragraphe 2 a (iii); c) lancer une attaque contre des ouvrages ou installations contenant des forces dangereuses, ensachant que cette attaque causera des pertes en vies humaines, des blessures aux personnes civiles ou des dommages aux biens de caractère civil, qui sont excessifs au sens de l'article 57, paragraphe 2 a (iii); d) soumettre à une attaque des localités non défendues et des zones démilitarisées; e) soumettre une personne à une attaque en la sachant hors de combat; f) utiliser perfidement, en violation de l'article 37, le signe distinctif de la croix rouge, du croissant rouge ou du lion-et-soleil rouge ou d'autres signes protecteurs reconnus par les Conventions ou par le présent Protocole.

4. Outre les infractions graves définies aux paragraphes précédents et dans les Conventions, les actes suivants sont considérés comme des infractions graves au Protocole lorsqu'ils sont commis intentionnellement et en violation des Conventions ou du présent Protocole : a) le transfert par la Puissance occupante d'une Partie de sa population civile dans le territoire qu'elle occupe, ou la déportation ou le transfert à l'intérieur ou hors du territoire occupé de la totalité ou d'une Partie de la population de ce territoire, en violation de l'article 49 de la IVe Convention; b) tout retard injustifié dans le rapatriement des prisonniers de guerre ou des civils; c) les pratiques de l'apartheid et les autres pratiques inhumaines et dégradantes, fondées sur la discrimination raciale, qui donnent lieu à des outrages à la dignité personnelle; d) le fait de diriger des attaques contre les monuments historiques, les oeuvres d'art ou les lieux de culte clairement reconnus qui constituent le patrimoine culturel ou spirituel des peuples et auxquels une protection spéciale a été accordée en vertu d'un arrangement particulier, par exemple dans le cadre d'une organisation internationale compétente, provoquant ainsi leur destruction sur une grande échelle, alors qu'il n'existe aucune preuve de violation par la Partie adverse de l'article 53, alinéa b, et que les monuments historiques, oeuvres d'art et lieux de culte en question ne sont pas situés à proximité immédiate d'objectifs militaires; e) le fait de priver une personne protégée par les Conventions ou visée au paragraphe 2 du présent article de son droit d'être jugée régulièrement et impartialement.

5. Sous réserve de l'application des Conventions et du présent Protocole, les infractions graves à ces instruments sont considérées comme des crimes de guerre. »

[16] *Tadic - Chambre d'appel*, *supra*, note 2, au par. 562.

qu'une attaque est lancée, qu'un non-combattant est affecté par le conflit ou qu'une portion de territoire est capturée[17].

À ces dispositions, le deuxième *Protocole additionnel* s'applique si les conditions de son article 1 sont rencontrées. Toutefois, ces conditions sont beaucoup plus restrictives que celles de l'article 3 commun aux *Conventions*. En effet, l'article 1 du *Protocole II* pose dans son paragraphe 1 des préalables nécessaires à son application, soit : qu'il doit s'agir d'un conflit ne rencontrant pas les critères de l'article 2 communs aux *Conventions* ou ceux de l'article 1 du *Protocole I*; que ce conflit doit prendre part sur le territoire d'une Haute Partie contractante entre les forces gouvernementales et des forces dissidentes ou des groupes organisés; que ces forces ou groupes doivent avoir un commandement responsable et qu'elles doivent exercer sur une partie du territoire un contrôle tel qu'il permet de conduire des activités militaires continues et concertées[18]. Si les premières conditions sont en grande partie les mêmes que celles que nécessite l'article 3 pour être applicable, la dernière impose une barrière juridique et matérielle extrêmement difficile à franchir. La question du contrôle sur un tel territoire en est une de contrôle effectif qui est rarement rencontré dans le développement d'une force de guérilla ou dissidente. Particulièrement dans le cas de la guérilla urbaine, le protocole devient inapplicable puisque la force de ces guérilleros est la capacité de pouvoir se fondre dans la population civile alors que le territoire est contrôlé par les forces gouvernementales.

De droit positif, les combats entre groupes sectaires, sans participation de l'autorité gouvernementale, excluent l'application du *Protocole II*, celui-ci ne s'appliquant que dans ce rapport de force[19]. La seule exception qui permettrait de croire que l'article 4[20] du *Protocole II*, adjoignant plusieurs obligations de

[17] A. Bouvier et M. Sassoli, *How Does Law Protect in War ?*, Genève, Comité International de la Croix-Rouge, 2000 à la p. 93.

[18] *Protocole II*, *supra*, note 6 à l'article 1 : « *Article premier -- Champ d'application matériel*
1. Le présent Protocole, qui développe et complète l'article 3 commun aux Conventions de Genève du 12 août 1949 sans modifier ses conditions d'application actuelles, s'applique à tous les conflits armés qui ne sont pas couverts par l'article premier du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I), et qui se déroulent sur le territoire d'une Haute Partie contractante entre ses forces armées et des forces armées dissidentes ou des groupes armés organisés qui, sous la conduite d'un commandement responsable, exercent sur une partie de son territoire un contrôle tel qu'il leur permette de mener des opérations militaires continues et concertées et d'appliquer le présent Protocole.
2. Le présent Protocole ne s'applique pas aux situations de tensions internes, de troubles intérieurs, comme les émeutes, les actes isolés et sporadiques de violence et autres actes analogues, qui ne sont pas considérés comme des conflits armés. »

[19] A.T. Frangi, « The Internationalized NonInternational Armed Conflict in Lebanon, 1975-1990 : Introduction to Conflictology », (1993) 22 Capital U. L. Rev. à la p. 974.

[20] *Protocole II*, *supra*, note 6 à l'article 4 : « Garanties fondamentales
1. Toutes les personnes qui ne participent pas directement ou ne participent plus aux hostilités, qu'elles soient ou non privées de liberté, ont droit au respect de leur personne, de leur honneur, de leurs convictions et de leurs pratiques religieuses. Elles seront en toutes circonstances traitées avec humanité, sans aucune distinction de caractère défavorable. Il est interdit d'ordonner qu'il n'y ait pas de survivants.
2. Sans préjudice du caractère général des dispositions qui précèdent, sont et demeurent prohibés en tout temps et en tout lieu à l'égard des personnes visées au paragraphe 1: a) les atteintes portées à la vie, à la santé et au bien-être physique ou mental des personnes, en particulier le meurtre, de même que les traitements cruels tels que la torture, les mutilations ou toutes formes de peines corporelles; b) les punitions collectives; c) la prise d'otages; d) les actes de terrorisme; e) les atteintes à la dignité de la personne, notamment les traitements humiliants et dégradants, le viol, la contrainte à la prostitution et tout attentat à la pudeur; f) l'esclavage et la traite des esclaves sous toutes leurs formes; g) le pillage; h) la menace de commettre les actes précités.
3. Les enfants recevront les soins et l'aide dont ils ont besoin et, notamment: a) ils devront recevoir une éducation, y compris une éducation religieuse et morale, telle que la désirent leurs parents ou, en l'absence de parents, les personnes qui en ont la garde; b) toutes les mesures appropriées seront prises pour faciliter le regroupement des familles momentanément séparées; c) les enfants de moins de quinze ans ne devront pas être recrutés dans les forces ou groupes armés, ni autorisés à prendre part aux hostilités; d) la protection spéciale prévue par le présent article pour les enfants de moins de quinze ans leur restera applicable s'ils prennent directement part aux hostilités en dépit des dispositions de l'alinéa c et sont capturés; e) des mesures seront prises, si nécessaire et, chaque fois que ce sera possible, avec le consentement des parents ou des personnes qui en ont la garde à titre principal en vertu de la loi ou de la coutume, pour évacuer temporairement les enfants

respect et de traitement des personnes ne prenant pas ou ne prenant plus part aux hostilités, ferait maintenant partie intégrante de la coutume internationale est l'article 4[21] du *Statut du tribunal pénal international pour le Rwanda*[22]. Or, même si cela s'avérait, l'inclusion de ces protections au sein de la coutume internationale comme base de reconnaissance de la responsabilité criminelle n'entraîne pas l'application de l'ensemble du *Protocole II*, mais seulement des principes qui sont reconnus comme faisant partie de cette coutume. La plupart des juristes continuent d'interpréter le *Protocole II* comme étant inapplicable entre factions qui ne combattent pas les autorités gouvernementales[23].

Il résulte de ces différences d'application que plusieurs types de conflits armés à caractère non-international peuvent survenir. Ainsi, il y a d'abord les conflits où l'autorité étatique n'est pas impliquée, d'où l'application unique de l'article 3 commun aux *Conventions* entre les belligérants. Ensuite, il y a ceux où les forces gouvernementales sont impliquées, mais où les forces dissidentes ou groupes armés organisés ne contrôle pas suffisamment de territoire pour rencontrer l'application du *Protocole II* et où seules les garanties de l'article 3 commun aux *Conventions* sont applicables. Il y a ensuite les situations où toutes ces dispositions s'appliquent. Finalement, il y a les situations où les belligérants décident d'appliquer l'ensemble des *Conventions de Genève* et le *Protocole I* par déclaration unilatérale, malgré le caractère non-international du conflit[24].

De ces situations, on doit identifier les différentes formes de conflits du type non-international. Ceux-ci peuvent être classifiés en quatre formes, soient les conflits ayant lieu : dans un État unitaire; dans un État fédératif, qui sont assimilables à la situation d'un État unitaire; entre des États membres d'une fédération ou d'une confédération, sans participation du pouvoir central ; et finalement entre les États membres d'une fédération ou d'une confédération et l'autorité fédérale ou confédérale[25].

Lors de conflit au sein d'un État unitaire ou d'un État fédératif ou confédératif, l'usage de la force armée par des groupes armés entre eux, sans participation de l'autorité centrale, en fait un conflit armé à caractère non-internationale qui enjoint l'application de l'article 3 commun aux *Conventions* et peut amener l'application du *Protocole II*, si les conditions sont rencontrées.

Dans le cas de conflits entre États membres d'une même fédération ou confédération, le type de conflit pourrait varier et être assimilable à la situation de conflit armé international. En effet, il est proposé par certains que la rupture des liens constitutionnels permettrait un retour de la qualité de sujet intégral du droit des gens à chacun de ces États, faisant de ces États des Hautes Parties Contractantes en soi[26].

Le conflit entre un ou des États membres d'une fédération ou d'une confédération contre l'autorité centrale pourrait quant à lui être assimilable à un conflit de caractère international, si ce ou ces États disposent d'une capacité juridique internationale reconnue par certains ou tous les États membres de la communauté internationale. Ainsi, ce sera le facteur de souveraineté externe de l'État qui déterminera la qualité du conflit[27]. Inversement, ce sera un conflit à caractère non-international si aucune forme de

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du secteur où des hostilités ont lieu vers un secteur plus sûr du pays, et pour les faire accompagner par des personnes responsables de leur sécurité et de leur bien-être. »

[21] *Statut du Tribunal criminel international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'États voisins entre le 1er janvier et le 31 décembre 1994*, Rés.CS 995, Doc. off. CS NU, 3453e sess., (1994).

[22] J.E. Alvarez, « Rush to Closure : Lessons of the Tadic Judgment », (2001) 96 Mich. L. Rev. à la p. 2076. L'auteur précise avec force que cette vision est loin de faire l'unanimité parmi les juristes.

[23] Frangi, *supra*, note 19 à la p. 974.

[24] Ceci est permis tout au moins au paragraphe 2 de l'article 3 commun aux *Conventions de Genève*.

[25] Boustany, *supra*, note 12 à la p. 51.

[26] J. Siotis, *Le droit de la guerre et les conflits armés d'un caractère non-international*, Paris, L.G.D.J., 1958 à la p. 32.

[27] *Ibid.*, à la p. 32.

reconnaissance n'a été démontrée. Toutefois, il existe toujours un potentiel d'internationalisation du conflit si un ou des États tiers parties au conflit interviennent.

Au regard du droit positif, le régime applicable dans les conflits armés internationaux est donc fonction premièrement de la qualité des parties au conflit, alors que dans le cas des conflits armés non-internationaux, ce sera le facteur de territorialité qui déterminera de façon prédominante le régime applicable[28].

LES COMPOSANTES DU CONFLIT ARMÉ À CARACTÈRE NON-INTERNATIONAL « INTERNATIONALISÉ »

De la même façon que la guerre de manœuvre est fluide et constamment en évolution, la nature d'un conflit change au gré des alliances et des combats. Ainsi, un conflit au départ à caractère international peut voir le retrait des troupes étrangères transformer sa nature en conflit intra-étatique. Toutefois, dans le contexte des conflits armés par combattants interposés de la guerre froide, la situation inverse dominait la scène politique et militaire. Un conflit de caractère non-international a souvent vu sa nature évoluée en tout en en partie en un conflit armé international du fait de la participation de troupes étrangères ou d'organisations internationales au conflit. Cette internationalisation du conflit peut prendre quatre formes, soient : entre les factions d'un conflit armé non-international auxquels ces règles s'appliquent ; entre les États intervenants en faveur des parties au conflit ; entre le gouvernement et un État intervenant en faveur des forces dissidentes ; et entre l'État prêtant main-forte à l'autorité gouvernementale contre des forces dissidentes[29].

Concernant les factions entre elles, de même que le cas des États prêtant un support à l'autorité gouvernementale reconnue, certains croient que le droit des conflits armés à caractère non-international serait le droit applicable. Dans les relations entre les États interventionnistes entre eux ainsi que dans les cas où un tiers-État supporte une force dissidente contre un gouvernement sur le territoire de ce dernier, l'ensemble des *Conventions* et le *Protocole I* serait applicable[30].

Toutefois, cette division ne peut englober toutes les situations et ne semble pas prendre compte de toutes les circonstances du conflit, incluant seulement la qualité des parties et non pas le facteur de territorialité comme l'application du droit des conflits armés à caractère non-international détermine normalement un conflit.

Certains auteurs proposent une troisième voie plus souple qui s'inscrirait dans une nouvelle science : « *conflictology* » - « conflitologie », ou la science des conflits. On propose ainsi que l'étude de la nature des conflits devrait se voir séparée en quatre avenues : les conflits armés internationaux, les conflits armés à caractère non-international, les conflits armés internationaux « intra-nationalisés » et les conflits armés non-internationaux « internationalisés »[31].

Alors que le conflit armé non-international « internationalisé » comporte un élément d'extraterritorialité du fait de l'intervention étrangère, le conflit armé international « intra-nationalisé » se forme lorsqu'un conflit, armé ou non, entre États génère un conflit armé non-international sur le

[28] Boustany, *supra*, note 12 à la p. 51.

[29] D. Schindler, « The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols », (1979) 163 Recueil des cours de l'académie de droit international à la p. 150. Frangi, supra, note 19 à la p. 967, supporte une vision parallèle en présentant comme division les cas l'application du droit entre: les factions internes sont supportés par de tiers-États ; les États qui interviennent en support des factions ; les tiers-États supportant une force dissidente et l'autorité gouvernementale reconnue ; un tiers-État supportant un gouvernement reconnu contre une faction. Pour Frangi, le deuxième et le quatrième cas sont des cas d'internationalisation du conflit alors que les deux autres sont d'un caractère non-international.

[30] *Ibid*.

[31] Frangi, *supra*, note 19 à la p. 1037.

territoire de l'une de ces parties. L'exemple présenté est celle du conflit au Liban entre 1975 et 1990 qui s'inscrit dans le cadre global de l'expulsion des Palestiniens du monde arabe alors que se produit le conflit israélo-arabe. Le résultat serait un conflit « intra-nationalisé » alors que sa source est véritablement internationale[32].

On explique que cette caractérisation quant à la véritable source du conflit permet de refléter objectivement la réalité du conflit en cause. Toutefois, on présente par la même occasion un plaidoyer selon lequel ce type de conflit devrait être régi que par un seul régime de droit : celui des conflits armés internationaux[33]. Une telle approche mérite d'être analysée, mais elle tend à confondre le conflit dans la situation globale sans tenir compte de la situation sur le terrain.

Prenons en exemple les cas de l'Afghanistan, du Cambodge et du Liban. La question du régime applicable s'est posée dans ces cas du fait de la source du conflit et de la qualité des parties qui y sont intervenus sur le territoire de l'autorité gouvernementale combattant des forces dissidentes.

La situation afghane se caractérise par un conflit armé non-international suivit d'une invitation du gouvernement afghan aux forces soviétiques d'intervenir dans le conflit. Le Comité International de la Croix-Rouge (CICR) a, dans un premier temps, reconnu l'existence d'un conflit armé non-international où les garanties de l'article 3 commun aux *Conventions de Genève* étaient applicables. Une fois l'intervention soviétique effectuée, le CICR n'a pas pris d'autres positions quant à la nature du conflit, l'invitation afghane ayant potentiellement réglée la question[34].

Or, la situation après l'invasion soviétique démontre clairement l'implication de troupes de l'Armée rouge dans les combats et la puissance même de la force en présence démontre le contrôle de Moscou sur une grande partie du territoire. Or, l'article 2 commun aux *Conventions de Genève* est clair à son paragraphe 2 : les *Conventions* sont applicables si tout ou une partie du territoire est occupée, avec ou sans résistance. Le verbe utilisé n'est pas permissif, mais bien obligatoire dans l'expression «… s'appliquera également… ». Des forces étrangères au territoire afghan étaient en position de contrôle effectif du territoire et une partie des forces locales étaient incorporée sous leur commandement. En conséquence, il apparaît que le conflit est passé d'un conflit armé non-international à un conflit armé « internationalisé », auquel s'applique tout au moins les *Conventions* dans les relations entre les *mujahidins* et les forces soviétiques[35].

Dans la situation cambodgienne, les forces armés de l'Armée populaire du Vietnam ont envahi le territoire cambodgien en 1978 et capturé Phnom Penh le 7 janvier de cette année. Pour les années qui suivent, les forces vietnamiennes combattent périodiquement les forces rebelles Khmers Rouges qui subsistent sur une bonne partie du territoire et qui demeurent le gouvernement en exil reconnu aux Nations Unies, malgré l'instauration d'un gouvernement provisoire cambodgien sous occupation vietnamienne.

La première phase du conflit entre le Vietnam et les forces cambodgiennes de l'autorité centrale Khmer Rouge est certainement un conflit armé international, répondant aux conditions du paragraphe 1 de l'article 2 commun aux *Conventions de Genève*. Il s'agit d'un cas où des forces étrangères interviennent en support à des forces dissidentes contre une autorité gouvernementale reconnue. Cette intervention contrevient certainement à l'intégrité territoriale et l'autonomie politique du Cambodge, faisant d'elle un conflit armé non-international « internationalisé ».

[32] *Ibid*. à la p. 1038.
[33] *Ibid*. aux p. 1038-1039.
[34] P.-H. Gasser, « International Non-International Armed Conflicts : Case Studies of Afghanistan, Kampuchea, and Lebanon, (1982) 31 Am. U. L. Rev. à la p.916.
[35] M.W. Reisman, « Which Law Applies to the Afghan Conflict ? », (1988) 82 A.J.I.L. à la p. 483.

La seconde phase du conflit est plus ambiguë. Une fois les Khmers Rouges repoussés, ils continuent d'exercer des activités militaires continues et concertées sur une partie du territoire. Un contrôle effectif est exercé sur cette partie de territoire. Puisque les combats se poursuivent entre les forces vietnamiennes et les Khmers Rouges, entre le gouvernement provisoire cambodgien et les Khmers Rouges, et entre les différentes factions Khmers, la question est de savoir quel droit s'applique à qui[36].

Entre les forces vietnamiennes et les Khmers Rouges le droit des conflits armés internationaux continuent de s'appliquer entre ces parties. Toutefois, entre les forces du gouvernement provisoire et les Khmers Rouges, seul l'article 3 commun aux *Conventions de Genève* est applicable, comme dans les combats entre les factions Khmers entre elles. Le statut de prisonnier de guerre n'est donc pas accordé à ces combattants, puisque le régime de l'article 3 commun prévoit des garanties de traitement, mais pas l'acquisition de ce statut et de ces protections[37].

La phase suivante, où le gouvernement provisoire devient reconnu par les Nations Unies, change la situation. Puisque les forces vietnamiennes sont invitées sur le territoire par ce gouvernement, le conflit « internationalisé » au départ deviendrait « intra-nationalisé ». D'après une majorité des commentateurs de l'époque, le conflit serait alors soumis qu'aux seules dispositions de l'article 3 commun des *Conventions de Genève*[38].

Or, cette possibilité de limiter la protection offerte au début du conflit « internationalisé » en le transformant en conflit « intra-nationalisé » ne sert aucunement les objectifs du droit international humanitaire, c'est-à-dire la protection des victimes du conflit. L'établissement d'un gouvernement provisoire, même reconnu par la communauté internationale, ne change en rien la situation d'occupation et de contrôle des forces locales par une puissance étrangère comme dans le cas de l'Afghanistan[39]. Si la situation de mixité produite dans la première phase, où le droit s'applique selon le régime des conflits armés internationaux ou non-internationaux d'après la qualité des parties, est au départ difficile à réconcilier avec la situation sur le terrain, elle permet tout de même un élargissement de la protection des victimes. Au contraire, la capacité de reconnaître une révision à la baisse du conflit par le simple changement de gouvernement produit des conséquences dramatiques qui sont irréconciliables avec les objectifs du droit international humanitaire. D'autant plus que l'article 47 de la quatrième *Convention de Genève* édicte sans ambages que :

> « Les personnes protégées qui se trouvent dans un territoire occupé ne seront privées, en aucun cas ni d'aucune manière, du bénéfice de la présente Convention, soit en vertu d'un changement quelconque intervenu du fait de l'occupation dans les institutions ou le gouvernement du territoire en question, soit par un accord passé entre les autorités du territoire occupé et la Puissance occupante, soit encore en raison de l'annexion par cette dernière de tout ou partie du territoire occupé. »[40]

Il est clair que le changement institutionnel ne change en rien la présence de forces étrangères sur le territoire cambodgien et que la participation au conflit de ces forces entraîne l'occupation du territoire. Le droit des conflits armés internationaux devait donc s'appliquer.

Quant à la situation libanaise, le conflit comportait au départ des combats entre des forces dissidentes contre les forces armées du gouvernement en place ainsi que des combats entre factions. La nature du

[36] Gasser, *supra*, note 34 à la p. 920.
[37] *Ibid*. à la p. 921.
[38] *Ibid*.
[39] Tel qu'exprimé par Reisman, *supra*, note 35.
[40] *Convention de Genève relative à la protection des personnes civiles en temps de guerre du 12 août 1949*, *supra*, note 6 à l'article 47.

conflit était clairement à caractère non-international. L'article 3 commun aux *Conventions de Genève* était donc le seul applicable.

Toutefois, l'intervention de contingents de maintien de la paix de la Ligue des États arabes change la donne, particulièrement avec l'avènement du contingent syrien, qui participe de façon toujours plus prépondérante au conflit en support de l'autorité gouvernementale libanaise. L'opinion des auteurs diffère largement sur la conséquence de cette intervention. Gasser argumente que le conflit demeure à caractère non-international, alors que Frangi le déclare international.

Leurs conclusions respectives diffèrent suivant l'importance qu'ils accordent au critère de nationalité. Gasser ne semble pas attribuer de valeur probante à ce critère en affirmant que l'on ne peut comparer les forces syriennes à une force d'occupation puisque le caractère inamical de la population envers ces forces était absent dès l'intervention et que ces forces étaient sous le commandement direct du président libanais[41]. Tout à l'opposé, Frangi déclare que l'intervention syrienne résulte en une internationalisation du conflit et que, par conséquent, l'ensemble des *Conventions de Genève* y était applicable[42]. Cette conclusion apparaît comme étant la plus apte, particulièrement du fait de l'intervention subséquente d'Israël.

Ces exemples démontrent que le conflit armé non-international « internationalisé » peut prendre plusieurs formes et qu'il peut se développer même avec la coopération du gouvernement en place ou du gouvernement établit des suites du conflit. Ils démontrent aussi que l'approche proposée de reconnaître des conflits des conflits « intra-nationalisés » auxquels le droit des conflits armés internationaux s'appliquerait est superflue, voire dangereux, car la reconnaissance de la nature du conflit demeure sujette à interprétation.

On retrouve dans ces trois cas des conditions d'application à la fois similaires et différentes. Néanmoins, des éléments communs ressortent. Ainsi, on peut affirmer que le conflit armé non-international internationalisé résulte de la fusion d'éléments politiques internes et externes[43] ; que le facteur de nationalité importe dans la caractérisation du conflit lorsqu'une intervention étrangère brime l'intégrité territoriale et la souveraineté étatique[44] ; et que les modifications institutionnelles internes n'altèrent en rien la nature même du conflit[45].

La question est maintenant à savoir quel régime de droit international humanitaire est véritablement applicable dans ces situations et à quelles conditions factuelles et légales. Trois voies furent proposées des suites de la guerre civile espagnole (1936-1939) lors de la rédaction des *Conventions de Genève* et des *Protocoles additionnels*. C'est lors de ce conflit que fut constaté 'officiellement' le caractère frauduleux de qualification de guerre civile d'un conflit entre grandes puissances par combattants interposés[46], mais ce n'est que lors de la rédaction des textes récents de droit international humanitaire qu'une solution légale pouvait être adoptée. On pouvait ainsi appliquer à ces conflits seulement l'article 3 commun aux *Conventions* et le *Protocole II* ; l'ensemble des *Conventions de Genève* et le

[41] Gasser, *supra*, note 34 à la p. 922.
[42] Frangi, *supra*, note 19 à la p. 970.
[43] R. Bierzanek, « Quelques remarques sur l'applicabilité du droit international humanitaire des conflits armés aux conflits internes internationalisés » dans *Études et essais sur le droit international humanitaire et les principes de la Croix-Rouge en l'honneur de Jean Pictet*, La Haye, Martinus Nijhoff, 1984 à la p. 283 : « *'the phenomenal increase in the number of unstable new States' et 'intertwining of civil and international conflict : in all of the major intenral conflicts of recent years which have provoked international tension and intervention (…) there have been genuine and major elements of internal rebellion reflecting the deep social and political turmoil, but they have been obscured and distorted by the outside intervention and counterintervention dictated by strategic and political reasons'…* ».
[44] Reisman, *supra*, note 35 à la p. 483.
[45] *Ibid*. et Gasser, *supra*, note 34 à la p. 921.
[46] C. Rousseau, « La non-intervention en Espagne », (1938) Rev. de D. Int'l et Lég. Comp. à la p. 474.

Protocole I ; ou encore, étant donné la mixité du conflit, l'application selon la relation entre les belligérants[47].

Or, c'est précisément cette relation entre les belligérants qui est la source du problème d'applicabilité, particulièrement dans les cas de conflits armés non-internationaux. Il est important de se rappeler le contexte de la rédaction des *Conventions de Genève* et des *Protocoles additionnels*. Dans le cas des *Conventions*, l'article 3 visait les cas de conflits internes, telle la guerre civile espagnole. Dans le cas des *Protocoles*, il s'agissait de guerres civiles dans un contexte de décolonisation. Dans les deux cas, il s'agissait d'étendre la protection aux victimes de guerres civiles. Cette définition a perdurée jusque dans les années 1980[48]. Or, comme le fait remarquer l'ex-ambassadeur de la République fédérale socialiste de Yougoslavie à la Communauté européenne, Mihailo Crnobrnja, :

> « *The character of the war fought in Yugoslavia defies easy description. All the media and many politicians have called the bloody fighting in Yugoslavia a civil war. Actually it was and it is not the type of confrontation best described as a civil war. It has no ressemblance to the civil war fought in Spain or the United States, for example. The ethnic, rather than civil components were and are predominant in the Yugoslav case. Yet, it started of as some kind of 'civil' war in the sense that it was an internal confrontation of the people of one country…* »[49]

Il est aujourd'hui certain que l'expression « guerre civile » est dépassée, les conflits ne correspondant plus seulement en un choix du type d'État désiré par différentes factions d'une population, mais bien souvent en un désir d'annihilation de « l'autre » sur la base de l'ethnie[50]. Cette caractérisation des conflits armés non-internationaux n'est certes pas globale et plusieurs conflits ont gardé le caractère de guerre civile sur la base d'un choix politique, mais l'explosion des revendications nationalistes à la suite de la chute du communisme permet certainement de qualifier la plupart des conflits armés internes sur la base de l'ethnie. Que ce soit en Somalie, au Soudan, au Rwanda, en ex-Yougoslavie ou en Indonésie, il ne s'agit plus tant d'un choix politique, mais bien de revendication de droits pour un territoire sur la base de la nationalité. Ces conflits sont rarement restreints à une portion de la population et du territoire. Ils tendent plutôt à s'étendre, le but de ces mouvements étant d'obtenir une reconnaissance internationale pour donner une légitimité à leur revendication. L'aide matérielle, techniques ou militaire à proprement parler est souvent une caractéristique majeure de ces conflits, car sans cette aide ces mouvements ne pourraient en toute probabilité pas réussir à accomplir leurs objectifs.

L'AFFAIRE DU *NICARAGUA*

Dans le cas du conflit yougoslave, cette aide fut un des facteurs déterminant à savoir quel régime de droit était applicable. En vue d'évaluer l'importance de ce facteur, le TPIY s'est d'abord basé sur la jurisprudence de la Cour Internationale de Justice (CIJ).

La CIJ s'est en effet déjà prononcée sur ce type de conflit dans l'affaire du *Nicaragua*[51]. Bien que cette affaire porte d'abord sur la question de la responsabilité étatique, la CIJ s'est aussi penché sur la

[47] R. Bierzanek, *supra*, note 43 à la p. 283.
[48] Gasser, *supra*, note 34 à la note de bas de page 1 de la page 911, datant de 1982, défini le conflit armé non-international « internationalisé » comme « …*a civil war characterized by the intervention of the armed forces of a foreign power*… ».
[49] M. Crnobrnja, *The Jugoslav Drama*, Montréal, McGill-Queen's University Press, 1996 à la p. 160.
[50] Bouvier et Sassoli, *supra*, note 17 à la p. 89.
[51] *L'affaire des activité militaires et paramilitaires au Nicaragua et contre celui-ci, (Nicaragua c. États-Unis)*, [1986] C.I.J. Rec. 1086 [ci-après *Nicaragua*].

question de la qualification du conflit pour déterminer si des violations graves du droit international humanitaire étaient imputables.

Le raisonnement de la CIJ fut d'abord d'établir la relation entre les rebelles *Contras* contre le régime sandiniste du Nicaragua, ainsi que celle entre les États-Unis et les *Contras*. Dans le premier cas, la relation est claire : il s'agit de toute évidence d'un conflit armé non-international entre une force de guérilla et des forces gouvernementales.

Dans le second cas, la CIJ s'intéresse au lien de subordination potentiel des *Contras* face aux États-Unis. La question est de savoir si le support américain est assez important pour attribuer la responsabilité des actes des *Contras* au gouvernement américain. Pour établir ce lien, la CIJ utilise le test « d'agence »[52], c'est-à-dire de contrôle effectif :

> « …si les liens entre les *contras* et le Gouvernement des États-Unis étaient à tel point marqués par la dépendance d'une part et l'autorité de l'autre qu'il serait juridiquement fondé d'assimiler les *contras* à un organe du Gouvernement des États-Unis ou de les considérer comme agissant [pour lui]… »[53]

Selon la CIJ, ce test comporte deux critères. D'abord, l'État tierce-partie au conflit doit exercer un contrôle effectif sur le groupe militaire ou paramilitaire. Concurremment, pour que la responsabilité des actions de ce groupe soit imputable au Gouvernement des États-Unis, ce contrôle doit être exercé durant l'opération pendant laquelle les violations sont commisses[54].

Suivant cette interprétation, le degré de contrôle requis est tel qu'il requiert la participation directe d'agents américains sur le terrain pour la direction et l'exécution des violations reprochées. La CIJ déclare :

> « …même prépondérante ou décisive, la participation des États-Unis à l'organisation, à la formation, à l'équipement, au financement et à l'approvisionnement des *contras*, à la sélection de leurs objectifs militaires ou paramilitaires et à la planification de toutes leurs opérations demeure insuffisante en elle-même, d'après les informations dont la Cour dispose, pour que puissent être attribués aux États-Unis les actes commis par les *contras* au cours de leurs opérations militaires ou paramilitaires au Nicaragua. Toutes les modalités de participation des États-Unis qui viennent d'être mentionnées, et même le contrôle général exercé par eux sur une force extrêmement dépendante à leur égard, ne signifierait pas par eux-mêmes, sans preuve complémentaire, que les États-Unis aient ordonné ou imposé la perpétration des actes contraires aux droits de l'homme et au droit humanitaire allégués par l'État demandeur. Ces actes auraient fort bien pu être commis par des membres de la force *contra* en dehors du contrôle des États-Unis. Pour que la responsabilité juridique de ces derniers soit engagée, il devrait en principe être établi qu'ils avaient le contrôle effectif des opérations militaires et paramilitaires au cours desquelles les violations en question se seraient produites… »[55]

En conséquence, la CIJ a jugé que les *Contras* n'avaient pas agit à titre d'agents du Gouvernement américain. Les seules violations reconnues perpétrées par les États-Unis furent celles de la violation des principes de la *Déclaration relative aux principes du droit international touchant les relations*

[52] *Ibid*. au paragraphe 75.
[53] *Ibid*. au paragraphe 109.
[54] M. Sassoli et L. Olson, « Prosecutor v. Tadic (Judgement) », (2000) 94 A.J.I.L. à la p. 572.
[55] *Nicaragua*, *supra*, note 51 au paragraphe 80.

amicales et la coopération entre les États conformément à la Charte des Nations Unis[56] et celles concernant la menace d'usage de la force, contraire à l'article 2(4) de la *Charte des Nations Unies*[57]. Pour que les États-Unis aient pu être imputables de toute autre responsabilité concernant les violations graves commises durant le conflit, les *Contras* auraient dû être payé par l'État américain ou encore reçu de cet État des ordres ou instructions les enjoignant de commettre ces violations. Dans le cas d'espèce, la CIJ prend la position que ces gestes peuvent avoir été commis de façon indépendante par des *Contras* et que rien dans les preuves présentées ne permet de croire en des directives qui feraient des États-Unis des parties prenantes à ces violations.

