



Propaganda-Oriented Media and International Humanitarian Law

LEGAL MEMORANDUM

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Facts/Attack on the RTS (Serbian State Television and Radio - Radio Televizija Srbija [RTS])

At 2:20 a.m. on 23 April 1999, NATO aeroplanes intentionally bombarded the headquarters and studios of the Serbian state Television and Radio facility (RTS) in the centre of Belgrade. Some 120 civilians were working in the building at the time of the attack (technicians and members of the production staff). At least 16 of them were killed and 16 others wounded, including electrical engineers, a make-up artist, a film editor, and guards. The news programme being transmitted at the time was pre-empted, and RTS' broadcasts were resumed about three hours after the bombing.

On the basis of available information on these events, in its *Final Report* of 8 June 2000, the Committee established by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) to review NATO's bombing campaign against the Federal Republic of Yugoslavia advised the Prosecutor's Office not to institute an investigation on the subject of the RTS bombing (*ICTY: Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 8 June 2000, §79, hereinafter referred to as the *Final Report* [ICTY]).

As recalled by the ICTY Committee (*Final Report - ICTY*, § 75), in order to have been lawful, an attack against the television and radio facility would have had to meet two requirements:

- first, attacks shall be limited strictly to military objectives (I) - the International Humanitarian Law grants general protection to civilian objects and authorises only attacks against military objectives (Article 52§ 1 and § 2 of Protocol I of 1977); and
- second, the attack must respect the principle of proportionality (II).

The RTS bombing also raises the issue of respect of the obligation to warn civilian populations prior to launching an attack (III), as well as that of the adequacy of means used to achieve the desired objective (IV).

Lastly, buildings and radio and television stations are subject to the protection granted to civilian objects—a protection that is nonetheless not absolute (V).

I. RTS: A MILITARY OBJECTIVE?

I.a. Definition of a "military objective"

The definition's two elements

In order for a television and radio facility such as the RTS to become a legitimate target, it would have to meet the definition of "military objective" as defined in Article 52, § 2 of Protocol I of 1977:

- its nature, location, purpose or use must make an *effective contribution* to military action (*constant element*): the civilian or military nature of an object depends upon the effect that such object has, or does not have, on the outcome of the hostilities;

- its total or partial destruction, capture or neutralisation provides *in this instance a definite military advantage (variable element)*; indiscriminate attacks offering only an indefinite or potential military advantage in the circumstances ruling at the time, are prohibited.

The two elements stipulated in the second sentence of Article 52 § 2, are cumulative. In instances where—as in this case—they have been verified, we are dealing with a military objective as defined in Protocol I. An attack on a target that would not meet both of these conditions would be unlawful.

Customary nature of the definition of "military objective," as defined in Article 52 of Protocol I

For more information:

- *Final Report (ICTY), op. cit., § 42;*
- United States Headquarters, Department of the Army, *Field Manual, FM 27-10, The Law of Land and Warfare*, 18 July 1956, Change No. 1, 15 July 1976, § 40 (c): faithfully reproduced and, in advance, the content of Article 52, § 2 of Protocol I;
- Remarks made in 1987 by Michael J. Matheson (Deputy Legal Adviser, U.S. Department of State) and by Lieutenant Colonel Burrus M. Carnahan, of the Organization of the Joint Chiefs of Staff, U.S. Air Force), at the *Sixth Annual American Red Cross - Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, Martin D. Dupuis, John Q. Heywood and Michèle Y. F. Sarko (rapporteurs), [*American Journal of Law and Policy*], Vol. 2, No. 2, Fall 1987, pp. 436 and 509, respectively.
- Based upon predominant legal theory, the definition of *military objective* and *civilian object* provided for in Article 52 of Protocol I is interpreted as customary law;
- The interpretative declarations made by certain States at the time that Protocol I was signed and ratified, on the subject of Article 52 § 2 concerned only a few minor points:

The Media - a potential military objective category

For more information:

- Draft rules limiting the risks incurred by civilian populations in wartime (1956) by the I.R.C.C., see Appendix: List of Military Objective Categories according to Article 7, § 2 [*Liste des catégories d'objectifs militaires, selon l'Article 7 al. 2*]:
I. 7) Radio and television facilities, telephone and telegraph centres of primarily military significance.
- List of military objectives proposed by the Division General A.P.V. Rogers, the Army of Great Britain's former Director of Legal Services:
"...communications installations, including broadcasting and television stations and telephone and telegraph stations used for military communications..." (in *Law on the*

Battlefield, p. 37, 1996);

- the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954), Article 8 § 1 (a):
"...a broadcasting station... ."

I.b. Does an object that serves a dual purpose—civilian and military—constitute a military objective?

Civilian objects (roads, schools, etc.) temporarily assigned to a military use or which are used both for civilian and military purposes, are legitimate targets.

For more information:

- UN: *Final Report of the Commission of Experts Constituted in Accordance with Resolution 780 (1992) of the Security Council*), appended to the letter dated 24 May 1994, addressed to the President of the Security Council by the Secretary General, UN Doc. S/1994/674, 27 May 1994, § 206;
- United States, *Department of Defense, Report to Congress on the Conduct of the Persian Gulf War*, Appendix O: *The Role of the Law of War*, April 10, 1992, *I.L.M.*, Vol. 31 (3), May 1992, p. 623;
- See: *U.S. Army Field Manual, op. cit.*, §§ 401, 403, 404, and spec. 410.

RTS - a component of the Serbian Army's C3 ("Command, Control and Communications") Network

NATO relied on the dual use—civilian and military—of RTS (RTS was closely linked to the C3 network) to justify bombarding it. Pertinent statements made by certain NATO representatives appear in:

- *Final Report (ICTY)*, §§ 72, 73 and 75;
- US Department of Defense (US DoD), the "Kosovo/Operation Allied Force After Action Report," submitted to Congress on 31 June 2000, p. 83;
- Amnesty International: "*NATO/Federal Republic of Yugoslavia Collateral Damage or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*", June 2000, p. 39.

Opinion of the ICTY Committee: If, in addition to the civilian use that was being made of them, the RTS facilities were an integral part of the C3 network, they constituted a military objective (*Final Report [ICTY]*, §§ 55 and 76).

This Committee's conclusion conforms to the letter and spirit of Protocol I. To attack an object that serves a dual purpose may be lawful when the criteria of Article 52 have been met.

For more information: W. J. Fenrick, Legal Adviser with the ICTY Prosecutor's Office, in "Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia," *European Journal of International Law*, Vol. 12, 2001, No. 3, p. 496; Antonio Cassese, "The Geneva Protocols of 1977 on the Humanitarian Law of Armed conflict and Customary International Law"; *UCLA Pacific Basin Law Journal*, Spring and Fall 1984, Vol. 3, Nos. 1 & 2, p. 83.

I.d. Does the use of a media for purposes of propaganda make it a military objective?

Precedent

The Nuremberg International Military Tribunal, *The Hans Fritzsche* case, 1946, *American Journal of International Law*, Vol. 41 (1947), p. 328: the Tribunal ruled that a German senior official employed by the Ministry of Propaganda was not guilty, insofar that his messages were not intended to incite the German population to commit atrocities against defeated populations, but rather their main purpose was to enflame popular opinion.

RTS: A propaganda-oriented media

NATO representatives also justified the bombing of the RTS building as a means of neutralising a propaganda weapon.

See: the *Final Report (ICTY)*, § 74; Amnesty International Report, *op. cit.*, pp. 39-40; and "Kosovo et droit de la guerre. L'attaque contre les studios de la Télévision serbe" by Claudio Cordone and Avner Gidron, *Monde diplomatique*, July 2000, pp. 18-19.

