Istituto Affari Internazionali

DOCUMENTI IAI 11 | 03 – February 2011

Report of the Conference "New Conflicts and the Challenge of the Protection of the Civilian Population"

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Abstract

In contemporary armed conflicts the overwhelming majority of the dead and injured are civilians and the bulk of the damages affect infrastructures vital to them. Actually, the very nature of armed conflicts has changed over the last two decades with dramatic consequences for the protection of the civilian population on the ground. An international conference on this issue was organized by the International Institute of Humanitarian Law (IIHL), in cooperation with the Institute for International Affairs (IAI), and held in Rome at the Ministry of Foreign Affairs on 14 December 2010. Eminent speakers delivered comprehensive and thought-provoking presentations on a number of outstanding questions, including the interrelationship between international humanitarian law and human rights law, the concept of responsibility to protect and the role of peacekeeping forces in protecting civilians, the protection of the civilian population in asymmetric conflicts and in occupied territory, the protection of women and children, the criminal accountability for grave breaches of norms protecting civilians, and the obligations and responsibilities of non-state actors in this field.

Keywords: *Armed conflicts / Protection of the civilian population / International humanitarian law / International human rights law / Responsibility to protect / Peacekeeping / EU military operations / Asymmetric conflicts / Occupied territories / Air and missile warfare / International crimes*

Report of the Conference "New Conflicts and the Challenge of the Protection of the Civilian Population"

by Marina Mancini*

The International Institute of Humanitarian Law (IIHL), which celebrated in 2010 its 40th Anniversary, organized, in cooperation with the Institute for International Affairs (IAI), an international conference on "New Conflicts and the Challenge of the Protection of the Civilian Population", under the scientific supervision of Professor Fausto Pocar[1] and Professor Natalino Ronzitti[2]. The conference was held in Rome at the Ministry of Foreign Affairs on 14 December 2010 and brought together representatives of Governments, international organizations and military institutions, renowned experts and academics and members of non-governmental organizations.

It was articulated in two sessions. The first session presented a general outlook of the current legal framework, focusing mainly on the interrelationship between international humanitarian law and human rights law, the concept of responsibility to protect and the role of peacekeeping forces in protecting civilians. The second session provided an in-depth analysis of a number of outstanding issues, namely the protection of the civilian population in asymmetric conflicts and in occupied territory, the protection of women and children, the criminal accountability for serious violations of international humanitarian law against civilians, and the obligations and responsibilities of non-state actors in this field. Comprehensive and thought-provoking presentations were delivered by eminent speakers[3].

The conference was introduced by Ambassador Maurizio Moreno[4]. Opening addresses were delivered by Ambassador Sandro De Bernardin[5], President Hisashi Owada[6], Monsignor Silvano M. Tomasi[7] and Professor Stefano Silvestri[8]; while closing remarks were made by Dr. Baldwin de Vidts[9]. Ambassador Roberto Balzaretti[10] chaired the first

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[3] The names of the speakers are mentioned *infra* in connection with the topics they dealt with in their presentations.

[4] President of the International Institute of Humanitarian Law.

[5] Deputy Secretary-General, Political Director of the Italian Ministry of Foreign Affairs.

[6] President of the International Court of Justice.

[7] Apostolic Nuncio, Permanent Observer of the Holy See to the UN Office and Permanent Delegate to other international organizations in Geneva.

[8] President of the Institute for International Affairs (IAI).

[9] Former Legal Advisor to NATO Secretary-General, Vice-President of the International Institute of Humanitarian Law.

session, while Ambassador John Shattuck[11] and Professor Pocar[12] chaired the second session. The discussion was introduced, in the first session, by Ambassador Mahmoud Karem Mahmoud[13] and, in the second session, by Dr. Yaël Ronen[14].

What follows is a summary of the main issues and points debated during the conference.

1. The civilian population in contemporary armed conflicts

The protection of the civilian population in armed conflict is an increasing concern for the international community. Notwithstanding an expanded legal framework aimed at protecting them, civilians remain the primary victims of war. In contemporary armed conflicts the overwhelming majority of the dead and injured are civilians and the bulk of the damages affect infrastructures vital to the civilian population.

Actually, the very nature of armed conflicts has changed over the last two decades with dramatic consequences for the protection of civilians on the ground. Most of the conflicts that are being waged around the world today are non-international armed conflicts, which are characterized by the participation of non-state armed groups. These groups often seek to overcome their military inferiority by resorting to strategies that are prohibited under international law. As the UN Secretary-General noted in its 2010 Report on the protection of civilians in armed conflict, 'these range from deliberate attacks against civilians, including sexual violence, to attacks on civilian objects such as schools, to abduction, forced recruitment and using civilians to shield military objectives'[15].