Ce faisant, la CIJ distingue deux conflits à l'intérieur des frontières du Nicaragua. Elle juge que le conflit est dualiste, au sens où un gouvernement est engagé simultanément dans un conflit armé à caractère non-international contre les rebelles *contras* et dans un conflit armé international contre les États-Unis. Il en résulte que :

> « … Le conflit entre les forces *contras* et celles du Gouvernement du Nicaragua est un conflit armé 'ne présentant pas un caractère international'. Les actes des contras à l'égard du Gouvernement du Nicaragua relèvent du droit applicable à de tels conflits, cependant que les actions des États-Unis au Nicaragua et contre lui relèvent des règles juridiques intéressant les conflits internationaux… »[58]

Cette position est la même que celle adoptée par le CICR[59], de même que par plusieurs auteurs[60], dans des conflits présentant des conditions similaires[61]. Le raisonnement de la CIJ va à l'encontre de plusieurs décisions, tel l'affaire de *Kenneth P. Yeager*, l'affaire *Stephens* et l'affaire *Loizidou c. Turquie*[62], mais il s'inscrit toutefois dans la logique de sa propre décision dans *Téhéran*[63].

Dans cette affaire, la question était à savoir si les étudiants révolutionnaires avaient agis comme agents de l'État iranien. La cour a déterminé que la responsabilité du Gouvernement iranien ne découlait pas des actions des étudiants lors de la prise de l'ambassade américaine et de la détention du personnel de l'ambassade comme otages, mais bien du fait que l'État iranien a clairement sanctionné ces gestes rétroactivement. D'après la CIJ, les étudiants devinrent alors agents *de facto* de l'Iran[64]. Toutefois, ceci concerne la responsabilité étatique et non pas la responsabilité individuelle dans un conflit armé. Or, la

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[56] *Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations Unis*, Rés. AG 2625 (XXV), Doc. off. A.G.N.U., 25, 24 octobre 1970.

[57] *Charte des Nations Unies*, 26 juin 1945, R.T. Can. 1945 n° 7 à l'article 2(4) : « Les Membres de l'Organisation s'abstiennent, dans leurs relations internationales, de recourir à la menace ou à l'emploi de la force, soit contre l'intégrité territoriale ou l'indépendance politique de tout État, soit de toute autre manière incompatible avec les buts des Nations Unies. ». Cette violation est intéressante en soi, car la CIJ établie ainsi un niveau très élevé d'intervention pour déterminer s'il y a emploi de la force. Ainsi, dans le cas du Nicaragua, elle conclue que l'armement, l'entraînement, le financement et l'organisation de forces rebelles ne se caractérise pas comme étant une attaque armée, donc l'emploi de la force. Elle affirme au contraire que la violation américaine est en fait celle de la menace d'utilisation de la force. T.J. Farer, « Nicaragua v. United States (Merits) », (1987) 81 A.J.I.L. à la p. 113 affirme : « … *anything other than a high and conpicuous treshold between an armed attack justifying the exercice of self-defense and lesser forms of intervention that transiently threaten freedom of choice but not the long-term territorial integrity or political independence of the state, would invite internationalization of essentially civil conflicts.* »

[58] *Nicaragua*, *supra*, note 51 à la p. 3.

[59] CICR, *Rapport annuel du CICR pour l'année 1988*, Genève, CICR aux p. 16 et 17 dans le cas de l'Angola.

[60] Gasser, *supra*, note 34 concernant les cas de l'Afghanistan, du Cambodge et du Liban.

[61] C. Greenwood, « International Humanitarian Law and the Tadic Case », (1999) 7 Eur. J. Int'l L. à la p. 271.

[62] Respectivement : *Kenneth P. Yeager v. Islamic Republic of Iran*, 17 Iran-U.S. Claims Tribunal Reports, 1987, vol. IV, 92, *United States v. Mexico (Stephens Case)*, Reports of International Arbitral Awards, vol. IV, pp. 266-267, *Loizidou v. Turkey (Merits)*, Eur. Court of H. R., jugement du 18 décembre 1996 (40/1993/435/514).

[63] *Personnel diplomatique et consulaire des États-Unis à Téhéran (États-Unis c. Iran)*, [1980] C.I.J. Rec. 1.

[64] *Ibid*. à la p. 17.

question de la responsabilité individuelle jouit d'une jurisprudence garnie par le comportement nazi et japonais durant la deuxième guerre mondiale.

La question des agents de l'état fut notamment évaluée en profondeur dans l'affaire *Eichmann*[65]. Dans cette affaire, l'accusé tenta de s'absoudre de ses actes sous la défense d'ordres supérieurs. La Cour du district de Jérusalem rejeta d'emblée cette défense sur la base du *Justice Trial*[66]. Ceci fut confirmé par la Cour Suprême d'Israël[67], mais avec une distinction claire entre les actes d'agents de l'État et la défense d'ordres supérieurs. La Cour voit trois différences importantes. D'abord, la défense d'acte étatique réfère au fait que l'agent de cet État ne peut être tenu personnellement responsable de l'acte commis et que l'État en assume la responsabilité. La défense d'ordre supérieur signifie que la personne qui commet l'acte est effectivement la personne responsable mais que cette responsabilité est absoute ou diminuée parce qu'elle a agit sous la contrainte d'un ordre émit par une autorité compétente à laquelle cette personne est subordonnée, justifiant ainsi son acte[68].

Ensuite, alors que la défense d'acte étatique repose sur la base de l'autorité suprême de l'État qui ordonne ou autorise un acte, celle de la défense d'ordre supérieur n'implique pas nécessairement cette forme d'autorité. Elle justifie simplement l'acte sur la base de l'ordre d'un supérieur immédiat à la personne qui commet l'acte et qui est requise d'obéir[69].

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[65] *Attorney-General of the Government of Israel v. Adolf Eichmann*, jugement du 12 décembre 1962, (1968) 36 Int'l. L. Rep. à la p. 12.

[66] *In re Altstötter and Others*, (1947) 14 Annual Digest à la p. 286 : « *(6) Pleas of Superior Orders and of Obedience to the Law of the State. The Tribunal pointed out that the accused submitted that they should not be found guilty, because they had acted within the anthority and by the command of German Law and decrees, but that Control Council Law no. 10, Article II, 1 (c), provided that crimes against humanity should be punished whether or not the acts were in violation of the domestic laws of the country where perpetrated. Article II, paragraph 4 (b), also provided : 'The fact that any person acted pursuant to the order of his government or of a superior order does not free him from responsibility for a crime, but may considered in mitigation (…) We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defence to the charge.* »
Puis, à la p. 289 : « *(12) Act of State and Responsibility for War Crimes. 'Each defendant has pleaded in effect as a defense the act of State as well as superior orders in justification or mitigation of any crime he may have committed (…) The basis for individual liability for crimes committed and the law relating thereto was clearly and ably declared by the I.M.T. judgment, which reads as follow : 'It was submitted that international law is concerned with the actions of sovereign States, and provided for no punishment for individuals ; and further, that where the act in question as act of State, those who carry it out are not personally responsible, but are protected by the doctrine of sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as States has long been recognised (…) As we have said, the defendants are charged with specific overt acts against named victims : they are charged with criminal participation in governmentally organised atrocities and persecutions unmatched in the annals of history (…) We shall, in pronouncing snetence, give due consideration to circumstances of mitigation and to the proven character and motives of the respective defendants…* ». Cette dernière citation reprend le paragraphe 1 de la quatrième partie du jugement du Tribunal militaire international dans *In re Goëring and Others*, (1946) 13 Annual Digest à la p. 221, mais exclut toutefois la portion suivante *in fine* : « *…In the recent case Ex Parte Quirin (1942, 317 U.S. 1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court, said : 'From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals.' (…) Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.* ».
Cette interprétation du droit fut appliqué de manière identique dans le cas du Tribunal militaire international de Tokyo. Dans *In re Takashi Sakai*, (1946) 13 Annual Digest à la p. 223, le Tribunal militaire chinois des crimes de guerre a reconnu l'accusé coupable de crime de guerre contre la population chinoise en affirmant : « *(2) Plea of Superior Orders. – 'Agressive war is an act against world peace. Granted that the defendant participated in the war on orders of his Government, a superior order cannot be held to absolve the defendant from liability for the crime.* »

[67] *Attorney-General of the Government of Israel v. Adolf Eichmann*, jugement d'appel du 29 mai 1962, (1968) 36 Int'l. L. Rep. à la p. 277.

[68] *Ibid*. à la p. 313.

[69] *Ibid*.

Finalement, alors que l'acte étatique présume une marge discrétionnaire pour l'application de directive émanent de l'autorité étatique, la défense d'ordre supérieur résulte *ex hypothesis* dans l'absence d'alternative de la personne qui commet l'acte[70]. On doit donc comprendre que si l'individu dépasse les demandes de l'État qui a émit une directive ou qui a omis d'en émettre à l'encontre d'actes contraires aux obligations étatiques, la responsabilité étatique est acquise si l'État tolère le comportement de cet individu.

Dans le cas de l'affaire de *Téhéran* et dans l'affaire du *Nicaragua*, la logique de la CIJ veut que la responsabilité iranienne soit contractée par l'approbation et le support public du gouvernement iranien des activités des étudiants révolutionnaires contre les ressortissants américains[71]. Cette logique suit mal les principes établis par le Tribunal militaire international de Nuremberg et les jugements subséquents. En ne reconnaissant la responsabilité iranienne que lors de l'approbation publique des actes révolutionnaires en 1979 et en ne reconnaissant aucune responsabilité américaine pour les actes des contras au Nicaragua en 1986, la CIJ applique les critères concernant les ordres supérieurs à des cas où ce sont les actes étatiques qui sont en cause. Elle va ainsi à l'encontre de la seule jurisprudence applicable portant sur le droit international humanitaire et la responsabilité individuelle et étatique, établissant un contre-courant concernant la responsabilité étatique.

Alors que la CIJ reconnaît clairement la participation américaine dans le financement, l'entraînement, l'équipement, l'armement et l'organisation des forces *contras*, elle fixe le contrôle opérationnel comme étant le seuil de la responsabilité étatique[72]. Pourtant, suivant la doctrine des actes étatiques, il est facile d'interpréter les actions prouvées comme un mandat ou tout au moins un accord tacite du Gouvernement américain aux forces *contras* pour mener un conflit armé à son profit contre un gouvernement reconnu. Si cela n'entraîne pas une démonstration de la volonté américaine de voir des forces commettre des infractions graves au droit international humanitaire dans le but d'accomplir ses objectifs géostratégiques, cette interprétation démontre clairement le caractère international d'un conflit non-international au départ.

L'AFFAIRE *TADIC*

L'arrêt *Tadic* reprend ces principes lors du procès en Chambre de première instance du TPIY. Pour considérer la nature du conflit, la Chambre de première instance fonde son argumentation en large partie sur les conclusions de l'affaire du *Nicaragua*. Dans *Tadic*, les questions factuelles étaient de savoir qui étaient les belligérants, quels étaient leurs liens avec les États qui supportaient leurs causes respectives et quel était le conflit en cause. Il faut d'abord mentionner que l'affaire *Tadic* concerne le conflit en Bosnie-Herzégovine et non pas les conflits serbo-croates au Krajina ou les courtes guerres de sécession de la Slovénie et de la Croatie contre l'autorité centrale Yougoslave[73].

En juillet 1991, la Slovénie et la Croatie ont déclaré unilatéralement leurs indépendances respectives de l'autorité centrale de la République fédérale socialiste de Yougoslavie. Les conflits ont crée des mouvements importants de migrations (souvent forcées) et de multiples atrocités ont été rapportées. La Bosnie-Herzégovine, géographiquement prise entre les parties à ce conflit, a reçu un important nombre de ces réfugiés. Devant la crise politique yougoslave, le gouvernement de Bosnie-Herzégovine a considéré en octobre 1991 de déclarer aussi son indépendance. La population serbe, habitant 50% du

[70] *Ibid*. et dans *In re Goëring and Others*, *supra*, note 65 à la p. 222. Le Tribunal militaire international exprime clairement l'importance de l'alternative en affirmant : « …*The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible…* ».
[71] *Personnel diplomatique et consulaire des États-Unis à Téhéran (États-Unis c. Iran)*, *supra*, note 63 à la p. 17.
[72] F.V. Boyle, « Appraisal of the ICJ's Decision : Nicaragua v. United States (Merits) », (1987) 81 A.J.I.L. à la p. 86.
[73] Pour une description complète des causes et de la chronologie de ces conflits, voire M. Crnobrnja, *supra*, note 49 et S.P. Ramet, *Balkan Babel*, Oxford, Westview Press, 1996.

territoire bosniaque et déjà aliénée par la situation dans les deux républiques ayant déclarée leur indépendance, s'est fortement opposée à une telle déclaration. Durant l'automne de 1991, plusieurs « républiques autonomes » furent auto-proclamées par les résidents serbes. Le Gouvernement de la République de Bosnie-Herzégovine a alors tenté de rétablir son autorité sur ces territoires. Les résidents serbes ont défendu leurs positions par la force des armes. Il s'est alors produit un conflit armé non-international prolongé pendant lequel les deux parties se sont réorganisées et ont cherché des appuis extérieurs, combattant rarement mais violemment.

D'abord, la République de Bosnie-Herzégovine, puissamment encouragée par l'Allemagne sous le principe du droit à l'autodétermination, a cherché la reconnaissance internationale. Dans ce but, elle a réorganisé son système politique et monétaire ainsi que créé sa propre armée. Quant aux Serbes résidant en Bosnie-Herzégovine, ils ont progressivement constitué une milice armée permettant de combattre les forces de l'autorité bosniaque sous une autorité politique dirigée de Banja Luka (qui changera ensuite pour Pale) et nommée *Republika Srpska* (RS).

Le but de la Bosnie-Herzégovine était d'obtenir la reconnaissance internationale avec son territoire intact, alors que celui des Serbes était de garder un lien constitutionnel avec la République fédérale socialiste de Yougoslavie.

À la fin de mars 1992, le Parlement de la République de Bosnie-Herzégovine a déclaré son indépendance. Des bandes armées serbes ont alors posé des barricades dans la capitale Sarajevo. Plusieurs tirs de franc-tireurs firent quelques dizaines de victimes. Toutefois, le conflit ne prit véritablement d'ampleur qu'avec la reconnaissance de l'État de Bosnie-Hézergovine une semaine après. Les forces de l'Armée Populaire de Yougoslavie (JNA) ont tenté d'intervenir pour rétablir l'autorité yougoslave et le conflit a dégénéré rapidement.

Le 19 mai 1992, suite a plusieurs bavure de la JNA, la pression internationale a forcé le retrait de cette force. Lors de ce retrait, plusieurs officiers et soldats serbes et monténégrins décident de demeurer en *Republika Srpska* et joignent l'armée nouvellement formée par cette autorité politique, la VRS. Le 22 mai 1992, les Nations Unies ont reconnu la République de Bosnie-Herzégovine[74]. La question du type de conflit en cause est d'autant plus compliquée du fait de l'implication et du retrait de la JNA, lors duquel elle change son nom pour VJ (armée yougoslave). Lorsque celle-ci est partie au combat sur le territoire d'une république reconnue par quelques États, doit-on considérer le conflit comme international ou comme ayant un caractère non-international ? Les théories vues ci-haut permettraient potentiellement d'assimiler ce type de conflit à une situation de conflit armé « internationalisé », mais rien n'assure cette conclusion. Ceci est compliqué davantage par le retrait de ces forces. Le conflit deviendrait-il alors un conflit armé international « intra-nationalisé » ? C'est ce problème que le TPIY a dû résoudre dans l'affaire *Tadic*.

Dusko Tadic était un résidant serbe de Bosnie-Herzégovine, tenancier d'un café et activiste politique (nationaliste serbe) qui a joint volontairement la VRS. Il a été arrêté en février 1994 en Allemagne, sous l'inculpation d'avoir commis, en juin 1992 dans le camp d'Omarska en ex-Yougoslavie, des infractions comprenant notamment le meurtre, le viol, la torture et la complicité de génocide[75]. Toutefois, la culpabilité de *Tadic* ne pouvait être établie, pour certains crimes, que si un conflit armé international existait au moment de la commission de ces actes, puisque le régime applicable aux conflits armés à caractère non-international ne peut reconnaître de caractère criminel qu'aux actes qui

[74] *Tadic*, *supra*, note 1 au paragraphe 118 : « Malgré le retrait de la JNA de Bosnie-Herzégovine annoncé en mai 1992, des éléments actifs de l'ex-JNA, devenue la VJ, coopérèrent avec la VRS en Bosnie-Herzégovine. Des avions et des pilotes de la VJ notamment restèrent en Bosnie-Herzégovine après le retrait du mois de mai et travaillèrent avec la VRS tout au long de 1992 et 1993. Le général Ratko Mladic, anciennement commandant du 2e District militaire de la JNA, basé à Sarajevo, devint le commandant de la VRS à la suite de l'annonce du retrait. »

[75] *Ibid.* au paragraphe 7.

sont reconnus comme partie de la coutume internationale sur la base de l'article 3 commun aux *Conventions de Genève*. La Chambre de première instance :

> « …[d]evrait-elle conclure à l'existence du degré nécessaire de contrôle effectif exercé par la République fédérale de Yougoslavie (Serbie et Monténégro) sur les opérations militaires des forces armées de la *Republika Srpska* ? Si oui, malgré les changements intervenus dans la structure hiérarchique des forces des Serbes de Bosnie après le 19 mai 1992 et, en particulier, l'établissement d'une force armée séparée - la VRS - à cette date ou postérieurement, la conclusion appropriée serait que la VRS n'était rien de plus qu'un organe ou agent *de facto* du Gouvernement de la République fédérale de Yougoslavie (Serbie et Monténégro). »[76]

Pour déterminer ce contrôle effectif sur la base de l'affaire du *Nicaragua,* la Chambre de première instance s'est attardée à trois éléments : le lien entre le Gouvernement de la *Republika Srpska* et la République fédérale socialiste de Yougoslavie (devenue République fédérale de Yougoslavie le 27 avril 1992) ; la création de la VRS et le transfert de responsabilité de la JNA (VJ après le 22 mai 199) ; et le lien entre la VRS et la République fédérale de Yougoslavie.

La Chambre de première instance examine le premier lien en affirmant d'emblée que la VRS et la *Republika Srpska* sont des entités juridiques distinctes de la VJ et du Gouvernement de la République fédérale de Yougoslavie, à tout le moins en date du 19 mai 1992[77]. Elle présente toutefois la possibilité de la responsabilité du Gouvernement yougoslave, si les forces et le Gouvernement serbe de Bosnie-Herzégovine agissent comme agent de cet État. Elle applique donc le test de contrôle effectif de l'affaire du *Nicaragua*. Elle distingue toutefois ces deux situations par la description des forces en présence. Dans le cas des *Contras*, il s'agissait d'une force armée effectuant des coups de main, alors que la VRS étaient une force d'occupation. Ensuite, la question était de savoir si, par le retrait de la JNA du territoire bosniaque et la création de la VRS, le gouvernement yougoslave s'était suffisamment distancé pour qu'il ne soit pas imputable des actes commis par ces forces. Quant à connaître le lien entre la VRS et la JNA/VJ, la Chambre de première instance reconnaît la force probante de la preuve et juge que la JNA a joué un « …rôle d'importance cruciale dans la dans création, l'équipement, le ravitaillement, l'entretien et la dotation en effectif … » de plusieurs unités de la VRS[78]. Mais, fidèle au jugement de l'affaire *Nicaragua*, elle affirme que cela n'est pas suffisant. Elle énonce clairement que :

> « …il n'est ni nécessaire ni suffisant de démontrer simplement que la VRS était dépendante, et même complètement dépendante, de la VJ et de la République fédérale de Yougoslavie (Serbie et Monténégro) pour les nécessités de la guerre. Il faut aussi démontrer que la VJ et la République fédérale de Yougoslavie (Serbie et Monténégro) exerçaient le potentiel de contrôle inhérent à cette relation de dépendance ou que la VRS s'était elle-même placée sous le contrôle du Gouvernement de la République fédérale de Yougoslavie (Serbie et Monténégro). »[79]

Elle s'attarde plutôt à la question de la direction et du contrôle des opérations. Bien que la preuve démontre clairement une coopération établie entre l'état-major de l'armée yougoslave et de l'état-major général de l'armée de la *Republika Srpska,* par laquelle ces deux forces coordonnaient leurs opérations, la Chambre de première instance reste dans le sillon des critères de direction et de contrôle effectif durant les opérations. Pour cette raison, elle conclut :

[76] *Ibid*. au paragraphe 600.
[77] *Ibid*. au paragraphe 584.
[78] *Ibid*. au paragraphe 585.
[79] *Ibid*. au paragraphe 588.

> «… Coordination n'a pas la même signification que direction et commandement. Le seul autre élément de preuve présenté par l'Accusation était que, en plus du passage de toutes les communications de l'échelon supérieur de la VRS par des dispositifs de protection contre le décodage à Belgrade, une liaison pour les communications quotidiennes était établie et maintenue entre le quartier général de l'état-major général de la VRS et l'état-major général de la VJ à Belgrade. L'Accusation n'a présenté aucun autre moyen de preuve sur la nature de ce lien… »[80]

Elle fonde de plus ce raisonnement sur la différence factuelle de l'affaire du *Nicaragua* où les commandants et dirigeants politiques *contras* étaient choisis et nommés par les États-Unis, alors que dans le cas des Serbes de Bosnie-Herzégovine ces responsables politiques ont été élus au suffrage universel par la population serbe de cet État[81].

En conséquence, et en l'absence de ce qu'elle juge être une absence de preuves directes suffisantes pour démontrer le lien de contrôle effectif des autorités de Belgrade sur le comportement serbe de *Republika Srpska*, la Chambre de première instance juge que les actes reprochés ne peuvent être considérés comme ayant été commis pour le compte de la République fédérale de Yougoslavie[82]. Elle considère plutôt que les objectifs de ces deux entités étaient largement complémentaires et que, de ce fait, il n'était pas nécessaire pour cet État d'exercer un contrôle effectif, mais simplement de coordonner ses activités avec la *Republika Srpska*[83]. Pour la Chambre de première instance :

> « … Si l'on peut dire ainsi que la République fédérale de Yougoslavie (Serbie et Monténégro), par l'intermédiaire de la dépendance de la VRS à l'égard du ravitaillement en matériel par la VJ, avait la capacité d'exercer une influence considérable et peut-être même un contrôle sur la VRS, aucun élément de preuve ne permet à cette Chambre de conclure que la République fédérale de Yougoslavie (Serbie et Monténégro) et la VJ ont jamais dirigé ou, pour cette raison, jamais ressenti la nécessité d'essayer de diriger les opérations militaires effectives de la VRS, ou d'influencer ces opérations au-delà de ce qui aurait découlé naturellement de la coordination des objectifs et activités militaires par la VRS et la VJ aux échelons supérieurs. En bref, tandis que, comme dans l'affaire *Nicaragua*, les éléments de preuve dont dispose cette Chambre de première instance montrent clairement que les "diverses formes d'assistance apportées" aux forces armées de la *Republika Srpska* par le Gouvernement de la République fédérale de Yougoslavie (Serbie et Monténégro) étaient "cruciales pour la poursuite de leurs activités" et, comme durant les premières années d'activité des *contras*, ces forces dépendaient presque entièrement du ravitaillement de la VJ pour exécuter leurs opérations offensives, la preuve que la République fédérale de Yougoslavie (Serbie et Monténégro) par l'intermédiaire de la VJ, y compris, dans certaines circonstances, un soutien militaire direct, "a utilisé le potentiel de contrôle inhérent dans cette dépendance" est de même insuffisante. »[84]

La Chambre de première instance considère donc que la VRS et la *Republika Srpska* ne peuvent être considérées comme organes ou agents de l'État yougoslave. La conséquence juridique de cette détermination est évidemment que la Chambre de première instance considère que la nature du conflit après le 19 mai 1992 est celle d'un conflit armé à caractère non-international. Puisque seul l'article 3 commun aux *Conventions de Genève* s'appliquent, excluant donc l'application du concept de personne protégée de la quatrième *Convention de Genève*. Elle absout donc *Tadic* d'une douzaine de chefs

[80] *Ibid*. au paragraphe 598.
[81] *Ibid*. au paragraphe 599.
[82] *Ibid*, au paragraphe 602.
[83] *Ibid*. au praragraphe 604.
[84] *Ibid*. au paragraphe 605.

d'accusation[85]. Elle retient toutefois sa culpabilité sur la base du droit international coutumier qui reconnaît, suivant l'*Arrêt de la Chambre d'Appel* que :

> « …Tous ces facteurs confirment que le droit international coutumier impose une responsabilité pénale pour les violations graves de l'article 3 commun, complété par d'autres principes et règles générales sur la protection des victimes des conflits armés internes, et pour les atteintes à certains principes et règles fondamentales relatives aux moyens et méthodes de combat [d]es conflits … »[86]

Il apparut évident aux Procureurs du TPIY que cette décision, si elle n'était pas contestée, aurait des ramifications extrêmement importantes quant à qualification des conflits armés et diminuerait ainsi les chances de voir justice être rendue. Ils ont donc porté ce jugement en appel. Un appel interlocutoire fut aussi fait par la défense. La Chambre d'Appel du TPIY a reçu de plein droit ces appels.

Elle analyse l'appel sur deux motifs de fond : la nature du conflit et le statut des victimes de *Tadic*. Dès ses premières pages, la Chambre d'Appel reconnaît certains faits juridiques. D'abord, que seul un conflit armé international peut entraîner l'application de l'article 2 de son *Statut*[87], pour des violations graves aux *Conventions de Genève* et aux *Protocoles additionnels*, lorsque ces derniers sont applicables. Elle reconnaît de plus que un conflit armé non-international peut devenir internationalisé ou encore avoir lieu pendant qu'un conflit armé international a lieu[88]. Elle reconnaît que la nature du conflit en Bosnie-Herzégovine avant le 19 mai 1992 était de nature internationale et que le test adéquat pour établir si la nature du conflit après cette date était de caractère non-international est celui du test d'agence[89]. De ce point, elle diverge toutefois des critères choisis par la Chambre de première instance et sur la conclusion juridique à porter. Elle précise que le test de l'affaire du *Nicaragua* n'est pas convaincant sur deux aspects : parce que ce test ne respecte pas la logique de la responsabilité étatique et parce qu'il diverge de la pratique juridique et de la pratique des États.

En ce qui concerne la logique de la responsabilité étatique, elle affirme que la pratique des États est claire quant à l'inclusion des forces irrégulières sous l'expression de combattants appartenant à une partie au conflit[90] et que cette inclusion réfère implicitement au test de contrôle. Néanmoins, elle énonce que les critères composants ce test quant au degré de contrôle requis pour imputer la responsabilité sont plus souples que ceux avancés dans l'affaire du *Nicaragua* et soutenus par la Chambre de première instance dans l'affaire *Tadic*[91].

La Chambre d'Appel distingue ainsi trois situations où un individu ou un groupe peut entraîner la responsabilité étatique d'un tiers-État. Elle mentionne d'abord le cas d'individus chargés officiellement par un État d'exécuter un acte illégal sur le territoire d'un autre État. Ensuite, il y a le cas où un individu ou un groupe est chargé par un État de commettre des actes légaux sur le territoire d'un autre État, mais où cet individu ou ce groupe commettent une violation aux obligations de l'État mandant. Finalement, il existe les cas où un groupe d'individus structurellement organisé en hiérarchie

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[85] *Ibid*. au paragraphe 608.
[86] *Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence*, Case No.: IT-94-1-A, 15 October 1998.
[87] *Statut du Tribunal international chargé de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie*, 25 mai 1993, publié dans le *Rapport du Secrétaire-Général en accord avec le paragraphe 2 de la Résolution du Conseil de Sécurité 808* (1993), (S/25704) et approuvé par la Résolution du Conseil de Sécurité 827 (1993), 25 mai 1993.
[88] *Tadic –Appel*, supra, note 2 au paragraphe 84.
[89] *Ibid*. au paragraphe 87.
[90] *Ibid*. au paragraphe 94.
[91] *Ibid*. au paragraphe 96.

qui agissent pour le compte d'un État sans instructions spécifiques de la part de cet État, sur le territoire d'un autre État[92].

Dans le cas d'individus chargés officiellement, la Chambre d'Appel affirme que le lien de subordination, soit des instructions spécifiques prouvant qu'il a agit *de facto* comme agent de cet État, doivent être émises pour entraîner la responsabilité de cet État[93].

Pour les individus chargés de poser des actes légaux, sur la base d'une analogie de la responsabilité des États pour les actes commis par leurs représentants, l'État mandant serait tenu responsable des actes légaux et *ultra vires* de ses mandataires[94]. La preuve de ce mandat n'est pas difficile à faire, puisque la capacité officielle des individus est reconnue publiquement.

Quant aux groupes organisés qui agissent pour le compte d'un État sans instructions spécifiques, la Chambre d'Appel voit une situation où le lien de dépendance doit en effet être démontré. Toutefois, ce lien ne concerne pas l'individu en soi, mais le groupe dans son ensemble. Ainsi, elle affirme :

> « *…If it is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, whether or not each of them was specifically imposed, requested or directed by the State...* »[95]

La Chambre d'Appel base son raisonnement sur l'article 10 et 7 du *Projet d'articles de la Commission de droit international sur la responsabilité des États*[96]. Dans les cas envisagés par ces articles, la responsabilité étatique est imputable lorsqu'une personne dûment reconnue sous la loi applicable d'un pays contrevient à ses obligations. Par extension du raisonnement, les individus agissant *ultra vires*, ou les groupes sujets au contrôle d'un État et qui contreviennent aux obligations internationales entraînent la responsabilité de l'État ayant autorité sur eux[97].

En ce qui a trait aux divergences de la décision de la CIJ dans l'affaire du *Nicaragua* face à la pratique juridique et celle des États, la Chambre d'Appel est très critique face au test de contrôle. Elle affirme que la pratique étatique a déjà envisagé le cas où un degré de contrôle moindre que celui que la CIJ a requis. Elle énonce que la pratique distingue clairement entre les cas de groupes d'individus inorganisés de ceux où il y a des groupes organisés.

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[92] *Ibid*. respectivement aux paragraphes 118, 119 et 120.
[93] *Ibid*. au paragraphe 118.
[94] *Ibid*. au paragraphe 119.
[95] *Ibid*. au paragraphe 120.
[96] *Projet d'articles de la C.D.I. sur la responsabilité des États* aux articles 10 et 7.
[97] *Tadic-Appel*, *supra*, note 2 au paragraphe 123. Il est à noter que, même si la Chambre d'Appel ne fait pas de référence au Tribunal militaire international de Nuremberg, l'article 9 de l'*Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*, 82 R.T.N.U. 280, entrée en vigueur le 8 août 1945 prévoyait la responsabilité criminelle individuelle pour des groupes étatiques jugés criminel dans les termes suivants : « … *Art. 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization. After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard…* ». Il est logique que le raisonnement inverse soit tout aussi valable quant à la commission de crime de guerre ou de crime contre l'humanité. Ce fut d'ailleurs le cas dans de multiples affaires que la Chambre d'Appel énumère, dont *In re Ohlendorf and Others (Einzatzgruppen Trial)*, (1948) 15 Annual Digest à la p. 667

Alors que dans les premiers cas des instructions spécifiques doivent être prouvées, dans le cas des groupes organisés tels des groupes militaires ou paramilitaires une telle preuve n'est pas requise[98]. La Chambre d'Appel maintien que le support financier et matériel n'est effectivement pas une preuve décisive qui permet d'établir le lien d'agent d'État, mais que la preuve d'un contrôle sur l'ensemble des opérations et la coordination des activités militaire était déterminante pour déclarer le conflit « internationalisé »[99]. Conséquemment, la Chambre d'Appel a renversé les conclusions de la Chambre de première instance et a reconnu Dusko Tadic coupable de neuf des douze chefs d'accusation dont il avait été acquitté.

CONCLUSIONS

L'arrêt de la Chambre d'Appel du TPIY pose des jalons forts appréciables concernant les conflits armés non-internationaux « internationalisés ». D'abord, elle en reconnaît l'existence. Selon elle, les conflits armés non-internationaux « internationalisés » peuvent exister de façon mixte ou de façon globale. C'est-à-dire qu'il peut exister à la fois un conflit international et un conflit non-international sur le territoire, ou encore que l'internationalisation du conflit est telle que l'ensemble du conflit peut être considéré comme international.

Ensuite, elle énonce que le critère de qualification du conflit dépend du lien de dépendance et de contrôle d'un tiers-État sur des individus ou des groupes partis au conflit. Elle quantifie ce lien de dépendance comme étant un lien de contrôle et/ou de coordination sur l'ensemble des opérations dans le cas de groupes organisés et hiérarchisés. Elle ne retient le critère élevé de contrôle effectif durant la conduite des opérations que lorsqu'il s'agit de groupes désorganisés auquel des instructions spécifiques auraient été donnés, auquel cas ces instructions doivent être prouvées.

Finalement, la Chambre d'Appel démontre clairement la dualité du TPIY comme avant-gardiste et tributaire des Tribunaux militaires internationaux. Si elle interprète différemment certains critères de responsabilité criminelle sur la base de son *Statut*, elle base son raisonnement juridique en grande partie sur les cas de la deuxième guerre mondiale. Cette continuité s'inscrit bien dans le

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[98] *Tadic – Appel*, *supra*, note 2 au paragraphe 125.

[99] *Ibid*. au paragraphe 131. Elle base cet argument sur les cas des affaires *Kenneth P. Yeager*, *Stephens* et *Loizidou c. Turquie*, *supra*, note 62, ainsi que sur celle de l'affaire du *Personnel diplomatique et consulaire des États-Unis à Téhéran*, *supra*, note 63, tel que discutées ci-haut. Ce raisonnement a déjà été appliqué dans l'affaire *Jorgic*, Federal Court of Justice (Bundesgerichtshof), jugement du 30 avril 1999, (3 StR 215/98), (non-publié) p. 19-20 and 23, archivé à la bibliothèque Tribunal international, où la Cour fédérale maintien le l'arrêt de la *Oberlandesgericht* de Dusseldorf concluant à l'existence d'un conflit armé non-international internationalisé du fait de cette coordination militaire. La Chambre d'Appel conclue que : « …*Where the question at issue is whether a single private individual or a group that is not militarily organised has acted as a de facto State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved ex post facto by the State at issue. By contrast, control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts…* ».

développement constant, quoique parfois trop lent, du droit international humanitaire et augmente les chances que justice soit rendue aux victimes des conflits armés.