Other sources: US Department of Defense (US DoD), *Kosovo/Operation Allied Force After Action Report*, submitted to Congress on 31 June 2000, Appendix (*Chronology of International Involvement in Kosovo*):

23 April. NATO attacked the Serbian state television building in central Belgrade, a facility used for propaganda purposes.

Opinion of the ICTY Committee:

- propaganda alone is not a sufficient motive to justify an attack against the media that broadcast it (*Final Report (ICTY)*, §§ 47, 55, 74 and 76);
- In NATO's opinion, the damage inflicted on RTS' propaganda capacity was only a secondary effect (though complementary) of its primary objective: to neutralise the C3 network (*Final Report (ICTY)*, § 76);
- civilian morale is not a military objective (*Final Report - ICTY*), §§ 55 and 76;
- the use of the media to incite violence may justify their destruction (*Final Report - ICTY*), §§ 47, 55 and 76).

The inadmissibility of the propaganda argument as sole justification for an attack against the media

For more information:

George H. Aldrich, former Head of the American Delegation to the Geneva Diplomatic Conference of 1974-1977, in "Yugoslavia's Television Studios as Military Objectives," published in the *International Law FORUM*, Volume 1, no. 3, September 1999, p. 150;

W.J. Fenrick, Legal Adviser to the ICTY Prosecutor's Office, in *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, *op. cit.*, pp. 496 and 497.

Amnesty International Report, *op. cit.*, p. 40.

Human Rights Watch Report, *Civilian Deaths in the NATO Air Campaign*, February 2000.

The morale of the enemy's population is not a legitimate target.

For more information:

British Defence Doctrine (JWP 0-01), published in 1996 by the British Ministry of Defence.
NATO Parliamentary Assembly, Civil Affairs Commission: *Kosovo and International Humanitarian Law*, Volker Kröning (Germany), Special Rapporteur, 45th annual session, Amsterdam, November 1999, p. 9, § 18.

Propaganda that incites people to commit unlawful acts of war and violence is prohibited; it must be stopped.

For more information:

Canada: Office of the Judge Advocate General, *The Law of Armed Conflicts at an Operational and Tactical Level [Le droit des conflits armés au niveau opérationnel et tactique]* (B-GG-005-027/AF-020), 1999, p. 7.4, § 30 (Psychological Operations).
Human Rights Watch Report: *Civilian Deaths in the NATO Air Campaign*, February 2000.

See: Article 1, found in all four Geneva Conventions, and Article 1 of the Protocol, by which the Party States agree to comply with, and *enforce compliance with*, these instruments.

II. THE PRINCIPLE OF PROPORTIONALITY

The legality of an attack depends not only on the nature of the object or person attacked— military objective—but also on the extent to which such attack conforms to certain requirements of international humanitarian law, with particular reference to the principle of proportionality.

II.a. Wording of the principle of proportionality

The principle of proportionality was only explicitly endowed with force of law by means of a conventional provision in 1977, in the Protocol Additional to the Geneva Conventions (Protocol I):

- Article 51, § 5 (b), (*Protection of the civilian population*), Protocol I of 1977:

"Among others, the following types of attacks are to be considered as indiscriminate: [...] 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."

- Article 57 (*Precautions in attack*), Protocol I of 1977:

"...those who plan or decide upon an attack shall: [...] refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injuries to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." (Article 57 § 2a [iii] of Protocol I).

"An attack shall be cancelled or suspended if it becomes apparent [...] that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." (Article 57 § 2 b of Protocol I)

The wording of this principle can also be found, in an identical form, in Article 3 § 3 of *Protocol II relating to the prohibition or limitation on the use of landmines, booby traps and other devices, an Annex to the 1980 Convention on Conventional Arms*, and to Article 3, § 8(c) of the same Protocol, as amended on 3 May 1996.

II.b. Meaning of the principle of proportionality

The principle of proportionality represents an attempt to minimise the "collateral damage" caused by military operations. It provides the criteria that may be used to determine the extent to which such collateral damage may be justified in respect of international humanitarian law; i.e., there must be a reasonable degree of proportionality between the effects of legitimate destruction and its undesirable collateral effects.

The principle of proportionality, as understood here, can be contemplated and applied only when the following three preliminary conditions have been met:

- 1) the weapon used must not be specifically prohibited;
- 2) the chosen objective must be a military objective as defined under the law

- of armed conflict;
- 3) the act of war must be militarily necessary ("military necessity").

Excessive damage

"Excessive" ["losses and damage that would be considered *excessive* in relation to military advantage"] is the key word in the formula that expresses the principle of proportionality.

It is the military authorities' responsibility to decide, in advance, what might be excessive and what might not: Article 57 requires such authorities to assess the military value of the attack as well as its cost in terms of civilian losses and, should the latter be excessive, to cancel the attack.

The military commanders' assessments are bound to be subjective, as they are comparing the incomparable and attempting to establish a relationship between two totally dissimilar things (military advantage vs. suffering sustained by the civilian population) and to balance conflicting interests: the quick achievement of a military objective, with minimal losses among their own combatants while providing maximum possible protection to the adverse party's population. Naturally, the greater the anticipated military advantage, the higher the tolerated level of civilian losses and damage will be.

"Anticipated" losses and damage

Application of the principle of proportionality is based on the way in which belligerents perceive and anticipate the effects of their attacks ("attacks on which may be expected"), not on actual civilian losses.

The test does not consist of knowing whether "those who plan or decide upon an attack" (Article 57 § 2 [a]) expected the attack to cause excessive losses and damage, but whether they *should have anticipated* such a disproportionate result. The ICTY Committee recommends that reference should be made to a "reasonable military commander." (*Final report [ICTY]*, § 50).

If the answer is in the affirmative, the aggressor's responsibility may be incurred, based on Article 85, § 3 (b) or (c) of Protocol I, or on Article 8, § 2 (b) (iv) of the Statute of the International Criminal Court.

The combined requirement that the attack cause death or grave injuries (Article 85, § 3) and that the perpetrator would have been aware of the excessive effects of such attack (Article 85 § 3 [b] and [c]) reduces the range of indiscriminate attacks that may constitute grave breaches of Protocol I.

Overall perception of the attack

Civilian losses of life and damage to civilian objects must be counterbalanced by the "concrete and direct military advantage anticipated."

The interpretative statements expressed by the States at the time that the Protocols

were ratified suggest that ***military advantage anticipated*** means:

"...the advantage anticipated from the attack considered as a whole, not from the separate and specific aspects of this attack..."

(Declarations made by the United Kingdom, Germany, Belgium, Canada, Spain, Italy, New Zealand, and the Netherlands).

According to these States' declarations, military advantage and proportionality are measured in terms of each attack considered as a whole, not in relation to a specific phase of the attack (when, in many aspects, the latter is conducted in a concerted manner), nor in relation to the military campaign considered as a whole.

The adjectives "**concrete**" and "**direct**," on the other hand, refer to:

"...a substantial and relatively immediate interest, by eliminating the advantages which would not be perceptible, or which would be evident only at long intervals." (ICRC, *Commentaries on the Additional Protocols*, p. 702, § 2209).

Opinion of the ICTY Committee:

- The Committee concluded that, although collateral damage to civilians was high, it was not clearly disproportionate (*Final Report [ICTY]*, § 77);
- The Committee assessed proportionality on the basis of the totality of civilian victims measured against the military advantage gained by the attack against the C3 network, considered as a whole, not in relation to the sole bombing of the RTS, which represents only one specific phase of the attack taken as a whole, in terms of the manner in which certain States interpret the concept of "military advantage anticipated." (*Final Report (ICTY)*, § 78).