Besides, in conflicts like those in Iraq and Afghanistan, western countries are called to play an extremely difficult twofold role, namely to combat insurgents often blended into the civilian population and to help to rebuild the state structures with the inherent risk of misperception by the local populace. Thus, they need to develop a comprehensive approach that involves different actors, such as military commanders, political leaders, relief workers, judges, within a clear legal framework.

2. The protection of the civilian population under international humanitarian law

The protection of the civilian population in armed conflict is a cornerstone of international humanitarian law. It is to be intended as protection against inhumanity and mistreatment when in enemy hands and as protection against the effects of military operations. Actually, however, civilians do not benefit from the same level of protection in international and non-international armed conflict. The provisions applicable in the

[10] Secretary-General of the Swiss Federal Department of Foreign Affairs.
[11] President and Rector of the Central European University in Budapest, Former US Assistant Secretary of State for Democracy, Human Rights and Labour.
[12] See *supra* note 1.
[13] Secretary-General of the Egyptian National Council for Human Rights.
[14] Ph.D. (Cantab), Assistant Professor at the Sha'arei Mishpat College in Hod HaSharon (Israel).
[15] UN Doc. S/2010/579, p. 2, para. 8.

case of an international armed conflict, as enshrined in the 1949 Geneva Convention IV and the 1977 Additional Protocol I, grant civilians a broader protection than those applicable in situations of non-international armed conflicts, which are mainly set forth in common Article 3 of the 1949 Geneva Conventions and in the 1977 Additional Protocol II. In his speech, Professor Ronzitti expressed the view that, as the distinction between international and non-international armed conflicts is nowadays often blurred, the difference in the protection of the civilian population in the two kinds of conflict is no more tenable.

Sparing civilians from the effects of hostilities requires, inter alia, strict compliance by the parties to the conflict with the principles of distinction and proportionality, which are two core principles of international humanitarian law. As far as the former is concerned, Rule 1 of the 2005 ICRC Study on customary international humanitarian law reads as follows: 'The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians'[16]. It is not entirely clear, however, who is a civilian. Article 50 para. 1 of the 1977 Additional Protocol I defines the civilian only in a negative way, stating that a civilian is any person who is not a combatant. As regards the principle of proportionality, Rule 14 of the ICRC Study states that 'launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited'[17]. The problem, however, is that there is no mathematic formula to calculate the military advantage anticipated by the belligerents. In particular, it is disputed whether the so-called collateral damages must be considered against the single attack, the overall operation or the war taken as a whole.

Reprisals against the civilian population are prohibited under Article 51 para. 6 of the 1977 Additional Protocol I. The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia, in its judgment of 14 January 2000 in the *Kupreškić* case, found that, after the adoption of that Protocol, 'a customary rule of international law has emerged on the matter under discussion'[18]. Professor Ronzitti noted, however, that this view is not reflected in all the military manuals. For instance, one of them affirms that a belligerent, whose civilian population has been targeted several times, is justified in attacking the enemy civilian population by way of reprisal.

Explosive weapons are of particular concern in the protection of civilians. Those arms, which include bombs, missile and rocket warheads, grenades and improvised explosive devices, are indiscriminate within their zones of blast and fragmentation effect. Monsignor Silvano M. Tomasi[19], in his opening address, drew attention to the impact of their use in populated areas on the civilian population. Practice shows that the use of explosive weapons in populated areas causes an unacceptably high record of dead and injured among the civilians within the vicinity of the explosion, severe

[16] Henckaerts J.-M., Doswald-Beck L. (eds.), Customary International Humanitarian Law, Volume I: Rules, ICRC, Cambridge, 2005, p. 3.
[17] *Ibidem*, p. 46.
[18] IT-95-16-T, Prosecutor *v*. Zoran Kupreškić *et al*., Judgment, 14 January 2000, para. 531.
[19] See *supra* note 7.

damage to infrastructures such as hospitals and sanitation systems, and poses a long-term threat to civilian life due to the unexploded ordnance that remain in the area. In fact, the UN Secretary-General, in its 2010 Report on the protection of civilians in armed conflict, urged 'Member States, United Nations actors and international and non-governmental organizations to consider the issue of explosive weapons closely, including by supporting more systematic data collection and analysis of the human costs of their use'[20].