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LA CÉLÉRITÉ –EXIGENCE ESSENTIELLE DU PROCÈS ÉQUITABLE (APPROCHE SUR LES TENDANCES DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME)

par

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PROBLÉMATIQUE ET PLAN

Une durée raisonnable dans l'examen des litiges constitue un des éléments essentiels du procès équitable. Son respect est soumis aux exigences particulières issues de la CEDH, ainsi que du Pacte international relatif aux droits civils et politiques et du droit communautaire européen.[2]

En droit roumain, la célérité fut consacrée tardivement[3] malgré l'adhésion de la Roumanie au Conseil de l'Europe et la ratification de la CEDH. Jusqu'à l'entrée en vigueur de la loi concernant l'organisation judiciaire de 2004, la célérité procédurale a été indirectement consacrée par de nombreuses dispositions des codes de procédure et elle fut reconnue en doctrine. Quoi qu'il en soit, le procès équitable réclamait plus qu'une consécration indirecte. La loi citée demeure l'unique texte énonçant cette garantie procédurale.

Dans le cadre du système des garanties du procès équitable, la célérité s'inscrit, à coté de la publicité et de l'équité, dans la catégorie des garanties relatives au bon fonctionnement de la justice. La célérité concerne la durée raisonnable de la procédure, à partir de la saisine et jusqu'au prononcé d'un arrêt, y compris l'exécution entière de cet arrêt[4]. La durée raisonnable assure la valorisation efficiente et en temps utile des droits subjectifs. Si la durée de la procédure dépasse les limites raisonnables, la justice ne serait"*ni équitable, ni crédible, ni efficace* "[5].

Un grand problème reste de savoir ce que le raisonnable, concept philosophique érigé en principe de droit positif, suppose. Cette notion " *gît au cœur des procédures judiciaires relatives à la célérité. Assurément, il s'agit là d'une notion fondamentale du droit, à l'aune de laquelle le droit sanctionne des comportements qui excèdent les bornes de ce qui paraît socialement acceptable* "[6]. La spécificité de la célérité en comparaison avec les autres garanties procédurales est tributaire à ce concept. Elle consiste dans les difficultés d'appréciation et d'interprétation que la formule *durée (ou terme) raisonnable* soulève. Le caractère raisonnable d'une certaine procédure constitue " *une notion à contenu variable, réfractaire à toute approche dogmatique*"[7] .

Garantie du procès équitable sous l'aspect de sa temporalité, la célérité signifie la rapidité de la procédure, le droit du justiciable à obtenir un jugement sans retards ou tergiversations. La rapidité de la procédure doit être comprise comme l'antipode d'une procédure abusivement prolongée, et non pas au sens d'un traitement rapide et superficiel des affaires judiciaires. Au contraire, les cas où il est nécessaire un temps plus long afin d'approfondir le fond de l'affaire, ne méconnaissent pas le principe de la célérité. Entre la célérité et une bonne solution de l'affaire, l'équilibre doit être toujours trouvé.
L'importance de la célérité se reflète dans la promptitude et le dynamisme que celle-ci imprègne au mécanisme de la justice. En son absence, le jugement perdrait tout intérêt pour le justiciable, réalité exprimée éloquemment par l'adage anglais "*justice delayed, justice denied*". En dernière instance, le manque de célérité vaudrait à un déni de la justice même.

Le procès suppose un certain temps pour mener une instruction adéquate, l'absence d'une telle période étant considérablement plus nocive pour la sauvegarde des droits individuels, que son prolongement.

Les retards excessifs ne sont pas permis à l'égard des impératifs d'une bonne administration de la justice, impératifs qui les sanctionnent énergiquement.

Une sanction spécifique pour l'absence de célérité manque des dispositions de la CEDH. On peut songer aux poursuites disciplinaires à la charge du ou des magistrats défaillants, ainsi qu'à une indemnisation pécuniaire du préjudice subi par le justiciable. Cependant, la sanction la plus radicale reste l'irrecevabilité des poursuites (en matière répressive) contre la victime de l'absence de célérité[8]. De toute façon, la lenteur de la procédure ne détermine pas la nullité de l'arrêt et celle de la procédure entière. Habituellement, le non respect de la durée raisonnable prend la forme d'un préjudice moral, dont le justiciable peut exiger la réparation.[9]

Le calcul de la durée désigne une opération qui ne se soumet pas aux principes généralement valables pour toutes les branches du droit. La jurisprudence de la CEDH en témoigne. Cette jurisprudence, confrontée au spécifique de la notion, réunit l'approche globale et l'approche concrète afin d'effectuer son contrôle.

L'appréciation de la célérité d'une façon globale suppose l'analyse de la durée de la procédure entière, considérée en son ensemble, dans sa totalité.[10] Ce type d'appréciation exige une précision particulière sur deux moments: *dies a quo*[11] et *dies ad quem*[12]. L'intervalle de temps contenu entre le dies a quo et le dies ad quem doit être le plus court possible, afin d'offrir aux justiciables une justice efficace.

Le point de départ de la période prise en compte coïncide, en matière civile, avec la date de la saisine de l'instance.[13] Le moment à partir duquel on commence à calculer le délai raisonnable, même s'il présente une certaine généralité, reste influencé par les particularités des législations nationales. Ainsi, il peut être établi antérieurement à la saisine de l'instance[14] ou ultérieurement à sa saisine (et même à la suite de la procédure devant l'instance de premier degré[15]).

En matière pénale, dies a quo est déterminé par la date de la mise en accusation de la personne.[16] "(…), le terme doit être entendu dans un sens non formaliste : il suffit d'un acte, quel qu'il soit, qui révèle, de la part de l'autorité, le reproche d'avoir accompli une infraction pénale, entraînant des répercussions importantes sur la situation du suspect "[17]

Dies ad quem se situe généralement à la date de la décision définitive, y compris les instances de recours, mais ce moment nécessite cependant l'analyse de plusieurs situations possibles, déterminées principalement par les particularités de l'admissibilité des requêtes devant la CEDH pour absence de célérité. En général, ce moment est marqué par la dernière décision édictée. Au cas où, en droit interne, le procès a connu tous les niveaux juridictionnels, y compris les voies de recours, le caractère raisonnable analysé est contenu entre la demande initiale et la dernière décision sur le fond.[18]

Les demandes des particuliers sont en principe admissibles seulement dans la mesure où les voies internes de recours sont épuisées. Il s'agit là de l'expression de la subsidiarité du système conventionnel par rapport aux systèmes juridictionnels internes. Quant à la célérité, cette condition n'est pas exigée. En effet, il serait injuste et inutile de demander au justiciable d'attendre le déroulement d'une procédure, qui, peut être, même dès sa première phase, lente ou extrêmement lente. En conséquence, la Cour admet des requêtes pour le caractère non-raisonnable de la durée de la première instance, sans que les voies de recours ne soient encore déclenchées. Dans le même ordre d'idées, la sanction de la durée non raisonnable d'une instance interne de recours n'a pas été conditionnée par l'émission d'un arrêt[19]. Le dernier acte de l'organe juridictionnel marque le dies ad quem. La non expiration du délai d'appel n'empêche pas l'admission d'une requête en constatation de la violation de la célérité en première instance.[20]

L'appréciation globale inclut l'étape de l'exécution de la décision finale qui tranche le fond. On considère que le justiciable a aussi le droit à l'exécution de l'arrêt dans un délai raisonnable.[21] Cette position a été affirmée à l'occasion de plusieurs affaires.[22]

L'analyse de la célérité peut être structurée selon les facteurs lié**s** au contentieux (section 1) et les facteurs lié**s** aux intervenants (section 2). Pour la première section, on envisage la complexité (1.1) et la nature (1.2) de l'affaire, tandis que la deuxième section contiendra une analyse du comportement des requérants (2.1) et des autorités étatiques (2.2).

SECTION 1. LES FACTEURS LIÉS AU CONTENTIEUX

1.1. La complexité de l'affaire

Le degré élevé de complexité d'une affaire, peut justifier la lenteur de la procédure. Cela suppose un état de fait complexe (nombre élevé de parties, la difficulté des preuves, l'exercice systématique des voies de recours, l'aspect international du litige[23]) et /ou l'application de nombreuses règles de droit, ainsi que des controverses et des incertitudes à l'égard de la législation interne applicable.

" *Il va sans dire qu'une procédure relative aux délits d'ordre financier rendant nécessaires, par exemple, des mesures d'expertise ou l'audition de nombreux témoins, nécessite un temps plus long qu'une procédure relative à une simple détention illégale d'armes ou à une résistance aux forces de l'ordre*"[24].

La complexité n'est pas de nature à justifier *a priori* une durée prolongée de la procédure, car celle-ci peut être également causée par des facteurs imputables à l'Etat. La Cour vérifie si la complexité est réelle ou illusoire, comme des procédures dilatoires.[25]
Le degré de complexité du litige augmente la durée de la procédure et influence son caractère raisonnable. Dès lors, la simplicité de l'affaire conduit à un abordage différent de la procédure, la juridiction ayant l'obligation de prendre tous les moyens utiles pour l'accélérer[26].

1.2. La nature de l'affaire

La nature de l'affaire, critère de l'appréciation concrète de la célérité, attire l'attention sur l'enjeu ou l'importance que l'affaire présente pour les requérants. La nature des affaires peut justifier un traitement différencié en matière de célérité, plus précisément, un traitement accéléré. Plus cet enjeu est vital pour le justiciable, plus stricte sera l'appréciation du caractère raisonnable de la procédure instruite. L'appréciation de la nature apte à engendrer ce traitement intervient in concreto, cas par cas, espèce par espèce. Aussi des affaires touchant à l'être moral et psychique du justiciable[27] exigent un traitement plus rapide.

En dehors de ces circonstances spéciales de la cause, par rapport aux matières du droit, certaines catégories de litiges, par leur nature, exigent une procédure plus rapide :

- les conflits du travail, en raison des conséquences économiques pour la personne[28];
- les litiges relatifs à l'état des personnes (divorce, tutelle des enfants, placement d'un enfant en vue d'adoption[29], etc.) ;
- les litiges dont les enjeux économiques sont essentiels pour le requérant[30];
- les litiges de droit pénal en général, en raison de leur importance par rapport aux valeurs protégées (vie, intégrité corporelle et santé de la personne, liberté, honneur, dignité, etc.) exigent une solution plus rapide.

SECTION 2. LES FACTEURS LIÉS AUX INTERVENANTS

2.1. Le comportement des requérants

Ce critère a une importance particulière pour la procédure de droit privé, étant donnée la liberté d'agir des justiciables et le principe de la disponibilité. En revanche, le contentieux répressif laisse peu de moyens d'agir d'une façon autonome pour les justiciables.

Le principe qui gouverne les juridictions de droit privé relatif au comportement des requérants, est celui de leur diligence, des démarches et des activités légales et morales qui les incombent pour l'efficience de l'activité juridictionnelle[31]. Dans la mesure où ce principe n'est pas respecté, la prolongation du procès ne saurait être imputée à l'Etat[32]. La Cour sanctionne seulement les retards imputables à l'Etat.

Toutefois, le comportement du requérant doit se présenter comme l'unique cause des retards procéduraux, ou, s'il y a d'autres causes encore, celles-ci doivent tenir de la complexité ou de la nature de l'affaire. En ce sens, l'attitude des parties ne dégrève pas le juge de son obligation d'assurer la célérité de la procédure et de prendre toutes les mesures légales possibles pour l'accélérer (par exemple, par le rejet des demandes injustifiées, etc.) [33].

A l'égard de la CEDH, les justiciables peuvent "*contribuer"* à l'absence de célérité par:

-l'usage de toute voie de recours ou par l'exercice de nombreux recours qui ont déterminé l'augmentation de la difficulté de l'affaire et de la procédure[34];

-la présentation tardive des preuves ou l'invocation de nouvelles preuves, qui, à la suite, se prouvent inexactes[35];

-le changement répété des avocats[36].

Le comportement dilatoire du requérrant, ainsi que sa volonté d'obstruer le déroulement de la justice exonèrent l'Etat. Par ailleurs, le refus de coopérer avec l'Etat (le refus de signer un procès - verbal, de produire des preuves, le retard dans la déposition des conclusions, etc.) constitue également une cause exonératoire pour le pouvoir publique.

Le fait d'empêcher la justice et l'omission de contribuer à côté des autorités à son accomplissement sont sanctionnées par la Cour. Cette sanction consiste dans le rejet de la requête en constatation de l'absence de célérité. Afin de justifier la lenteur de la justice, le comportement du requérrant doit être abusif et dilatoire.[37]

2.2. LES AUTORITÉS ÉTATIQUES

2.2.1. Les autorités juridictionnelles

Les autorités juridictionnelles, directement responsables de l'administration de la justice, les retards voulus peuvent leur être imputés. La vérification se fait étape par étape, afin de dépister le niveau où des retards dans le mécanisme procédural sont intervenus.

Les juges ont le devoir d'instruire efficacement et dans un délai raisonnable les procès. De plus, ils doivent utiliser toutes les prérogatives dont ils disposent pour éviter les tentatives des parties ou l'attitude des spécialistes de nature à tergiverser la procédure. En raison de la nature de l'affaire, les juges doivent même accélérer la procédure. Le rôle du juge pour le bon déroulement d'un procès reste fondamental, son inertie et son indolence compromettant irréparablement l'idée de justice[38].

Dans la jurisprudence de la CEDH, la violation de la célérité "*du*" au juge, se réalise, le plus souvent, par:

- l'organisation d'une procédure caractérisée par un grand nombre des délais et/ou par des intervalles excessivement longs entre eux[39];
- l'absence des mesures d'instruction du dossier ou de renvoi vers les structures compétentes[40];
- l'interruption sans un motif sérieux du prononcé de l'arrêt[41];
- l'ajournement répété des séances[42];
- la passivité du juge pendant de longues périodes[43];
- l'absence des mesures pour la déposition en temps utile du rapport d'expertise[44];

La diligence manifestée par le juge empêche une éventuelle condamnation de l'Etat pour non-respect de la célérité, ainsi que les particularités de la procédure.[45] En même temps, un délai plus long est justifié s'il était nécessaire à la bonne documentation de l'affaire par le juge et à son approfondissement, aspects qui, de toute façon, se refléteront positivement sur la décision finale.

2.2.2. Les autorités extra juridictionnelles

La CEDH analyse en subsidiaire la diligence des autorités législatives et exécutives dans leur appui à la gestion judiciaire raisonnable des affaires. Plus synthétiquement, "*l'Etat a le devoir de protéger juridictionnellement l'individu*"[46].

La Cour insiste pour que les autorités étatiques extrajudiciaires législatives et exécutives agissent afin de favoriser la durée raisonnable des procédures judiciaires. Il s'agit d'une obligation générale de résultat de l'Etat d'assurer à ses citoyens un procès équitable. L'Etat répond pour tous ses services d'une façon unitaire à l'égard des obligations internationales assumées, y compris le procès équitable. L'inertie des autorités, débiteurs de cette obligation, est de nature à entraîner des condamnations répétées de l'Etat[47].

Conformément à l'art. 1-6 de la Charte européenne des juges, élaborée par le Conseil de l'Europe en juin 1998, "*l'Etat a le devoir d'assurer au juge ou à la juge, les moyens nécessaires pour un bon accomplissement de sa mission et notamment, du traitement des affaires dans un délai raisonnable* ".

Pourtant, on ne peut pas reprocher aux autorités étatiques la lenteur de toute la procédure et donc établir une responsabilité générale dans les cas où les affaires apportent en attention des situations isolées, qui ne présentent une fréquence inquiétante. Cependant, ces autorités doivent agir pour remédier la situation et pour prévenir des cas semblables. Des réformes énergiques sont exigées seulement dans les circonstances d'une crise généralisée, structurelle et prolongée[48].

La célérité peut être améliorée par la diminution des dossiers qu'un juge doit trancher. Le système juridictionnel roumain se confronte pleinement avec ce problème, à côté des carences liées à l'indépendance des magistrats, la lenteur formant le deuxième grand reproche des justiciables roumains pour leur service de justice.

La Cour établit seulement les buts que les Etats doivent atteindre, en leur laissant le choix des moyens spécifiques en fonction de leurs ordres juridiques internes, des ressources financières et des priorités générales. Elle se réserve quand même le droit de vérifier l'utilité de ces moyens, pour que le but fixé soit atteint.

Les déficiences internes aboutissant à des retards injustifiés dans la solution des affaires judiciaires, sont remédiées habituellement par des réformes administratives[49]. Celles-ci conduisent habituellement à une augmentation du nombre des juges, donc à la création de nouveaux postes des magistrats[50], des greffiers ou de personnel auxiliaire. Cette amélioration devrait être également qualitative, par le caractère obligatoire des cours de préparation et de perfectionnement professionnel.

Au niveau des structures, les réformes en justice ont engendré soit de nouvelles structures juridictionnelles, soit de nouveaux départements dans les juridictions en place, ainsi que l'implantation des mécanismes préalables ou parallèles aux juridictions. Toutes ces transformations supposent évidemment une croissance importante du budget de la justice.

Notion difficile à cerner, le délai raisonnable reste particulièrement influencé par les circonstances des affaires judiciaires. Exigence essentielle du procès équitable, la célérité exprime l'inextricable lien entre la promptitude de la justice et l'idée de justice même. Trop tard rendue, la justice devient inéquitable. Cependant, la célérité doit être recherchée dans une sorte d'équilibre entre l'approfondissement du dossier en vue d'une bonne solution de celui-ci et la rapidité avec laquelle les autorités étatiques agissent. La célérité devient la quintessence de "*l'importance qui s'attache à ce que la justice ne soit pas rendue avec des retards propres à en compromettre l'efficacité et la crédibilité*"[51].

[1] Ingéneur d'études à la Faculté de droit de Craiova, Roumanie, abucureanu@yahoo.com;

[2] En dépit du fait que les juridictions internationales se montrent particulièrement exigeantes à l'égard de la célérité, elles-mêmes, dans leur activité, ne respectent trop ce principe. La lenteur de leur procédure est bien connue. En ce sens, des réformes institutionnelles en vue d'améliorer le traitement des affaires et de réduire les délais s'imposent. On rappelle à cet égard, un document de réflexion sur l'avenir du système juridictionnel de l'Union européenne, autour de l'accélération de la procédure, notamment dans les conditions de son élargissement : Les activités de la Cour de justice et du Tribunal de première instance des Communautés européennes, 17/99, semaine du 14 au 18 juin 1999, pp 42;

[3] Sa consécration a été réalisée par la loi concernant l'organisation juridictionnelle, 303/2004 ;

[4] Son embryon pouvant être trouvé, avant d'être établi par la jurisprudence analysée, en droit grec et espagnol: au cas ou des voies d'exécution forcées étaient exercées, la durée de la procédure civile les englobait.

[5] Natalie Fricero, Les garanties d'une bonne justice, in Droit et pratique de la procédure civile (sous la direction de Serge Guinchard), Dalloz-Action, 2001/2002, pp 527;

[6] Ch. Perelman, Le raisonnable et le déraisonnable en droit, Archives de philosophie de droit, t. 23, 1978, pp 35-42, cité par Rusen Ergec et Jacques Velu, dans La notion de délai raisonnable dans les articles 5 et 6 de la Convention européenne des droits de l'homme, essai de synthèse, RTDH, 5/1991, pp 137;

[7] N. Fricero, op. cit., pp 527;

[8] Rusen Ergec et Jacques Velu, op. cit, pp 158;

[9] Une façon originaire de réparation du dommage a été établie par la Cour de justice de l'U.E., par la déduction de la somme due au titre de dommage de l'amende. Cette modalité de réparation évite l'instrumentation d'un deuxième procès en indemnisation.

[10] Afairres Buchholz c/Allemagne, 6 mai 1981, Pretto c/Italie, 8 décembre 1980, Guincho c /Portugal (10 juillet 198400, Capuano c/Italie, 25 juin 1987 (www. echr.coe.int, www.droitenligne.com :jurispru/CEDH.html, www.idhbb.org) ;

[11] Dies a quo signifie le moment à partir duquel on commence à calculer le délai et à apprécier son caractère raisonnable.

[12] Dies ad quem marque la fin du délai dont on contrôle le caractère raisonnable.

[13] Affaires Konig c/Allemagne, 28 juin 1978 (www. echr.coe.int, www.droitenligne.com :jurispru/CEDH.html, www.idhbb.org);

[14] Un exemple en ce sens reste le droit belge, le point de départ pouvant être situé avant la date de saisine de la juridiction compétente, lorsque les parties ont eu recours à une procédure préliminaire, telle la tentative de la conciliation(R. Ergec, J. Velu, op. cit. pp 155).
[15]Affaires Guincho c/Portugal, Poiss c /Autriche, 23 avril 1987, (www. echr.coe.int, www.droitenligne.com :jurispru/CEDH.html, www.idhbb.org) ;
[16]Affaire Eckle c/Allemagne Fédérale, 15 juillet 1982 (www.droitenligne.com :jurispru/CEDH.html, www.idhbb.org) ;
[17]Rusen Ergerc, Jacques Velu, La notion de délai raisonnable dans les articles 5 et 6 de la Convention Européenne des Droits de l'homme, essai de synthèse, Revue Trimestrielle des Droits de l'Homme, 1991 ;
[18] L'affaire Roselli c /Italie, 15 février 2000 (www.idhbb.org) ;
[19]Les affaires de la contamination avec le virus HIV, engagées contre la France (www. echr.coe.int, www.droitenligne.com :jurispru/CEDH.html, www.idhbb.org) ;
[20]Afacerile Boudier c/France, Castel c/France (www. echr.coe.int, www.idhbb.org);
[21] Afacerea Hornsby c/Grece, 19 mars 1997 (www. echr.coe.int, www.droitenligne.com :jurispru/CEDH.html, www.idhbb.org);
[22] Les règles devant les instances constitutionnelles diffèrent de celles applicables aux instances de droit commun.
[23] Pettiti, Decaux, Imbert, La CEDH commentaire article par article, Economica, 1995, pp264 ;
[24] Cité de l'article de Rusen Ergec et Jacques Velu, op. cit. pp 157;
[25] Serge Guinchard, Monique Bandrac, Xavier Lagarde, Melina Douchi, Droit processuel, Droit commun du procès, Dalloz, 2001 ;
[26] N. Fricero, op. cit., pp 530.
[27]Affaires Alain Vallee c/France, 26 avril 1994; X/France, 31 mars 1999, (www.droitenligne.com :jurispru/CEDH.html).
[28]Affaires Vocaturo c/Italie, 24 mai 1991, Gergouil c/France, 21 mars 2 000 (www. echr.coe.int) ;
[29]Affaires Laino c/Italie, 18 fevrier 1999, E.P. c/Italie, 16 novembre 1999 (www.idhbb.org) ;
[30] Affaires Podbielski c/Pologne, 30 octobre 1998, Gozalvo c/France, 9 novembre 1999 (www. echr.coe.int) ;
[31] Affaire Capuano c/Italie (www.droitenligne.com :jurispru/CEDH.html).
[32] Affaire Vernillo c/France, 20 fevrier 1991 (www. echr.coe.int) ;
[33] Guincho c/Portugal, Capuano c/Italie, Baraona c/Portugal (www.idhbb.org) ;
[34]Deumeland c/Allemagne, 29 mai 1986, Lechner et Hess c/Autriche; 23 avril 1987 (www.droitenligne.com :jurispru/CEDH.html) ;
[35] Affaires Monnet c/France, 27 octobre 1993, Ciricosta et Viola c/Italie, 4 décembre 1995 Di Pede c/Italie, 26 septembre 1996 (www.idhbb.org) ;
[36] Affaires Konig c/Allemagne, Monnet c/France, 27 octobre 1993 (www. echr.coe.int) ;
[37] Affaire Dobbertin c/France, 25 février 1993 (www.idhbb.org) ;
[38] Guinchard, M. Bandrac, .Lagarde, M.Douchy, op. cit. 533 ;
[39] Affaire Buchholz c/Allemagne (www.idhbb.org) ;
[40] Affaires Konig c/Allemagne, Terranova c/Italie, 4 décembre 1995, Allenet de Ribemont c/France, 10 février 1995 (www. echr.coe.int) ;
[41] Affaire Konig c/Allemagne (www. echr.coe.int) ;
[42] Affaire Zappia c/Italie, 26 septembre 1996, (www. echr.coe.int) ;
[43]Affaires Zimmermann et Steiner c/Suisse, 13 juillet 1983, Ficara c/Italie, 19 février 1991, (www.droitenligne.com : jurispru/CEDH.html);
[44] Affaires Galinho Carvalho Matos c/Portugal, 23 novembre 1999, Marques Gomes Galo c/Portugal, 25 novembre 1999 (www. echr.coe.int);
[45]Affaire Raffineries grecques Stan et Stratis Andreadio c/Grèce, 9 décembre 1994 (www.idhbb.org) ;
[46] Cour de justice de l'U.E. (www.droitenligne.com : jurispru/CEDH.html);
[47] Typiquement pour les condamnations répétées en matière de célérité, reste le cas de l'Italie. Les affaires suivantes en témoignent: scalvini, G.M.N., Arno, Bargali, M.C., Bottazzi, Paderni (www. echr.coe.int).
[48] Affaire Zimmermann et Steiner c/Suisse, (www.droitenligne.com : jurispru/CEDH.html)
[49]Affaire Union Alimentaria sander sAC/Espagne, Guincho c/Portugal, 17 juillet 1989, Buchholz c/Allemagne (www.droitenligne.com : jurispru/CEDH.html).
[50] En Espagne, en raison des condamnations répétées pour l'absence de célérité, on a crée dans les années '90, plus de 1 600 postes de juges et on a réorganisé la compétence.
[51] Affaire Moreira de Azevedo c/Portugal, 3 octobre 1990 (www. echr.coe.int).

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THE COMMISSION'S POWERS OF INVESTIGATION IN THE LIGHT OF FUNDAMENTAL RIGHTS

by

JULIA KLUCZYŃSKA

Nowadays a common connotations with the notion 'fundamental rights' are a rich output of European Court of Justice jurisdiction, Charter of Fundamental Rights and European Convention for the Protection of Human Rights and Fundamental Freedoms. In this context it can seem surprising that initially there is no remark in the Treaties about human rights protection. In the fifties an individual was considered mainly in the context of four freedoms, because of it's commercial activity. A breakthrough came with the judgement in *Van Gend & Loos* in 1963, where the ECJ explicitly stated that subjects of EC law are not only Member States but also their nationals. Moreover, EC law can not only impose obligations on individuals but also confer them rights. Formulating a principle of direct legal effect, which in connection with principle of supremacy of EC law over national law gave necessary impulse for national judges and doctrine to start wondering, whether an individual under EC law is equipped with some rights of fundamental character and, what is also important, whether community legal system provides necessary mechanism to protect such rights.

However, until 1969 the ECJ was very reluctant to recognising fundamental rights. With regard to that issue, the case *Stauder v. city Ulm* was a seminal one. Here ECJ for the first time recognized fundamental rights as a part of general rules of community law and it's own competence to ensure their respect.

It was the beginning of line of cases where the ECJ developed the doctrine of fundamental rights. In *Internationale Handelsgeselschaft* ECJ added that the *"protection of such rights, whilst inspired by constitutional traditions common to the MS must be ensured within the framework of the structure and objectives of the Community"*. In the case *Nold* ECJ stated that Community's measures that are not consistent with fundamental rights guaranteed in constitutions of MS can't be valid. However, it was remarked that fundamental rights stemming from the constitution of Member State can not be a hindrance in realisation of community's objectives granted in the Treaties.

It was a background for two controversial ruling of Verfassungsgericht in Germany in case *Solange I* and *Solange II*, which implicitly called in question the supremacy of community law. It was a clear signal send by national constitutional court that EC should work out its own catalogue of fundamental rights if it wants national courts to respect supremacy of EC law.

Solange-beschluss could have been one of the reasons why in *Heuer* case ECJ referred to European Convention for the Protection of Human Rights and Fundamental Freedoms. In that case ECJ interpreted property right in the light of additional protocol to ECHR. Therefore the question arises of the relationship between community legal order and the Convention. There is still an open question whether the fact that all MS are part signatories of ECHR means that the ECHR binds also EC.

Nevertheless, principles gradually worked out by ECJ were underpinned by Article 6 Treaty on European Union added by Amsterdam Treaty:

> "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. (…) The Union shall respect fundamental rights, as guaranteed by the European Convention of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

Currently the process of development of fundamental rights is a very advanced one. The Charter of Fundamental Rights as a II part of the European Constitution will be a binding, legal act and the draft of the Constitution includes an Article enabling accessing EU to ECHR.

If individual is supposed to be so well protected - by fundamental rights stemming from constitutional traditions common to the MS as a part of general rules of EC law, the Charter and ECHR, interesting issue appears : what to do when the fundamental rights and community organ's powers are in conflict.

In this work I would like to concentrate on the impact of the doctrine of fundamental rights on Commission's powers of inspection in proceeding against anti-competitive practices. Currently that issue is regulated by the Council Regulation No 1/2003[1] but all cases that I am going to analyze were judged under the rule of previous Council Regulation No 17 from 1962[2].

According to Article 14 of the Regulation No 17 the officials authorised by the Commission are empowered to examine the books and other business records, to take copies of or extracts from the books and business records and to enter any premises, land and means of transport of undertakings.
In all three cases that I am going to analyse-*AM&S, Hoechst* and *Roquette Frére* Commission adopted, on the basis of Article 14 (3) of Regulation No 17, a decision ordering the undertaking to submit to an investigation because of alleged breach of competition law. All defendants called in question Commission's investigations powers on the basis of the Article 8 (1) of the ECHR which provides that: *"Every one has the right to respect for his private and family life, his home and his correspondence*".

In case AM&S the undertaking was questioning the Commission's decision imposing on it an obligation to present certain documents. According to the undertaking documents were confidential communications between lawyer and client and because of that reason it is protected by professional privilege common to constitutional traditions of the MS. The basic issue was whether a scope of legal privilege includes correspondence between client and every lawyer or only lawyer who are not bound with the client by a relationship of employment. According to ECJ *"it is apparent from the legal system of the MS that, although the principle of such protection is generally recognised, its scope and the criteria for applying it very."* ECJ stated that only communication that is made for the purposes of client's defence and only made by independent lawyer is common criteria in national laws of the MS.

That approach to the scope of protection of professional privilege has begun to change recently. Decision of the Court of First Instance on October 30, 2003 in *Akzo* indicates that CFI may extend professional privilege to in-house lawyers. The President of the CFI suggested that the judgement in AM&S can be out-dated. As CFI in a different case underlined, *"the protection of the confidentiality of written communications between lawyer and client is an essential corollary to the full exercise of the rights of defence, the protection of which Regulation 17 itself, in particular in the 11th Recital and its preamble and its provisions contained in Article 19, take care to ensure"*[3].

Some authors even conclude that the extension of legal privilege will enhance a legal compliance and predictability and "the fears of the ECJ that in-house lawyers will hide behind the legal privilege to engage in, or assist with, anti-competitive practices are unfounded"[4]. Maybe they are right, but if they are not there is a risk that a wider definition will make a Commission's powers of inspection in proceeding against anti-competitive practices seem ridiculous.

[1] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty
[2] Council Regulation No 17 of 6 February 1962
[3] Joint cases T 125/03 R & 253/03 R, para.100
[4] Gavin Murphy, "CFI Signals Possible Extension of Professional Privilege to In-house Lawyers", (2004) European Competition Law Review, vol.25, p.439

It is worth noticing that ECJ judgement in *AM&S* is a typical model of ECJ answer as we will see in the next case-*Hoechst*. Here the undertaking contested legality some Commission's decisions ordering the entry on premises of the undertaking on the basis of their non compliance with right to the inviolability of home. The question was whether the scope of that fundamental right protects also business premises. The ECJ said that "*although such a right must be recognised in the Community legal order as a principle common to the laws of the MS in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergences between the legal systems of the MS in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities.*" The court also interpreted Article 8 (1) of the ECHR and said that expression "everyone" indicates that "*the protective scope of that article is concerned with the development of man's personal freedom and may not therefore be extended to business premises*". However the ECJ underlined that in legal systems of the MS there is provided protection against arbitrary or disproportionate intervention and the need for such protection must be recognised as a general rule of Community law.

In 1992 the European Court of Human Rights answered the question of the scope of protection in very different way. In case *Niemetz* it stated that interpretation of the notions 'private life' and 'home' consisting of certain professional and business activities is consistent with the basic purpose/objective of the Article 8 of the ECHR, which is to protect individual against arbitrary intervention of public authority.

ECJ had again the possibility to analyse that issue and to clarify the lack of compliance in Strasbourg's and Luxembourg's interpretation of the Article 8 of the ECHR in case *Roquette Frére* but the court successfully managed to avoid answering that important problem. We can interpret ECJ judgement in *Roquette Frére* as we want because on the one hand ECJ regarded to case-law of the European Court of Human Rights, according to which the protection of the home may in certain circumstances be extended to cover business premises. But on the other hand the right of interference established by Article 8 (2) of the ECHR *'might well be more far reaching where professional or business activities or premises were involved that would otherwise be the case'*. In that ruling ECJ concentrated only on answering the question asked by national court in preliminary ruling procedure. That question concerned a slightly different issue- about relations between national court and Commission's investigations powers.

It is obvious that this case was a hot potato because the ECJ had to cautiously balance between Commission's powers that have to be broad to ensure free competition-one of the pillar of the common market and on the other hand right of inviolability of home of not only natural but also legal persons. However, it seems that sooner or later the question of the scope of the protection of the Article 8 of the ECHR will have to be answered by the ECJ.

The case *Roquette Frére* has one more interesting aspect. It shows how strong impact have ECJ jurisdiction on legislature because main thesis from *Roquette Frére* judgement concerning the co-operation between the Commission and the courts of the EU Member States were repeated in Article 20 (8) of the Council Regulation 1/2003.

It is a great time to analyze issue of Commission's powers of inspection just now because it is a breakthrough moment for a doctrine of fundamental rights. First, it is very important because it will show what role do the fundamental rights play not only in theory but in reality. Furthermore we do not know neither how the Charter of Fundamental Rights will be functioning in the future nor what with possible accessing of the EU to ECHR. Besides, we do not know how the ECJ approach to fundamental rights will evaluate. As we can see, until now ECJ have been very careful in interpreting EC law in the context of fundamental rights. We can only observe that interesting and important for all of us process.

WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW

by

RÉKA BEREKMÉRI-VARRÓ

I. Introduction:

During the period 1989-1997 there were an estimated 103 armed conflicts taking place in 69 locations in the world. Moreover, at any given time, many countries are in the process of recovering from armed conflict. The civilian casualties from armed conflict today are catastrophic.