In respect of the potential non-conformity of the attack to the principle of proportionality:

[Refer to:]

The NATO Parliamentary Assembly, Commission on Civil Affairs, *Kosovo and Humanitarian International Law*, by Volker Kröning (Germany), Special Rapporteur, 45th annual session, Amsterdam, November 1999, p. 9, § 17.

Amnesty International Report, p. 42.

Human Rights Watch Report, *Civilian Deaths in the NATO Air Campaign*, February 2000.

Generally speaking, even if the vagueness of the concept of proportionality affords military authorities considerable latitude, it cannot justify any sort of military action. Military leaders must "do everything feasible" (Article 57 § 2 [a] [i] of Protocol I) to limit collateral damage and apply in good faith the provisions of Articles 51 and 57, respecting the constant obligation to take all feasible precautions.

At a minimum, the principle of proportionality, as defined in international humanitarian law, provides a standard applicable to the most flagrant breaches, such as the saturation bombing of negligible military targets situated inside highly populated areas. In more ambiguous situations, passing judgement will be more problematic; however, "in such cases [...], it is the interest of the population that must prevail" (ICRC, "Commentaries on the 1977 Protocols Additional to...", *op. cit.*, p. 640, § 1979).

II.c. Customary value of the principle of proportionality

The vast majority of legal texts—though not all of them—find that even before it was codified in Protocol I, the principle of proportionality was broadly acknowledged as a customary principle of international humanitarian law.

For more information, see:

Final Report (ICTY), §§ 18-20, spec. § 20 ("the customary rule of proportionality").

As a customary principle, the principle of proportionality is enforceable against all States of the international community, including those that are not a Party to Protocol I of 1977.

In its Advisory Opinion of 8 July 1996 on *The Legality of Threat or Use of Nuclear Weapons*, the International Court of Justice (ICJ) did not fail to remind the Non-Party States that they:

"...are bound by those rules of the Additional Protocol I that, at the time of their adoption, solely represented the pre-existing expression of the received customary law."

The affirmation of the customary value of a principle is based upon the presence of a combination of two elements comprising the custom (Article 38 of the Statute of the International Court of Justice): on the one hand, the *material element* or "general practice" of the States and the *psychological component*, or *opinio juris sive necessitatis* (sense of law or of necessity); and, on the other hand, the belief among the subjects of law (States, international organisations, NGOs) that the behaviour which they have agreed to adopt is not equated with compliance with mere custom but is imposed by a rule of law.

In respect of the principle of proportionality, evidence of *opinio juris* and of State practice may be brought forward.

The States' "Opinio juris"

[Refer to:]

Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law of 1974-1977

See: Declarations of the *United States* (*Proceedings*, Vol. XIV, CDDH/III/SR.8, p. 73, § 69 and Vol. XIV, CDDH/III/SR.21, p. 212, § 91), of the *United Kingdom* (*Proceedings*, Vol. IV, p. 164), of *Canada* (*Proceedings*, Vol. IV, p. 179) and of the *Ukraine* (*Proceedings*, Vol. IV, p. 202).

Letter from the Department of Defense Advisor to Senator Kennedy of 22 September 1972, [*American Journal of International Law*] (*A.J.I.L.*), 1973, Vol. 67, pp. 124-125.

Remarks made by [Michael J.] Matheson (Deputy Legal Adviser, U.S. Department of State), *The position of the United States on the relation of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions, in The Sixth Annual American Red Cross...*, *op. cit.*, p. 426.

U.S. Department of Defense, Report to Congress on the Conduct of the Persian Gulf War, International Legal Materials, pp. 622 et 627.

U.S. Military Field Manual (1956), *op. cit.*, § 41 (*Unnecessary Killing and Devastation*)

Swiss Army: *Manuel des lois et coutumes de la guerre* (1963), p. 6

Federal Republic of Germany: *Völkerrechtliche Grundsätze der Landkriegführung, Sonderdruck des Anhangs, Teil III zu Hdv 100/2* (1961), p. 22.

Written Declaration of the Government of Egypt, 20 June 1995, p. 20 (ICJ, Advisory Opinion, *The Legality of Threat or Use of Nuclear Weapons*, 8 July 1996).

Written Declaration of the Government of India, 20 June 1995, p. 3 (ICJ, Advisory Opinion, *The Legality of Threat or Use of Nuclear Weapons*, 8 July 1996).

Written Declaration of the Government of Sweden, 20 June 1995, p. 3 (ICJ, Advisory Opinion, *The Legality of Threat or Use of Nuclear Weapons*, 8 July 1996).

Situation in the Middle-East

The international community has, on several occasions, protested against the disproportionate use of force by the Israeli Army against the Palestinians.

Ex.: Security Council Resolution 1322 of 7 October 2000, § 2; Joint Resolution of the European Parliament Session of 17 May 2001. (Comment: Israel is neither a party to Protocol I, nor to Protocol II of 1977.)

Non-governmental factors in the application of "opinio juris"

ICRC appeals and codes of conduct

In recent years, the ICRC has appealed for restraint in the course of conflicts, in which it has specifically requested that whenever force is used, the principle of proportionality be applied.

ICRC, Press release 00/37, 6 Oct. 2000, *Israel, The Autonomous and Occupied Territories (A/OT): the International Red Cross and Red Crescent Movement urge that the lives of civilians and all members of the medical personnel be spared.*

ICRC, Press release 96/30, 27 Sept. 1996, *Israel, The Autonomous and Occupied Territories (A/OT): the ICRC appeals for restraint.*

ICRC, *Memorandum of Understanding on the Applicability of International Humanitarian law*, 14 Dec. 1990 (*I.R.R.C.*, No. 787, Jan.-Feb. 1991, pp. 25-27).

ICRC, *Memorandum of Understanding on the Respect of International Humanitarian Law in Angola*, 8 June 1994 (*I.R.R.C.*, No. 827, Sept.-Oct. 1997, pp. 537-541).

ICRC, *Memorandum of Understanding on the Rules of International Humanitarian Law that must be respected by States that are members of the International Task Force Working for Security in Afghanistan*, 2002.

Other application-related factors

UN, Final Report of the Commission of Experts Constituted in Accordance with

Resolution 780 (1992) of the Security Council, appended to the letter dated 24 May 1994, addressed to the President of the Security Council by the Secretary General, doc. UN S/1994/674, 27 May 1994, §§ 206 and 207.

UN, Circular of the Secretary General, *Respect of International Humanitarian Law by the United Nations Armed Forces*, ST/SGB/1999/13, 6 August 1999, Article 5.5.

International jurisprudence

International jurisprudence, which is supposed to be a reliable indicator of the state of law, has acknowledged that the obligation of proportionality in an attack on military objectives causing civilian casualties is in keeping with a principle of customary law.

ICTY, Hp. of 1st instance II, in *Prosecutor v. Zoran Kupreskic, et al*, 14 January 2000, Case No. IT-95-16-T, § 524, 526.

ICTY, Hp. of 1st instance I, ruling in the case, *Prosecutor v. Milan Martić, examination of the indictment within the scope of Article 61 of the Rules of Procedure and Evidence*, 8 March 1996, No. IT-95-11-I.

II.d. Field of application: *ratione contextus*

(In what situations does the principle of proportionality apply?)

International armed conflicts

In theory, the principle of proportionality, as understood by conventional international humanitarian law, applies only in the context of an *international armed conflict*. This is made clear in the Protocols Additional to the Geneva Convention of 1977, as only the First Protocol codifies this principle.