As to the strengthening of the international humanitarian law framework aimed at the protection of the civilian population in armed conflict, Professor Ronzitti remarked that the main problem nowadays is the implementation of the existing treaties. He also argued that a major role in enhancing the protection of civilians on the ground may be played by the Security Council. In resolution 1894 (2009), which is a landmark resolution concerning the protection of the civilian population in armed conflict, the Security Council noted that 'the deliberate targeting of civilians as such and other protected persons, and the commission of systematic, flagrant and widespread violations of applicable international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security' and reaffirmed in this respect 'its readiness to consider such situations and, where necessary, to adopt appropriate steps'. Indeed, the Security Council, acting under Chapter VII of the UN Charter, can adopt legislative resolutions in order to ensure a better protection of civilians in specific situations of armed conflict. Such resolutions, being immediately binding, have an indisputable advantage over international treaties, which need to be ratified by States and can enter into force only after a certain number of instruments of ratification have been deposited.

3. The interplay between international humanitarian law and international human rights law

The life, health and dignity of the civilian population in time of armed conflict are protected not only by international humanitarian law, but also by international human rights law. In fact, both these bodies of law apply in situations of armed conflict. In its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice clearly stated that 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights'[21].

In fact, some human rights treaties, like the 1950 European Convention on Human Rights and the 1966 International Covenant of Civil and Political Rights, allow States to derogate from certain rights in a situation of emergency, such as an armed conflict; while no derogations are permitted under international humanitarian law, except as provided in Article 5 of the Fourth Geneva Convention.

[20] UN Doc. S/2010/579, p. 11, para. 50.
[21] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136, at p. 178, para. 106.

However, contrary to international humanitarian law, international human rights law grants individuals a right of complaint in case of violation of their rights. For example, under the European Convention on Human Rights, an individual may lodge an application with the European Court of Human Rights, if he/she considers that a State party to the Convention has violated his/her rights as set out in the Convention or its Protocols.

As to the relationship between international humanitarian law and international human rights law, Professor Ronzitti[22] stressed that the former is construed by the majority of scholars as *lex specialis*, to be applied in armed conflict instead of the latter in case of inconsistency. In this respect, the view expressed by the International Court of Justice with regard to the right to life, in its 1996 Advisory Opinion on the *Legality of Threat or Use of Nuclear Weapons*, is worth mentioning. The Court stated that 'in principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities'[23]. Interestingly, however, both President Owada[24] and Professor Pocar[25], speaking in their personal capacity, argued that it is not appropriate to consider international human rights law as general law and international humanitarian law as special law. In particular, President Owada noted that both these bodies of law are applicable theoretically, but practically one of them may have priority over the other depending on the situation. In this regard, Dr. Ronen[26] submitted that, generally speaking, the protection of civilians is likely to be better secured by international human rights law than by international humanitarian law.

4. The concept of responsibility to protect

The concept of responsibility to protect offers new grounds for ensuring the protection of the civilian population from the effects of armed conflicts. In his speech, Professor Edoardo Greppi[27] illustrated its evolution. The concept of responsibility to protect was first elaborated in the 2001 report of the International Commission on Intervention and State Sovereignty, established by the Government of Canada together with a group of major foundations. The central idea expressed in this report was 'that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states'[28].

[22] See *supra* note 2.
[23] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, at p. 240, para. 25.
[24] See *supra* note 6.
[25] See *supra* note 1.
[26] See *supra* note 14.
[27] Professor of International Law at the University of Turin, and Member of the International Institute of Humanitarian Law.
[28] The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty, December 2001, p. VIII.

Thereafter, the concept of responsibility to protect was affirmed by the UN Secretary-General's High-level Panel on Threats, Challenges and Change in its 2004 report. The High-level Panel endorsed 'the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent'[29].

Subsequently, the 2005 World Summit Outcome Document enshrined the concept of responsibility to protect. The Heads of State and Government gathered at UN Headquarters in New York on the occasion of the World Summit, in September 2005, declared to be 'prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity'[30]. The relevant provisions of the World Summit Outcome Document were then reaffirmed by the Security Council in various resolutions, including resolutions 1674 (2006) and 1894 (2009) concerning the protection of civilians in armed conflict.

Professor Greppi noted, however, that the strong political commitment expressed by the Heads of State and Government in 2005 still remains to be transformed into a legally binding rule, broadly accepted by the international community. The World Summit Outcome Document was only incorporated in a General Assembly resolution, which as such is not legally binding. According to Professor Greppi, it may be considered an expression of a widespread *opinio juris*, relevant to the creation of an international custom. The other element of custom, *diuturnitas*, that is to say a general practice, however, is still lacking.