The United Nations Security Counsil in 1999 noted, that civilians account for the vast majority of casualties in armed conflicts and are increasingly targeted by combatants and armed elements.[1]

II. The Impact of Armed Conflict on Woman:

Woman experience armed conflict differently from men. Woman are subsumed under general categories such as civilians and combatants. As a consequence, the numerous aspects of woman's lives that are detrimentally affected by armed conflict remain largely undocumented in mainstream accounts. Increasingly, however, it is possible to piece together a picture that more accurately presents how woman's lives are affected by armed conflict. Althogh the majority of woman experience armed conflict as civilians, there are increasing numbers of woman combatants.

Woman as civilians

Because of their role as combatants, historically men have been the primary victims of military operations. This is no longer the case. Civil wars are predominant form of armed conflict in the world today. In such struggles, communities become the battle field, and current figures suggest that civilians account for over ninety percent of casualties resulting from armed conflict. Such a development has serious ramifications for woman who are most likely to experience conflict as part of the civilian population.

Chivalric ideals frequently lead to perceptions that woman and children will not be directly targeted during conflict. In some cases the death toll from armed conflict is higher for men than for woman, but this is not universally true. Acts of genocide, such as the „Final Solution" implemented by the Nazis in Europe during World War II, target men, woman, children and the elderly without distinction. Indeed, when a strategy of deliberate extermination is being implemented, woman are offen amongst the first to die. Pregnant woman were singled out for death during the selecions conducted by the Nazis, as the carriers of the next genertaion of Jews.

It is not just treatment by opposition forces that woman have to fear. Parties to the conflict frequently locate military targets in or around civilian objects, in an attempt to shield them from military attack.

[1] UN Doc S/RES/1265 (17 Sep 1999).

Civilians are also used as human shields. Such tactics generally do not prevent attacks, but instead result in increased civilian casualties.

The effects of being targeted in armed conflict are distinctive for woman. Woman may take fewer precautions in such situations, relying upon misconceptions that they are not as vulnerable as men. In many cases, civilians do not have adequate access to protecive equipment such as gas masks, shelters, or other shields, that would mitigate the injuries sustained as a result of armed conflicts.[2]

In recent years, there has been a marked trend towards the proliferation of small armes. Countries without sufficient financial resources to purchase more traditional heavy weaponry, particularly African countries, have become increasingly reliant upon small arms, such as landmines, handguns, and rifles. Small armes are major threat to woman. During the 1990s, it is estimated that small armes killed three million people and that eight out of every ten of these casualties were woman and children.

Increasingly, civilian casualties outnumber combatant casualties during armed conflict. This is a function of the changing nature of warfare, and the use of weapons of an indiscriminate nature. For example, in recent international armed conflicts, the delibarete choice of aerial bombardment as a military strategy has led to significant short and long-term casualties. Generally speaking, woman form the majority of the civilian population in times of armed conflict. Thus, it is inevitable that they represent a disproportionate number of the civilian deaths of such conflicts. The impact of landmines on woman provide a further example of the gender-differentiated consequences of armed conflict. Despite intensified international efforts to eradicate landmines, they remain serious humanitarian problem, particularly in civil conflicts. Civilians frequently constitute the majority of the victims of these indiscriminate weapons. The use of other weapons, such as certain chemical weapons, can have particularly detrimental effects upon woman. In recent times, there is a high level of abortion amongst Vietnamese woman of congenitally foetuses, a phenomen that has been linked to the use of Agent Orange during the Vietnem War.

Violence against woman is perhaps one of the clearest examples of how discrimination against woman that exists in all societies during peace-time exacerbated during periods of armed conflict. Violence is widely recognised as one of the most pervasive problems facing woman in every country throughout the world. When conflict breaks out, this violance escalates.

It is known that a large number of of refugees and internally displaced persons, particularly those fleeing internal armed conflicts are woman. Woman may be forced to leave their homes in an effort to protect themselves, their children and other vulnerable family members. The home is where most woman traditionally live out their lives and carry out their responsibilities and the loss of their home impacts distinctly harshly on woman. Becoming refugee adds a new dimension to the vulnerability of woman. Refugee woman may be injured or killed while escaping regions where there is on-going fighting. The journey itself invariably involves considerable physical hardship. When woman are separeted from their homes and communities their vulnerability to gender-based violence increases. Refugee woman are often denied legal status in their own right. In some cases, refugee registration cards and other essential documentation, are issued only to husbands and fathers. Conditions in refugee camps pose particular problems for woman. Refugee camps are generally poorly sanitised and lacking in essential services and basic supplies. Repatriation, and the recovery of homes and possessions at the conclusion of armed conflict is of great importance to refugee and displaced woman.

[2] A study of fatalities during the 1991-92 conflict in Croatia estimates that sixty-four percent of deaths were civilians and that the majority of these were from head injuries. The authors of the study suggest that these casualties could have been reduced by imroving civilian access to shelters, and ensuring that protecive head equipment was available.

Overall, commentators suggest that woman are less likely to be detained as a result of armed conflict than men. However, this frequently means that those woman who are detained suffer worse conditions because facilities are not designed to meet their needs. Woman may be detained with men, and female guards are frequently not available.[3] Although both men and woman are routinely tortured in detention, there are gender specific methods of torture.[4] Stories of harm to children were used by authorities to traumatise their mothers.[5] Sexual mutilation is another well-known tactic used to torture woman. Gender-specific medical experimentation was widely practiced in the Nazi concentration camps during World War II. The forced labour of woman is used by all parties in armed conflicts. It takes many forms, including domestic tasks such as washing and ironing soldier's uniforms, washing dishes, cleaning rooms. Woman are also compalled to work in labour camps by their captors, and as unpaid porters for their own forces.

Armed conflict reinforces gender stereotypes that contribute to the subordination of woman. During these times, considerable emphasis is placed on woman as wives and mothers, with the responsibility for breeding the next generation of soldiers. As long as woman stay within their constructed gender roles, they perform a valuable function for the military in many areas, for example, as nurses, social workers, prostitutes, wives, mothers, widows. These stereotypes also generate new forms of discrimination against woman. In many societies if woman are percieved to flout these rigid social dictates, they are subjected to harsh and discriminatory punishments.[6] Stereotypes of woman are manipulated for propaganda purposes by all parties to a conflict.[7] Moreover, belligerents often capitalise upon reports of sexual violence against „their" woman to garner sympathy and support for their side, and to strengthen resolve against the enemy. Widowhood and loss of other male family members, is one of the most likely outcomes of armed conflict for woman. IN some armed conflicts, men and boys are singled out specifically for execution. During the armed conflict in the former Yugoslavia, Serb forces separeted the population of Srebenica into two groups. Males between the ages of approximately 16 and 65, and woman, children, and the elderly. There is evidence that thousends of the men and boys were summarily executed and their bodys consigned to mass graves. The loss of loved ones causes immeasurable emotional, social, and economic suffering for the woman who are left to reconstruct their lives following the conflict. The resulting trauma is exacerbated in cases where woman have been forced to witness these killings. Wives and mothers of the „disappeared" and other missing persons, experience the anguish of not knowing what has happened to their family members, and of being unable to bury their dead. For those woman, seeking out the truth, and reclaiming the bodies of deceased loved ones, are issues of paramount importance.

The fear and poverty associated with armed conflict often leads to social isolation for woman. Woman frequently comprise the majority of the population at the end of an armed conflict. Consequently re-marriage, which is often essential for restoring social status, is difficult. In some societies, the shortage of marriageable men following armed conflict leads to an increase of poligamy. Wives of the „disappeared" face particular difficulties. Their indeterminate status often prevents re-marriage, with the situation

[3] ICRC, Woman and War (comments of Dr. Hernan Reyes, gynaecologist and ICRC medical coordinator for visits to detention centres)

[4] For example, in South Africa during the apartheid era, pregnant woman were subjected to electric shocks; medical care was withheld leading to miscarriages; body searches and vaginal examinations were carried out; rape and forced intercourse with other prisoners occurred; and foreign objects, including rats, were inserted into woman's vaginas.

[5] For example, children born to woman while in custody during the „dirty war" in Argentina, were taken from their mothers at birth. It has been argued that in doing so „the Argentine military state asserted its power over a disinctive aspect of female identity, motherhood.

[6] For example, in Britain during the two World War, woman were subjected to discriminatory curfews as a measure to prevent the perceived decline in their morality. French woman who were suspecte of „fraternising" with the German soldiers during World WArII., had their head shaved in public.

[7] For example, int he 1994 conflict in Rwanda, consructed images of both Hutu and Tuts woman were used as propaganda to incite violence.

exacerbated by religious or social constraints. The social consequences of amputation resulting from landmine injuries are distinctive for woman. A woman amputee is frequently unmarriageable, or if married, may be rejected by her spouse.[8] Much has been written about the social stigma experienced by survivors of sexual violence. This phenomen may be exacerbated by religious and/or cultural traditions.[9] Woman who become pregnant as a result of rape suffer additional hardship.

Woman are economically disadvantaged as a result of armed conflict, and this situation is likely to continue into the post-conflict era, when woman make up the majority of the population. Moreover, in many cultures, it is woman who have the most to gain from the economic development, and are thus particularly disadvantaged when these resources are diverted into the war effort. Inflation is commonplace during periods of armed conflict. As a result, woman who generally are responsible for running the household, are less able to meet the basic needs of their families. At the same time armed conflict allows woman the opportunity to develope new skills. Unfortunately many of these advantages are lost when the conflict ends. Lack of education and training, and general community attitudes, makes it difficult for woman to support themselves and their families. Armed conflicts create large numbers of hoseholds headed by woman. These hoseholds are likely to be poor. For example war in Mozambique created many widows and female-headed households. Traditional methods of earning income, such as through food production, are frequently lost to woman as a result of armed conflict. Woman may be forced to resort to illegal activities to make a living.[10]

Armed conflict invariably results in shortage of food, water, clothing, shelter, health care and sanitation. Traditionally, woman are responsible for meeting the basic needs of their families. These tasks are rendered difficult and often dangerous by the breakdown of societal conditions brought about by armed conflict. Lack of adequate nutrition can lead to a range of detrimental health consequences for women, such as anaemia, demage to their reproductive system, and potentially loss of their lives. Statistics indicate that vulnerable groups, such as woman and children, experience high rates of nutritional deficiency diseases in refugee camps. Woman who are malnourished may be unable to breast feed their children. The reproductive role of woman makes them particularly vulnerable to shortages in medicine, reliable birth control, and medical treatment. Pregnancy and illegal abortion rates may increase during armed conflict due to the lack of birth control, and the high incidence of rape during such times. Adequate facilities for pre- and post-natal care are unlikely to be available. The physical and physiological pressures inherent in armed conflict situations can result in miscarriage, premature labour, low birth weight babys, and menstrual problems.

Rape and acts of sexual violance have serious and life thretening implications for woman's health. For woman who have been raped, there is a risk of contracting HIV/AIDS. This is a particular problem in Sub-Saharan Africa, the area with the highest rate of the HIV/AIDS virus.

In common with most survivors of armed conflict, woman survivors suffer severe psychological trauma. The vulnerability of woman to post-traumatic stress disorder, and other psychological conditions, is slowly receiving greater recognition.

[8] Studies of the impact of landmines in conflict zones such as in Cambodia and Somalia indicate that unmarried woman amputees suffer the greatest detrimental social impact.

[9] Woman are frequently rejected by their spouses, fiancees, and families. For example, following the widespread rape of woman during the 1974 war in Cyprus, many Cypriot men reportedly applied to the church for divorce or dissolution of their engagement contracts.

[10] For example, woman caught up in conflict int he Sudan have been imprisoned for illegally brewing and/or sellin liquor. At the end of the conflict, many woman find they have no other means of survival, and prostitution becomes institutionalised. This phenomen has been particularly evident in Cambodia.

Woman as combatants

Historically woman were not always excluded from combat, but in most cultures it has been regarded as inimical to perceptions of their natural roles. There are notable examples of woman, such as Eleonor of Aquitaine and Joan of Arc, who defied the codes of the day. These woman were, however, regarded with contempt by the knightly classes for their unfeminine behaviour. Moreover, in the nineteenth century, woman participated in the Austrian and Italian armies, some receiving prestigious military honours. However, such woman were the exceptions to the rule.

In recent years, arguments based on equality have allowed the increased participation of woman in the role of combatant. Globally, however, woman make up only two percent of regular army personnel. Woman are similarly under-represented on peacekeeping operations. For many years woman have played a significant role in paramilitary forces. In recent times, woman and young girls have fought in conflicts in South Africa, Mozambique, El Salvador, Guatemala, Peru, Sri Lanka, the Phlippines, Eritreia and with Palestinian fighters in Lebanon and the Israeli-occupied territories. They have proved to be highly effective in guerilla-style warfare, for example, in gaining close access to enemy personnel without arousing suspicion. In many cases woman have been active and enthusiastic members of such movements.[11]

III. Woman, Armed Conflict and International Law:

The system of the four Geneva Conventions and the Protocols:

International humanitarian law has always accorded women general protection equal to that of men. The four Geneva Conventions and the Protocols establish a system of equality in the sense that no advers distinction can be drawn between individuals on the basis of, inter alia, sex.

So one of the basic principles of the Geneva Conventions and of Protocol I. is that the persons protected shall be treated without any adverse distinction[12] and that women shall in all cases benefit by treatment as favourable as that granted to men.[13]

At the same time the humanitarian law treaties recognize the need to give women additional special protection according to their specific needs. A complementary principle to the basic one is that women must be treated with all consideration due to their sex [14] and that privileged treatment may be accorded by reason of age.[15]

International humanitarian law protects women when: they are combatants, by laying down limitations on permissible means and methods of warfare; they are captured, sick, wounded or shipwrecked combatants; they are members of the civilian population not taking an active part in the hostilities.

Women who are not, or no longer, taking part in hostilities are protected against the effects of the fighting and also against abusive treatment by the parties to hostilities. Women are entitled to humane treatment,

[11] Judith G. Gardam and Michelle J. Jarvis: Woman, Armed Conflict, International Law
[12] GC. I and II, art. 12;GC. III, art. 16; GC. V, art. 27; AP. 1, art. 75
[13] GC. III, art. 14
[14] GC. I and II, art. 12; GC. III, art. 14
[15] GC. III, art. 16; GC. IV, art. 27

respect for their life and physical integrity, and to live free from torture, ill-treatment, acts of violence and harassment. In addition to this general protection, women are afforded special protection. For example, they are specially protected against attack, in particular against rape, enforced prostitution or any form of indecent assault.

Separate quarters and conveniences for woman prisoner of wars and internees

In all camps where women prisoners of war are quartered at the same time as men prisoners, separate dormitories[16], or separate facilities[17], especially sanitary conveniences[18] shall be provided for them. Women prisoners shall be under the immediate supervision of women[19]. The work that women are asked to do shall take their sex into account [20].

Whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, they shall be provided with separate quarters[21], in particular separate sleeping quarters and sanitary conveniences[22]. Women internees shall be under the immediate supervision of women[23].

Sanctions against women prisoners of war and against woman internees

A woman prisoner of war shall not be sentenced to a punishment more severe, or whilst undergoing punishment be treated more severely, than a woman member of the armed forces of the Detaining Power dealt with for a similar offence[24]. In no case may a woman prisoner of war be sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a male member of the armed forces of the Detaining Power dealt with for a similar offence[25].

Women prisoners of war shall be confined in separate quarters from male prisoners of war and shall be under the immediate supervision of women[26].

Disciplinary punishments shall take the internee's sex into account[27]. Women accused of offences or undergoing punishment shall be confined in separate quarters and shall be under the immediate supervision of women[28].

[16] GC. III, art. 25
[17] AP. 1, art. 75
[18] GC. III, art. 29
[19] AP. 1, art. 75
[20] GC. III, art. 49
[21] AP. I, art. 75
[22] GC. IV, art. 85; AP. I, art. 75
[23] AP. I, art. 75
[24] GC. III, art. 88
[25] GC. III, art. 88
[26] GC. III, art. 97, 108; AP. I, art. 75
[27] GC. IV, art. 119
[28] GC. IV, art. 76, 124; AP. I, art. 75

Protection of expectant mothers and mothers of young children

There is range of provisions that deal with pregnant woman, maternity cases, and mothers of children under seven years respectively. Throughout the conventional rules, these categories of woman are equated with the wounded, sick and the aged[29], and enjoy particular protection and respect. They are accorded special treatment in the context of such matters as medical care, foodstuffs, physical safety, and repatriation.

They shall be admitted in hospital zones and localities[30], or in hospital and safety zones and localities[31] which have been established to protect certain categories of the population from the effects of war. They shall at all times be entitled to priority relief, in particular foodstuffs, clothing and tonics[32] and to benefit from special treatment[33]. They shall at all times be the object of particular protection and respect[34]. Endeavours shall be made to conclude local agreements for their removal from besieged or encircled areas[35]. Nursing mothers shall at all times be entitled to benefit from relief priority, in particular foodstuffs, clothing and tonics [36]and special treatment[37].

Expectant mothers or maternity cases who are interned, interned mothers with small children

Expectant mothers who have been arrested, detained or interned for reasons related to the armed conflict shall have their cases considered with the utmost priority[38]. Endeavours shall be made to conclude agreements for their release, repatriation, return to places of residence or hospitalization in a neutral country[39]. In occupied territory, expectant mothers and maternity cases shall be given additional food, in proportion to their physiological needs[40]. Maternity cases must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population[41]. They shall not be transferred if the journey would be seriously detrimental to them, unless their safety imperatively so demands[42].

Utmost priority shall be given to the consideration of cases involving mothers who have dependent small children and who have been arrested, detained or interned for reasons related to the armed conflict[43]. Endeavours shall be made to conclude agreements for the release, repatriation, return to places of residence or hospitalization in a neutral country of mothers with infants[44].

[29] AP. I, art. 8; GC. IV, art. 21, 22
[30] GC. I, art. 23
[31] GC. IV, art. 14
[32] GC. IV, art. 23
[33] AP. I, art. 70
[34] GC. IV, art. 16
[35] GC. IV, art. 17
[36] GC. IV, art. 23
[37] AP. I, art. 70
[38] AP.I, art. 76
[39] GC. IV, art. 132
[40] GC. IV, art. 89
[41] GC. IV, art. 91
[42] GC. IV, art. 127
[43] AP. I, art. 76
[44] GC. IV, art. 132

Sanctions

Whenever possible, the parties to a conflict shall endeavour to avoid pronouncing the death penalty, for an offence committed in relation with the armed conflict, against expectant mothers or mothers with infants. A death sentence against this category of women for such an offence shall not be executed[45].

Protection of foreigners

Expectant mothers and mothers of children under seven years shall benefit by preferential treatment to the same extent as the nationals of the State concerned[46].

Occupied territories

The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war, which may have been adopted prior to the occupation in favour of expectant mothers and mothers of children under seven years.

IV. ICRC

The **International Committee of the Red Cross** (ICRC) is particularly concerned about the protection of women against the effects of hostilities, and especially against the acts of violence to which women are particularly vulnerable. It tries to prevent such violations by making appropriate representations to parties to armed conflicts, be they States or armed opposition groups, urging them to comply with the rules of international humanitarian law and to respect and protect persons not, or no longer, taking an active part in the hostilities. The ICRC carries out and promotes the dissemination of international humanitarian law and refers to this law in its activities throughout the world when dealing with specific problems concerning women. In January 2000 the ICRC began implementing a four-year pledge to ensure dissemination of provisions of international humanitarian law relating to the protection of women and the prohibition of sexual violence to parties to hostilities, and to ensure that all its activities appropriately assist and protect women.

The ICRC aims to ensure that victims of war, be they woman, girls men or boys, have access to essential preventive and curative care. To help maintain normal health services, the ICRC contributes to the reconstruction, rehabilitation or refurbishment of medical facilities, supplies equipment, medicines and consumable items to health facilities, and provides management support and training for health professionals. If needed, the ICRC also provides skilled and experienced medical and/or surgical teams to support and supplement existing local human resources. The ICRC also endeavours to ensure that they have access to water for drinking and domestic use.

International law prohibits the starvation of the civilian population as a method of war fare, and the destruction of objects indispensable to its survival, such as foodstuff, crops, livestock and agricultural areas. The law also requires parties to an armed conflict to ensure that persons hors de combat have the means necessary for survival. Where this is not provided by the parties to hostilities, international humanitarian law entitles humanitarian organizations to provide such assistance on a humanitarian and

[45] AP. I, art. 76
[46] GC. IV, art. 38

impartial basis. Such organizations, including the ICRC, must be allowed to reach populations affected by hostilities to assess their needs and provide the humanitarian assistance necessary to their survival.

The ICRC is committed to helping families in their quest to obtain information on their missing relatives, by acting as an intermediary between the families of the missing and the parties to an armed conflict and seeks to clarify the fate of persons missing in relation to hostilities and by reminding the parties to armed conflicts of their obligation to determine the fate of missing persons. The ICRC also issues certificates that can be used by families to show they have missing relative, which in some countries entitles them social assistance. In addition, the ICRC draws up lists of missing persons which it publishes in the hope of obtaining new information. It also provides ad hoc material assistance to particularly vulnerable families of missing persons.

The ICRC carries out protection and assistance activities on behalf of persons internally displaced by armed conflict. The ICRC provides material assistance to displaced persons especially affected by armed conflict. In particular, it distributes emergency food aid, seeds agricultural tools, hygiene products and emergency medical supplies, helps ensure an adequate supply of clean drinking water, and provides primary health-care and reproductive health-care programmes.

The ICRC visits persons detained in relation to an armed conflict to ensure compliance with provisions of intenational humanitarian law relating to conditions of detention and treatment of detainees, and to prevent the disappearence of persons from places of detention by registering the identity details, and visiting these persons continually until they are released. When ICRC finds that specific provisions of humanitarian law have not been complied with, it makes representations to the detaining authorities to obtain improvements in the conditions of detention, the treatment of woman and respect for their rights. ICRC teams carrying out detention visits usually include a medical doctor who assesses medical needs and provides medicines and treatment. [47]

V. Summary

Discrimination that exists against woman in all societies renders woman particularly vulnerable to the effects of armed conflicts. IHL fail to recognise or address this discrimination. Moreover, it creates new forms of discrimination against woman by the reliance on hierarchies based on gender. In the context of IHL, this hierarchy can be seen first in the fundamental distinction drawn in its rules between the combatant and the civilian. There are more rules protecting combatants than civilians, and their reach is taken more seriously. And even within the rules of IHL protecting the civilian population, it is the „male" civilian that is taken as the norm and its provisions are construed around their needs.[48]

IHL constructs and presents a partial and distorted vision of woman that has little to do with the reality of their lives, or the way in which they experience warfare. When we consider the distinctive impact of armed conlict on woman, either there are no applicable provisions, or those that exist only deal with a vision of woman that does not reflect the reality.

When attention is directed toward woman and their experiences in armed conflict, it is only selective aspects of these events that are addressed. For examle, nowadays, woman and international criminal law in armed conflict is an established topic in international law. Punishment of perpetrators of sexual

[47] www.icrc.org, woman and war
[48] Judith G. Gardam and Michelle J. Jarvis: Woman, Armed Conflict, International Law

violence, although of considerable importance, is insufficient to achieve lasting changes of attitude and the prevention of these atrocities. The less high profile aspects of woman's experience of armed conflict, such as their social and economic needs during and after conflict, have not attracted the same kind of attention, and few legal norms exist to regulate these matters. And if there is no law there can be no enforcement. Recognising that physical, psychological. and economic rehabilitation of individuals who have been affected by armed conflict is an essential component of peace, the international community would ensure appropriate criminal prosecutions, compensation funds, and rehabilitation programmes.

The issue of woman and armed conflict must include an acknowledgement of race as a factor, in addition to gender. It is the non-Western civilian woman in international armed conflicts whose needs are the least acknowledged in the system.

The development of an affective methode to monitor the imlementation of IHL should also be an integral aspect of any fundamental revision of the existing regime. Currently there is no comprehensive scrutiny of the extent to which norms protecting individuals from the effects of armed conflict are complied with. Scrutiny of the implementation by a State of its international obligations, commonplace in human rights instruments, could become part of IHL.

There are doubts as to the ability of law to achieve fundamental change for woman. It may be that all that will be achieved, is „a triumph of form over substance". The fact that woman have to bear so much of tragic burden of hostilities is not primarily because those rules are not sufficiently observed. The general and special protection to which woman are entitled must become a reality. Constant efforts must be made to promote knowledge of and complience with the rules of international humanitarian law among as wide an audience as possible by using all available means. Nevertheless, the powerful role that law plays in constucting the way we see the world and moulding reality confers on it, at the very least, a significant symbolic role to play in any improvements for the position of woman in armed conflict.

One vehicle to achieve change is a new conventional instrument dealing with woman and armed conflict. For example one way forward could be a protocol on woman and armed conflict to the Convention or the four 1949 Geneva Conventions should be „re-examined and re-evaluated so as to incorporate developing norms against woman during armed conflict.

The meaning of certain standard phrases that are used throughout the conventional instruments could be clarified. For example, the requirements imposed by the phrases „special respect" and „woman shall be treated with all consideration due to their sex", could be given an interpretation more consistent with modern perceptions of woman and their rights in armed conflicts.

The ICRC has a special responsibility for the development of IHL. Traditionally, whilst recognising the vulnerability of woman in armed conflict, the ICRC has tended to take the view that the rules of IHL are adequate, they merely require re-interpretation or better enforcement. Now there is increasing acknowledgment by the organisation that there may be gaps in the protections offered to woman by IHL. Moreover, there is a recognition that the topic of woman and their paticular experiences has been insufficiently examined.

The existing rules only take a very limited view of woman's lives and much more is required to address the real needs of woman in armed conflict. It seems evident that a major area that needs addressing if the position of woman in armed conflict is to improve, either through legal or non-legal means, is their low participation at all levels in decision-making. The access of woman to economic and political power

remains minimal. As long as men make the decisions for woman, irrespective of how well-intentioned they may be, the particular experiences of woman in armed conflict will always tend to be overlooked. It is their lives that are being dealt with and they should have a say in any decisions that are made.

„The equal access and full participation of woman in power structures and their full involvment in all efforts for the prevention and resolution of conflicts… If woman are to play an equal part in securing and maintaining peace, they must be empowered poltically and economically and represented adequately at all levels of decision-making."[49]

Overall, the approach of the international community to woman and armed conflict is ambivalent. There is increasing recognition that something needs to be done. However there is a refusal to acknowledge, and thus to address, the underlying factor of discrimination that accounts for so many of the difficulties woman experience during times of armed conflict.

[49] Beijing Platform Paragraph 135

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LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

by

GABRIELLA ECSEDI

„Tévedésnek hármas úta,
Útam itt ez volna hát, […]
A közép a biztos út,
Oh, de melyik nem közép itt?
Melyik az, mely célra jut?
Itt egymásba összefutnak,
Egy csekély ponton nyugosznak,
S mennyi ország, mennyi tenger
Nyúlik végeik között!
Vagy tán vége sincs az útnak,
Végtelenbe téved el,
S rajta az élet úgy vesz el,
Mint mi képet jégre írnak?”

/ Vörösmarty Mihály: Csongor és Tünde /

I. Intoduction

In 1994 the question of the legal status of the resource to use nuclear weapons appeared to reach an express answer: the International Court of Justice was challenged to form a resolution concerning the legality or illegality of the threat or use of nuclear weapons. The Court – allegorically – arrived at cross-roads : it was given the charge to interprete the corpus of intenational law regarding the use of nuclear weapons, whether the law permits it or not. The phrase "cross-roads" – which connotes the act of deciding – might sound ambiguous and require some explanation. Although jurisdiction does not come under the competence of the Court, it is on the one hand entitled to choose the concrete way and subject of the interpretation – of course within the latitude of the law – and that choice has a decisive effect on the "aborning" conclusion. On the other hand, it was also the Court that weighted the arguments pro and contra adduced by the states of opposing views. This leads me to say that fundamentally three solutions were offered: to enounce that recoursing to use of nuclear weapons is prohibited or permitted, or condicioned under the international law.

The problem is not uncompounded, nor yet at first glance. Before examining the elements of the question and expounding the statements of the advisory opinion of the International Court of Justice, let us have a look at the definition of nuclear weapons and at the legal or political (or other) nature of the problem of their utilization.

II. Nuclear weapons: the weapon that is inadequate for application

By definition atomic weapons are explosive devices whose energy results from the fusion or fission of the atom. But this determination does not express the grate possibilities and advantages of the possession of that technics and weapons: the appearance of nuclear weapons has not only opened up new prospects of foreign policy, domestic security policy and warfare, but has posed several unevitable questions as well. The unique characteristics of nuclear weapons has brought up a need for reconsidering the states’ rights and obligations in connection with assessing what weapon to use. The effects of this kind of weapons are actually indomitable in either space or time and the appallingly destructive power of atomic weapons is capable for destroying all civilization and the entire ecosystem

of the planet, and for that reason this new type of menace requires a new way of approaching the scope and nature of responsibility.

Despite the fact that the first (and hitherto the last) nuclear weapons were used more than a half century ago, we cannot observe a cristallized and consistent international legal regulation and practice concerning the use of such weapons. In the background of this lack of specific rules we found the practice of non-utilization of nuclear weapons by states since 1945. For the above-mentioned reasons nuclear weapons have became the first weapons of war which cannot be used for its designation, purpose: namely for achieving victory. Why? Because its utilization would definitely result in the reciprocative eradication of the adverse fighting parties.

It is easy to recognize that the international community and law simply might not be unconcerned in such a pressing question. From the beginnings of the existance of the atomic weapons the states have been seeking to place the conducts and practicing possibilities connected to these weapons under control and states possessing nuclear weapons aspired to realise that control under their own influence. Several specific treaties have been concluded in order to limit the acquisition, manufacture, possession and deployment of nuclear weapons and to regulate their testing.

III. To use or not to use - the nature of the problem

As visible, the subject of these treaties is not the use of nuclear weapons, but we can state that the present absence of rules does not affect the thesis that the question of the use constitutes a *legal* question. The conditions and circumstances in which the recourse to the application of this type of weapon of mass-destruction might be legally justifiable must be strictly defined, in conformity with the international law, or – as the majority of the states conceives – the use should be declared to be prohibited.

This need of regulation represents the legal side of the question. Besides its legal relevance the possession and eventual use of nuclear power and weapons provide a really significant benefit in the *political* aspect. Not (yet) to mention preserving the state's sovereignty, it can serve as an excellent means of influencing and manipulating "weaker" states and of gaining political and economic potence. All states have realised this quality of nuclear weapons and this recognition leads them to an attitude that makes the formation of a uniform legal approach to the subject more difficult. States that have managed to acquire the technics and weapons are reluctant to abandon them.

As the 'third side' of the coin, also emerges the question of *moral* responsibility of the state (person) who is empowered to make a decision on the acquisition, manufacture, possession or particularly on the recourse to use of nuclear weapons. There is a qualitative and quantitative difference between all conventional arms and nuclear weapons: the effects of the latter cannot be concentrated on a limited object or area, and in addition, they are perfectly capable of breaching all (not solely the ones based on law) human principles, endangering the lives of future generations as well and of demolishing the entire flora and fauna.

As a consequence, even if the law permitted the use of such weapons, the state must balance the ethical justifiability of the virtual use of them.

IV. The legal judgement of the threat or use of nuclear weapons in the light of the advisory opinion of the International Court of Justice

After having a glance at the grate importance of atomic weapons and at the aspects of its use let us continue on examining the "choise of way" referred at in the citation.

In 1996 the International Court of Justice – on granting the request of the General Assembly of the United Nations for an advisory opinion - has delivered its resolution concerning the legality or illegality of the threat or use of nuclear weapons. The question readed as follows: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"

To be able to answer the question the Court firstly identified, afterwards interpreted and suited the relevant elements and dispositions of international law to nuclear weapons. Both written and customary law had been examined.

A) The applicable law

a.) The right to life – a right that is effective in any circumstances

On the surface, owing to its inability to discriminate between civilian persons and combatants, any use of nuclear weapons seems to be in an irresolvable collision with the right to life, the right not arbitrarily to be deprived of life.

Although the International Covenant on Civil and Political Rights, which declaires the inherent right to life is regarded as a "peace-time treaty" and certain provisions of it may be derogated from in a time of national emergency, the right to life must be effective in any circumstances. Nevertheless under the advisory opinion neither the extremly high risk of civil casulties, nor the "perpetuity" of this right *in itself* establishes the illegality of the use of atomic weapons.

Several further human rights could be appealed to in order to prove the said collision, namely the right to be free from torture, the right to be free from cruel, inhuman or degrading treatment or punishment, and the right to health[1].

In connection with the uncontrollable effects of nuclear weapons the question of the prohibition against genocide may arise as well. Examining the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide the Court has stated that the prohibition of genocide would be breached only in the case if the recourse to nuclear weapons do indeed had an intentional aim to eradicate a group as such.

To sum up: in the phrase of a hungarian expert "Mankind is the part of world-heritage, it claims protection"[2] - but this principle does not constitute a sufficient base on which the total illegality of use of nuclear weapons could be established. This issue bears an inseparable connection with the requirements of humanitarian law which inter alia states that no civilian persons shall be made the object of attack.

b.) Legal norms protecting the environment

[1] Kim Van der Borght & Stefaan Smis
[2] Sándor Pirityi a.

The idea of protecting the nature surrounding us accrues from the recognition that environment is not everlasting and ever-regeneratory. Quite the contrary human activities continuously pollute and destroy it. Practicing power in the international field and utilizing a weapon of war is - in practice - so an essentially political question and a dependent of the puissance that even principles and rules of the law are disregarded at times. Being conscious of this fact we can pose the question: in what degree are environmental considerations taken into account when deciding on a political dilemma? Besides numerous specific treaties[3] regulating the protection of environment both in peace-time and in war, this topic also forms the subject of the laws of war. The above-mentioned specifc teraties prohibits the use of weapons which have widespread, long-lasting or severe effects on the environment within the own territory of a state as well as beyond the country. Although – as some states argued – those treaties made no mention of nuclear weapons it is evident that these weapons are able to (or in other words : are unable not to) cause "widespread, long-lasting or severe effects". The Genova law, namely the Protocol Additional I. to the Genova Conventions also contains a prohibition relating to the safeguarding of environment: it also refers to the expansive effects of the weapon forbidden to use.