Non-international armed conflicts

In the Second Protocol, which is devoted to non-international armed conflicts, there is, indeed, no provision that expressly mentions proportionality, even if we were to interpret an indirect allusion to such principle in Article 15, which prohibits attacks that may "cause [...] severe losses among the civilian population."

Neither does Article 3, common to both Geneva Conventions, contain a prescription prohibiting attacks with excessive effects.

As for the Statute of the International Criminal Court, although it deems that the violation of the principle of proportionality is a war crime when committed during an international armed conflict (Article 8 § 2 [b] [iv] of the Statute), this incriminating contention does not apply in the case of an internal armed conflict; the sole provision approximating it being that which deems that the unnecessary destruction or seizure of the property of an adversary is an act of war (Article 8 § 2 [e] [xii] of the Statute).

It should, however, be noted that on various occasions, the ICRC has reminded the

parties to an *international armed conflict* of their obligation to respect the principle of proportionality in the attacks. For example, it did so during the Somalia and Angolan conflicts.

ICRC: Press release no. 93/17, 17 June 1993, *Somalia: the ICRC appeals for compliance with international humanitarian law* (in ICRC[J.R.R.C. ?], *Public statements issued by the ICRC on its operations in Somalia 1989 - 3 April 1997*, Geneva, ICRC, 1997).

ICRC: *Memorandum of Understanding on the Respect of International Humanitarian Law in Angola*, *loc. cit.*, p. 539.

State Practice

Memorandum of Understanding on the implementation of the applicable rules of International Humanitarian Law, by the Republic of Croatia, the Republic of Serbia and the Armed Forces of the Federal Republic of Yugoslavia (FRY), Geneva, 27 November 1991, § 6 (including provisions related to the principle of proportionality of the instruments concerned).

Comment: the *Memorandum of Understanding* adopted during the non-international phase of conflict in the former Yugoslavia.

Agreement to Respect the Rules of International Humanitarian Law, by the plenipotentiaries representing the parties in the Bosnia-Herzegovina conflict, 22 May, 1992, § 2.5.

These factors tend to prove that the customary principle of proportionality applies to armed conflict of any sort. Other inferences seem to indicate that this principle may also be invoked within the scope of "danger to the public," or "internal unrest."

Based upon all of the elements considered, it is clear that, first, the principle of proportionality unquestionably constitutes an integral part of customary international law, and secondly, that it is applicable to any armed conflict, regardless of whether it is an international, or a non-international, armed conflict.

It is a guiding principle, in the sense that it imposes no precise rule of behaviour, but does indicate the course to be followed.

The flexibility of this principle of humanitarian law constitutes both its strength and its weakness. Its strength, because a doctrine that would prohibit any use of force that might entail civilian casualties would be inapplicable, as it would be irreconcilable with the demands of military necessity. Its weakness, because its highly subjective nature provides a margin of interpretation that would profit the party resorting to force.

The divergent interpretations that may be made of certain provisions related to this principle are not of a nature to challenge its status as a customary standard, although they may potentially weaken its substance or its impact. Similarly, violations of the principle of proportionality will not compromise its authority; in any case, inasmuch as those States who perpetrate the violations will be attempting to evade their responsibility by denying that they committed them, or by invoking exceptions and legal justifications for their behaviour—the effect of which will thus be to affirm, rather than weaken, the standard, as the ICJ recalled in the case of

Nicaragua v. the United States (Rec. ICJ 1986, p. 98, § 186).

III. THE OBLIGATION TO WARN

Although NATO claims to have done "everything that was in [its] power to avoid civilian losses and collateral damage" (Amnesty International Report, *op. cit.*, June 2000, p.39.), some reservations have been expressed as to compliance in such cases with the obligation to warn civilian populations in advance of an attack, as stipulated in Article 57 § 2 (c) of Protocol I of 1977.

According to the ICTY Committee Report, there are conflicting testimonies on this point (see *Final Report [ICTY]*, § 77).

According to the Amnesty International Report:

- NATO declarations regarding the advance warning given prior to the bombing of the RTS building were contradictory (pp. 42-43 of the Report);
- Various people were allegedly warned, however: CNN's president, some Western journalists working in the RTS head office and Yugoslavian managers: pp. 43-44 of the Report;
- Amnesty International is of the opinion that no clear and actual warning was given (p. 44 of the Report).

Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, February 2000: the RTS and representatives of the Yugoslavian government claim that, at the time of the attack on the RTS building, the authorities no longer believed that any serious threat existed, in view of the amount of time that had elapsed since the initial warnings.

Natalie Nougayrède, "Victims of the NATO bombing of the Serbian television station turn against Slobodan Milosevic," *Le Monde*, edition of 2 November 1999: *RTS knew...*

The Balkan Courier, "Serbia-Montenegro: Chaos on the media front," translated by Pierre Dérens, published in the press on 23 August 2002 and posted on the Internet on 30 August 2002:

"Today, Dragoljub Milanovic, RTS' former president, is serving a 10-year prison term for having "gravely endangered public safety" by failing to evacuate the building when the bombs first started falling."

Opinion of the ICTY Committee: NATO may have given sufficient advance warning in view of the circumstances (§ 77).

III.a. Sources of the obligation to warn

Conventional provisions, et al

Article 19, *Instructions for the behaviour of the United States Armies while on campaign*, drawn up by Francis Lieber and proclaimed by President Lincoln as set forth under General Order No. 100, on 24 April 1863 (Lieber Code);

Article 16, [Draft international declaration concerning the laws and customs of war] *Projet d'une Déclaration internationale concernant les lois et coutumes de la guerre*. Brussels, 27 August 1874;

Article 33, *Manual of the Laws of Land Warfare*, adopted by the Institute of International Law in its Oxford session of 9 September 1880 (*Oxford Manual*).

Article 26 of the supplementary *Regulation Annex to the 1907 Fourth Hague Convention*, concerning the laws and customs of land warfare, and its Annex:

...Unless his purpose is a surprise attack, the commander of the attacking troops must do all in his power to warn the authorities before initiating an aerial bombing[...]

Article 6, *The 9th Hague Convention relating to bombardment by naval forces in wartime*, The Hague, 18 October 1907;

Article 19, *The Fourth Geneva Convention relating to the Cessation of the Protection of Hospitals*;

Article 57 § 2 (c) and § 4 (*Precautions in attack*), Protocol I (1977)

§ 2. (c) - Effective advance warning shall be given of attacks that may affect the civilian population, unless circumstances do not permit.

§ 4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

Article 5 § 2, Protocol relating to the prohibition or limitation on the use of landmines, booby traps and other devices (Protocol II to the 1980 Convention);

Article 3 § 11 and Article 6, Protocol relating to the prohibition or limitation on the use of landmines, booby traps and other devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention).

Military field manuals

United Kingdom, the War Office, WO Code N° 12333, *The Law of War and Land*, being Part III of the *Manual of Military Law*, 1958, p. 97, § 291:

291. If military exigencies permit, and unless surprise is considered to be an essential element of success, the commander of an attacking force must do all in his power to warn the authorities of a defended place before commencing a bombardment. There is, however, no obligation to give notice of an intended assault (1). Should there be no civilian population left in the area, no such notice is required.

(1) Hague Rules 26. Notice of the intended bombardment of Paris and La Fère, in 1870, was not given, but as a rule the besieged locality is given notice with a view to sparing the civilian population. A warning was given to the German commander of Munster, Germany, in 1945, that an intensive bombardment would begin unless he surrendered. The German declined and the town was then subjected to intense and heavy bombardment. In fact, a bombardment is normally a prelude to an assault by armoured and infantry units.