As to the question whether the concept of the responsibility to protect is to be considered as incorporated in the 2000 Constitutive Act of the African Union, Ambassador Karem Mahmoud[31] stressed that Article 4 (h) of the Constitutive Act affirms the right of the African Union to intervene only in a Member State, in respect of war crimes, genocide and crimes against humanity, and that, consequently, it refers only to African crises.

5 The role of peacekeeping forces in protecting the civilian population

Peacekeeping operations have a significant impact on enhancing the protection of the civilian population in conflict and post-conflict situations. The role of peacekeeping forces in protecting the civilian population was addressed by Major General Michael Conway[32].

[29] UN Doc. A/59/565, p. 57, para. 203.
[30] UN Doc. A/RES/60/1, p. 30, para. 139.
[31] See *supra* note 13.
[32] Director General of the Army Legal Services of the United Kingdom.

During the Cold War period, the mandate of the UN peacekeeping missions did not include the protection of civilians. After the end of the Cold War, the nature of peacekeeping changed dramatically. However, it was not until 1999 that the Security Council first authorised peacekeeping forces - the UN Mission in Sierra Leone (UNAMSIL) by resolution 1270 - to use force in order to afford protection of civilians under imminent threat of physical violence. Moreover, it was not until 2000 that it was established - in the Report of the Panel on UN Peace Operations (the so-called Brahimi Report) - that the UN peacekeepers who witness violence against civilians should be presumed to be authorized to stop it, within their means. The 2003 Handbook on UN Multidimensional Peacekeeping Operations stated that 'in specific circumstances, the mandate of a peacekeeping operation may include the need to protect vulnerable civilian populations from imminent attack', but added that 'the military component may be asked to provide such protection in its area of deployment only if it has the capacity to do so'[33]. Finally, the 2008 UN Peacekeeping Operations Principles and Guidelines took note that 'most multi-dimensional United Nations peacekeeping operations are now mandated by the Security Council to protect civilians under imminent threat of physical violence'[34].

As regards NATO, non-Article 5 crisis response operations include peace support operations. These are multi-functional operations conducted impartially in support of a UN/OSCE mandate or at the invitation of a sovereign government, covering peacekeeping and peace enforcement as well as conflict prevention, peacemaking, peace building and humanitarian operations. As stated in the 2010 Strategic Concept, 'NATO has unique conflict management capacities, including the unparalleled capability to deploy and sustain robust military forces in the field. NATO-led operations have demonstrated the indispensable contribution the Alliance can make to international conflict management efforts'[35]. The protection of human life is an inherent responsibility of NATO peace support forces. Moreover, these forces may be specifically tasked to relieve or reduce human suffering. NATO peace support forces may be deployed in areas of genocide and human rights abuses, where they would be in a position to deter and contain such abuses. They may also be mandated to provide assistance in relief operations where the need for them arises.

Regarding the requirements for protecting civilians successfully, Major General Conway stressed the importance of the mandate and of the capacity and capability of the peacekeeping forces. As to the former, peacekeeping operations must have a clear and unambiguous mandate, which includes the ability for peacekeepers to afford protection of civilians under imminent threat of physical violence. With respect to the latter, a sufficient number of troops must be provided to fulfil the mandate, which must be properly trained and motivated, with equally motivated leadership and adequate equipment.

[33] Handbook on UN Multidimensional Peacekeeping Operations, UN Department of Peacekeeping Operations - Peacekeeping Best Practices Unit, December 2003, p. 64.
[34] UN Peacekeeping Operations Principles and Guidelines, UN Department of Peacekeeping Operations - Department of Field Support, January 2008, p. 24.
[35] Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organisation, adopted by Heads of State and Government in Lisbon on 19 November 2010.

6. The protection of civilians in EU-led operations

The protection of the civilian population is included in the mandate of many missions and operations conducted by the EU under the Common Security and Defence Policy (CSDP). In her speech, Mrs. Catharina Wale Grunditz[36] provided several examples. The protection of civilians was the main focus of the military operation Artemis conducted in the Democratic Republic of Congo in 2003, whose purpose was addressing the large-scale attacks being committed against civilians in the district of Ituri. A significant contribution to the protection of the civilian population and to the improvement of the security and humanitarian situation was provided by the civilian-military supporting action to the African Union's enhanced Mission to Sudan/Darfur, AMIS, from 2005 to 2007. Providing a safe and security environment for refugees and internally displaced persons was a key objective of the military bridging operation EUFOR Tchad/RCA in eastern Chad and the north-east of the Central African Republic, in 2008-2009. In a similar vein, the ongoing military operation EUFOR Althea in Bosnia and Herzegovina provides a military presence in order to contribute to a safe and secure environment and deny conditions for a resumption of violence.