There are two consequences of the existing of such legal limitations. In the first place environmental considerations must be taken into account if a state wills to act in accordance with international law. But at the same time the Court "does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence […] because of its obligations to protect the environment". The key-words are necessity and proportionality: conformity with these requirements might justify causing damage in the environment – in the case where the other conditions fulfill as well.

c.) The Charter of the United Nations – neither authorization, nor prohibition

The Charter includes two significant provisions from which a conclusion can be deduced concerning the legal status of the threat or use of nuclear weapons.
Art. 2 (4) of the Charter states the prohibition of use of force:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the UN." There are exceptions to this prohibition, namely in Art. 51, and in Art. 42. Art. 51. recognizes the states' inherent right of individual or collective self-defence if an armed attack occurs. In Art. 42. a further lawful use of force is envisaged, whereby the Security Council may take military enforcement measures in conformity with Chapter VII of the Charter.

Accordingly, it is actually the case of self-defence that may serve as a ground for recoursing to use force and it is the principles of military necessity and proportionality that assignes the mesure of the force applicable. Now three questions emerge: Does the Charter indicate the types of weapons which can be utilized? How can "self-defence" be described? What is proportionate and necessary when counteracting an unlawful attack?

1. Utilizable weapons

The first question is the most simple to answer. It is not the type of the weapon on what the Charter focuses, which entails that the provisions neither expressly prohibit nor permit the use of *any specific* weapon: they apply to any use of force, regardless of the weapons employed. As a consequence, nuclear weapons could be legitimately employed under the Charter. Hence - due to is non-weapon

[3] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1977; Stockholm Declaration, 1972; Rio Declaration, 1992

specific nature - the Charter does not offer the final criteria of the legality of the use of atomic weapons. The Court concluded: "legality or illegality of recourse to nuclear weapons is not regulated directly by the Charter but will depend on treaties and custom". Since a weapon that is already unlawful *per se*, by treaties or customary law, does not become lawful even if used for a legitimate purpose under the Charter The pre-question is the legality or illegality of the weapon itself.

2. The notion of self-defence

Art. 51 of the Charter recognises the inherent right of member states to self-defense – with two restrictions: only if an armed attack occurs against them (the state is obliged to immediately reporte the measures taken to the Security Council), and solely until the Security Council has taken measures necessary to maintain international peace and security. If the Security Council does not take such mesures, the state is entitled to continue on self-defending until the total ceasing (repulsing) of the aggression.
As visible, these provisions draw the frames and conditions of practicing this inherent right, but they withhold the definition of it and nor the advisory opinion precises the meaning of self-defence.

To determine the general notion of the main concept relating to the permission of utilizing force, we first must look backwards to the middle ages. To be just: it is an age-long exigence toward wars. The idea of equitable war has occured in the medieval theories and implied that only the se defendendo pursued war constitutes a righteous war. The concept of self-defense has been enduring in our age as well and now means the right of repulsing an unlawful attack in the case where there are no else solutions of avioding the attack[4]. Hence it follows that pre-emptive strike, preventive use of force shall not be regarded as lawful self-defense. It is also important to emhasize that armed self-defence is not allowed against ecomonical, ideological or other indirect aggression - none but against an armed attack.

In the view of certain cholars self-defense has an extra-legel nature, "cannot be governed by law because ultimately law is subordinate to power when grave threats to the existence of a state or its way of life are made. In such cases, no legal limits can be imposed on the sovereignty of states"[5].

Though self-defence in some respects indeed stays beyond the scope of legal amenability, it has several legal material[6] touchstones. For instance, the war has to be based upon lawful and justifiable cause and purpose, it has to be resorted to as final solution (the ultima ratio nature of war), when non-violent alternatives has already failed. A further requirement which the state shall fulfill is the proportionality of the attack launched, of the weapons used.

By this last criterium we recur to the advisory opnion of the International Court of Justice: the principles of proportionality and necessity are the two postulata that the Court underlines as the minimum conditions, which if accomplished render the self-defence of a state lawful. The Court states: "only measures which are proportional to the armed attack and necessary to respond to it" can be considred as legal. As for the extra-legal nature of self-defense the Court seems to deem that self-defense is essentially a legal concept. The right of self-defense is absolute insofar as a state cannot be deprived of it, but is relative because legal rules determine its boundaries.

Having introduced the concept of self-defense we still do not have an answer to the main question: whether the use or threat of use of nuclear weapons is in any circumstance permitted under

[4] Sándor Pirityi: b.
[5] Stefaan Smis & Kim Van der Borght
[6] Formal criteria are for examlpe legal authorization to make a decision on the recourse to use of armed forces, addressing a declaration of war to the enemy.

international law? The answer will be presented after the whole introduction of the applicable law (in part B).

3. Military necessity and proprtionality

These tenets form the basis of general measurability in the field of international laws of war. The Charter does not give a definition of them, therefore I borrow a phrasing from humanitarian law.

In terms of the Additional Protocol I. to the Geneva Conventions military necessity refers to a situation where the attack or military operation makes an effective contribution to the military action, offers a definite military advantage. Only such measures are lawful which are necessary to respond to the armed attack. The notion of proportionality expresses that the attack is at the same level as the offence. It poses severe difficulties - not only in theory but in practice as well - to appraise and calculate whether a mesure or act is necessary and balanced, and for this reason the conformity with these principles must be examined in each individual case.

During the oral proceedings before the Court several states asserted that on utilizing a nuclear weapon it is simply impossible not to exceed necessity and proprtionality. The use of them would definetely have indiscriminate effects on civilian people, on non-belligerent States and on the environment. States bearing a contradictory opinion (and interest) argued that tactical nuclear weapons exist which are sufficiently precise to limit those risks. The existence, however, of such a "controlable" atomic weapon could in part modify the complexity and gravity of the question, but the Court did not enquire into this question. In the background of the reticence of the Court we may fight two motives. Firstly that even if tactical nuclear weapons were permitted to use, as the proverb says: little streams make great rivers. In other words, the strong risk of escalation would still remain a drawback to the legal (proportionate) utilization. On the other hand the present advisory opinion was dedicated to the theme of using nuclear weapons as such "en masse", the examination of the legal applicability of the different types of atomic weapons perhaps could be the matter of a future request for an advisory opinion. Nevertheless the Court concluded that "the proportionality principle may not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law."

d.) Treaty law – neither specific authorization, nor prohibition

Conventional international law applicable in situations of armed conflict represents the main written base on which the legality or illegality of use or threat of use of nuclear weapons can be examined. The treaties analysed by the Court can be divided into two groups: on the one part treaties concerning the different aspects of nuclear and other weapons of mass-destruction and on the other part the principles and rules of humanitarian law.
I anticipate that, as a result of its examinations, the Court concluded that "international treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons" Now let us survey the bundle of treaties referred to.

1. Treaties on weapons – analogy and / or specific rules

During the enumeration of the treaties an argument has been advanced that nuclear weapons should be treated in the same way as poisoned weapons. What gave the particular gravity of the idea is the fact that in case of accepting it nuclear weapons would have been prohibited. These relevant regulations

relate to biological and chemical weapons[7] and prohibits their possession and use. Although these contracts does not define what is to be understood by "poison or poisoned weapons" the practice of the states has elaborated and have been following the "working definition" of that type of weapon of mass-destruction: weapons whose effect is to poison or asphyxiate. This interpretation of biological and chemical weapons excludes the validity of the idea of subordinating nuclear weapons to those treaties. Therefore the mentioned conventions do not contain any prohibition of recourse to nuclear weapons.

The second group of treaties that the Court dealt with are the ones that specifically relate to nuclear weapons. In the last two decades, several treaties have been concluded in order to limit the acquisition, manufacture, possession[8] and deployment[9] of nuclear weapons and to regulate their testing[10]. The treaties grasp the different aspects and activities in connection with nuclear weapons, but none of them involves a *general* prohibition of the same kind as for bacteriological and chemical weapons. Two of the treaties (treaties of Tlatelolco and Rarotonga) expressly prohibits the use of nuclear weapons, but these are limited to specific zones (Latin America; the South Pacific) or against certain States, and therefore cannot be regarded as universal interdiction. Several states have hold up that the limitations set forth in the treaties shall be interpreted as the foreboder of a future general prohibition, but this circumstance – in the view of the Court – does not provide a sufficient reason to infer to the existence of such prohibition. In brief: the treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing of nuclear weapons also do not constitute a prohibition of use. Some states have concluded more extensive consequences: they affirmed that the acceptance by states of the fact that those states possess nuclear weapons is equivalent to recognizing that such weapons may be used in certain circumstances.

To resume the core of the statement of the Court: the "international treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons in general or in certain circumstances, in particular those of the exercise of legitimate self defence".

The problem have not been solved by this declaration, the question emerges: what are the consequences of the absence of both permission and prohibition?

The non-existence of rules illegalizing the use of such weapons may mean (if solely the treaties are taken into account) that their use can be legal. In addition, there is not any principle or rule of international law which would make the legality of the threat or use of any weapons dependent on a specific authorization, in other words: illegality must derive from explicite prohibition. For these reasons the lawfulness or unlawfulness of the use of nuclear weapons cannot be decided on under the treaties examined. To conclude the question the Court has invoked international humanitarian law and customary law.

[7] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their destruction, 1972; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993; Regulations annexed to the Hague Convention IV and its Protocol of 1925

[8] For example: Treaty of Tlatelolco for the Prohibition of Nuclear Weapons in Latin America, 1967; Non-Proliferation Treaty, 1968; Treaty of Rarotonga on the Nuclear-Weapon-Free Zone of the South Pacific, 1985

[9] Antarctic Treaty, 1959; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967; Treaty of Tlatelolco, 1967; Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, 1971; Treaty of Rarotonga, 1985

[10] Antarctic Treaty, 1959; Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, 1963; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967; Treaty of Tlatelolco, 1967; Treaty of Rarotonga, 1985.

2. Humanitarian law applicable in armed conflict

The "laws and customs of war" are embraced by "Hague Law" and "Geneva Law". This field of disquisition provides more precise rules than the provisions of the Charter of the UN or the treaties on the nuclear weapons.

The conduct of military operations is governed by a number of legal prescriptions. It was doubtless, all states have admitted - whether or not they have ratified the conventions - that the principles and rules of humanitarian law are binding upon all of them. The fact that the great majority of principles and rules of humanitarian law has become part of international customary law emphasizes the importance of these rules: they are considered to involve the most universally recognized humanitarian principles which form part of jus cogens.

The cardinal principles of the laws of armed conflict aim to protect on the one hand the civilian population against the danger and harms of war and on the other hand the combatants from unnecessary suffering. The two means to realise this protection are: the exigence of utilizing weapons that are capable to discriminate between civilians and combatants and, as for the people who take part in hostilities, the requirement of proportionality and military necessity. Therefore states do not have unlimited freedom to choose the methods and weapons they use.

Pursuant the Additional Protocol I. to Geneva Conventions "Parties to the conflict shall at all times distinguish between the civilian population and combatants and accordingly shall direct their operations only against military objectives[11]" and "it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering"[12].

On examining the rules a question has occured on the ground that these principles and rules had evolved prior to the invention of nuclear weapons, thus the unique features of atomic weapons simply could not have been taken into account. What makes this circumstance be worthy of consider indeed is the fact that there is a significant qualitative and quantitative difference between nuclear weapons and all conventional arms. There are two possible ways to enlarge the effect of the rules of humanitarian law to nuclear weapons. Adopting the method of logics we can state that if the "lesser" is prohibited even more the "more" is prohibited (interpretation by the principle a fortiori). The other solution is offered by the Additional Protocol itself as it pronounces that: "In the study, development, acquisition or adoption of a new weapon, […] a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party[13]".

As a consequence the principles of humanitarian law permeate the entire law of armed conflict and apply to all forms of warfare and to all kinds of weapons. Thus nuclear weapons are subjected to international humanitarian law which therefore defines its conditions of beeing utilized.

A number of states contended the nuclear weapons' capability for distinguishing between military and non-military objects, and from this position they have indicated that recourse to nuclear weapons could never be compatible with the principles and rules of humanitarian law and is therefore prohibited. The Court did not adopt this view but concluded that the particular nature of atomic weapons does not necessarily result in the ab ovo unlawfulness of the recourse to nuclear weapons. Besides this statement, however, the Court expresses its dubiety: "the use of such weapons *in fact* seems scarcely reconcilable with respect for" the requirements of the humanitarian law. Even so, the Court refrains from predicating the illegality of the use of nuclear weapons. The reason: "it does not have sufficient

[11] Art. 48.
[12] Art. 35. par. 2
[13] Art. 36.

elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict *in any circumstance*".

The indiscriminative nature of the effects caused by nuclear weapons may affect the principle of neutrality as well. As the Court deems this principle is applicable to all international armed conflict and to all types of weapons. The intention of the principle of neutrality is to prevent neutral territories from the incursion of belligerent forces. The prevention covers both protection against incursions of armed forces and against the transborder damages caused by the use of a weapon in / by a warfaring state. So the gist of the principle in brief: "the territory of neutral powers is inviolable". This concept badly encumbers the situation of a state that intends to recourse to nuclear weapons.

e.) Customary law

International customs of war also form part of the law applicable in the cases of armed conflits. On the one hand it is declared to be an effective source of law and on the other hand the rule refered to as Martens Clause also confirms the applicability of customary law to the case of armed conflict. The modern phrasing of the clause is involved in the Additional Protocol I. to GCs[14], which evokes "the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience" in order to assure protection for civilians and combatants in the cases not covered by written international agreements.

The main role of customary law is to fill in the gaps on the tissue of conventional law, to pilot the conduct of states in the case of the absence of written regulations. At the same time it is the source from which one can recognize the rules and principles that are generally belived by states to be obligatory.

Since the norms of customary law are not codified it might be difficult to seek out its content. To carry out this task the Court first has disclosed the actual practice that states pursue and secondly has decided on the question whether an opinio juris relating to nuclear weapons exists. The co-existence and the same direction of these two elements are required for the establishment of a new rule of costumary law.

Although nuclear weapons have been manufactured and deployed by States continuously since 1945, they have never been used after Hiroshima and Nagasaki. This means that in the last fifty years there exists a consistent practice of non-utilization of nuclear weapons by States.

The Court had the duty to estimate the legal consequences of this state practice: whether it refers to an unspoken prohibition of use or it has other reasons in the background. In my view this was the question that roused the most striking disaccord between the states. Non-nuclear states were deeply convinced – and hoped that the Court would feel the same - that the absence of any military use of nuclear weapons indicated that there had been formed an opinio juris among states against the use of nuclear weapons. On the contrary, states possessing nuclear armaments held firm to the view that the "fact that nuclear weapons have not actually been used since World War II results not from an opinio juris that their use is totally prohibited but from other military, political and humanitarian considerations". In their opinion the non-utilization of nuclear weapons is to be attributed to "the great success of deterrence policy", and not to opinio juris. States pursuing the doctrine of deterrence alluded to the fact that they have never abandonned the right to use those weapons in the exercise of the right to self-defence. In their view, the lack of recourse to nuclear weapons must be explained by the fact that circumstances that might justify their use have fortunately not arisen.

[14] Art. 1, par. 2

The Court adopted the latter argumentation, but before reducing a conclusion concerning the existence or non-existence of opinio juris it has examined the relevant (otherwise not binding) resolutions of the General Assembly. Throught a series of resolutions the General Assembly has declared and affirmed the illegality of nuclear weapons. This circumstance led non-nuclear states to assert that a rule of international customary law exists (the resolutions contain the confirmation of it) which prohibits the recourse to such weapons. According to the counter-argument of the rest of the states those resolutions – besides not being obligatory - are not the media of any customary rule settling the illegality of nuclear weapons.

The Court recognised that General Assembly resolutions might contain certain pre-existing customary rules of international law, but these have not arrived at the level of establishing the existence of an opinio juris.

As an other result of analizing the General Assembly resolutions the Court had the opportunity to clarify the question whether there exists any specific rule of customary law sustaining the prohibition of the use of nuclear weapons. In its first resolution expressly proclaiming the illegality of the use of such weaponary[15] the General Assembly applied the general rules of customary international law to nuclear weapons which – according to the Court - indicates that there was no specific rule of customary law interdicting the use of atomic weapons.

Having considered these circumstances the Court came to the view that neither the existence of an opinio juris of the prohibition of using nuclear weapons is proved, nor any specific costumary rule can be found proscribing the use of them.

B) The substantive statements of the Court – and their interpretation

Having explored the corpus of international law providing the frame for a decision on the legality or illegality of the use of nuclear weapons the Court summarised the consequences of applying the relevant rules of law.
The syllogistic schema reads as follows :
Since there is in neither customary nor conventional international law any specific authorization or any universal prohibition of the threat or use of nuclear weapons, the legality of utilizing such weapons is not ab ovo precluded. To potentionally be regarded as legal the recourse to nuclear weapons must fulfill two requirements:

1. A threat or use of force by means of nuclear weapons cannot be lawful if is contrary to the prohibition of recourse to force or / and does not comply with the rules of legal self-defense under the Charter of the United Nations.

2. A threat or use of nuclear weapons should also be compatible with treaty law: with the laws of armed conflict, particularly the principles and rules of international humanitarian law, and with the specific treaties which expressly deal with nuclear weapons.

It follows from the above-mentioned requirements that resort to threat or use of nuclear weapons can only be an extraordinary means and that the sole case in which it might be legally justifiable is the case of self-defence. At the same time this indicates that the threath or use of such weapons is generally contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.

[15] resolution 1653 (XVI) of 24 November 1961

The final conclusion of the Court incorporates this dichotomy of "may" and "must not":
"In view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".

Accordingly the "spell-word" is "extreme circumstance of self-defence, in which the very survival of a State would be at stake ". Now let us examine the content and conditions of it.

The right of self-defence is the inevitable result of the fact that the international community have not created its own particular defence institution which would possess the monopoly of force in order to defend states against external armed attacks. However, the right of self-defense is absolute only in that recpect that a state cannot be deprived of it, but it is relative because – as seen – law restrists the opportunities to practice it.

Through its decision, the International Court of Justice has extended the right of self-defense to include the resort to nuclear armaments as a means of protecting sovereignty. By doing so the Court allows an otherwise illegal weapon to become a legal instrument when it seeks to ensure a state's jeopardized sovereignty.

An extreme situation of self-defense is equivalent to be exposed to an extremly grave attack or the threat of such an attack. First and foremost we must grasp the meaning of the phrase "extreme". It is not worth to enquire into the philosophical aspects of the question, because the extremism of a situation always depends on the individual case: an attack or threat which queries the survival of a state may not be as exaggerated from the view of an other state. The degree of the necessity of self-defense therefore must be assessed in each particular case occuring. The fact that since World War II. nuclear weapons have not been used may indicate that there have not arisen such circumstances that would have required the use of these weapons. But knowing the historical and political surroundings of the of the choise of non-utilization this argumentation cannot be accepted. We cannot posteriorly appraise the really need of resort to use nuclear weapons by any state in the past in order to assure its survival, because states possessing such weapons unhazarded to use them. A mutual threat of employing nuclear armament were "sitting" on them and that led states to abstain from the use. However, (as far as I know) no state has disappeard during the last fifty years.

In practice it poses difficulties to estimate the field of situations which may be deemed as extreme, so it is more effortless to except the ones that might not be regarded as such. Against ecomonical, ideological or other indirect aggression self-defence by nuclear weapons – as nor by any other weapons – cannot be practiced lawfully. The existence of such a forceful economic, political influence that already endangers the independence of a state does not authorizes the state to recourse to nuclear weapons. It is only the case of armed attack that may provide a legal ground for such a decision.

Answering the question whether the survival of a state is at stake we have to interprete the phrase "survival". The intension of this notion is a dependent on the meaning of the "life" of a state. Theorically it includes on the one hand the "corpus" of the state: the territory over which it dominates, and on the other hand the "psyche" of the state: its political and cultural system. But in practice the survival of a state does not require the co-existence of all the elements of it "life", as a man is able to live with a corporal or menthal defect. In brief, the survival of a state connotes that it remains capable of exercising authority over a territory and accmplishing its primary functions.

Even supposing that the state is in an extreme situation of self-defense, "in which its very survival is at stake", the use of nuclear weapons must be justifiable in the light of the law applicable to it as well.

a.) The right to life

In theory the inherent right to life of a human being is definitely stronger than the righ to life of a state. Despite the moral value of this concept, neither international law nor practice of the states own it. In the phrase of Krmpoti: "at the point where a state faces an «extreme circumstance of self-defense», the role of law relating to humanitarian issues no longer applies in the same manner as in normal battle situations".
In connection with the right to life one further fact must be pointed out: even if the existense of a state were in distress, we cannot lose sight of the circumstance that it consists of the people living within its borders. The state as such is not an end in itself but is an entity colligating the individuals inhabitating its territory. Applying nuclear weapons not only extinguishes the present lives of thousands of people but also endangers the perspective of life of future generations.

b.) Obligation of states to protect environment

In the legal hierarchy of rights and responsibilities the right of the state to defend itself against an external threat of dissolution have priority over their obligation not to destroy environment.
In pursuance of this (reasonable) scale of values "the Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment". Nevertheless, environmental considerations cannot be disregarded when deciding on the weapon to use.

c.) "Humanitarian issues"

The essence of the rules and priciples of the humanitarian law can be summarized in three notions: military necessity, proportionality and the principle of neutrality. The exercise of the right of self-defence is submitted to the conditions of necessity and proportionality.
The "extreme circumstance of self-defense" implicitly contains the requirement of military necessity. Force – namely nuclear weapons – may be legally resort to only in the case where there are no other methods and means of warfare considered to be capable of defending the state's survival. This fact strongly suggests that the use of nuclear weapons for an attack hundreds of miles away from the state would be illegal.

The advisory opinion of the Court does not entertain the subject of the legality or illegality of the first use of nuclear weapons. In the sense of the self-defense-concept the first use cannot be lawful at all - independently of the weapon used. And since resort to nuclear weapons is only permitted in the case of self-defence, those kind of weapons are prohibited to be used first. This statement, however, is at variance with the reality and with the interest of foreign policy of the nuclear states: though nuclear weapons remain legal to possess, they do not serve any practical purpose (aside from the exceptional case of self-defense).

As asserted, the proportionality principle may not in itself exclude the use of nuclear weapons in self-defence, but it is really complicated to define the admissible mesure of the force. It is also a key-question question: to what do the defensive use of nuclear weapons have to be proportionate? To the attack that imperils the state's existance or to the gravity of the interest being offended? De jure the answering attack by utilizing nuclear weapons must not exceed the amplitude of the attack, de facto, on the contrary, states would evidently accept the latter concept.

The requirement of proportionality poses a further remarkable question about the equivalence of the means and methods used by the parties to the conflict. Opinions are divided. Certain sholars submit

that only the same means can be used when repulsing an unlawful attack, in other views[16] the state being in an extreme circumstance of self-defense is entitled to defend itself by any means accessible. The second approach proposes the possibility of such a case where the state may lawfully recourse to nuclear weapons as a response to an attack by conventional weapons of war. In my opinion basically the counter-attack must be adjusted to the attack, however there might occur a situation when the risk of overthrow is such high that – as a final means - the use of nuclear weapons appears to be the sole solution.

All the conditions established for the use of nuclear weapons applies to the threat of use of such weapon as well. The Court did not differentiate between threat and use, what is interesting, because threat is "less" than use. Accordingly in the circumstance of an extreme self-defence the state – at first glance - is enabled to chose between tempting to deterre the enemy or directly resorting to use nuclear weapons. Rethinking this surmise the inaccuracy of it appears: the choise of the state is determined by the principles of necessity and proportionality.

Another question arising relating to the notion of threath is its definition itself. Threat means envisaged use of force, in the words of the advisory opinion: "In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence". As a result of the co-regulation of the notions of "threat" and "use" of force, if the use of force itself in a given case is illegal, the threat to use such force will likewise be illegal. Some states put forward the argument that possession of nuclear weapons is itself an unlawful threat to use force. The Court did not agreed but held the view that possession of nuclear weapons without the really serious intention to use them pertains to the sphere of the policy of deterrence that is practiced by some of the nuclear states. However, if the conduct of the state appeares to foreshadow its preparedness to use those weapons, it must be deemed and mesured as the other activities coming under the notion of threat.
The third relevant principle of international humanitarian law is neutrality. The use of nuclear weapons either is lawful or not, has an effect which cannot be concentrated on a definite area, thus it would necessarily affect non-belligerent states as well.

A state's right to self-defence is one of the rights involved by the idea of sovereignty. Therefore in the present case "two sovereignties" are colliding with each other and the state that is in the extreme situation of self-defense seeks to enforce a very special element of its sovereignty against the territorial integrity of the other (otherwise neutral) state. On the one part, pursuant to its neutrality the non-belligerent state has the right to be free from the harms and dangers of the war, and on the other part the state in distress has the indefeasible right to survive. Of course, resort to nuclear weapons is not the only possible way of assuring survival, but if the state decides to do so it might endanger not only neutral states but by initiating or escalating a nuclear confrontation the entire international community - in the name of its own sovereignty.

D.) Conclusion

Having delivered its resolution the International Court of Justice - at first sight - still appears to stand in the meeting-point of the allegorical three-went-way road.

On balacing the answer given by the Court one cannot forget that the proposed question was phrased in a really general and abstract way, and that it has not emerged in connection with a concrete case but during legal debates. This fact explaines the cautious and apparently equivocal argumentation of the Court. The final (non-) conclusion of the Court reads as follows: "[…] the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme

[16] For example in the sight of László Valki, cited by Sándor Pirityi: b.

circumstance of self-defence, in which the very survival of a State would be at stake". Therefore the legality or illegality of recoursing to threat or use of nuclear weapons must be assessed in the individual case where the condrete utilization has occured.

It is essential to underline that by the fact that in its answer the Court has not established a definite prohibition, it did not give license to states to use nuclear weapons in the extreme circumstances of self-defense: it merely refused to decide the question!

Taking into account the present international circumstances and the policies and practice of (nuclear) states, the choise of the Court seems to optimally safeguard the interest of the law: interdiction of use of nuclear weapons would more probably result in the infringement of it. This "loophole" for use such weapons in self-defense may assure the "self-defense" of the law (and of the dignity of the Court as a consequence).

Eventually it would be – in my view - the political puissance and status on the intenational stage that says the last word if a state has to justify the lawfullness of its acts – even of the use of the most devastating weapon that humankind has invented.

In real life a state scarcely appeals to international jurists in order to decide whether it is allowed to defend itself or not, because use of force might be condemned only from outside, while it always has a justification from inside: a state never regard itself as an aggressor.

On the other hand a number of experts hold the opinion that nuclear states presumably will not change their existing policy, those states do not appear to be willing to abandon their nuclear weapons which are politically so valuable and effective.

Despite this known approach of the potent states the Court has unanimously enounced the existence of an obligation of the states "to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".

There is a vivid international endeavour to more and more restrict the scope of legal applicability of nuclear weapons and we might hope that states that possess such weapons will recognize that it would not be feasible to gain the victory by nuclear weapons and simultaneously bear a lawful self-justification.

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THE LEGALITY OF THE WAR AGAINST AFGHANISTAN

by

ATTILA SARI

September 11, 2001 was an inevitable day. Suddenly came a a shocking news on the screen of the tv: burning towers, panic in the street. Terrorists hijacked four commercial airlines and crashed them into the World Trade Center and Pentagon, killing thousands of people. The US government said that Osama bin Laden and his Taliban supporters in Afghanistan were guilty of the act of terrorism. The US started a strike against the Taliban regime of Afghanistan.

Nowadays, Bin Laden is not easy to found and he is in hiding somewhere maybe in the mountains. The US won the war, there is a new government in Afghanistan. This war raises the question: was it legal? United States is a part of the Unites Nations Charter ant therefore is bounded by the international law.[1]

War is an armed conflict between two or more countries. The actors are states using armed force against an other state. In connection with war we must distinguish between two notions: ius ad bellum (use of force) and ius in bello (armed conflict). This essay is about ius ad bellum. Our topic is whether the "war against terrorism" is a legal war according to the laws of war. One of the problems is that in this violence are both state and non-state participants.

US is a party of the United Nations Charter June 26, 1945. The Charter contains the rules in which situations may states use armed force. US invoked the Article 51 which is about the self-defense, a very debated notion in the last years. In aspect of "ius ad bellum"we have to focuse on the Article 51 and its interpretations, ant the case law.

The basic premise of the rules about the legality of war in the Charter is the outlaw war, the endangering the peace between the states. This principal is inferred from the general provisions of the Charter. Article 2(3) requires that all members of the UN must settle their disputes in a peaceful manner, Article 2(4) says that all members shall refrain from using force against any state, or in any manner inconsistent with the purposes of the UN. These provisions are now regarded as a rule of customary international law too.

Articles 39-51 contain rules about these situations. In these articles there is a method: in case of acts against peace the Security Council decides how to solve the problem. But if the act against peace is e. g. a sudden strike against a country, according to the Art. 51. The right of self-defense allows a state to act immediately, before the Security Council decides. Article 51 contains the following rule: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."[2]

1The legality of the United States War on terror... (Afghanistan1 p. 1)
2The legality of the United States War on terror... (Afghanistan 1 p. 2-3)

A state using defensive armed forces must report its actions to the Security council so that the Council may act.[3]

It has drawn debate over how the Article 51 must be interpreted and what circumstances must be present for a state to legally defend itself. The problem is the lack of accurate definitions. The followings are the most debated criteria: armed attack, self-defense. Can be an armed attack a terrorist-attack? What degree of self-defense is allowed? Is it allowed to bomb Afghanistan as a self-defense against the terrorists?

1. Armed attack

President George W. Bush stated, "We will make no distinction between the terrorists who committed these acts and those who harbor them." If we applied only a narrow definition, the term “armed attack” would not include attacks from terrorist organizations. We have to apply this narrow definition if we consider the traditional views at the time the Charter was signed.

1.1 The connection between state and terrorism

First of all, we have to define the “terrorist attack”, the “international terrorist offence”. The elements of a proposed definition by the International Law Association: act of violence or threat; acting alone or in association with other persons, organizations, places, transportation or communications systems or against members of the general public; its purpose is intimidating persons, causing injury or death, disrupting the activities of international organizations; causing loss, detriment or damage, interfering with transportation and communications systems in order to undermine friendly relations among States or among the nationals of different States or to extort concessions from States. The definitions refer to unlawful force. Terrorism takes on various forms. Its purpose is to change the structures or policies of the enemy state, to destabilize world order. Its aims are directed to the collective society of a perceived oppressor. Terrorist groups sometimes collaborate with each other and share their resources, even though their aims might be different. They are usually centrally coordinated. Members of terrorist groups are demonizing anyone who is outside their culture. Some of them believe that the source of their problems is a society and the cure is to destroy the source.[4]

Terrorism distinguished from non-terrorism, terrorists are not state deployed armed forces. They have no specific boundaries or territory. Both terrorism and conventional var have goals and rationales. In war, innocent civilians may not be used as targets, while terrorist freely choose them as targets, sometimes in order to blackmail a state or the public opinion. Negotiating with a terrorist organization is problematic because it isn't a representative of a state and they are not structured like states. Legitimate struggles and other permissible insurgencies under international law (attacks based on self-determination, anticolonialism or other categories) must be distinguished from terrorism. When we accept that state sponsored terrorism exists, then the sponsoring state may be in violation of Article 2 (4) of the UN Charter. The UN Security Council Resolution in the Lockerbie case stated that “organizing, instigating, assisting or participating in terrorist acts” is forbidden. State-sponsored terrorism can be analyzed along the lines of a four-part continuum ranging from active to passive support: 1. the state actively sponsors, controls 2. the state encourages; provides training, equipment etc. 3. the state tolerates the terrorists operating 4. the state is unable to deal effectively with the terrorists. In Afghanistan, the Taliban has supported terrorists both directly and indirectly. The Taliban were established by Afghan refugees during the Afghan-Sowiet war in Pakistan as a movement. In year 1996 the group captured the capital, Kabul and some other Afghan cities.[5]

3The Afghanistan War and Self-Defense (Afghanistan 1.pdf p. 44)
4Formulation of a state's response to terrorism and state-sponsored terrorism (Afghanistan 1.pdf p. 71-75)
5Formulation of a state's response to terrorism and state-sponsored terrorism (Afghanistan 1.pdf p. 75-80)

If the incident1s on September 11 had been taken directly by the Taliban Govermnent of Afghanistan, it would be clearly an armed attack by a state. However, the connection between the hijackers and the Taliban seems to be a bit obscure. These acts are to see also as criminal acts. Ther was a similar case in 1986 when Israel bombed the headquarters of Palestinian terrorists in Tunisia as a response of a terrorist attack, but the Security Council condemned the action. However, the destruction on September 11 was worse than Pear Harbor.[6]

According to an other interpretation, states can also be responsible for acts of omission regarding non-state actors. States have to prosecute or extradite terrorists. In 1999 the appeals chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held in Prosecutor v. Tadic that the acts of the Bosnian Serb army could be imputed to Serbia because Serbia had exercised "overall control" over the former. The draft articles written by the ILC (International Law Comission) regard a state as responsible "if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"; "if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities"; and "if and to the extent that the State acknowledges and adopts the conduct in question as its own."[7] It seems that none of the cited tests supports the theory of the US, which theory imputes based on the toleration of terrorist acts by the government. US government said that a state could be responsible for aiding and abetting another in an illegal act, with knowledge of its actions. The US view significantly differs from the above mentioned ones.[8]

1.2. The Nicaragua Case – whether a terrorist attack is "armed attack"

The meaning of term "armed attack" was interpreted by the International Court of Justice in case Nicaragua v. USA. The court said that a situation in which a country harbours a terrorists organization isn't an armed attack. In this case US conducted military actions against Nicaragua because it has been providing weapons and other support to rebels in order to help them overthrow the government of El Salvador. The opinion of the court was that supporting armed bands in a neighbouring country isn't an armed attack. However, it may constitute a breach of Art. 2(4). Very important is what the court said: "the concept of an armed attack includes the dispatch by one state of armed bands into the territory of another state." This decision has set up a standard in which the term "armed attack" is to analyze.[9] There is a scale, above the threshold of "armed attack" are attacks such as sending armed irregulars. The words "an armed attack occours" mean thet there must be an actual commencement of physical violation[10].