United States, Headquarters of the Department of the Army, *Field Manual, FM*

27-10, *The Law of Land and Warfare*, 18 July 1956, Change No. 1, 15 July 1976, § 43:

43. Notice of Bombardment

a. Treaty Provision.

The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities. (*HR, Article 26*)

b. Application of Rule.

This rule is understood to refer only to bombardments of places where parts of the civilian population remain.

c. When Warning is to be Given.

Even when belligerents are not subject to the above treaty, the commanders of United States ground forces will, when the situation permits, inform the enemy of their intention to bombard a place, so that the non-combatants, especially women and children, may be removed before the bombardment commences.

Canada, Bureau of the Judge Advocate General, *The Law of Armed Conflicts at an Operational and Tactical Level* (B-GG-005-027/AF-020), 1999, p. 4-4, § 29 (Section 5 - *Obligations bound to the selection of objectives*):

Warning

29. In the event of attacks capable of affecting the population, a warning must be given in due time and by adequate means, unless the circumstances do not permit it. For tactical reasons, an attacking force may not warn so as to maintain the element of surprise.

Swiss Army, Regulation 51.7/11 f, *Laws and Customs of War (Extracts and comments)*, valid as from 1 September 1987:

Article 29 § 1: "Commanders of battalions or groups, and commanders of more substantial units, will make sure that the civilian population has been warned and will sustain no losses."

France, Rapid Deployment Staff Headquarters, *Order for Operation Mistral* (1995) (Orders given to the French Army forces for the purpose of conducting *Operation Mistral*: simulated military operations based on the right to legitimate defence or the execution of a United Nations' mandate)

p. 4: These instructions include the duty to warn approaching ships or aeroplanes, or those violating a zone of exclusion, or similar zone, before attacking.

III.b. Purposes of the warning

The main purpose of the warning is to allow non-combatants—and in particular women and children—the time to seek shelter and to give hostile military authorities the opportunity to evacuate the civilian population or to lead them to protected areas, such as shelters.

One may, however, find references to the duty of summoning and warning so as to forestall a confrontation. In this case, the objective is not to protect the hostile forces by giving them an opportunity to escape, but to try to avoid a confrontation.

Ex. *The Rules of Engagement of the Canadian Forces in Somalia* included such a measure.

Ex. The IFOR instructions on the use of force oblige military personnel to give warning before opening fire (*IFOR Instructions on the Use of Force*, first edition, 1995). The Rules of Engagement (R.o.E.) used in Bosnia anticipate the obligation of warning prior to any attack.

III.c. Customary nature of the obligation to warn

The affirmation of the customary value of the obligation to warn relies on the observation of a "general practice" by the States and the existence of *opinio juris*. The customary nature of the obligation makes it enforceable against all States, including those that would not be bound by the 1977 Protocol I.

"Opinio juris"

Lieutenant Colonel Burrus M. Carnahan, of the Organization of the Joint Chiefs of Staff—a consultative body of the American Secretary of Defense that includes the Chiefs of Staff of the three branches of the U.S. Armed Forces of the United States Air Force), in *American Society of International Law: Customary Law and Additional Protocol I to the Geneva Conventions for the Protection of War Victims: Future Directions in Light of the U.S. Decision Not to Ratify*, Proceedings of the 81st Annual Meeting, Boston, Massachusetts, 8-11 April 1987, p. 37.

ICRC

ICRC, *Memorandum on the Applicability of International Humanitarian Law*, 14 December 1990:

"Every feasible precaution will be taken to avoid civilian casualties or damage to civilian objects."

ICRC *Memorandum of Understanding on the Rules of International Humanitarian Law that must be respected by all States taking part in the operations of the International Security Assistance Forces in Afghanistan*, Geneva, ICRC, 11 January 2002:

"Every feasible precaution will be taken to avoid, or in any case minimise, civilian losses, injuries to civilians and damage to civilian objects."

UN, Circular of the Secretary General

UN, Circular of the Secretary General, ST/SGB/1999/13, 6 August 1999, *Respect of International Humanitarian Law by the United Nations Armed Forces*:

5.3 The United Nations' forces take every possible precaution to avoid and, in any case, minimise civilian losses, civilian injuries and any damage to civilian objects that could incidentally occur.

State practices

Second World War

Warning by Americans before dropping the atomic bomb on Hiroshima:

- Warning and threat formulated in the Potsdam Ultimatum, 27 July 1945
- Tracts were dropped, urging civilians to take shelter.

See: Antonio Cassese, *Violence et droit dans un monde divisé* (Violence and Law in a Divided World), Paris, Presses universitaires de France, 1990, p. 30):

Similar warnings were dropped from planes before other European cities were bombed during the Second World War.

See: Leslie C. Green, *The Contemporary Law of Armed Conflict*, Manchester, Manchester University Press, 2nd ed., pp. 160, 191, 353 (2000).

Gulf War

On the practice of the coalition States, see for example: Christopher Greenwood, "Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict," *The Gulf war 1990-91 in International and English Law*, Peter Rowe (ed. by), London/New York, Sweet & Maxwell, Routledge, 1993, pp. 83-86.

Iran/Iraq War

Urban Warfare - In this conflict, Iranian authorities generally warned the civilian population of targeted cities before launching an attack. Prior to every bombardment, military communiqués or War Information Centre statements were published: they listed the name of the cities that were to be attacked and demanded that the civilian population evacuate these cities and take refuge in one of the four Holy Cities.

The Iraqi President sent a warning to Iranian citizens declaring that, should the Iranian army open fire on Iraqi citizens from an Iranian city, that city would then be subject to a counterattack. Moreover, the President asked the Iranian population to dissuade their national armed forces from launching such attacks. There are other examples of the Iraqi practice in which ships were warned to dissuade them from approaching danger areas in the Gulf and to warn of Iraqi attacks against cities.

Falklands War

During this conflict, British forces warned that they intended to bombard Goose Green and specified that such a warning was being issued in accordance with the applicable law.

See: Leslie C. Green, *The Contemporary Law of Armed Conflict*, Manchester, Manchester University Press, 2nd ed., p. 157 (2000).

Rwanda

Association rwandaise pour la défense des droits de la personne et des libertés

publiques (ADL) [Rwandese Association for a Individual Rights and Public Liberties], *Rapport sur les droits de l'homme au Rwanda [Report on Human Rights in Rwanda]*, Kigali, 1993. In February 1993, prior to the attack on the city of Kigali, F.P.R. soldiers warned the civilian population of the imminent attack and urged them to evacuate the city.

Israel/Lebanon

During the "Peace in Galilee" operation in 1982 and other operations in Lebanon, the Israelis dropped tracts on the cities. They also used radios and loudspeakers to encourage the civilian population to leave the target areas.

Operation "Grapes of Wrath" (1996) - use of a radio controlled by the Israeli Armed forces to broadcast bombing threats, to set a deadline so that the inhabitants would leave, and to declare that, beyond that date, Israeli forces would consider anyone remaining as legitimate targets. As a result, about a quarter of the inhabitants (over 100,000) left the targeted areas (Report of the Secretary-General on the United Nations Interim Force in Lebanon, p. 3, § 12)

During a meeting of the Security Council, the Lebanese Representative reported that on Friday, 12 April, the Israelis warned the Lebanese that they had to evacuate their homes in 40 villages and towns in southern Lebanon. A massive migration followed these warnings. On Saturday and Sunday, 13 and 14 April, other warnings were given to evacuate the cities of Nabatiye, in western Bekaa and the city of Tyre (Security Council, 3653rd meeting, Monday, 15 April 1996, S/PV.3653 and Corr 1, p. 3).