Notably, in October 2010, the EU Foreign Ministers approved Revised Guidelines on the Protection of Civilians in EU CSDP Missions and Operations, which replace guidelines from 2003. The document provides concrete and practical guidelines for use in the planning, conduct and subsequent lessons learned processes of the EU missions and operations. It emphasizes the need for the EU to continue to cooperate closely with, and take into account best practice adopted by the UN and other relevant organizations regarding the protection of the civilians.

As to the ways to further strengthening and integrating the protection of civilians in the CSDP, Mrs. Grunditz stressed that the EU has expressed its readiness to cooperate with the UN in further developing UN concepts and guidelines as well as exchanging programs in relation to the protection of civilians, also drawing on the UN experience in this domain. The EU-UN Steering Committee on crisis management and the EU-UN desk-to-desk dialogue on conflict prevention provide useful mechanisms ensuring exchanges on the protection of civilians. As far as the UN is concerned, the cooperation with the EU should involve the Department of Peacekeeping Operations, the Office for the Coordination of Humanitarian Affairs and the offices and agencies responsible for relevant thematic issues. Moreover, Mrs. Grunditz suggested that appropriate exchanges should be developed between the EU and other organisations such as the ICRC, NATO, OSCE, the Council of Europe, the African Union and non-governmental organizations on how to mutually take forward the work on the protection of civilians in crisis management.

As regards the application of international humanitarian law, Dr. de Vidts[37], in his closing remarks, argued that, presently, whether international humanitarian law is applicable to a EU CSDP mission or operation is a matter of fact. He remarked that the EU is not party to any treaty in the field of international humanitarian law. However, compliance with international humanitarian law is major concern of the EU. At its

[36] Officer at the Crisis Management and Planning Directorate of the Council of the European Union.
[37] See *supra* note 9.

meeting of 8 December 2009, the EU Council adopted an updated version of its Guidelines on Promoting Compliance with International Humanitarian Law and expressed its intention to redouble the efforts to implement them 'in all relevant decision-making instances, in civilian and military missions, in other relevant offices and agencies, and by the special and personal representatives of the High Representative, as appropriate'[38].

7. The protection of the civilian population in air and missile warfare

As stressed by Professor Michael Bothe[39] in his speech, the role of law as a restraint to military action in order to reduce human suffering is an ongoing challenge in the field of air and missile warfare. In this context, the 2009 Manual on International Law Applicable to Air and Missile Warfare deserves to be mentioned. It provides the most up-to-date restatement of existing international law applicable to air and missile warfare, as elaborated by an international group of experts under the aegis of the Program on Humanitarian Policy and Conflict Research of the Harvard University. International law, however, fails to provide clear answers to a number of important questions relating to air and missile warfare.

For example, the lawfulness of targeted killings of suspected terrorists is highly controversial. In this respect, Professor Bothe submitted that a terrorist, except in the case of State terrorism, is a civilian who may only be targeted while directly participating in hostilities.

The range of precautions to be taken when deciding to launch an attack is also debated. Nowadays, decision-makers usually rely on intelligence and satellite imagery. These sources, however, are not always reliable. Suffice to mention the erroneous intelligence information that led to the bombardment of the Chinese Embassy in Belgrade, during the Kosovo war, or the satellite pictures of Iraqi laboratories where weapons of mass destruction were supposed to be produced, presented by the United States Secretary of State Colin Powell before the Security Council in February 2003. In this regard, Professor Bothe expressed the view that an appropriate organization of the targeting process must provide for screening and cross-checking information.

The inclusion of the long-term and indirect effects of attacks on civilians in the proportionality equation is still a controversial issue. For instance, attacks on traffic infrastructures and power plants hit the lifelines of modern big cities with devastating effects on the life of the civilian population. As far as the 1991 Operation Desert Storm is concerned, there was a significant increase in the infant mortality due to the destruction of the infrastructures of Baghdad. According to Professor Bothe, the proportionality equation evidently needs to be reconsidered and further studied.

[38] EU Council Conclusions on Promoting Compliance with International Humanitarian Law, 2985th Foreign Affairs Council Meeting, Brussels, 8 December 2009, para. 6, available at <http://www.consilium.europa.eu/showPage.aspx?id=1854>.
[39] Professor Emeritus of Public and International Law at the Johann Wolfgang Goethe Universität in Frankfurt-am-Main.