Contrasting with the decision in the Nicaragua Case, the hijackers on September 11 weren't classical armed persons, neither members of an irregular or paramilitary force. They didn't have arms, but hijacking an aircraft can effect a damage as a bomb does. Therefore – considering the intention of the hijackers and the Taliban – the attacks on September 11 were armed attacks, although not classical ones.

One of the elements of the US claim was that Afghanistan was the preparator of the terrorist attacks. We have to examine the connection between the terrorist attacks and the activities and intentions of the Taliban. The letter written by the US did not claim that Afghanistan organized or encouraged the attacks on September 11. Taliban only allowed to use Afghanistan as a base of an operation. "The UN General Assembly said that if a state sends irregulars who carry out an armed attack on another state,

6Sean D. Murphy: Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter (Afghanistan 1.pdf p. 208 ff)

7Jus ad Bellum and Jus in Bello After September 11 (Afghanistan 1 p. 153)

8Jus ad Bellum and Jus in Bello After September 11 (Afghanistan 1 p. 153-154)

9The legality of the United States War on terror... (Afghanistan 1 p. 3-4)

10Louis-Philippe Rouillard: The Caroline Case… (20042ruillard.pdf at www.mjil.hu) p. 13.

that would be aggression, as much as if it had sent its own armed forces."[11] However, the government of Afghanistan did not "send" in this meaning any forces. On the other hand, the future attacks that were anticipated in October, can be imputable to Afghanistan. According to the article[12] these fact do not establish imputability to Afghanistan.

Even if we accept, that the attacks on September 11 could have raised the level of "armed attack" in itself, these completed attacks were not enough to start air strikes legally against Afghanistan. Without an other armed attack being in progress against the US, starting air strikes would be reprisals only. the president of the United States said that Al Qaeda threatened US with further terrorist attacks.

UN Security Council has on many occasions expressed that there is a close relation between the Taliban and Al Qaeda. The Taliban has terrorist training camps on its territories. The motives of the Taliban government, and their strong ties with the Al Qaeda can support this argumentation. In my opinion, it is a case of the earlier mentioned close relation too.

1.3. Anticipatory self-defense

According to an other argumentation, an "armed attack" must be commencing, before armed force can be used in self-defense. This statement is not evident in the English text of the UN Charter, but the other authentic text of the Charter are a bit different and they confirm this argumentation. (e. g. the Chinese text: "at any time any member of the United Nations is attacked by military force.")[13]

A French author argued that the "agression armée" (instead of "armed attack") in the French version of the Charter permitted aniotcipatory self-defense because an agression could exist separately from armed attack. Hovewer, these arguments have been always rejected and the French word comes from the Latin aggredi, therefore it has the same meaning like "attack".[14]

Twenty years ago, dr. Polebaum argued that the policy of first strike is necessary because of the nuclear armaments. She presented three criterions of the legality of the anticipatory self-defense on the basis of the Carolina case: attempt to avert war or the threat of war until it is aviodable and immediate; self-defense must be proportional to the provocation; th immediacy of the threat.[15]

The author of an other essay says that applying a broader interpretation, an e-mail threat from abroad could be argued to constitute an armed attack.[16] In my opinion we have to distinguish between the levels of the threat. Therefore the e-mail-argumentation is not satisfactory. The result of a narrow interpretation is not enough in all situations. States that utilize terrorists to carry out acts of war on other nations would be protected under the UN Charter.

1.4. Was it an armed attack against the US?

A contemporary author wrote that analyzing the expression "armed attack" from a literal standpoint, also terrorist attacks by armed groups were "armed attacks".[17] When an armed band is supported by a government of a foreign state (and this foreign state wants the armed band to start an attack against an other country), the situation can be equivalent to an attack by the regular armed forces of the state. Vividly the difference is only the legal connection between the two types of the armed forces and the

11The Afghanistan War and Self-Defense (Afghanistan 1.pdf p. 46.)
12The Afghanistan War and Self-Defense
13The Afghanistan War and Self-Defense (Afghanistan 1.pdf p. 45.)
14Louis-Philippe Rouillard: The Caroline Case… p. 13
15Louis-Philippe Rouillard: The Caroline Case… p. 12
16The legality of the United States War on terror... (Afghanistan 1 p. 3.)
17The legality of the United States War on terror... (Afghanistan 1 p. 4)

government. However, we cannot say that the both cases are absolutely equivalent. There is a slight difference. Before we consider an act of terrorism supported by a foreign state as equivalent, we have to examine the relation between the armed bands and the foreign government closely. Therefore neither this theory gives a correct solution.

According to an another author, the language in Art. 51 leads open the possibility that it can be read broadly enough to include the terrorists attacks that occurred on September 11, 2001. "Armed attacks by non-State armed bands are still armed attacks, even if commenced only from- and not by- another State."[18] However, as mentioned above, other factors should also be considered. These are in particular: the level of state support, link in a long chain of acts (which are relevant in the considering the level of the attack), subjective factors (threat to the safety, motives).[19] It can be important that a state that has been a victim of a completed attack (and there isn't any threat to take other terrorist acts) may not use armed force in response. Claiming self-defense also needs other factors to be considered, reprisals aren't permitted. However, the letters sent by the US and he UK to the President of the UN Secretary Council, haven't contained any information about any particular anticipated attack.[20]

It seems that the September 11 attacks were isolated from other terrorist attacks by Al Qaeda, but killing thousands of people, and causing chaos and massive destruction reaches the level of “armed attack”. According to the author, these attacks by Al Qaeda were not the first attacks on American targets and, according to Al Qaeda leaders, they will probably not be the last.[21] However, I think, “per se” the verbal threat by a leader of an armed band shouldn't be enough to make an attack probable, but in this case the attack against the WTC and the shock in the whole USA must have been a believable omen.

1.5. International support

The NATO parties had "determined that the attack against the U.S. on September 11th was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty."[22] Article 5 makes direct reference to the terms “armed attack” and “self-defense”. Also collective self-defense (NATO-forces, US-UK-forces against Afghanistan) is allowed by Article 51.

The UN Security Council has issued two resolutions that reaffirm the United State's right to self-defense. 51 By reaffirming this right, the Security Council is implying that there was an armed attack on the United States and therefore is recognizing the United States's inherent right of self-defense. However, UN Security Council hasn't declared expressis verbis that it was an “armed attack”. On the day the US initiated air strikes against Afghanistan, it sent a letter to the President of the Security Council recited that the US has initiated self-defensive armed attack. According to one of the opinions, sending this letter the US acknowledged that its action against Afghanistan wasn't a legal self-defense.[23]

2. Self-defense

18The legality of the United States War on terror... (Afghanistan 1 p. 4)
19The legality of the United States War on terror... (Afghanistan 1 p. 4)
20The Afghanistan War and Self-Defense (Afghanistan 1. pdf p. 45.)
21The legality of the United States War on terror... (Afghanistan 1 p. 4)
22a statement made by NATO Secretary General Lord Robertson, quoted in The legality of the United States War on terror... (Afghanistan 1 p. 5)
23The Afghanistan War and Self-Defense (Afghanistan 1.pdf p. 44)

In case of an "armed attack" the next step is to decide the necessity and the appropriate measure of a self-defense action. In our case, the questions are the following: Was it necessary to start a self-defensive armed attack? If yes, was it proportional to destroy the whole Afghanistan and remove the Taliban regime?

2.1. The Carolina Case

The United Nations Security Council makes no reference as to what constitutes reasonable and proper self-defense under the charter. The concept of self-defense has been shaped by the Carolina Case (1837), in which a British officer, believing that an American ship was operating as an ammunition supply vessel for Canadian vessels, gave orders to destroy the ship, which was caled Carolina. British officers argued that it was justified by the necessity of self-defense. They arguments were the followings: the vessel had a piratical nature, the ordinary laws of the United States were not being enforced at the time, and the third argument was self-defense.[24] According to the letter written by Daniel Webster, United States Secretary of State, the criteria of necessity are "'instant, overwhelming, leaving no choice of means, and no moment for deliberation", and he defined proportionality as actions that are not unreasonable or excessive: "It will be for it to show, also, that the local authorities of Canada,- even supposing the necessity of the moment authorized them to enter the territories of the United States at all,-did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be strewn that admonition or remonstrance to the persons on board the "Caroline" was impracticable, or would have been unavailing; it must be strewn that daylight could not be waited for; that there could be no attempt at discrimination, between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her, in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some, and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate, which fills the imagination with horror."[25] A British officer, Ashburton sent an ingeniuos answer, he accepted the conditions formulated by Webster. He wrote that the time of the attack at night was consciously selected in order to cause the least lost of life, and the strength of the current did not permit the vessel to be carried off to the Canadian side. Therefore, wrote Ashburton, it was necessary to attack the Carolina.

The doctrine of the Carolina case lives on, but there wasn't an organ before the UN Charter what could really adjudicate on using force. The UN charter prohibits using force, excepting self-defense and collective self-defensive actions (Art. 51 of the UN Charter).

It is now accepted that necessity and proportionality must be considered. In the light of these, it isn't easy to judge the necessity and the proportionality of the "war against terrorism" (see below).

It marks out from further cases that "the existence of a potential right of anticipatory self-defense can be supported", but only in reaction to a "first use of force or a clear and imminent threat of such use."[26] Furthermore, when a country has prepared the attack and is on the point of starting it, and the victim state discovers it and starts a self-defensive attack before the enemy starts the attack, isnt't illegal and isn't anticipatory self-defense.[27]

24Louis-Philippe Rouillard: The Caroline Case… (20042ruillard.pdf at www.mjil.hu) p. 5.
25Letter of Secretary of State Daniel Webster to Special Minister Ashburton, dated 27 July 1842, reproduced at http://www.yale.edu/lawweb/avalon/diplomacy/britian/br-1842d.htm; quoted by Louis-Philippe Rouillard: The Caroline Case… p. 8.
26Louis-Philippe Rouillard: The Caroline Case… p. 15
27Louis-Philippe Rouillard: The Caroline Case… p. 13-15

2.2 Necessity

Using armed force must be an ultima-ratio-solution in an instant, overwhelming situation. Before a response to an armed attack must be examined, wether using arms necessary is. If less harmful means there are available, there must be used. After September 11, 2001 another possibly means were for the US: shut off financing Al Qaeda, criminal prosecution. Afghanistan indicated willingness, to discuss a surrender. US refused this means.[28]

Inferred from Webster's letter the doctrine of necessity needs immediacy or a close-in-time response to the attack. Without those states could use self-defense to retaliate actions. On the other hand – as a contemporary author sees it -, todays warfare is rather different, modern weapons does not give time to prepare for the self-defense in that restricted meaning (the most of the critical situations aren't classical face to face battles). The narrow interpretation might eliminate the chances of legal self-defense. Under certain circumstances, this argumentation could be acceptable, but it doesn't answer whether the anticipatory self-defense legal is. This argumentation says that the air strikes by the US were not reprisals, but legal responds to the terrorist attack on Spetember 11. However, my opinion is that US started the air strikes a bit late after the terrorist attacks, therefore the US had enough time to approach the UN Security Council (see below).

There are many scholars who say that anticipatory self-defense is permissible under Art. 51. because "pre-charter rights inherently survive the adoption of the charter if they are not prohibited by or inconsistent with it."[29] This is a wide interpretation and in my opinion it could lead to unfavorable effects, it could be against the mind of the UN Charter, first of all against the Article 2. On the other hand, it is reasonable that the right to self-defense is not limited to instances of actual attacks against the victim state. However, a wide interpretation can lead to dangerous consequences: many states could lawfully initiative armed attacks to anticipate an only potential attack in the future.[30] Second, anticipatory self-defense gives states the opportunity to invent anticipated attacks as a pretext. The third risk is that a state may erroneously believe that the enemy is on the point of attacking[31]. In my opinion we have to distinguish between a very far indirect threat and a serious realistic one – the second one may establish the necessity. President Bush announced that new threats to the United States have required the Untied States to adopt a new policy of pre-emptive actions. ("...the doctrine of anticipatory self-defence is one that is punctual, answering the threat of the moment immediately. The theory of pre-emptive self-defence is a much wider concept, aiming at eradicating the source of the problem."[32])

One of the criteria is that there must have been no time to resort to the U.N. Security Council before initiating the armed force[33], but the US attacks against Afghanistan were nearly a month after September 11. The International Court of Justice decided in an other case, that the situation of self-defense obtains only in the moment when an object is attacked, but a latter answer isn't a legal self-defensive action.[34] However, there are many who are rethinking the need of "immediacy" because it needs time to prepare a well-thought-on military campaign against the real responsible. Mainly in Afghanistan, in which country there are difficult terrain, underground canals, and bunkers in caves.[35] If we accept this argumentation, "these realistic and serious threats made against the United States must allow for the use of preemptive force to defend against future tragedies."[36] According to the views of

28The Afghanistan War and Self-Defense (Afghanistan 1.pdf p. 46-47.)
29The legality of the United States War on terror... (Afghanistan 1 p. 6)
30The Afghanistan War and Self-Defense (Afghanistan 1.pdf p. 44.)
31 The Afghanistan War and Self-Defense (Afghanistan 1.pdf p. 52)
32Louis-Philippe Rouillard: The Caroline Case… p. 16
33The Afghanistan War and Self-Defense (Afghanistan 1.pdf p. 44.)
34Iran vs. USA for the petrol plate-forms (2004)
35Formulation of a state's response to terrorism and state-sponsored terrorism (Afghanistan 1.pdf p. 82)
36The legality of the United States War on terror... (Afghanistan 1 p. 7)

other authors, the anticipated attack must be imminent and obvious, but in the above mentioned letter sent by the US haven't specified the anticipated time, location, or target of the possible further terrorist attacks.[37]

The argumentation by US is not easy to accept. If there is a time indeed for an approach to the UN Security Council, there is no right to use armed force in self-defense. US had enough time, but Al Queda was about to attack again. Attacks might occur at any time, but there was no reason to US not to approach the Security Council. US could have convinced the Council.[38]

As can be seen, there is a strain between the need of immediate and the well-prepared response, furthermore between "face to face" situations and anticipatory self-defense. Furthermore, the threat against the US was hardly "instant and overwhelming".

2.3. Proportionality

If a response to an attack is allowed by the previous rules, there remains a further question: is the response proportional to the original attack? This criterion can be very interesting: could be legal a strike against Afghan cities and innocent citizens (like the terrorist act against the WTC)? Of course, this cannot be the meaning of proportionality. Only an attack against military objects, terrorist training camps, leaders of the Taliban etc. can be legal. Today, proportionality refers more to the balance between a military objective and its cost in terms of lives lost or the military actions needed to control the enemy.[39] The international community on the whole rejects a strict construction of this principle, the response needs to be enough to cease the activity of terrorists. Having this aim, it isn't disproportionate if in some cases the retaliatory force exceeds the original attack – according to an opinion. It is important to view the total context of hostilities, past acts and logical projections of future events. This is the theory of "cumulative proportionality". [40]

The interpretation of an other aspect of the proportionality is quite important. Armed force used in self- defense has an aim to defense the country, reverse the armed attack, driving the foreign army back. It is not easy to decide, whether using armed forces to destroy buildings, terrorist training camps, governmental objects is permitted. In my opinion, nowadays there aren't other options in situations like after September 11. But if there was an other reason for use of force (controlling the Central Asian oil pipeline, overthrowing the Taliban) rather than self-protection, then self-defense would be unavailable. Furthermore, we have to consider that if US eliminates the leaders of Al Qaeda in Afghanistan, there remain in other countries arount the world other members of Al Queda who can attack against the US.[41]

Opponents of the war said that the US attacks weren't proportional, and weren't military in nature, but rather political. The Taliban isn't simply an army and its members are largely civilians. Sometimes US has attacked civilian objects and has undoubtedly made mistakes. Whether the US attacks were excessive, is subjective in its analysis. Could hundreds of innocent Afghan civilians outweigh the life and security hundreds of US citizens? US government strongly denied that its military targeted Afghan civilians and there was a trend that US used at the end of the war ground forces as the primary weapon instead of air strikes and it leaded to less civilian casualties.

37The Afghanistan War and Self-Defense (Afghanistan 1.pdf p. 45)
38The Afghanistan War and Self-Defense (Afghanistan 1.pdf p. 47-48)
39The legality of the United States War on terror... (Afghanistan 1 p. 7)
40Formulation of a state's response to terrorism and state-sponsored terrorism (Afghanistan 1.pdf p. 83)
41The Afghanistan War and Self-Defense (Afghanistan 1.pdf p. 48)

3. Conclusions

From the disputes lightens that the notion of anticipatory self-defense belongs not in the content of the self-defense in Art. 51. United States declared a new foreign policy in September 2001: the US Government will defend the US with armed force when it's necessary, also in an anticipatory way.[42] In my opinion, the judiciary problems of terrorist attacks illustrated in this essay, must be solved, but also we have to consider that the US didn't want to use only legal tools whatever happens. Therefore we have to analyze this case mistrustfully against the real intentions of the US government.

The connection between the Taliban and Afghanistan seems to be a legal ground of self-defensive attacks against Afghanistan when the other legal conditions exist. Terrorist attacks on September 11 could have been “armed attacks”, but there wasn't a threat of further terrorist attacks clearly.

Unimaginable attacks can be very dangerous, but a too wide interpretation of self-defense leads to the depletion of the principles of the UN Charter and of the ius cogens. the security of a country is very important, but it mustn't be acceptable by the law to “shoot on everyone” who a bit suspect is. Anticipatory self-defense seems to be illegal when an other country or organization has only the intention to fight, but there isn't an armed attack already in progress, or there isn't a realistic, immediate threat. Having dangerous weapons or making declarations mustn't authorize an other state to start anticipatory self-defensive armed attacks. And we mustn't forget that US had enough time to approach the Security Council.

42Louis-Philippe Rouillard: The Caroline Case… p. 2

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THE DEROGATION REGIME OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

by

LOUIS-PHILIPPE ROUILLARD*

The application of the norms protecting human rights in situations of exceptions, that is in situations of emergencies where a disruption of peace occurs but where the threshold of what consists into an armed conflict has not been reached, remains one of the most problematic aspect of the respect of fundamental human rights.

Constitutional orders, regional and international human rights all possess, to a measure or another, curbs or derogations on the full enjoyment of human rights during these periods. One of the most known method of limiting the full enjoyment of human rights during periods of exception is the derogatory clause. Such clauses can be found in articles 4 of the *International Covenant on Political and Civil Rights*[1], 27 of the *American Convention on Human Rights*[2] and 15 of the *European Convention on Fundemantal Human Rights and Freedoms*[3]. To these measures, one could add the proposed derogatory clauses of article 4(b) of the *Charter of the Arab States League*[4] and article 35(1) of the *Convention of the Commonwealth of Independent States* (CIS)[5].

But even instrument not possessing derogatory clauses possess limits based on the principle of legality, such as in the case of the *International Covenant on Economic, Social and Cultural Rights*[6] or the *African Charter on Human and People's Rights* at its articles 9(2) and 10[7], or with general limitation clauses such as article 30 of the *Universal Declaration on Human Rights* at its article 30[8]. The latter states :

> «Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein"[9].

In the former case of legality clauses, the *African Charter* states : " …within the law … " and" … provided that he abides by the law.… "[10].

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[1] *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR 21st Sess., Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [hereinafter *ICCPR*].

[2] *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 *entered into force* July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

[3] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, E.T.S. 5, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *amended by Protocols Nos 3, 5, 8,* and *11* which entered into force on 21 September 1970, 20 December 1971, 1 January 1990 and 1 November 1998, respectively.

[4] *Charter of the Arab States League*, 15 September 1994, in 18 Hum. Rts. L. J. (1997) 15. Approuved in Septembre 1994, it is not in force.

[5] *Convention of the Commonwealth of Independent States*, adopted in May 1995, it is not in force.

[6] *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), U.N. GAOR 21st Sess., Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 [hereinafter *ICESCR*].

[7] *African Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 [hereinafter *African Charter*].

[8] *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948) [hereinafter *Universal Declaration*].

[9] *Ibid.*, at Article 30.

[10] *African Charter*, *supra*, note 7 at Articles 9(2) and 10.

The problem in such case is to define what an emergency consists of or what the limits imposed by the law can be. Article 27 (Suspension of Guarantees) of the *American Convention* provides such a definition, edicting an emergency as one of : "time of war, public danger, or other emergency that threatens the independence or security of the States party" and follows by precising that the guarantees of the *American Convention* can only be suspended "for the period of time strictly required by the exigencies of the situation"[11].

By opposition to this approach, Article 15 of the *European Convention* permits to take the derogatory measures necessary in "In time of war or other public emergency threatening the life of the nation"[12]. The problem with such a liberal definition is obviously that it leaves a large margin of appreciation to the States as to know whether there exist a public danger menacing the life of the Nation.

The most interesting example concerning the regime of the Council of Europe's *European Convention* is that of the Case of *Ireland v. United Kingdom*[13]. In this affair, the reach of Article 15 was examined by the European Court of Human Rights in a State to State requisition, following the request of the government of Ireland, alleging that the 1922 law of the United Kingdom concerning the emergency powers of the Crown on the civilian authorities and the systematic pratices of the United Kingdoms' officials on Northern Ireland's soil contravened Articles 2 (Right to Life), 3 (Protection against torture and cruel and inhumane treatements), 5 (Deprivation of Liberty) and 14 (Non-discrimination) of the *European Convention*.

It must be noted that at the time of this affair, only *Protocols 1* and *2* to the *European Convention* were in force[14]. Referring to Article 15, the Irish Government argued that Her Most Britannic Majesty's measures largely over-stepped the reach of the strict exigencies of the situation, since these measures were not in accordance with international law, as stipulated by article 15[15]. In the second part of its request, the Irsih Governement furthermore argued that the Law of 1972 on Northern Ireland, attributing large powers to the Northern Ireland Parliament concerning the use of British Forces, contravened article 7 (*Nullum Crimen Sine Lege*). The European Court of Human Rights based itself on the previous claims of the first *Case of Cyprus*[16], the *Case of Greece*[17] and on the *Case of Lawless*[18], and judged that :

> " It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the

[11] *American Convention*, *supra*, note 2 at Article 27.
[12] *European Convention*, *supra*, note 3 at Article 15.
[13] *Case of Ireland v. United Kingdom, 23 Eur. Ct. H.R. (Ser. B)* at 3 (1976) [hereinafter *Ireland*].
[14] By opposition, the other Protocols entered into force on : *Protocole* n° 3, le 21 septembre 1970; *Protocole* n° 4, le 2 mai 1968, *Protocole* n° 5, le 20 décembre 1971; *Protocole* n° 6, le 1er mars 1985; *Protocole* n° 7, le 1er novembre 1988; *Protocole* n° 8, le 1er janvier 1990; *Protocole* n° 9, le 1er octobre 1994, *Protocole* n° 10,le 25 mars 1995 et le *Protocole* n° 11, le 1er novembre 1998.
[15] *European Convention*, *supra*, note 3 at Article 15.
[16] *Eur. Comm. HR, Application No. 6780/74 and 6950/75, Cyprus v.Turkey*, Report adopted on 10 July 1976, Vol. 1, although this affair did not reach a decision stage due to a joint demand at the Council of Ministers of the European Council. See Council of Europe, Committee of Ministers, *Résolution* 59(12), *Yearbook of the European Commission on Human Rights*, Vol. 11, 690, 20 April 1953.
[17] *Case of Greece (Greek case), Yearbook of the European Commission on Human Rights*, Vol. 11, 701, 1967. Following four separate request by Norway, Danmark, Sweden and the Netherlands, an aborted procedure similar to that of the Cyprus case took place.
[18] *Affaire Lawless, Eur. Court HR. (Ser. A)*, nos 1, 2 et 3. In this affair, the Court defined was constitute a danger menacing the life of the Nation. It came to the conclusion that it consisted in a crisis of an exceptional dnager that affects the whole of the population and constitute a menace for the organised life of a community that composes the State..

> national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 (art. 15-1) leaves those authorities a wide margin of appreciation.Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements (Article 19), is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis (Lawless judgment of 1 July 1961, Series A no. 3, p. 55, para. 22, and pp. 57-59, paras. 36-38). The domestic margin of appreciation is thus accompanied by a European supervision. "[19].

As a result, the court refuse to allow the argument of the Irish Government and recognised that the actions of British officials did not over-step the strict necessity of the situation[20]. It follows from this decision that the States is tributary of adjudging the reach of the derogation it intends to take. This margin of appreciation left to the State makes it both judge and party, although subject to judicial revision, and therefore creates quite a dangerous precedent. As remarked the renowned Canadian jurist L.C. Green, the Court in effect :

> " *… held that the burden of proof was on the complainant, and that the standard to be applied was 'beyond reasonable doubt' (…) the chances of a Party being found guilty of wrongly declaring an emergency are somewhat remote…* "[21]

Not only did the Court agreed in full bench to this benchmark ruling on this score, but not even an *obiter dictum* suggested that the Court could have been convinced otherwise if, in the use of its discretionary powers, the United Kingdom had exceeded and/or continued to exceed the restrictions imposed by Article15[22]. The Court seems to have kept firmly in line with its decision of the *Case of the SS Wimbledon*[23], where it opined that it cannot, nor even shouldm contemplate such situations where it would have to interpose its judgement *in lieu* of the States.

It is interesting to note that this is totally opposed to the approach of the Inter-American system, where the Court did not hesitate to substitute itself to States in order to determine the limits of the suspension of guarantees in the *American Convention* and to objectively define what constitute a war, a public danger or a situation of crisis menacing the independence or security of the State. In its advisory opinion of the *Habeas Corpus in Emergency Situations*[24], the Inter-American Court presented the reasons that could be invoked to claim the suspensions of Article 27

In its opinion, the Court takes the direct approach and clearly announces that rights cannot be denied or suspended unless the circumstances leave only this sole recourse to preserve the most fundamental values of a democratic society[25]. The Court therefore puts the legitimacy of the democratic system of government as the ruling principle when it comes to the evaluation of the legitimacy of the use of derogatory measures. It further adds in the same paragraph that the suspension of guarantees may not be dissociated from the "effective exercice of representative democracy", and that any use of

[19] *Ireland*, *supra* note 13 at 68.
[20] A.S. Calogeropoulos-Stratis, *Droit humanitaire et droit de l'homme : la protection de la personne en période de conflit armé*, Genève, Institut Universitaire des Hautes Études Internationales, 1980, 258 at 81.
[21] L.C. Green, *Human Rights in Emergency Situations*, Conference of the Canadian Council on International Law, University of Ottawa, 1978, 19 at 5.
[22] *Id.*
[23] *Case of SS Wimbledon, (1923) I.P.C.J. (Ser. A)*, n° 1, 163 à la p. 180.
[24] *Habeas Corpus in Emergency Situations, Advisory Opinion AO-8/87, Inter-Am. Ct. HR (Ser. A)*, 1, 27 I.L.M. 519. [hereinafter *Habeas Corpus*].
[25] *Ibid*. at 38, para. 20.

derogation in the aim of undermining a democratic system is an illegitimate use of Article 27. Non content with this, the Court finally opined that the exercice of democratic rights can only be suspended if the most stricter conditions of Article 27 are met. By this, the Court states without the inkling of a doubt that it meant :

> "*… rather than adopting a philosophy that favors the suspension of rights, [it] establishes the contrary principle, (…) rights are to be guaranteed and enforced unless very special circumstances justify the suspensions of some, and that some rights may never be suspended, however serious the emergency.* "[26].

Contrary to the European approach, which seems to permit the wider latitude possible to the State with the reservation of judicial review, albeit only subsequently to a previous action of the State, the Inter-American Court emitted its opinion before any situation concerning such cases reached it and choose to apply a *stricto sensu* interpretation of the suspension clause of Article 27 of its *American Convention*. It is also capital to note that the Court did not authorise the proscribtion, full interdiction of exercice or the eradication of a right ; at the most, the Court allows the State meeting the strict condition of Article 27 to suspended the exercice or to limit the full and complet exercice of the right in question. The rights in themselves survive this regime of suspension and are deemed inherent to the human being[27], and therefore inalienable[28].

These approaches of the Inter-American and European system are distanced in part by the approach of the *African Charter*. Still, one must emphasise that it is so *in part* only because while the African Charter adopted a new approach by including the rights of collectivities into its framework, it was neither the first nor the only one to include individual, economic, social and cultulral rights with obligations in a regional system of protection of human rights.

The *American Declaration on the Rights and Duties of Man* incorporate respectively these at its Articles XIII, XXIX, XXX, XXXI et XXXIV : the right to benefit from cultural life in one's community (XIII); the right to social security (XVI), the obligation of having an individual deportment permitting the development of the potential of others (XXIX); the obligation to support parents (in particular the aide of children and the honoring due to parents) (XXX); the obligation to receive at the minimum a primary education (XXXI) and the obligation to serve the community and the Nation (XXXIV)[29].

The *Charter of Fundamental Rights of the European Union*[30] also incorporated some of these notions. Even, in a more restrictive measure, do the rights and obligations to participate to the cultural and intellectual life in the proposed *Charter of the Arab States League* at its Article 35, where it states :

> *" Citizens have a right to live in an intellectual and cultural environment in which Arab nationalism is a source of pride, in which human rights are sanctified and in which*

[26] *Ibid* at 38 and 39, para. 21.
[27] *Ibid.* at 37.
[28] A.L. Svenson-McCarthy, *The International Law of Human Rights and States of Exception,* Coll. Internatioal Studies in Human Rights, vol. 54, Boston, Martinus Nijhoff Publishers, 1998, 780 at 254
[29] *American Declaration of the Rights and Duties of Man,* O.É.A. Rés. XXX, adopted at the Ninth International Conference of the Organisation of American States, reproduced in *Basic Documents Pertaining to Human Rights in the Inter-American System*, (1992) OAS/Ser.L.V/II.82 doc.6, 1.
[30] *Charter of Fundamental Rights of the European Union*, 2000 O.J. (C 364) 1, (Dec. 7, 2000) and the *Draft Charter of Fundamental Rights of the European Union*, CHARTE 4422/00 (July 28, 2000) [hereinafter *European Union Charter*]. The proposed charter of the Praesidium includes economic and social rights at Article 31. A particular attention is given there to the "familial" application of this article.

> *racial, religious and other forms of discrimination are rejected and international cooperation and the cause of world peace are supported.* "[31].

Nonetheless, it is exact to claim that the *African Charter* seems to accord a proeminence to these rights and that its dialectic of individual rights as opposed to collective rights in much more pronounced than in other systems.

Still, the writing of Articles 9(2) and 10 forces one to ask himself if the protections of the *African Charter* are not illusionary[32]. The question is not solely or the abstract : in determining the true force of the legal limitation clauses, one can discover if the *African Charter* is a juridical instrument or a political instrument serving the ends of non-democratic regimes. The problem of the *African Charter* was, at first, that its *African Commission on Human and People's Rights* had not, for the longest time after its implementation, had the occasion of pronouncing itself on the important question. Rather, indication of its potential were given through Articles 60 and 61 as to its capacities to acquire a viable juridical strenght opposable to States. Article 60 reads as directing principles :

> " The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members. "[33]

And Article 61 attempts to enlarge this reach by edicting :

> " The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine. "[34]

It is important to note here that while the African Court was created following the redaction and adoption of its founding *Protocol*, its article 7 retakes *expressis verbis* the notions of the *African Charter* edicting that in its deliberation : "*…the Court shall be guided by the provisions of the Charter and the applicable principles stipulated in Articles 60 and 61 of the Charter.*" [35]. There is therefore a need to set and determine the legality principle from other instruments. An extraordinary analysis of this kind was made by A.L. Svensson-McCarthy and permits to define in a large measure this principle of "legality"[36]. First, the question is to know what sources of law are included in this principle.

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[31] *Charter of the Arab States League, supra,* note13 at Article 35.
[32] A.H. Robertson and A.J. Merrills, *Human Rights in the World,* New York, Manchester University Press, 1989, 314 at 209.
[33] *African Charter, supra,* note 7 at Article 60.
[34] *Ibid*. at Article 61.
[35] *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) following the *Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights*, (1997) AU/LEG/MIN/AFCHPR/PROT.1 rev.2.
[36] Svensson-McCarthy, *supra,* note 28.

At the universal level, the principles invoked flow from Articles 29 and 30 of the *Universal Declaration*. The question of legality does not pose serious problems when concernning the elaboration of the both *International Covenants* of 1966[37]. When it came to refer to Articles 29 and 30, the debate concerning the legitimacy principle and its link with legality addressed mainly the notion that rights could only be limited by law.

Many countries of the British *Commonwealth* founded this sentence much too limitative in the residual power that it left to the States. The principal argument was that there existed more than the sole means provided by law to impose justified limits on the exercice of human rights in the Universal Declaration and that often the law itself was the very source of contravention to human rights. These countries preferred a mention to the concept of justice, which had in their eyes a superior level to that of the law. After many discussions, Article 29 incorporated nonetheless the notion of law in its paragraph 2, but the criteria of satisfaction of the just exigencies of moral, public order and general good were adjunct to it in order to complete it. Further to this debate, common law countries asked themselves whether the notion of law included solely the notion of statuatory law or also the non-written notions often found in the *stare decisis* system of case law and soft law. The decision of the participants was definitive on the matter in that it included all sources of laws, whether of a traditional, case or statuatory source[38].

It results from this interpretative statement that the notion of legality implies a notion of legitimacy, that is a pre-estalished legal norm of law originating from a competent legislative authority. This was deemed necessary in order to protect individuals from abuses and arbitrary actions of the executive and judiciary branches of governments.

Also, the criteria of the exigencies cited above guarantee that the limitations are only legitimate if they meet the norms justifiable in a just and democratic society. Since the Universal Declaration made a direct reference to the Charter of the United Nations in its Article 29(3), by stating that these rights and freedoms cannot be fully exerciced in contradiction to its aims and principles, it appears clearly that the legitimacy of the universal system has a specific and independent sense[39].

At the regional level, this question of legality has been retaken in the Inter-American System in Article 30 of the *American Convention*, whereby : « *The restrictions (…) may not be applied except in accordance with the laws enacted for reasons of general interest and in accordance with the purposes for which such restrictions have been established.* »[40]. And this question was rapidly addressed and dealt with, at unanimity, by the advisory opinion of the Inter-American Court at the request of the gouvernment of Uruguay :

> " [it] *means a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of States Parties for that purpose…* "[41].