Practice of the United Nations Forces

Korea

A.P.V. Rogers, "Law on the Battlefield," Melland Schill Studies in International Law, Manchester University Press, Manchester and N.Y., 1996, p. 55:

UN forces occasionally gave advance warning of aerial bombardments during the Korean War, from 1950 to 1953.

ONUSOM II

Médecins Sans Frontières stated that ONUSOM II forces warned NGOs and, in some cases, the civilian population, before launching an attack in an urban area (1993 M.S.F. Report and 1993 M.S.F. Declaration).

IFOR

IFOR's instructions on the use of force by combatants only provide that a warning must be given before opening fire (*IFOR Instructions on the Use of Force*, 1st ed., 1995.).

III.d. Limitations and exceptions to the obligation to warn

A. Limitations

Obligation of means

According to the 1907 Hague Conventions, the obligation to warn is not absolute; it is an obligation of means, not an obligation of result:

The commander [...] *should do all in his power* to warn the authorities. (Article 26, Regulation of The Hague Convention of 1907 and Article 6 of the 9th Hague Convention; Article 16 of the Brussels Declaration, 1974).

However, this phrase has been excluded in applicable provisions of contemporary treaties.

The United Kingdom's *Manual of Military Law* contains a similar phrase (§ 291).

A form of it also appears in the U.S. *Army Field Manual* (§ 43).

Combatant safety: a commander's responsibility

The safety of the combatants serving under him is the commander's responsibility. This factor comes into play in the selection of targets, as well as in the implementation of the principle of proportionality and of the obligation to warn.

Combatant safety/proportionality/selection of targets

The declarations that Australia and New Zealand made at the time that the Protocols were ratified stipulate that the term "military advantage" implies a certain number of considerations including "the safety of the attacking forces."

U.S. Department of Defense, Report to Congress on the Conduct of the Persian Gulf War, loc. cit., p. 622:

"To the degree possible *and consistent with allowable risk to aircraft and aircrews*, aircraft and munitions were selected so that attacks on targets within populated areas would provide the greatest possible accuracy and the least risk to civilian objects and the civilian population... ."

British Defence Doctrine (JWP 0-01), published in 1996 by the British Ministry of Defence (MoD):

Targeting. [...] he [a commander] is entitled to take into account factors such as his stocks of different weapons and likely future demands, the timeliness of attack and *risks to his own forces*. *Nevertheless, there may be occasions when a commander will have to accept a higher level of risk to his own forces in order to avoid or reduce collateral damage to the enemy's civilian population.*

In its report, the ICTY Committee asked the following question:

To what extent is the military commander required to expose his forces to danger in order to limit civilian losses and damage to civilian objects? (§ 49)

According to the Committee, the answer to this question is not a simple one. A case-by-case inspection must be made, and the solution can vary widely, depending upon the experience and the values of the person who decides to attack. The values in question may be those of a "reasonable commander"—a criteria that can apply at least in the most flagrant situations (§ 50).

Safety of combatants/obligation to warn

One passage in the International Amnesty report, which was included in the ICTY Committee report (§ 77), states:

"NATO representatives in Brussels stated to Amnesty International that no specific warning had been given in order to preserve the security and life of the pilots" (p. 44)

The commander's duty to ensure the safety of the combatants serving under him also appears in certain declarations of interpretations relating to Article 50 of Protocol I, which were made by the States at the time of their adherence:

France: § 9 of the reservations and declarations made by France to Protocol I, annexed to Order 2001-565 of 25 June 2001, announcing publication of the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted in Geneva on 8 June 1977, in the *Journal Officiel (J.O.)*, no. 150 of 30 June 2001, p. 10409.

United Kingdom: Reservations and declarations of the United Kingdom dated 2 July 2002, §§ (c) and (h).

See also: the comment made by Lieutenant Colonel Burrus M. Carnahan, in *The Sixth Annual American Red Cross...*, *op. cit.*, p. 506.

B. Exceptions

a) Surprise, Assault

Sometimes, an exception to the obligation to warn is provided for in some instruments in cases of assault (or surprise attack), or when surprise is an element essential to the success of the attack. The warning is then excluded for considerations of military necessity, or more precisely, because it would be militarily counterproductive.

Regulation of The Hague, Article 26.

United Kingdom, *Manual of Military Law*, *op. cit.*, § 291.

Canadian Military Manual, *op. cit.*, p. 4-4, § 29.

United States, *Field Manual*, *op. cit.*, § 43.

b) Circumstances

Article 57 § 2 (c) of Protocol I requires a prior warning, "*unless the circumstances do not allow it.*"

This phrase somewhat reinforces the obligation to warn.

This phrase is found in *Protocol II relating to the use of landmines* of the 1980 Convention, in its 1980 version, as amended in 1996, and in the *Canadian Military Manual*, p. 4-4, § 29).

According to the ICRC *Commentaries on the Additional Protocols*:

"In bombardments where projectiles are fired either from long range or by airships, the warning can present some inconveniences when the suddenness of the attack is a condition of its success. For this reason, the rule is accompanied by a derogatory clause: "unless the circumstances do not allow it" (C.I.C.R., *Commentaries on the Additional Protocols*, *op. cit.*, p. 705, § 2223).

More lenient phrasing:

- The *Rules of Engagement of the Canadian Forces in Somalia* imposed a warning only "when the delays and the conditions permit it."
- The United Kingdom's *Manual of Military Law* (1958) states: "If military demands permit" (§ 291).

c) Absence of civilians

The authorities' obligation to warn does not apply when there are no civilians in the area threatened with bombardment, if the attack targets only combatants.

United Kingdom, *Manual of Military Law*, § 291.

United States, *Field Manual*, § 43.

Canadian Military Manual, p. 4-4, § 29.

III.e. The obligation to warn "in due time" and "by adequate means"

(See: **State practice** and **Practice of UN forces**, above)

Contrary to the Regulation of The Hague (Article 26), the 1977 Protocol I requires a warning "in due time" and "by adequate means."

A warning "in due time" and "by adequate means" does not require that the warning be given to the concerned authorities. A direct warning to the population is considered sufficient (warning shots, tracts dropped out of a plane, radio messages, loudspeaker messages, etc.)

A certain practice shows that the warnings often consist merely of general declarations, announcing that attacks will target a particular type of facility or building, insofar as specific warnings would provide hostile forces with too much

information. It is thought that it suffices to instruct civilians (via tracts, radio messages, etc.) to remain at home, and to stay some distance away from military objectives.

According to military manuals and doctrine, the obligation to warn in due time and by adequate means applies based on *common sense*, in light of *all applicable factors*, and a warning is not compulsory when the *proposed military operation* or *safety of the combatants* could thereby be seriously compromised.

Invoking surprise, or risks that might be incurred by combatants makes very little sense when the attacker enjoys absolute aerial supremacy. In general, the warning is given shortly before the attack so as not to give the adversary the time to evacuate the targeted facilities.

III.f. Obligations of the commander when the civilian population does not heed the warning

Does the warning relieve the attacker of his obligation to take all necessary precautions in respect of the civilian population? The letter and spirit of the Geneva Conventions and of the Protocols additional thereto impose a negative response. In particular, the obligation remains to respect the prescriptions of Article 57 and the principle of proportionality.

Precedent

Before the bombardments of southern Lebanon started on April 11, 1996, the Israeli Armed forces warned the civilian populations, stating that any inhabitants who would remain in the delimitation area after a certain date would be considered as legitimate targets. A report by the UN Secretary General raises the issue that, in spite of such warnings, a large percentage of civilians remained in the area. However, the Israeli armed forces did not strike the area, which they considered to be a firing range. They restricted their attacks to suitable military targets, because they have been known in the past—and recently—to have perpetrated hostile fire or hostile acts.