8. The protection of the civilian population in current asymmetric conflicts

Current asymmetric conflicts, namely the conflicts raging in Iraq and Afghanistan, are characterized by the weaker party resort to unconventional methods and means of warfare, which are often illegal under international humanitarian law. Current asymmetric warfare raises complex issues from the perspective of the protection of the civilian population. Brigadier General Jan Peter Spijk[40], in his speech, addressed the main issues.

In asymmetric conflicts ascertaining the very existence of an armed conflict, on which the application of international humanitarian law depends, may be difficult. As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia found in its decision of 2 October 1995 in the *Tadic* case, 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'[41]. As asymmetric conflicts usually involve a non-state actor, it must be ascertained whether there is 'protracted armed violence'. However, since such conflicts are generally characterized by the weaker side avoiding large-scale confrontations and using hit-and-run tactics instead, this is not easy. Particularly, it may be doubtful whether the attacks launched by the non-state actor amount to an armed conflict or they are rather only 'internal disturbances and tensions' to use the words of Article 1 para. 2 of the 1977 Additional Protocol II.

In asymmetric conflicts the weaker party often blatantly disregards international humanitarian law. As it is usually a non-state actor, those fighting on its behalf do not have the combatant privilege and may be prosecuted for the very simple fact of taking up arms. Reciprocity is not likely to be an incentive for insurgents to respect international humanitarian law, because the enemies - the western armed forces in Iraq and Afghanistan - are instructed to comply with international humanitarian law even if the opponent does not. As to the ways to improve respect for international humanitarian law by the weaker side, Brigadier General Spijk pointed to Article 6 para. 5 of the 1977 Additional Protocol II, which stipulates that 'at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict'. He argued that, if these authorities do consider the possibility of granting amnesty and use respect for international humanitarian law as a factor in determining who is granted amnesty, this may be an incentive for insurgents to comply with international humanitarian law.

Notably, as the conflict in Afghanistan attests, despite the wilful disregard for international humanitarian law, shown by the weaker side, the most powerful side usually makes every effort to respect international humanitarian law and, most importantly, imposes on its forces restrictions going beyond what are required by that law. Such restrictions are generally aimed at enhancing the protection of the civilian populations. They are prompted by the counterinsurgency strategy itself, which focuses

[40] Director of the Military Legal Services of the Royal Netherlands Armed Forces, and Vice-President of the International Society for Military Law and the Law of War.
[41] ICTY, Prosecutor *v.* Dusko Tadic a/k/a "Dule", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

on the local populace, and by the expectations of politicians, non-governmental organizations and the general public on the domestic front.

In asymmetric conflicts the line between fighters and civilians is increasingly blurred. The weaker party often employs persons who are not full-time fighters, but take up arms one day and go back to their regular job the next day (the so-called 'revolving door'). Also it frequently tries to blend into the civilian population to avoid identification and targeting by the opponent. Suffice to mention the Taliban fighters wearing burkas. In this respect, Brigadier General Spijk praised the approach taken in the Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, issued by the ICRC in 2009. He observed that the ICRC Interpretive Guidance makes a distinction between members of an organized armed group belonging to a non-state party to an armed conflict and civilians who directly participate in hostilities without forming part of an organized armed group. The former may be attacked at any time, while the latter may be attacked only for such time as they take a direct part in the hostilities.

9. The protection of the civilian population in occupied territory

Civilians are generally adversely affected by the military occupation of the territory where they live. Occupation law, whose rules are enshrined in the 1907 Hague Regulations, the 1949 Geneva Convention IV and the 1977 Additional Protocol, aims to ensure the protection of the civilian population living in occupied territory. In particular, it spells out the responsibilities of the occupying power for the welfare of the local population. These responsibilities include ensuring human treatment, satisfying the occupied population needs, respecting private property, managing public properties, ensuring the functioning of educational establishments and of the health service, allowing relief operations to take place as well as impartial humanitarian organisations to carry out their activities, notably to protect and to assist.

In his speech, Dr. Philip Spoerri[42] highlighted the main challenging questions that may undermine the protection of the civilian population in occupied territory. The first of them regards the beginning and the end of occupation. Article 42 of the 1907 Hague Regulations reads as follows: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised'. This provision calls up two different interpretations. It could be read to mean that a situation of occupation exists whenever a party to the conflict is exercising some level of authority or control over the territory belonging to the enemy. Thus, for example, advancing troops could be considered an occupation and consequently occupation law could be held applicable already during the invasion phase of hostilities. Alternatively, the above mentioned provision could be interpreted to mean that a situation of occupation only exists once a party to the conflict is in a position to exercise the level of authority over enemy territory to be able to discharge all the obligations imposed by the occupation law. As to the Anglo-American occupation of Iraq in 2003, Dr. Spoerri observed that the ICRC adopted a pragmatic approach and suggested that, whenever

[42] Director for International Law and Cooperation of the International Committee of the Red Cross.

persons come within the power or control of a hostile army, even in the invasion phase, they shall be ensured the protection of the 1949 Geneva Convention IV, including the sections devoted to occupied territory.