[37] *Ibid*. at 54 and 59 respectively.
[38] *Ibid*. at 58.
[39] *Ibid*. at 58 and 59.
[40] *American Convention, supra,* note 2 at Article 30.
[41] *The Word 'Laws' in Article 30 of the American Convention on Human Rights, Advisory Opinion, AO-6/86, Inter-Am. Ct. HR (Ser. A),* No. 6, 1 at 37. The Court further opined : « *[in] a democratic society, the principle of legality in inseparably linked to that of legitimacy by virtue of the international system that is the basis of the Convention as it relates to the 'effective exercise of representative democracy', which results in the popular election of legally created organs, the respect of minority participation and furtherance of the general welfare, inter alid…* », *Ibid*. at 35.

For the Inter-American Court, there exist a clear link that is unseparable and indissiciable between legality, democratic institutions and the rule of law. It reaffirms the notions of the *Habeas Corpus* adivisory opinion[42].

The *European Convention* follows a similar line of thought when concerned with the principle of legality. In the *Case of Silver and Others*[43], the European Court of Human Rights confirmed the notion of its previous cases whereby the " conditions, restrictions or sanctions of the law " are to be interpeted first as a reference to the fact that interferences in the exercice of human rights must have a juridical base in national law and that this must be *A priori* because the Court confirms onlz later that this includes common law with statuatorz laws.[44].

The concept of legality forged a minimal norm of the respect of national laws within the larger interpretative concept of international instruments when concerned with the application of derogatory norms. Still, such a norm remains incredibly fragile in the European system, in particular in the case of countries having a centralised government or a unitary method of governance. Through the concentration of power, ones concentrates the States' decision and influence in the determination of what constitute a legitimate suspension of rights and a derogation to the *European Convention*. Simply by restraining the protections given by the national legislation, a State can easily overturned or circumscribe the provision of the *European Convention*. Still, the basis of the *European Convention* is that of a voluntary system of ratification and therefore there is some understanding that States do not forgo every aspect of their sovereignty upon ratifying it and therefore interpretation is left in part to their margin of appreciation, until review by the judicial process if necessary.

As such, we can therefore assert that their exist limitative systems of derogation that permits to suspend rights and that the *European Convention*'s system is in part as much as risk as even the *African Charter*'s system if one considers only its own limitation of legality. The American Convention system would seem more established that these both at first glance.

But this would not be a complete understanding of these different systems, as it would not take into account the very rights they permit to derogate from and the limitations it permits to impose. As opposed to the limitations of the general clauses and clauses of derogations of the *Universal Declaration* and of the *International Covenant relative to Economic, Social and Cultural Rights*[45] at the universal level, and of the *African Charter* at the regional level, both the *European Convention* and the *American Convention* adopt the approach of the *International Covenant Relative to Civil and Political Rights*. Article 27(2) of the *American Convention* edicts :

> " 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in

[42] *Habeas Corpus*, *supra*, note 24.
[43] *Silver and Others*, *Eur. Court HR, (Ser. A)*, n° 61, 1 at 33.
[44] *The Sunday Times*, *Eur. Court HR (Ser. A)*, n° 30 1 at p.30.
[45] *ICESCR*, *supra*, note 6 at Articles 4 et 5(2). Respectively: " The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society… 2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.. ".

> Government), or of the judicial guarantees essential for the protection of such rights. "[46].

By contrast, Article 15(2) of the *European Convention* states :

> " 2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision"[47]

This compares to the *International Covenant Relative to Civil and Political Rights* at its Article 4(2):

> 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision."[48]

On this comparative basis[49], one can represent schematically the protection offered by each system, whether universal, American or European by comparing which rights are non-derogable in all and any circumstances. These cannot be suspended, limited or otherwise infrigued upon in any circumstances or for any reason whatsoever.

A synthesis of these non-derogable rights clearly shows that solely the rights which are universally recognised, and those of the two *Covenants* of 1966, due to their different reach are : the right to life, the prohibition of torture and inhumane and degrading treatment, the interdiction of slavery and the principles of legality and non-retroactivity. Whithin the concept of legality, it is important to note that

[46] *American Convention*, *supra*, note 2 at Article 27(2).
[47] *European Convention*, *supra*, note 30 at Article 15(2).
[48] *ICCPR*, *supra*, note 1 at Article 4(2).

[49]**DISPOSITION**	DÉCLARATION UNIVERSELLE*	***PACTE DROITS CIV ET POL***	***PACTE SUR LES DROITS ECOSOC***	***CONVENTION EUROPÉENNE***	***CHARTE AFRICAINE***	***CONVENTION AMÉRICAINE***
Right to life	ARTICLE 3	ARTICLE 6		ARTICLE 2	ARTICLE 4	ARTICLE 4
Freedom from torture, inhuman, degrading treatments and punishments	ARTICLE 5	ARTICLE 7		ARTICLE 3	ARTICLE 4 ET 5	ARTICLE 5(1)
Freedom from slavery and servitude	ARTICLE 4	ARTICLE 8(1) & (2) RESPECTIVEMENT		ARTICLE 4(1)	ARTICLE 5	ARTICLE 6
Legality and retroactivity	ARTICLE 11(2)	ARTICLE 15		ARTICLE 7	ARTICLE 7(2)	ARTICLES 8(1) ET 9
Legal personality	ARTICLE 6	ARTICLE 16			ARTICLE 5	ARTICLE 3 ET 24
Freedom of thought, conscience and religion	ARTICLE 18	ARTICLE 18			ARTICLE 8	ARTICLE 12
Non-imprisonment for debts		ARTICLE 11				
Protection of the family					ARTICLE 18	ARTICLE 17
Right to a name						ARTICLE 18
Right of children						ARTICLE 19
Right to nationality	ARTICLE 15					ARTICLE 20
Political rights	ARTICLE 21				ARTICLE 13	ARTICLE 23
Freedom of expression	ARTICLE 19				ART. 9(2)	
ECOSOC rights	ARTICLE 22		ARTICLE 1			
Right to primary education	ARTICLE 26		ARTICLES 13(2)(a) ET 14		ARTICLE 17	
Right to cultural life	ARTICLE 27		ARTICLE 15			
Equality of the sexes	ARTICLE 1	ARTICLE 3	ARTICLE 3			ARTICLE 24

***** This table is based upon that presented by A.S. Calogeropoulos-Stratis, *Droit humanitaire et droit de l'homme : la protection de la personne en période de conflit armé*, Genève, Institut Universitaire des Hautes Études Internationales, 1980, 258 at 131, but joins together all major instruments in one comparative schematics.

none covers the right to an equitable judgement and that the *European Convention* does not contain the recognition of the legal personality.[50].

It is possible, on this basis, to distinguish rights protected as "fundamental rights and freedoms", which are generally protected within international universal or regional instruments, and a "minimal non-derogable core" of human rights, which can perhaps be seen as fundamental rights in a *stricto sensu* interpretation[51]. Those not part of this core may not survive limitations during periods of emergencies and situations of exceptions.

As one can see from the table of comparison of non-derogable rights, apart from the *International Covenant Relative to Economic, Social and Cultural Rights*, it appears at first that the *European Convention* protects fewer rights than any other instruments. Indeed, solely the four rights enumerated above can be seen as being non-derogable.

In the case of the European system of protections, the case law does provide for a mature set of protections and does appear to have proportionality and due diligence well-entrenched within its *corpus juris* when concerning the right to life. Whether from the Commission's previous decisions, such as in the cases of *Steward*[52], of *Farrell*[53], or of *Cyprus v. Turkey*[54] or the Court's decisions such as in *McCann*[55], the differentiation between lawful deprivation of the right to life and unlawful ones has been extensively explored and have resulted in a solid and logic system of law.

In the case of the right to freedom from slavery and servitude, the Court has rarely had to deal with cases of forced or compulsery labour and many of the cases sent to it were either frivolous or groundless. Overall, the best known example is that of Van Droogenbroeck, which concerned the obligation for a prisoner to earn money during his detention in order to save a certain amount prior to his release from prison[56]. In most other cases, it is clear that the member States of the Council of Europe have had a low ceiling of tolerance for slavery and servitude and have enacted and implemented the proper legislation to curb abuses at the national level[57].

Where the *European Convention* is weak is definitely where it concerns judicial guarantees. While the first two sentences of its Article 7(1) are very comparable to that of Article 15(1) of the *International Covenant Relative to Civil and Political Rights*, its third sentence lacks the protection of guilty parties

[50] *Ibid*. at 132. The protection to an quitable trial is found at Article 10 of the ICCPR, 14 of *ICESCR*, 6 of the *European Convention*, , 7 of the *African Charter* and 8 of the *American Convention*.
[51] *Ibid*. at 135.
[52] *Eur. Comm. HR, Application No. 10044/82, K. Steward v. the United Kingdom*, decision of 10 July 1984 on the admissibility, 30 DR, 162 at 167, determining the criteria of "absolute necessity" on the use of force resulting in a deprivation of the right to life.
[53] *Eur. Comm. HR, Application No. 9013/80, O. Farrell v. the United Kingdom*, decision of 11 December 1982 on the admissibility, 30 DR, 96 at 97, also determining the criteria of "absolute necessity" on the use of force resulting in a deprivation of the right to life, but settle out of court by friendly settlement upon admission of State responsibility.
[54] *Eur. Comm. HR, Application No. 6780/74 and 6950/75, Cyprus v.Turkey*, Report adopted on 10 July 1976, Vol. 1, 110-119 at paras. 315-329, defferentiating between lawful acts of war and unlawful deprivation of the right to life.
[55] McCann and Others judgement, Series A, No. 324, 46 at 62, where the Court determined that while the actions of agents of the State sincerely believing the dangers against which they were advise to shoot to kill was lawful in itself, the lack of good intelligence – or indeed the very intent of agents of the State to deceive other agents – can lead to violations of Article 2.
[56] *Eur. Court HR, Van Droogenbroeck judgement of 24 June 1982, Series A, No. 50,* 17 at 18.
[57] That is not to say that such abuses do not exists in States Parties to the *European Convention* : it means that in most States, the abuses are dealt with under national law and that not many issues arise from this and that in cases of States where such legislation and execution of the laws are weak, cases do not succeed in getting through the national system and exhaust available remedies before reaching the Court. The case of sexual slavery and immigrant servitude to repay illegal immigration fees to organised crime remain untractable problems even in such progressive places as the United Kingdom or the Netherlands, and are even more pronounced in places such as Bulgaria, Romania, Bosnia or the Ukraine.

to benefit from the lighter penalty available. Still, the guarantees do provide for protection of *ne bis in idem* with the addition of Article 4 of *Protocol 7*[58], and does provide for the principle of *nullum crimen, nulla poena sine lege*[59]. Overall, these protection certainly are limited compared to that of the Inter-American regime.

Perhaps where the Court held on the longest to a wrong interpretation of the *European Convention* is where it concerned itself with the right to freedom from torture, inhuman, degrading treatment and punishment at Article 3. Too long did the Court uphold its owns interpretation of the caseof *Ireland v. United Kingdom* and too long did it impose an unduly strict interpretation of a severity/intensity test. Too long it interpreted the European Convention within its owns syllogisms, and forgot to add interpretative additions from applicable international law such as the Convention against Torture. Finally, in the *Case of Aksoy* a breakthrough was achieved and the threshold of what constitute torture has been lowered.

Conclusions

What appears clearly from the rights deemed non-derogable under the European Convention, when compared to the Universal and other regional regimes of protection of human rights, is that its protections are very limited. The core rights of fundamental rights and freedoms deemed non-derogable are a small number of rights and even these are to be interpreted within a Court's view of a certain margin of appreciation left to the State.

Nonetheless, while the protection of these rights and the prevention of their abuse remains problematic under this regime, not all is to be seen in a lame light. In fact, one must still point the core strenght of the European regime : the Council of Europe's power of peer pressure upon other member States. This, in itself, does not guarantee respect of human rights and freedoms, but it does present a fundamental enforcement aspect that pretty much has been lacking from either the universal or other regional systems.

As the crisis of the European Union will subside over the years and a *rapprochement* will be felt between the Council of Europe's system of protection contained in the *European Convention* and the evolution of the *European Charter*, there may be hope that the protection of non-derogable rights may be enlarged. But in the meantime, the best approach remains for individual to stay far from the potential of abuse ; otherwise, States remain with the higher hand.

[58] *Protocol 7, supra*, note 14.

[59] The principle of non-retroactivity includes as much the very existence of a delinquant conduct in accordance to national laws as well as a proper definition and understanding of such possible violation by the reading of the law from the point of view of a reasonable person. See *Kokkinakis judgement, Series A*, No. 260-A, 22 at para 52.

THE NOTION OF SUPERIOR RESPONSIBILITY IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW– THEORETICAL AND LEGAL IMPLICATIONS WITH SPECIAL EMPHASIS ON THE MENTAL ELEMENT-

by

ERZSÉBET STRAUSZ

I. INTRODUCTION

The notion of superior responsibility, originating from the fifteenth century[1], has most significantly evolved after World War II.[2] According to scholarly work, the basic structure of establishing a superior's responsibility, consisting of a hierarchical superior-subordinate relationship, a certain level of knowledge related to the subordinates' committing of crimes and the failure to prevent or punish these crimes, seem to have crystallized by now, thus represents a constant nature.[3] However, since its first contemporary emergence in the Yamashita case, the further development of some of the basic constituents of the three-element scheme, with respect to both customary international law and codification processes seem to follow an uneven pattern of evolution, leading to theoretical debates and variations in the application.[4]

This paper, with special emphasis on the mental element of the superior responsibility doctrine, internally, seeks to pinpoint the most important changes and different layers of meaning in terms of the progress of the concept proceeding from the early case law to contemporary codification embodied in the statute of the International Criminal Court (hereinafter Rome Statute), while at the same time, externally, specifies certain points of delimination from other concepts of international criminal law.

II. THE NOTION AND NATURE OF COMMAND RESPONSIBILITY

In order to investigate superior responsibility in light of its theoretical implication, a brief, pragmatic legal contextualization of the doctrine is necessary. Firstly, the basic and underlying situation upon which the notion rests is the commission of a criminal offence by a subordinate.

In this context, the concept of superior responsibility makes the superior liable for a failure to act to prevent the criminal conduct of his or her subordinates, which means, that the superior is punished for a lack of control and supervision of his or her own failure to intervene.[5] However, along a practical dimension, it should be noticed that in the process of establishing responsibility for criminal offences, under the terms of international criminal law, superior responsibility is usually invoked as a secondary

[1] Green, L. C. 1995. Command Responsibility in International Humanitarian Law. In: Transnational Law and Contemporary Problems, p 320.
[2] Smidt, Michael L. 2000. Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Opreations. In: 164 Military Law Review
[3] Cassese, Antonio, Gaeta, Paola and Jones, John R.W.D. (eds). 2002. The Rome Statute of the International Criminal Court: a Commentary. Oxford: Oxford University Press. (hereinafter: Commentary) p 824
[4] Commentary p 825 et seq.
[5] Commentary p 824.

source of accountability, as a 'last line of defence' of civil society[6] against war crimes, in those cases where individual criminal responsibility for the crime cannot (or is not likely to) be established.

In this respect, two additional aspects concerning the nature of superior responsibility from the viewpoint of criminal law shall be investigated: the indirect and direct liability for the act and the individual versus collective responsibility of superiors.

In the first place, following from the individualized approach of international law in general[7] and international criminal law, for the commission of the crime, the subordinate having committed it shall be held responsible. Superior responsibility is added to the responsibility formation from the viewpoint of the broader, social context of the act: the individual soldier acting in a specific hierarchical relationship, which is characterized by the unique features of the military society, prescribing both moral and legal duties.[8]

In this light, the question emerges: what is the exact conduct to which responsibility attaches and once established the extent of this responsibility. In other words, whether the responsibility of the superior derives from the same charge brought against the subordinate in the form of, for instance, complicity or other mental or physical involvement in the commission[9] or it shall be conceptualized under the *sui generis* notion of command responsibility.

According to scholarly opinion, the concept of superior responsibility therefore seems to have the potential of creating on the one hand, direct liability for the lack of supervision, on the other hand, indirect liability for the criminal act of others; therefore it has a double character: a genuine offence of omission and offence which creates danger.[10] This approach seems to be in consonance with the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR), which held in the Kayishema case that individual criminal responsibility according to Article 6(1) of the ICTR Statute and superior responsibility according to Article 6 (3) of the ICTR Statute are not mutually exclusive.[11]

Nevertheless, as a further contribution to the development of the doctrine, the Rome Statute seems to follow a more specific structure which clearly defines the relationship of these two different formations of accountability. In this case, the Statute distinguishes the separate crime of omission embodied in the failure to supervise subordinates properly. Accordingly, the underlying crimes of the subordinates are not sufficient for the punishability of the superior; they do not even constitute an element of the offence: they only appear as a point of reference of the superior's failure of supervision, therefore only serves as one of the decisive aspects of the causal relationship.[12]

As K. Ambos notes, prior case law does not sufficiently distinguish between accomplice liability and liability for failure to supervise. According to this approach, simultaneous liability can only arise if the mental object of the two kinds of liability is the same; for instance, if both arise in respect of the crimes committed by the subordinates.

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[6] Russel-Brown, Sherrie L. 2004. The Last Line of Defense: The Doctrine of Command Responsibility and Gender Crimes in Armed Conflict. In: 22 Wisconsin International Law Journal Winter, p 126.

[7] Slaughter, Anne-Marie. 2003. Rogue Regimes and the Individualization of International Law. In: New England Law Review. Vol 36. pp 815-823.

[8] Russel-Brown. 2004. p 138. Smidt. 2000. p.

[9] With respect to these additional bases upon which criminal responsibility can be established, the Rome Statute under Article 25 enlists, among other ways of contribution, the ordering, soliciting or inducing of such a crime, or for the purpose of facilitating the commission, aiding, abetting or otherwise assisting in its commission.

[10] Commentary p 824

[11] Judgement 21 May 1999, *Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, para. 210.

[12] Commentary p 852

As Professor Ambos formulates '[…] in the case of superior responsibility, the *main* object of the offence is the superior's failure properly to supervise and, consequently, his or her *mens rea* needs to extend to this failure; in contrast, in the case of complicity, the superior takes part in the crime of subordinates and must share the subordinates' *mens rea*, i.e. he or she must have *mens rea* with regard to his or her *own* contribution *and* with regard to the main offence. […] then and only then could the superior be liable as an accomplice; in such a case liability for superior responsibility would be subsidiary'.[13]

As it has been demonstrated, the Rome Statute, representing a peculiar approach in the direct or/and indirect liability debate, resolves the potential tension in the application of accomplice or superior liability by moving from the 'status' element to the subjective, mental element of the conjunction of the formerly mentioned three conditions that are ought to be met in order to establish superior responsibility.

Along the 'status' element, as the ultimate basis of the notion of superior responsibility, without entering into specific investigations concerning the specific contents, i.e. the existence of effective control, that may satisfy the requirements of the case-law or codification-developed standards, another conceptual issue shall be addressed, namely, the individual versus collective approach towards superior responsibility.

Nevertheless, the contemporary paradigm of individualized fault seems to prevail over the idea of collective responsibility, understood as a concept in which the moral unit of accountability is considered to be the group, not the individual.[14] In this case individual moral responsibility is not regarded to be an absolute requirement of punishment; moreover, on the contrary, belonging to a certain group of people establishes the basis of the charge brought against the member of the community.

The significance of this theoretical approach, despite being predominantly replaced by the new paradigm, may be found in cases when i.e. members of a government are ought to be held responsible for the conduct of the government as a whole, i.e. with respect to the planning of criminal offences. As for the present importance of the view, it may be argued that it has contributed to the development of superior responsibility in terms of civilian superiors, where the strict hierarchical structure, characteristic of the military relationships, may not be found but still, morally, the accountability of the civil superior, even in the absence of prima facie evidence of an established control structure, should be justified.

The Court's reasoning in the Yamashita case, although from a different perspective, may support this argumentation, since Yamashita's conviction, based on a strict liability standard lacked reference to any of the mental elements required by today's standards of command responsibility. Nevertheless, O'Reilly argues that the Yamashita trial affirmed the principle of individual accountability[15], still, from this paper's point of view, as far as the case can be considered to be based on the 'legacy of victor's justice' as proposed by O'Reilly himself and there is a general consensus on despite Yamashita's being the debut of the superior responsibility doctrine, the broad standard of liability has not been followed on the grounds of contravening the principle of personal guilt[16], it is plausible to

[13] Commentary p 852; emphasis added in the original text.
[14] O'Reilly, Arthur Thomas. 2004. Command Responsibility: A Call to Realign Doctrine with Principles. In: 20 American University International Law Review. p 104.
[15] O'Reilly. 2004. p 76.
[16] Commentary pp 825-28; Landrum, B. D. 1995. The Yamashita War Crimes Trial: Command Responsibility Then and Now. In: 149 Military Law Review; Prévost, A.M. 1992. Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita. In: 14 Human Rights Quarterly.

maintain that a judgement influenced significantly by the ideological opposition of victor state – defeated state supports more the impact of the notion of collective responsibility.

The Yamashita case, in the evolution of the doctrine parallel to the individualization of international law, has not been followed by the succeeding jurisprudence on the grounds of not having taken sufficient account of the mental element. The following section aims at addressing the legal and theoretical ambiguities and implications of the *mens rea*, one of the central targets of contemporary scholarly debate.

III. ELEMENTS AND AMBIGUITIES – MENS REA IN LIGHT OF CUSTOM AND CODIFICATION, PROVISIONS OF THE ROME STATUTE

1. Developments through Case-law

As for knowledge, the basis of the mental element applied in the superior responsibility doctrine, there has been an extensive development concerning its scope, having resulted in various layers of meaning and different patterns of standard.

The strict liability approach leaving the mental element out of consideration in Yamashita has not been followed; nevertheless, the political will to convict military officers as superiors in a position of command has become even stronger.

During the Nuremberg trials, in the Hostage cases the Court definitely investigated the mens rea by stating that officers are 'obliged to know' if they receive information about subordinates' committing atrocities. The High Command case applied an even more restrictive standard of 'actual knowledge'.[17] On a scale, these judgements would represent various grades in terms of what level of knowledge may establish superior responsibility. On the one hand, the negative extreme was set up in the Yamashita case, which neglected the subjective element by setting a broad, objective standard, while the High Command case's actual knowledge constitutes the positive extreme, restricting the scope of application to prima facie cases in terms of possession of information. In this light the Hostage case seem to occupy a certain middle position by its option for a 'should-have-known' standard, based on the concrete information received by the superior and a presumption of certain conclusions derivable from that available information.

The jurisprudence of the ad hoc tribunals has reaffirmed the should-have-known standard by the ICTY's 'had reason to know'-test, which was developed through the Delalic case, and later clarified in the Blaskic and Aleksovski judgements; as for the ICTR's jurisprudence, it has confirmed this standard at the Kayishema case.[18]

2. Recent Developments in Codification: Provisions in the Rome Statute

The responsibility formations of the Rome Statute differ from the prior developments of case-law in several aspects. In principle, to establish criminal responsibility, for the mental element to be fulfilled Article 30 requires both intent and knowledge, either in a form of direct or indirect intent.

[17] Commentary. pp 828-31.
[18] Commentary pp 833-37.

Superior responsibility, in this sense, creates an exception of the rule. Firstly, superior responsibility can be based on negligence and dolus eventualis as well. The should-have-known test qualifies to be a form of negligence, meaning that the person did not foresee the consequences while a reasonable person situated in the same circumstances would have been expected to foresee those consequences resulting from the wrongful act, whereas wilful blindness, where the superior consciously disregards information shall be considered as dolus eventualis, in which case despite the fact that the perpetrator has the knowledge or information to foresee those consequences other than those desired as a possibility, goes ahead with the act.[19]

Depicted on a scale, in this light, the middle spectrum of the knowledge-level has been enriched with various layers introduced by the Article 28 of the Rome Statute.

A significant development emerges in the distinct regulation of the responsibility of civilian leaders by which another responsibility formulation is added to the already existing. Accordingly, with respect to civilian leaders the test has become stricter: only actual positive knowledge satisfies the mental element, as it is formulated in the Rome Statute 'superior either knew, or consciously disregarded information which clearly indicated that the subordinates were committing or were about to commit such crimes'.[20]

3. An alternative approach

As an alternative approach to the regular evaluation of the three-pillar doctrine of superior responsibility, S. Russel-Brown proposes a crime-specific, strict construction of superior responsibility, constituting an objective standard in many aspects similar to the one established in Yamashita.

The author, with respect to gender crimes, emphasizing their gravity and widescale nature, makes an argument in favour of the lowering of the standard of the mental element, namely, it is suggested that only with respect to gender crimes, historical information and common or public knowledge that gender crimes occur throughout history within internal and international armed conflicts shall be sufficient to fulfil the knowledge element, therefore only the last element, the fact of inaction concerning the punishment or prevention of crimes committed by the subordinates shall be further investigated. In this case, the superior could only be exempted from criminal responsibility if he or she took all the necessary preventive steps in order to avoid occurrence of the crimes in question.[21]

This proposal is based on a sole precedent, the Kahan Report, in which the Commission found the State of Israel and several other individuals indirectly responsible for the 'Sabra and Shatilla' massacre against Palestinians in 1982. According to the Commission's position, by the fact of prior, historical violence of such between the Phalangists and the Palestinians, Minister of Defence Sharon and General Eitan should have taken measures to prevent the repeated occurrence of such violence.

The proposal is therefore radical in the evaluation of the mental element: by the introduction of historical or popular knowledge, it proposes a change, an extension to the presumption concerning the meaning of a 'reasonable person', the basic image that serves as a general yardstick in establishing negligence under criminal law.

[19] Van der Vyver, Johan D. 2004. The International Criminal Court and the Concept of Mens Rea in International Criminal Law. In: 12 University of Miami International and Comparative Law Review, Summer, pp 61 -76.
[20] Rome Statute, Article 28 (b) (i)
[21] Russel-Brown. 2004. p 147 et seq.

In comparison with Yamashita, this proposal reiterates the objective standard, which has not been followed by the recent developments of codification or case-law. However, it does so, unlike Yamashita, within the individualized structure of international law by the means of changing the basic presumptions concerning the image of the individual itself.

The proposal, however, according to the standards of the Rome Statute, since it excludes the possibility of relieve of a charge by the founding the mental element insufficient, it contravenes the basic principle of personal guilt, which is one of the main features of the contemporary paradigm based upon individual fault, where the concept of 'fault' is comprised of either intent or negligence.[22]

IV. CONCLUSION

In light of the recent and historical case-law of international tribunals and the results of codification processes of the doctrine of superior responsibility, this paper has attempted to show the basic notion driven by a twofold aim: on the one hand, it has sought to define the constant elements and draw attention to those theoretical components that are, in the course of their evolution, subject to alteration. On the other hand, it was attempted to embed the notion of superior responsibility in the general structure of criminal law, while, at the same time, efforts were made to differentiate between similar or akin concepts.

Within the three-tiered concept of superior responsibility consisting of status, knowledge and inaction, the role and variants of the mental element were given emphasis. Finally, in addition to the investigation of what is already generally conceptualized, in contrast to the settled and crystallized customary law approach, a contemporary alternative proposal has been analyzed.

[22] Van der Vyver, Johan D. 2004. p 61.

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THE REGULATION OF WAR SPIES IN THE INTERNATIONAL LAW

by

MÁRTA VARGA

Index

INTRODUCTION

Intelligence activities are accepted as a common, moreover inherent attribute of the state.[1] Information has a priceless importance in international relations. For a state to maintain authority in its decisions and policies, furthermore to maintain sovereignty and freedom, it must have access to good intelligence and through this access to value information.[2] Intelligence is knowledge. However, not all kinds of knowledge are really value for a state – at least those which relates to decision making process -, and not every intelligence activities are considered as espionage, only human information collection.[3] States use spies in almost every aspect of their activity: to get information in relation with other states, with their own citizens; they do intelligence work in peace and in war; they do counterespionage to prevent the spying activity of an other state, etc.

In this essay I intend to focus on war spies and the regulation of their activities and pass over other formes of espionage in relation to the above mentioned extent of the subject. I will use spying and espionage as synonyms.

1. THE FIRST REGULATIONS OF ESPIONAGE

Spying is almost as old as statehood and war. The belligerents always sent and send out spies to gain information about each other. The intensification of international relations has intensified espionage activities, as well. Gradually, espionage has developed from isolated incidents to an established

[1] Demarest, Lt. Col. Geoffrey B.: Espionage in International Law, at p. 2.
[2] Demarest, at p. 2.
[3] Demarest, at p. 3.

international function of states.[4] Not only this activity has developed during warfares, but its regulation, as well. As war begins, the peacetime prohibition of espionage in national spaces does not apply between belligerent states, and the permissibility of spying extends to all areas of hostilities, land, sea and air, whether national or international.[5] In international law separate rules govern the legal status of war spies. These special regime of war spies is particularly essential for the regulation of belligerent reconnaissance operations.[6]

1.1. The definition of espionage

Before examine the international regulation of espionage, we should clear the definition of espionage. The definition beneath is not an official one, however, it shows the essential characteristics of spying, and it makes a good starting point. Therefore, espionage can be defined as the consciously deceitful collection of information, ordered by a government or organization hostile to or suspicious of those the information concerns, accomplished by humans unauthorized by the target to do the collecting.[7] In regard to espionage the most difficult is to distinguish it from other activities, such as treason[8], military reconnaissance in uniform, delivering despatches, or giving information under coercion. In the course of this distinction the most important aspects are „conscious" and „deceitful", in the meaning of acting deliberately clandestinely or under false pretences. These are essential elements of spying because if any of these are missing, the activity will not be espionage. Because of the difficulty of defending such deceit, the punishments of spying are severe, most of the time death penalty.

1.2. The Lieber Code

The first modern document that deals with the question spying is the Lieber Code, which was a general order for the Union Army during the American Civil War. However, it is not a document of international law, it influenced the Draft Convention of the international conference which was held in 1874 in Brussels, and that is why it is important for my subject. The Code underlines personal deceit or false pretences as the essence of espionage, notes the serious threat espionage poses, and acknowledges the heavy penalties allowed. The Code permitted „scouts or single soldiers, if disguised in the dress of the country or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor [...] [to be] treated as spies and suffer death."[9] Nevertheless, according to the traditional viewpoint, human intelligence gathering is not an illegal activity. We can find the paradox yet here, which is the feature of spying, such as the law of nations permits the sending of spies, but if caught, spies are treated most severely.[10] The reason of this provision is that deceit is considered dangerous and this is justifying exceptional deterrent measures, however, the states need the information that only espionage can give them. According to the Lieber Code „while deception in war is admitted as a just and necessary means of hostility, and is consistent with honourable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injury an enemy, because they are so dangerous, and it is difficult to guard against them."[11]

[4] Kish, John: International law and espionage, introduction at p. xv
[5] Kish, at p. 123.
[6] Kish, at p. 144.
[7] Demarest, at p. 4.
[8] Treason is a statutory crime in most countries, and typically involves the conscious transmittal of information to another country's agents and spies by a citizen of the target country. The information conveyed usually must have some importance to national security. Demarest, at p. 5.
[9] Demarest, at p. 9.
[10] Demarest, at p. 7.
[11] Demarest, at p. 9.

The Lieber Code marked the beginning of the modern pattern of giving the spy considerable leeway after the fact, but very little leeway if caught during the action. „A successful spy [...], safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy [...], but he may be held in closer custody as a person individually dangerous."[12]

1.3. The International Declaration concerning the Laws and Customs of War

In 1874 a conference was held in Brussels and adopted the International Declaration on the Laws and Customs of War. The document expands the legal scope of espionage in war and dedicated several articles to the problem of intelligence and espionage.[13] It stated that „stratagems, and the employment of means necessary to procure intelligence respecting the enemy or the country [...]are considered as lawful means [of warfare]"[14]. The Declaration's definition of espionage has all the essential elements mentioned above: „A person can only be considered a spy when acting clandestinely or on false pretenses he obtains or endeavours to obtain information in districts occupied by the enemy, with the intention of communicating it to the opposing force".[15] The Declaration regulates that a spy if taken in the act shall be tried and treated according to the laws in force in the army which captures him.[16] However, if a spy rejoins the army to which he belongs is subsequently captured by the enemy, he is to be treated as a prisoner of war, and he incurs no responsibility for his previous acts.[17] The reason of this provision is that a spy does not remain like other criminals, since espionage is considered a „noncrime" crime. Once the actor has returned to his own army, the spy is no longer a spy in the same way that a criminals remains so until capture. The paradoxical nature of espionage can be again caught here, because on the one hand the law of war preserves the deterrence effect of capital punishment, on the other hand it rewards success in spying.[18] The essential acceptance of espionage manifested its gradual consolidation in general international law.

The Declaration gives the exceptions under its provisions. Those soldiers who are not wearing a disguise have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Soldiers and civilians– carrying out their mission openly – entrusted with the delivery of dispatches intended either for their own army or for the enemy's army, also should not be considered spies.[19]

The next document which deals with espionage, was adopted by the Oxford Session of the Institute of International Law, is a resolution including a Manual of the Laws of War on Land. The Manual's innovation that it declares that „no person charged with espionage shall be punished until the judicial authority shall have pronounced judgment."[20] This rule has a great importance in relation with the prevention of arbitrary execution of spies.

1.4. THE CONVENTIONS OF THE HAGUE

1.4.1. The 1899 Convention of The Hague

[12] Demarest, at p. 9.
[13] Demarest, at p. 7.
[14] Declaration of Brussels, art. 14.
[15] Declaration of Brussels, art. 19.
[16] Declaration of Brussels, art. 20.
[17] Declaration of Brussels, art. 21.
[18] Demarest, at p. 7.
[19] Declaration of Brussels, art. 22.
[20] The Manual of Oxford, art. 25.

In 1899 an international conference was held at The Hague. A Draft Convention was submitted about the Laws and Customs of War on Land. Its provision declares that „the employment of methods necessary to obtain information about the enemy and the country are considered permissible." The Commentary of the Convention explains the limitation of permissibility. Taken literally the rules of spying, it could be meant that every ruse of war and every method necessary to obtain information about the enemy should be considered permissible. However, this would be an enlarging interpretation of the provision, for its aims are only to say that ruses of war and methods of obtaining information are not prohibited as such, but these activities have their legal limits. This provision became the part of the Convention (II.) with Respect of the Laws and Customs of War on Land, therefore it is the part of the international law.