IV. ADEQUACY OF MEANS USED TO ACHIEVE THE DESIRED END: PRECAUTIONS IN ATTACK

In its reply to Amnesty International, dated May 17, NATO affirmed that it had done "all in [its] power to avoid civilian losses and collateral damages..." (Amnesty International Report, p. 39), in accordance with the prescriptions of Article 57 (*Precautions in attack*) of the 1977 Protocol I.

The question arises as to whether bombarding radio and television facilities is the only foreseeable means.

Indeed, according to § 2 of Article 52 of Protocol I, the *destruction* of a military objective is not necessarily the ultimate goal of the attack; it may suffice to take it over or *neutralise* it. First of all, this is justified from a military perspective in terms of economy and concentration of means, since annihilation of a military objective implies the destruction of materials and munitions; from then on, "the potential of destruction must only be used where militarily necessary." This is particularly justified from a humanitarian perspective, with a view toward "minimizing incidental loss or civilian life, injury to civilians... [selon ma source]" (Article 57 § 2 [a] [ii]).

Give this, should not other solutions than bombardment be favoured, insofar as possible, such as scrambling radio broadcasts?

There have been precedents in which neutralising radio transmissions was either considered (Rwanda), or carried out (Somalia), by scrambling broadcasts.

Rwanda/The RTLM Affair

Human Rights Watch and the Fédération Internationale des Ligues des Droits de l'Homme (FIDH) [International Federation for Human Rights (IFHR)] denounced the continued operation of the RTLM and resorted to scrambling. *Aucun témoin ne doit survivre. Le génocide au Rwanda*, Karthala publishers, Paris, 1999, pp. 33-34.

The *Belgian Report* on the Rwanda genocide reveals that the UN had the opportunity to scramble the RTLM, as it could not suppress it *manu militari*; the report also mentioned operations in Somalia that planned to scramble radio broadcasts. (Rapport de la Commission d'enquête parlementaire du Sénat de Belgique sur les événements du Rwanda, 1997) [Report of the Belgian Senate's Parliamentary Commission of Inquiry into the Events in Rwanda, 1997].

V. PROTECTION OF RADIO AND TELEVISION FACILITIES AS CIVILIAN OBJECTS

V.a. Sources of the prohibition against attacking civilian objects

Article 23 (g), 25 and 27 of the supplementary *Regulation to the Fourth Hague Convention relating to the laws and customs of land warfare* (1907).

Articles 1 and 5 of the *Ninth Hague Convention relating to bombardment by naval forces in wartime* (1907).

Articles 23, 53, and 147 of the *Fourth Geneva Convention* (1949).

Specific civilian objects, such as cultural goods, are protected by The Hague Convention of 1954 and its two Protocols.

Additional Protocol I of 1977 ensures the double obligation stated in Article 48: that a constant distinction must be made between civilian objects and military objectives, and consequently direct attacks only against the latter. Moreover, that civilian objects—like the civilian population—benefit from a general protection, whose modes are stipulated in Article 52 (*General protection of civilian objects*).

If Article 85 of Protocol I attributes the status of a war crime to an attack on a civilian population or on civilians, no similar provision has been made regarding civilian objects in general. However, an attack perpetrated against certain objects that have been granted special protection would constitute such a crime (Article 85 § 3 [c] and [d], Article 85 § 4 [d]).

Additional Protocol II of 1977: A similar general protection towards civilian objects does not appear in the 1977 Protocol; only some goods, of a particular importance for the civilians, are granted with specific protection:

- Medical units and means of casualty transportation (Article 11);
- Objects indispensable to the civilian population's survival (14);
- Works and installations containing dangerous forces;
- Cultural objects and places of worship (Article 16).

To evoke the existence of a general protection of civilian objects during a period of internal armed conflict, it must be considered in the context of customary law. According to the ICTY Appeal courts, in the *Tadic* case:

"It is undeniable that some customary rules have surfaced to govern internal conflicts. These rules [...] cover some areas such as [...] the protection of civilian objects, in particular the cultural goods "(ICTY, *Appeal courts, ruling relative to the defence appeal concerning the preliminary issue of incompetence*, in *Prosecutor v. Dusko Tadic, alias "Dule,"* 2 October 1995, Case No. IT-94-1-AR72, § 127).

Article 3 § 7 of Protocol II relating to the prohibition or limitation on the use of landmines, booby traps and other devices, as amended on May 3, 1996 (Protocol II to the 1980 Convention).

The Statute of the International Criminal Court includes in its list of war crimes likely to be committed in an *international armed conflict*:

- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (Article 8 § 2 [a] [iv]);
- Intentionally directing attacks against civilian objects; that is, objects which are not military objectives (Article 8 § 2 [b] [ii]); and
- Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives (Article 8 § 2 [b] [v]).

Within the scope of the same Statute, the following points also constitute crimes of war, in the context of an *international or internal armed conflict*:

- Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict (Article 8 § 2 [b] [iii]. and Article 8 § 2 [e] [iii]);
- Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives (Article 8 § 2 [b] [ix] and Article 8 § 2 [e] [iv]);
- destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war (Article 8 § b) xiii and 8 § 2 [e] [xii.];
- Pillaging a town or place, even when taken by assault (Article 8 § 2 [b] [xvi] and Article 8 § 2 [e] [v]); and
- Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law (Article 8 § 2 [b] [xxiv] and Article 8 § 2 [e] [ii]).

V.b. Definition of "civilian objects"

As it does for "civilian," the 1977 Protocol I gives a definition of "civilian objects" *a contrario*: "Civilian objects are all objects which are not military objectives" (Article 52 § 1).

At best, three examples of civilian objects are specified in Article 52 § 3: a place of worship, a house and a school.

This method of defining by omission offers at least the advantage of avoiding overlapping concepts and it covers all objects. The same definition is found in Article 2 § 5 of the *Protocol relating to the prohibition or limitation on the use of landmines, booby traps and other devices* (Protocol II to the 1980 Convention), to Article 2 § 7 of the same Protocol, as amended on May 3, 1996 and to Article 1 § 4 of the *Protocol relating to the prohibition or limitation of the use of incendiary weapons* (Protocol III to the 1980 Convention).

In the same way, the ICTY Committee, within the scope of the first condemnation for unlawful attacks, in the *Blaskic* case, defined the civilian object as "all objects that cannot be lawfully considered as military objectives" (ICTY, Hp. of 1st inst. I, judgement, *Prosecutor v. Tihomir Blaskic*, March 3, 2000, Case No. IT-95-14-T, § 180).

See the definition of "military objective" (above).

Presumption of civilian use of an object, in case of doubt

Within the framework of Article 52, § 3 of Protocol I, in case of doubt, objects that are commonly recognised as being of a civilian nature benefit from a *civilian use presumption*:

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

Also see Article 3 § 8 (a) of the *Protocol relating to the prohibition or limitation on the use of landmines, booby traps and other devices*, as amended on May 3, 1996.

Objects benefit from this very presumption even when they are located in contact areas. Evidently, this presumption can be reversed, but there again military staff must act in accordance with the precautionary measures provided for in Article 57 (*Precautions in attack*), and take into consideration the Protocol's general objective, which is to protect the civilian population.

This presumption, like the presumption provided for in Article 50 § 1 in favour of civilians, is a new rule, in advance on common law, and would very significantly contribute to the protection of objects and people, if it were respected.

In its report to Congress on the conduct of hostilities during the Gulf War, the U.S. Department of State clearly made it known that it interpreted paragraph 3 of Article 52 merely as a conventional rule, not as a codification of the customary practice of States (*U.S. Department of Defense, Report to Congress on the Conduct of the Persian Gulf War...*, *op. cit.*, *International Legal Materials*, Vol. 31 [3], May 1992, p. 627).