Other challenging issues regard prolonged occupation and transformative occupation. The occupying power does not acquire sovereignty over the occupied territory. Occupation is a temporary situation. International humanitarian law, however, does not place limits on the duration of effective control over foreign territory. It seems therefore that the occupying power may impose its authority over the occupied territory for as long as it deems necessary to secure its military success and impose its terms of peace upon the enemies. In case of prolonged occupation, occupation law should continue to apply. Besides, prolonged occupation could call for special measures not normally necessary during shorter occupation. Decisions relating to the social, economic and sometimes political spheres should be taken in order to maintain as normal as possible the life in the occupied territory. In this respect, Dr. Spoerri expressed the view that the welfare of the local population should or could be established as the main principle guiding the measures and policies undertaken by the occupying power in the administration of the occupied territory.

The occupying power must preserve the *status quo ante* in the occupied territory. Recently, however, the problem has been raised whether there are cases in which legislation and institutions may be changed. According to Dr. Spoerri, changes are allowed to the extent that they are authorized by a Security Council resolution.

10. The protection of women and children in armed conflict

Among civilians, women and children are particularly exposed to violence and other injury during armed conflicts. Suffice to mention the practice of rape and other forms of sexual violence against women and the recruitment and use of child soldiers.

In his speech, Dr. Denis Caillaux[43] focused on the protection of children affected by armed conflict. He stressed the importance of the four-pronged approach adopted by the Security Council in its resolution 1612 (2005): (a) establishment of a monitoring and reporting mechanism to collect and provide timely, objective, accurate and reliable information on the recruitment and use of child soldiers and on other violations and abuses committed against children in situations of armed conflict; (b) endorsement of the method of listing the parties to the conflicts that recruit and use child soldiers (the so-called 'name and shame' approach), adopted by the Secretary-General in his 2005 report on children and armed conflict; (c) request to the parties concerned to prepare concrete, time-bound action plans to halt the recruitment and use of child soldiers, as provided for in resolution 1539 (2004); (d) creation of a working group consisting of all the members of the Security Council with the task to receive reports from the above mentioned mechanism and to review progress in the development and implementation of the aforementioned action plans.

[43] Special Representative of the Global Movement for Children.

Dr. Caillaux suggested four courses of action to be taken with the support of civil society actors, in order to make the system envisaged by resolution 1612 (2005) work. Firstly, children and youth must be mobilized. Under Article 12 of the Convention on the Rights of the Child, children are to be consulted on all the matters affecting their life. Secondly, the vital role of communication is to be reinforced. Ensuring communities' awareness about the children rights is the first and essential step toward their realization. Thirdly, a broader view of security is to be adopted, moving from peacekeeping to the so-called police keeping. Finally, a dual approach to prevention of violations and abuses against children has to be taken, both structural and operational. Structural prevention requires the following: social inclusion of alienated or vulnerable groups, particularly youth; reduction of inequalities, particularly on the job market; reinforcing the civil society network to facilitate social inclusion and dispute resolution; advancing respect for human rights and the rule of law; controlling small arms and light weapons. Operational prevention focuses on an efficient early warning system. In this field, civil society organisations may play an important role.

As regards women, Dr. de Vidts[44], in his closing remarks, stressed that international humanitarian law recognizes their specific needs and vulnerabilities and grants them a number of specific protections and rights in situations of armed conflict. In fact, Rule 134 of the 2005 ICRC Study on customary international humanitarian law states that 'the specific protection, health and assistance needs of women affected by armed conflict must be respected'[45]. According to the Study, this rule is to be considered as a norm of customary international law applicable in both international and non-international armed conflicts[46].

11. Criminal accountability for grave breaches of norms protecting civilians

Nowadays, war crimes include grave breaches of norms protecting the civilian population in both international and non-international armed conflicts. As illustrated by Judge Fausto Pocar[47], in his speech, however, the criminalization of serious violations of international humanitarian law against civilians was not without difficulties. In particular, while since the adoption of the 1949 Geneva Conventions it has been largely recognized that serious violations committed in international armed conflict must entail individual criminal responsibility, States have been traditionally reluctant to accept that their agents could be held responsible for similar violations committed in non-international armed conflict. In fact, the 1949 Geneva Conventions provisions on grave breaches and their criminalization do not refer to common Article 3, which is the only article applicable to non-international armed conflicts. Moreover, contrary to 1977 Additional Protocol I relating to the protection of victims of international armed conflicts, 1977 Additional Protocol II, which applies to non-international armed conflicts, does not contain any provision on grave breaches and their criminalization.