The Convention used the rules of the Declaration of Brussels almost without change, however its Article 30 declares that a spy taken in the act cannot be punished without previous trail. This provision is much more concrete than the order in the Oxford Manual, therefore, if a spy is executed without judgment, it realizes the breach of this rule. This rule was applied after the Second World War by the British Military Courts in Germany, who confirmed on more occasion that killing of a spy without trial is a war crime.[21]

The Convention adopted the definition of spies from the Declaration.[22] The essential elements of the definition are „clandestinely" and „on false pretences". As I mentioned above, the most important feature of espionage is its secret nature. This nature makes it possible to distinguish between combatants and spies. This distinction is important in consideration of the special protection of prisoners of war and civilians, because in wartime they are more protected and have more rights than spies.[23] Therefore it matters if a person is considered a spy or not. According to the Convention soldiers not in disguise who have penetrated into the zone of operations of a hostile army to obtain information cannot be considered spies. Similarly, soldiers or civilians, carrying out their mission openly, charged with the delivery of despatches destined either for their own army or for that of the enemy, are not considered spies. To this class belong likewise individuals sent in balloons to deliver despatches, and generally to maintain communication between the various parts of an army or a territory.[24] The common in these persons, however, they seek or transmit information likewise as spies, is that they are acting openly, not in disguise, and the deceitful feature of their acts is missing.

The Convention regulates if a spy is captured after rejoining to its own army. In this case the spy should be treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.[25] As we seen, this provision stayed the same as it was in the Declaration.

The significance of The Hague Convention, which entered into force in 1900, that it was the first multilateral conventional regulation of the law of war.[26]

[21] Kish, at p. 145. footnote 8. An example for such breach : in 1944 British commandos parachuted into German-occupied territory and embarked on secret reconnaissance operations. Some of them were captured and summarly executed by German troops, without trial. Although the commandos were engaged on missions of espionage, they should not have been punished without previous trial under the Hague Rules, and their execution eventually led to the conviction of their former captors for war crimes by a British military court after the war. (Kish, at p. 146-147.)

[22] Convention (II.) of The Hague, art. 29. An individual can only be considered a spy if, acting clandestinely, or on false pretences, he obtains, or seeks to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

[23] This statement is supported by the regulations of prisoners of war and civilians, for these regulations are more comprehensive, than the regulation of spying, which only declares the definition of espionage, including the exceptions and the right for a fair trial.

[24] Convention (II.) of The Hague, art. 29.

[25] Convention (II.) of The Hague, art. 31.

[26] Kish, at p. 124.

1.4.2. The 1907 Convention of The Hague

In 1907 a Second International Conference was held at The Hague to revise and develope the 1899 rules of the law of war. The Conference adopted a revised Convention and the annexed Regulations on the Laws and Customs of War on Land. The provision of the Regulations reaffirms the permissibility of espionage in war. This permissibility is not unlimited – as I mentioned above -, for there are certain methods of spying that may be contrary to other rules of warfare, such as the abuse of a flag of truce.[27] The other provisions of the Regulations in relation with spies are remained the same as in the Convention of The Hague.[28]

The subsequent practice of states manifested the application of the conventional regulation when the rules governing war spies were brought into operation during the First World War. One of the most notorious spy case was the case of Mata Hari who communicated French official secrets to the German intelligence service. As she acted clandestinely in belligerent territory, the definition of spies under the Hague Rules applied to her. Accordingly, she was convicted of espionage by a French court-martial and executed.

An other incident happened during the War, when a British spy, Sidney Reilly, was killed because of espionage activity in Russia.

All of these cases where the spies were captured, they were executed for their operations in belligerent zones constituted espionage under the Hague Rules, whereas the responsibility of the states was never adduced and their liability did not even arise.[29] The reason of this practice is that the law of war does not prohibit the states sending spies, whereas states try to protect their secrets, thus they will fight against espionage. The essence of this practice is reciprocity: everyone can use spies, and everyone can fight against them, and the information gained through espionage is priceless. Espionage has a major role in determining the outcome of hostilities and wars.

2. THE EFFECTIVE REGULATION OF WAR SPIES

A necessity of revision and developing appeared after the Second World War, especially because of the grave breaches of the Conventions of The Hague.[30] The status of war spies was further considered in 1949 by the Geneva Conference for the Protection of War Victims. The results of the Conference were the four Geneva Conventions of 1949, which were doing little to change the law of war regarding espionage, however, employed additional procedural safeguards.[31] Only the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War deals with espionage. The reason of this solution is that spies are not combatants and cannot be prisoners of war in the case of capture. Therefore, their very special status is closer to civilians. They have a particular role in the „war machine", thus, they cannot have the same rights and protection as civilians, because they are more effective and they are more dangerous to the enemy. Although, spies can be condemned to death because their activities, they have the rights of humane treatment. Now let's have a look at the exact regulation of the Convention.

[27] Kish, at pp. 124-125.
[28] Convention (IV.) of The Hague, art. 29-31.
[29] Kish, at p. 126.
[30] The necessity arose in connection with the revision of the whole regulation of the laws of war, therefore a new convention was born in 1949.
[31] Demarest, at p. 9.

2.1. The fourth Geneva Convention

There was a debate on the Conference reflected the conflict of interest between the security of belligerents and the protection of civilians. The majority of the delegations, including the United Kingdom and the United States, preferred effective measures for the suppression of espionage and voted for an adequate provision in the Draft Convention for the Protecion of Civilian Persons in Time of War. According to this intent, an article was inserted in the Draft Convention, which became the part of the Convention. This article deals with the spies' rights of communication.[32] The Article 5 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War states that „where in occupied territory an individual protected person is detained as a spy [...], or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as *having forfeited rights of communication* under the present Convention."[33] These rights, guaranteed by the Convention for civilians in detention, contain the rights of communication with the International Red Cross and family members.[34] The reason of this provision was explained by the Commentary to Draft Article 3/A (this became Article 5 of the Geneva Convention). According to this commentary „enemy secret agents penetrate into the inner workings of the war machine, either to spy or to damage its mechanism. Many Delegations have therefore felt the fear that, under cover of the protection offered by the Convention. spies may be able to abuse the rights which it provides for them."[35] Article 5 is intended to protect the military security of belligerents, and therefore it entitled belligerents to stop communications from and to war spies detained in occupied territory. Nevertheless, the withdrawal of the rights of communication does not mean the deprival of rights to humane treatment and to fair and regular trial. When it is consistent with the military security of the occupying power, war spies regains their rights of communication.[36]

The next regulation dealing with spies, is the Article 68 of the Convention, which declares that death penalty can be used against a protected person, if he is guilty of espionage. There is a restriction in connection with this provision, that capital punishment is applicable only, if such offences were punishable by death under the law of the occupied territory in force before the occupation began.[37] The subjection of the death penalty for espionage to the law of the occupied territory conflicts with the military security of the occupying power. However, this restriction protects the persons accused of spying from arbitrary execution and helps to facilitate the extension of humane treatment in wartime.[38] The Convention mandates trial with counsel, an appeal process after penalty is imposed, and a six-month waiting period before an execution can be carried out. The six-month suspension of sentences can be reduced in grave emergencies.[39] The importance of this waiting period is that the court is more able to bring a careful judgment and through this maybe a more just decision. This provision can help to reduce the number of executions of persons who are considered as spies, however, they were not, only their acts were judged as actions of espionage.

Upon the entry into force of the Convention, there were reservations to Article 68. These reservations were made by, for instance, the United Kingdom and the United States. According to these reservations these countries reserved the right to impose the death penalty for espionage, without

[32] Kish, at p. 147.
[33] The Geneva Convention (IV.), art. 5.
[34] Callen, Jason: Unlawful Combatants and the Geneva Conventions, at p. 6.
[35] Kish, at p. 147.
[36] Kish, at p. 147.
[37] The Geneva Convention (IV.), art. 68.
[38] Kish, at p. 147.
[39] Demarest, at p. 9. and The Geneva Convention (IV.), art. 75.

regard to whether the offences are punishable by death under the law of the occupied territory at the time the occupation begins.[40]

2.2. The first Protocol Additional to the Geneva Conventions

2.2.1. The antecedents before the Protocol

At the 1972 Session of the Geneva Conference of Government Experts, the International Committee of the Red Cross proposed a Draft Protocol on International Armed Conflicts. This Draft Protocol declares the definition of spies and it emphasizes that, as regards the scope of the rule, „limitation to the zone of operations is no longer relevant to the seeking of information" for purposes of espionage in contemporary warfare.[41]

In 1973 the International Committee of the Red Cross adopted a revised Draft Protocol on International Armed Conflicts. It provides a definition of spies and the Commentary of the Draft Protocol clarifies the distiction between reconnaissance and espionage. According to the Draft Protocol, what distinguishes espionage from the legitimate quest for military information, is its clandestine nature. The quest for military information is always concealed, as far as possible, from the enemy: reconnaissance parties and observers will always try not to reveal their presence to an enemy, for this is prerequisite of success. However, the standing of such persons should be unmistakably recognizable from their uniforms.[42] This definition tries to give a more precise distinction between spies and combatants, and from this continuing effort to find a quite accurate definition, we can see, that the international law has not given yet a sufficient solution for the problem of spies.

In 1976 Committee III of the Conference adopted a Report, including a Draft Protocol on International Armed Conflicts. The Draft Protocol specifies the rules governing espionage, and declares that residents of occupied territory should not be considered as spies, though, they can come across information of value to the armed forces to which they belonged. That should not make them spies, however, if they disguised themselves in order to gain access to secret information or in other ways used false pretences or deliberate clandestine acts in order to obtain such information, they would be spies.[43] The reason why it is important to emphasize the distinction between spies and civilians, that not only soldiers or members of an army can act as a spy, but a citizen of the country or aliens in the territory of the warfare.

2.2.2. The regulation of the first Protocol Additional

In 1977 the Geneva Conference adopted the Protocol for the Protection of Victims of International Armed Conflicts.[44] This Protocol was intended to develop and reaffirm the laws of war established at the earlier Hague and Geneva conferences.[45]

Article 46 of the Protocol establishes a revised regulation of espionage in war. As a basic sanction, war spies shall not have the right to the status of prisoner of war.[46] Paragraph 2 provides for a general definition of war spies: „A member of the armed forces of a Party to the conflict who, on behalf of that

[40] In 1971 the United Kingdom withdrew its reservation., Kish, at p. 148.
[41] Kish, at p. 148.
[42] Kish, at p. 148.
[43] Kish, at p. 149.
[44] Kish, at p. 149.
[45] Demarest, at p. 9.
[46] Protocol Additional I., art. 46. paragraph 1.

Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces."[47] This rule excludes from the definition those members of the armed forces who carry out reconnaissance in uniform, the decisive negative criterion of espionage.[48] Paragraph 3 of the article extends the scope of the negative definition to a member of the armed forces who is a resident of occupied territory. Such a person, even if he gathers or attempts to gather information of military value without uniform, „shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner"[49].These criteria of secrecy and false pretences confirm the traditional notion of espionage. The phrase „gathering or attempting to gather information" used in Article 46 paragraph 2 is also relevant, for this act is a critical component of espionage. Why it is important to emphasize this „information gathering"? Because Article 44 paragraph 3 of the Protocol[50] does not require combatants to distinguish themselves constantly from the civilian population. This Article only requires combatants to distinguish themselves during an attack and in military operations preparatory to an attack. Therefore, combatants may go into enemy territory while wearing civilian clothing, and as long as they are not „gathering or attempting to gather information" and they properly distinguish themselves as required under Article 44 paragraph 3, they have neither engaged in espionage under Article 46, nor violated the principle of distinction under Article 44 paragraph 3.[51]

In any case, a member of the armed forces who is a resident of occupied territory shall not lose his right to the status of prisoner of war unless he is captured while engaging in espionage. Any other member of the armed forces shall not be treated as a spy in occupied territory unless he is captured before rejoining his army.[52]

The Protocol for the Protection of Victims of International Armed Conflicts entered into force in 1978, and several states have ratified the Protocol, without reservation to the Article 46. Certain States, including the United Kingdom and the United States, have not ratified the Protocol. However, most rules of Article 46 of the Protocol represent the established regulation of espionage generally recognized in conventional and customary international law.[53]

CONCLUSION

[47] Protocol Additional I., art. 46. paragraph 2.
[48] Kish, at p. 149.
[49] Protocol Additional I., art. 46. paragraph 3.
[50] „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." Protocol Additional I. art. 44. paragraph 3.
[51] Ferrell, Major William H. III.: No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict, at p. 17.
[52] Kish, at p. 149.
[53] Kish, at p. 149.

The inherent strategic conflict of hostilities dominates the legal status of war spies and the legal regulation has to balance the conflicting interests of reconnaissance and security. While the recognition of surveillance in uniform safeguards military reconnaissance, the sanctions of clandestine observation protect the security of the belligerents. Considering the difficulties of detection, the criterion of secrecy has a special significance in the definition of espionage.[54] The aim of the international regulations was always to give an exact definition for spies, in order to be able to distinguish between espionage and other military intelligence operations.

The legal regulation of espionage has important consequences for the future of international relations. Until the methods of espionage will develope – and sure they will-, the regulation has to follow this developement, and has to invent new definitions and legal institutions for that the rules shall be more able to keep up with the new forms of espionage.

A balanced legal regime of espionage is intended to safeguard national security, yet facilitate mutual observation. A recognized but regulated system of espionage has the potential of revealing and deterring aggression and consequently diminishing the threat of conflicts and improving international security.[55]

[54] Kish, at p. 149.- 150.
[55] Kish, introduction at p. xv.

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CHILDREN SOLDIERS: REGULATION AND PRACTICE

by

GÁBOR PAPP

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1. INTRODUCTION

One of the most sorrowful tendency of armed conflicts even in the recent decades, is the incrasing number of child soldiers in particular parts of the world. Children have become fairly precious „human resource" especially in non international armed conflicts. Several military leaders recruit soldiers amongst children not because of lack of grown-up soldiers. The main reason for this distressing phenomenon, is that children don't have a fixed, stabilized personality, mostly they don't know the difference between good and bad due to the fact, that their basic socialization hasn't finished at that age. Besides, they don't claim for salary, it is easy to influence them, they are perfect „materials" for socializing to aggression and hatred, in one world: perfect killing machines can be created from children.

Employing children during an armed conflict is not a new idea. The best generals of warships in the 17th – 18th century started their training around the age of 10. These people have grown up on board of a vessel. Nevertheless the entire new phenomenon in the last decades, what is very favourable for using more and more children in an armed conflict is the fast developement of weapons and technology used in war. The wide-spread incidence of cheap, light, hand weapons is in a strong correspondence with the rising numbr of child soldiers. Even a ten year old child can be taught to use an AK-47 or a M-16.

In this small essay I would like to deal with two topics. In the first part I will try to gather the laws, binding states in connection with child soldiers. I beleive, that this is the first step to understand the importance of the topic. In the second part of the essay I will try to make an attempt to examine how

these regulations work in practice. My idea is that it is far from enough if there are a lot of regulations under international law, but a very of them working in practice. My concluding opinion will be that the world needs no more laws in books, but some laws in practice.

2. PROHIBITION UNDER INTERNATIONAL LAW

2. 1. Geneva Convention:

The first regulations in connection with children being involved in armed conflicts as fighters can be found in the two Additional Protocols of the Geneva Concentions. Art. 77. (1) (AP1.) states that special care must be taken of children during armed conflicts. According to paragraph 2., the Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest. The Second Addtitional Protocol is applicable in non-international armed conflicts, it repeats the regulation written in AP 1. but also broaden the applicability of it, when saying that children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities [art. 4. (3) AP2.]. This regulation is wider, because of not only applicable in concrete armed coflicts, it prohibits the recrutation of children under 15 in all circumstances. In case of breaching the Convention, and using children as soldiers, no doubt, these young soldiers will have all the rights and protection based on Geneva Conventions.

2. 2. International Criminal Court

The Rome Charter, founding the International Criminal Court entered to force in the 1st of july 2002. According to art. 8. (2) it is a war crime to recruit children under the age fifteen, and flinging them in either a non international or an international armedconflict.

2. 3. International Labour Organization

The International Labour Organization is against antihuman, derading, unhealthy occupation of children. In 1999. its assembly accepted its 182. convention, the Worst Forms of Child Labour Convention (applicable since nov. 2000.) This convention is applicable to everybody under eighteen. It classifies forced or compulsory recruitment of children for use in armed conflict as one of the worst forms of child labour [art. 3. (a.)]. The Convention strictly prohibits all forms of the worst child labours. In order of fulfilling this regulation, each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions [art 7. (1)].

2. 4. The United Nations

The United Nations Convention on the Rights of the Child (1989) repeats the regulation created in the Second Additional Protocol. However we can consider this as something more than simple copying it,

because its applicability is much broader than the Protocol's. The New York Conention can be referred in any circumstances, not only during armed conflicts.

In 1994. a drafting commision was elected inside the United Nations with the purpose of creating a convention in connection with child soldiers. In 2000. the General Assembly adopted the draft as Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflic (entered to force in 12th February 2002.). One can asume, that there must have been a shift in the attitude of dealing with the protection of children being involved in armed conflicts, because this protocol extends the protection with raising the age limits of covered children. States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities [art. 1.]; Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years [art. 4. (2)]. The importance of these articles are easily visible if comparing with the contents of other international documents in the relating topic. However there is a problem with its applicability, because it operates with a lot of expressions, that don't have conventional definitions. Let's take the example of „taking direct part in hostilities". Several states, breaching this article will possibly say that children soldiers they used, were not taking direct part in the conflict, because e.g. they were only spies, mesangers, or they were only fighting in the second lines. In The Cape Town Principles (1997) the drafters accepted quite broad definitions so „taking direct part" „does not, therefore, only refer to a child who is carrying or has carried arms".

The Optional Protocol differenciates between voluntary and mandatory levy, and also between recruitment made by state organs, and by non-state organs. However there is a basic common rule binding for everybody, both state parties and armed groups that are distinct from the armed forces of a state should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years [art. 2., 4. (1.)]. Armed groups separate from the state shall not recruit children under any circumstances, but states have a narrow possibility though with several restrictions [art. 3. (3) a-d)]. Accoding to art. 3. (1) the member states shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38 (3) of the Convention on the Rights of the Child. The minimum age of recruiting for state organs became sixteen after the Optional Protocol. The Protocol sets up several guarantees in case children would be recruited by a state. The state insisting on using child soldiers in their army shall shall deposit a binding declaration upon ratification of or accession to this Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced [art. 3. (2)]. The minimum standards of the Protocol are: 1) the recruitment is genuinely voluntary; and 2) is done with the informed consent of the person's parents or legal guardians; 3) the persons are fully informed of the duties involved in such military service, and 4) provide reliable proof of age prior to acceptance into national military service. [art. 3. (3)]. It is very important that the implementation, realization of this Protocol is the same as New York Convention's: there has been set up a monitoring committee, that produces reports annualy about the enforcement of the regulations.

The biggest problems with child soldiers happen traditionaly in Africa. Therefore it is interesting to take a look at the regional reactions to this phenomenon. In 1990. the African Unity accepted the The African Charter on the Rights and Welfare of the Child. Due to this charter all the participant states are responsible for not letting by any ircumstances children to take direct part in hostilities, and they also shall avoid to recruit children. Sadly there were several problems with the applicability of the declaration (e.g.: Rwanda) , that is the reason for prohibiting levying persons under the age of eighteen in several declarations, protocols, conventions during the last fifteen years (e.g.: Maputo Declaration, 24. June 2004.)

As summerizing the legal regime of child soldiers I would like to point to the fact there are quite a lot international agreements, conventions prohibiting or strictly regulating the usage of children in armed conflicts, on the other hand however the law in books seems not to be enough for being effective in practice. I beleive that the reason for still recruiting child solders is not because of the lack of prohibition but rather because of other factors, such as underdeveloped economics, hopeless perspectives, lack of education, etc. In the next part of the essay I will try to gather all the reasons that explain why the phenomenon of child solders still wide-spread.

3. WHY CHILDREN BECOME SOLDIERS?

While examining the reasons of recruiting child soldiers one has to make difference between the methods of levying children. In my tipology there are four different means of recruiting: 1) legal, based on a statute 2) violent recruiting 3) voluntary 4) mixture of the second and third. There are some characteristic features for each method, but it is impossible at th esame time to draw a clear border between them, they are often overlapping eachother.

Knowing the widespread prohibitions it is not surprising, that only in the very small minority of states is still legal to use children as soldiers. The real problem is not with the regulation, but with the practice of it. In many countries the pure regulation means no guarantee in practice. The main reason for this, is that in many states (especially in underdeveloped Middle-African states) there is still no reliable parish register adopted, hence it is impossible to know how old children really are. In Mocambique for example children are officialy as old as they look like.

3. 1. Methods

There are a lot of methods to drag children away from their homes, and to start their military „education". Mostly recruitmens are being made in schools, orphanages, sipmply on streets, refugee camps. It happens still several times that children are being kidnapped from their homes as well during a riot fer example. One of the most notorious feorms of recruiting by force was the Egyptian „afesa", used untill the late 1980's. Armed groups, or simply policemen, military corps stormed streets, schools, villages, suburbs in deprioved, poor areas, and dragged away all boys especially under fifteen. In UN reports we can find several other countries with incidents like this (e.g.: Angola, Nepal, Sierra Leone, Sudan). According to the Report of the Secretary General on children and armed conflict [A/58/546-S/2003/1053 (2003.)], the Lord Resistance Army in Uganda, in 2002 solely kidnapped more than 8000 children with the purpose of using them as soldiers. Despite these facts, it is fairly interesting to see that a significant percentage of child soldiers say that they joined the army as voluntiers. There was a survey in Middle-Africa organized by the ILO, according to which 2/3 of these young soldiers said they were voluntiers. I don't think, that in most of cases we can beleive to these surveys. Children might think after some years of fighting, that they joined voluntierly to armed forces, they might even be proud to be soldiers, but the scene looks a lot different if we take a look at their loving conditions before joining to or being kidnapped for the army. These children come from the poorest parts of the world, from desperately underdeveloped countries struggling with war permanently. The reason why they „decide" joining the military forces can be explained perfectly with the permanent war conditions surrounding them, their poorness, lack of education and jobs, family problems, and from some extents with culture and ideology as well. Most of the times they are even not able to imagine what peace is. It is beyond any doubt that in most of the cases they don't really have real chance to make own decisions (such as joining the army), because of the lack of possibilities, alternatives. And what is more, „volunteers" in most of the cases neither know what they are volunteering for, nor that their decision is irreversible. If they realise the real conditions of their situation and try to escape from the army, most likely they will be shot down. (The New People's

Army in the Philippin Islands is a rare exception, because at least it is guaranteed by the domestic laws, that child soldiers have the right to quit the army).

3. 2. War situation

Children are not searching for war situation, instead war finds cildren. Because the lack of stabile personality children can be socialized during permanent war situations. War can be the normal world for them after a while, it becomes an ordinary part of their lives. In plenty of cases joining to one of the adversaries means some kind of chance to escape from the general economical an social dobtfulness, vagueness. The desire to secure family member's and their own survival might be a very strong legitimizer power. If there is chance to survive, it definitely worth killing for. It is basic psichology that describes the process, when the ever stronger motive of survival overwhelm the moralty of a young, malleable personality.

3. 3. Pauperization

Poverty is the signal easiest to recognize amongst the motives of a volunteer action that leads a child to the middle of an armed conflict as a child soldier. Poor families can not afford to send their children abroad in order to avoid the sad impact of war on them. They neither have the financial stability to send the children school, what narrows their possibilities to find a job. Besides all, armed conflicts always cause deprivation, strenghten the poverty of the poor. In order to escape from this blind-alley situation, to avoid starvation and to provide at least the basic needs with satisfaction military groups might seem as the only escaping route. During most of armed conflicts, soldiers are the last to starve. This fact can be very spectacular and attractive at the same time amongst children, not knowing the real prize, they have to pay. Armed forces often contribute in influencing or even empting the dceision of joining them. They draw a much more alluring, preferable picture of them as reality truly is. It happens also that they make illusory, misleading promises to children or to their families, in connection with the salary of young soldiers, or with the future schooling of child soldiers. The truth is that child soldiers are often the first to be sacrified in an armed conflict becasue they are the „cheapest materials". Their lives worth significantly less than the life of a skillful, trained professional soldier.

3. 4. Education

Lack of education and even the nature of education in some areas can be considered as a grave danger. Children not being involved in regular education have no chance to be socialized normally at the age when students do. Unqualified children has even small possibilities to play succesful part on labour market. However armed groups need definetely young transformable (not yet socialized), unskilled youngsters to be soldiers. In this case the army and its military training will be the first to print deeply the children's personality. The result of this kind of recruitment is often a „killing machine" without fear, questions and basic moralty. On the other hand it would misleading to think tha only the poorest children join the army because of the lack of other possibilities. Certain regimes, military forces with strong influence often try to change educational system, in order to create a stable basis for their future levies. It is often amongst the interests of armed forces to mobilize students, change their education in favour of segregation and trunk ideas. In most of the states in South-Africa children with different religions are not allowed to go to the same school. This progression leads at least to misandurstanding of the others, not tolerating them, and it can also fall into hatred of differring people, creating a favourable basis for recruiting soldiers.

3. 5. Family

The existens or absence of family, family ties play without any doubt an important role in socialization of children. Children without family ties (orphanes or simply neglected ones) are in special danger. Quite often military groups specialize their recruiting to children without strong relationships offering new families protecting them. In a permanent armed conflict a relatively high percentage of the whole society deals with war, no matter if they are soldiers or working hard for securing the hinterland. The more war becomes a lifestyle, or something like a traditional occupation, activity, the more attractive it is for young children. Being soldiers, killing the enemy can be the simpliest thing of life, if most of the ones a child admires support and deal with war. In some cases family ties are so weak that instead of finding protective shelter at home, children have to escape from home. Violence at home often force children to join the army.

3. 6. Problematic Society

If a society is strongly divided to segregated ethncics, religions, races, tribes, etc. the divison can create a perfect hothouse for anger and therefore hostilities. It is basic human nature that even if there was nothing the adversary party to be blamed for prior the war collision, if the conflict escalades the enemy will be responsible for everything unfortunate. On the other hand of course the army where a person belongs to will provide everything that is good in life. The we-us division easily and necessarily transformates itself to a good-bad, „worth to live"-„deserved to die" dichotomie. Life becomes less complicated in armed conflict, the we-us antagonism ill be the filter in every single question, no matter how little importance it has. Because of the cruel simplicity of this logic children are very much capable to think like this. They always would like to be similar to admired grown-ups, in order to this goal they often copy the acts of them. During a war they not only have to copy the external acts of grown-ups, but they are able to understand the logic behind as well. If they are provided with the means of war (weapons) as well, this is one of the main reasons why they will be fearful soldiers. This effect can be even intensified with ideology of war. In Rwanda for example the main reason of terror were the trunk adversary ideologies. During second world war the nazi ideology deprived jews to be humans, therefore it was not eaqual to kill a jew and to kill a human being. Ideologies can very effectively demolish the basic rules estabilishing our societies. Because the lack of mature personality children are really acceptant to ideologies that provide them with feeling of belonging togather. Children coming from deprived states, from hopeless circumstances without the healthy family atmosphere will do anything (even against their moral code) to ensure this feeling. Liberty, holy war, jihad, martyr-worship are only some of the ideologies that are worth killing and dying for. On the other hand ideologies are only one group of reasons for hatred and anger of youngsters. War is a self-impulsive machine. Violence is the best excuse for using force, to resort to force. Lot of children decide to take part in hostile attacks because of the abuse of their families. The desire for revenge is an integrant part of human nature again that has been suppressed by the rules civilazation. The basic idea of the power of the state was to substitute individual vengeance. Thence it is not surprising that in the societies where a lot of child soldiers are involved in armed conflicts, vendetta has still existing, strong roots.

3. 7. Refugees

One of the most imperiled groups of children are refugees. In 2003. the UN Secretary – General published a report on the circumstances of refugee children [A/58/546-S/2003/1053 (2003.)]. In this document the Secretary – General mentions several cases where children were being recruited in refugee camps. The Liberian Movement for Democracy recruited refugee children by force in Ivory Coast, and the Liberians United for Reconciliation and Democracy did the same in Liberia and in

Guinea. This form of levy is strictly against of international customary law, just as all the conventions covering the topic.

4. HOW CHILDREN BECOME SOLDIERS?

The training of child soldiers is not significantly different from the military training of grown-ups. The main deflection is that children's training includes some kind of nurture, upbrnging too. Violence plays central part in this special training. Children are often forced to commit atrocities, cruel acts against their own community, or even against their family. This form of „nurture" was typical especially in Afganisthan, Mocambique and in Columbia. The result of hostile acts like this is dual. On one hand it is extremly useful for measuring the level of loyalty of the newborn soldier, on the other hand it helps to create close ties between the child and the military group, because these hostile acts cut all the strings that attach children to their lives previous the levy. Sadly this means also, that the last escaping rout is being cut as well for child soldiers. Their hope of fitting in the society, of going home once is perished. In my point of view this is the main reason for the relatively hogh representation of young soldiers amongst suicide acts. In a lot of cases the only scape is commiting suicide.

The real training of child soldiers based on strenghtening their loyalty. Children are very rare provided with even the necessary pieces of inromation how to survive. Maybe this is the reason for the fact that amongst the most fearful soldiers there are a lot who have started their „carrier" as child soldiers. Children have to learn almost everythng on their own, by imitating the acts of real soldiers. This way of genuine learning makes the military groups very much interdependent. Child soldiers who are succesful enough to survive and learn the at least the basic knowledge of how to stay in alive, will be very effectice soldiers, because their socialization immanently containes the capability to comply with war circumstances. They simply grow up next to battlefields. For them real life is war, and armed conflicts are not extraordinary situations as they are for odinary soldiers no matter how long ago they have been involved in.

The first tasks of child soldiers are in most of the cases forms of indirect participation in a conflict, such as being carriers, doing houshold works, being messangers, or spies. This characteristic of child soldiers is very dangerous because since they are not acting as real soldiers at first, it is impossible to differentiate them from ordinary children. However from the perspective of the adversary forces there is a great difference: a child soldier is an enemy, while an ordinary kid is nothing but a civilian. Using children as soldiers, but not differentiating them from other kids means that all the children are shady. The result can be an insane massacre amongst children without any differentiation. In Peru for example the governmental forces murdered children youger than five year old as well, suspecting that they have been trained by the reblling guerrillas.

After the first part of the training, those child soldiers who survived the „natural selection" are being flung to real hostile activities. Due to the fact of their incomplete, bare education they are not allowed to handle expensive means of war. This follows that they often form the first lines in close combats, with small arms only. In order to make fearless soldiers from frightened kids, child soldiers often forced to take drugs, or drink alcohol before the battle. It is not rare that because of this they don't even know where they are and what they are doing. Usually the life of a child is the cheepest during an armed conflict so they often get the most dangerous works, just as mine laying or mine clearing. According to report of the UN Secretary – General mentioned above, this was an existing practice Cecenia. In the Iraq-Iran war child soldiers were used for dangerous scouting activities.

Although the vast majority of child soldiers are boys, it is necessary to deal with girls recruited for participating in armed conflicts as well. In Angola, Sierra Leone and in Uganda cases have been

reported when young girls were forced to join the army. In Sri Lanka, Columbia, Phillippin Islands there is a possibility for girls under sixteen to join the army as volunteers. These states are beyond any doubt militarized in a high level, being a soldier in these regions means an entire lifestyle, it is not only a job, but also a chance to escape from misery. Being a soldier is a career with reputation, a mighty calling. This kind of career might be tempting even for girls, dependingon the culture of course. In Congo for example the soldiers for the corps of the Amazones are recruited only from young girls. Anyways, we can consider as a fact that girls would be recruited most likely by force against their will. They are even more naked, defenceless than boys, due to their sex, and phisichal characteristics. Their duty is different in the warmachine. The Lord Resistance Army in Uganda kidnaps girls in order to marry them to soldiers. If their husband dies afterwards, they should take part in a ritual clearing ceremony, and marry an other soldier again. It is clear that these marriages have only one purpose, motivating soldiers to fight brave, and providing them sexual oppurtunity the way that they don't have to „waste" their precious energy for searching a woman. These „marriages" are nothing else than sexual exploitations, sexual slaveries definetely against all forms of international law. The practice of sexual exploitation is very harmful in the struggle against different forms of sexual diseas, especially AIDS. Besides this form of exploitation leads to irreversible psychical traumas. It is general problem that the society often stigmatize these girls, not letting them to fit in again. The problem is even more serious when they have small children from these forced relationship with soldiers. In Honduras, and in Peru the uprising rebels forced abortion on girls escaped from slavery of the governmental forces.

5. IS THERE ANY SOLUTION?

After discribing the problem and the legal regime the question is unavoidable if there is any solution? It is beyond any doubt that existing practice in connection with child soldiers is far rom satisfying. I beleive that the real root of the problem is not the lack of regulations. There are a plenty of international conventions prohibiting exploiting children as soldiers in an armed conflicts. The real problem is the implementation and fulfillment of the declarations. In the most problematic states and regions there are simly missing even the basic conditions for adherence of the legal regime. If the international community wants to stop the existing practice of using child soldiers, then the first step should be the creation of basic life conditions, the struggle against hopeless perspectives.

It is extremly important to brake the diabolic circle of violence in order to stop exploiting children. Illegaly employed child soldiers must be disarmed, disassemble and reinegrate. These are the three pillars of a relatively newborn international program (DDR) against children exploitation. Special care shall be taken not to carry these duties out only meenwhile an armed conflit but during peace as well. Prevention is very important part of the efforts taken against illegal recruitements. DDR programs don't have general rules, they have to be adopted individually to each armed conflicts, and to each problematic areas. The common thing in the programs is that they have to be organized by international bodies as a guarantee. The programs shouldn't be finished after the last concrete project finished. Monitoring of the results is equally important as realising plans.

The first and so far the only international law document that estabilishes a mandatory duty of disarming, disassembling and reinegrating child soldiers is the Optional Protocol to the Convention on the Rights of the Child On the Involvement of Children in Armed Conflict. Accosrding to art. 6. (3) States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to this Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery and their social reintegration.

Carrying out real effective and useful DDR programs is always extremly expensive. DDR programs are inconceivable without a broad reform of the whole social system. In order to ensure the financial

support for the programs art. 7. (1) states, that States Parties shall cooperate in the implementation of the present Protocol, including through technical cooperation and financial assistance. In 2001. the Worldbank launched an initiative for gathering enough financial support to carry out a succesful DDR program in Middle-Africa. This can be considered as a frst step towards more programs to begin, because the Worldbank and its partner states pledged themselves to support further initiatives against illegal recruitment of children.

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