[44] See *supra* note 9.
[45] Henckaerts J.-M., Doswald-Beck L. (eds.), Customary International Humanitarian Law, Volume I: Rules, *supra* note 16, p. 475.
[46] *Ibidem*.
[47] See *supra* note 1.

The decision adopted by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia on 2 October 1995 in the *Tadic* case was a radical breakthrough in this respect. The Appeals Chamber found that 'customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife'[48].

The judgment rendered by the Appeals Chamber in the same case on 15 July 1999 was also important in that it broadened the notion of international armed conflict for the purpose of individual criminal responsibility. The Appeals Chamber held that a prima facie internal armed conflict is to be considered international, when a foreign State - in the case at issue, the Federal Republic of Yugoslavia - exercise 'overall control' over an armed group that is party to the conflict - the Bosnian Serb armed forces - 'going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations'[49]. Judge Pocar noted, however, that subsequently the International Criminal Tribunal for the Former Yugoslavia frequently decided cases irrespective of the nature of the conflict. It did not attach particular importance to the nature of the conflict, when not compelled to do so because of the indictment, thus contributing to the assimilation of international and non-international armed conflict for the purpose of criminal prosecution of serious violations of international humanitarian law.

The drafters of the Statute of the International Criminal Court took the decision of 2 October 1995 in the *Tadic* case into consideration. Article 8 of the Rome Statute includes serious violations of international humanitarian law committed in armed conflict not of an international character among war crimes. It, however, in paragraph 2, describes separately war crimes committed in international armed conflicts and those committed in non-international armed conflicts. The former are listed under letters (a) and (b), while the latter are listed under letters (c) and (e).

12. Obligations and responsibilities of non-state actors towards civilians in armed conflict

Non-state actors active in contemporary armed conflicts include armed groups, humanitarian organizations, human rights non-governmental organizations, private corporations, religious organizations and media. The obligations and responsibilities of non-state actors towards civilians in armed conflict were addressed by Professor Michel Veuthey[50].

As regards armed non-state actors, Professor Veuthey made a distinction between hard law and soft law instruments. As to the former, he recalled Article 3 common to

[48] ICTY, Prosecutor *v*. Dusko Tadic a/k/a "Dule", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 134.
[49] IT-94-1-A, Prosecutor *v*. Dusko Tadic, Judgment, 15 July 1999, para. 145.
[50] Associate Professor at the University of Nice Sophia-Antipolis and Vice-President of the International Institute of Humanitarian Law.

the 1949 Geneva Conventions, which laid down the first rules to be observed by parties to non-international armed conflicts and is nowadays considered to reflect customary international law, and the 1977 Additional Protocol II, which developed and supplemented common Article 3 by extending to non-international armed conflicts the main rules applicable in international armed conflicts.

With respect to soft law, Professor Veuthey mentioned the 2000 Voluntary Principles on Security and Human Rights, the 2008 Montreux Document on private military and security companies, the 2010 International Code of Conduct for Private Security Service Providers. The Voluntary Principles on Security and Human Rights, which are the result of a dialogue among the Governments of the United States, the United Kingdom, the Netherlands and Norway, extractives companies and non-governmental organizations, provide guidance to extractives companies on maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms. The Montreux Document, which is the result of an initiative launched jointly by Switzerland and the ICRC in 2006, recalls existing obligations of States, private military and security companies and their personnel under international law whenever such companies, for whatever reason, are present during armed conflict. The International Code of Conduct for Private Security Service Providers, which was signed by nearly sixty private security companies in November 2010, aims at ensuring respect for human rights and international humanitarian law by private security service providers by setting forth a commonly-agreed set of principles and commitments. The Geneva Call was also mentioned. It a neutral and impartial humanitarian organization dedicated to engaging armed non-state actors towards compliance with international humanitarian law and human rights law.

As regards other non-state actors, Professor Veuthey stressed the important role that humanitarian organizations, such as the ICRC, and human rights non-governmental organizations, such as Human Rights Watch, can play in promoting the codification of international humanitarian law, ratification of the relevant treaties and their implementation as well as in monitoring and denouncing violations, assisting victims and helping them to receive compensation.

Updated: 24 February 2011

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