V.c. Customary nature of the rule prohibiting attacks on civilian objects

Elements relating to *opinio juris* and to State practice attesting to the customary nature of the rule prohibiting attacks on civilian objects, can be found in both international, as well as internal, armed conflicts. This rule would therefore be enforceable under all circumstances, in all States of the international community, including those that are not parties to the 1977 additional Protocols.

"Opinio juris" and the practice of States involved in international armed conflicts

Elements of *opinio juris* and of practice attesting to the customary nature of the rule prohibiting attacks on civilian objects within the context of an international armed conflict:

Diplomatic Conference of Geneva of 1974-1977

Declaration of the Mexican delegation (*Proceedings VI*, p. 192, CDDH/SR.41, Appendix (Mexico)).

United States

Remarks made by Michael J. Matheson Legal Adviser attached to the State Department of the United States, in *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law...*, op. cit., p. 436).

U.S. Department of Defense, Report to Congress on the Conduct of the Persian Gulf War..., loc. cit., p. 622.

United States

Field Manual, FM 27-10, The Law of Land and Warfare, 1956, §§ 58 and 393 (a).

United Kingdom

United Kingdom, War Office, WO Code 12333, *The Law of Land and Warfare*, being Part III of the *Manual of Military Law, 1958, §§ 288, 589, 590, 616.*

France

Order 75-675 defining the *Règlement de discipline générale dans les armées* [Regulation of general discipline in the French armies], July 28, 1975, Article 9 (b), *Respect des règles du droit international applicable aux conflits armés* [Respect of the Rules of International Law Applicable to Armed Conflicts] (Article 9 [b], amending the Order of July 12, 1982).

Sweden

Written Declaration of the Government of Sweden, June 20, 1995, p. 3 (ICJ., op. cit., 8 July, 1996).

UN Secretary General

Conflict in former Yugoslavia

UN, *Final Report of the Commission of Experts Constituted in Accordance with Resolution 780 (1992) of the Security Council*, appended to the letter dated May 24, 1994, addressed to the President of the Security Council by the Secretary General, Doc. UN S/1994/674, May 27, 1994, § 206.

Letter dated 24 August, 1992, addressed to the President of the Security Council by the Acting Chargé d'Affaires of the Croatia Permanent Mission to the United Nations, S/24481 (25 August, 1992), Annex, pp. 2-4.

UN, Circular of the Secretary General, ST/SGB/1999/13, 6 August 1999, Article 5.1.

Human Rights Commission

Res. 1993/7 (23 February 1993), *Assessment of Human Rights in Bosnia-Herzegovina*, § 10; Res. 1994/75 (9 March 1994), *Assessment of Human Rights in Bosnia-Herzegovina*, § 1; Res. 1995/89

(8 March 1995), *Assessment of Human Rights in the Republic of Bosnia-Herzegovina, the Republic of Croatia and in the Federal Republic of Yugoslavia (Serbia and Montenegro)*, § 5.

United Nations General Assembly

A/RES/50/193 (11 March 1996), *Assessment of Human Rights in the Republic of Bosnia-Herzegovina, the Republic of Croatia and in the Federal Republic of Yugoslavia (Serbia and Montenegro)*, § 5.

Final Report (ICTY), *op. cit.*, § 55.

Iraq-Iran War

Security Council, Res. 540 (31 October 1983), preamble, 3rd and 5th cons., and § 2; Res. 552 (1 June 1984), Preamble. 6th cons. and § 2;

Declaration of the President of the Security Council of March 5, 1985, Doc. UN S/17004; Declaration of the President of the Security Council of January 16, 1987, Doc. UN S/18610; Declaration of the President of the Security Council of March 16, 1988, Doc. UN S/19626.

"Opinio juris" and the practice of States involved in non-international armed conflicts

Even though an internal armed conflict was taking place on their territory, some States made a commitment to respect civilian objects.

Congo

Public declaration of October 21, 1964 by the Prime minister of the Democratic Republic of Congo (mentioned by ICTY, Appeals Court, *Decree relating to the appeal of the defending party concerning the prejudicial exception of incompetence, Prosecutor v. Dusko Tadic, alias "Dule,"* 2 October 1995, Case No. IT-94-1-AR72, § 105.)

Non-international phase of the conflict in the former Yugoslavia

Memorandum of Understanding on the implementation of the applicable rules of International Humanitarian Law, by the Republic of Croatia, the Republic of Serbia and by the Armed Forces of the FYR, Geneva, November 27, 1991, § 6.

Agreement to Respect the Rules of International Humanitarian Law, by the plenipotentiaries representing the parties in the Bosnia-Herzegovina conflict, May 22, 1992, § 2.5.

Declaration of the Secretary General to the Security Council of June 26, 1992, Doc. UN S/24201 (June 29, 1992).

Letter of 5 October 1992 addressed to the President of the Security Council by the representatives of Saudi Arabia, Egypt, Pakistan, the Islamic Republic of Iran, Senegal and Turkey, Doc. UN S/24620 (Oct. 6, 1992).

On numerous occasions, attacks on civilian objects during non-international armed conflicts aroused swift reactions among representatives of the international

community, such as in the cases of the Sudanese, Rwandan, Somalian, and Angolan or Burundese conflicts.

Sudan

Human Rights Commission:

E/CN.4/RES/1995/77, 8 March 1995, *Assessment of Human Rights in Sudan*, 8th preambular recital and § 16;

E/CN.4/RES/1996/73, 23 April 1996, *HR Situation in Sudan*, 9th preambular recital and § 12;

E/CN.4/RES/97/59, *id.*, 15 April 1997, § 15;

E/CN.4/RES/2000/27, 18 April 2000, *Assessment of Human Rights in Sudan*, §§ 2 (v), 3 (b) and 4 (j).

United Nations General Assembly:

A/RES/51/112 (5 March 1997), *Assessment of Human Rights in Sudan*, 5 March 1997, 7th preambular recital and § 8.

A/RES/55/116 (12 March 2001), *Assessment of Human Rights in Sudan*, §§ 2 (a) (iv), 3 (e), 4 (h).

Rwanda

United Nations General Assembly:

A/RES/49/206 (23 December 1994), § 3.

ICRC/Somalia

Somalia: ICRC appeals for compliance with International Humanitarian Law (Press release 93/17, 17 June 1993 in ICRC, *Public statements issued by the ICRC on its operations in Somalia 1989-1993*, April 1997, Geneva, 1997).

ICRC/Angola

ICRC, ***Memorandum of Understanding on the Respect of International Humanitarian Law in Angola***, 8 June 1994, I.R.R.C., 827, Sept.-Oct. 1997, p. 539.

ICRC/Burundi

Declaration for standards of humanitarian behaviour: a minimum of humanity in situations of internal violence" (1994), § III., I.R.R.C., 826, July-Aug. 1997, pp. 431-432.

San Remo Institute for International Humanitarian Law

International Institute of Humanitarian Rights, *Declaration on regulations related to International Humanitarian Law on the conduct of hostilities in non-international armed conflicts* (1990), I.R.R.C., 785, Sept.-Oct. 1990, p. 440, § 6 and p. 426 (preliminary observations).

Instruments applicable to every armed conflict

The above-mentioned references specifically concern the regulation of immunity for civilian objects in the event of internal armed conflicts. The same rule is recorded in different instruments of unequal significance, each of which are intended to be indifferently applied to international, as well as non-international, armed conflicts, and are elements that contribute toward constituting *opinio juris communis*.

The prohibition to attack civilian objects falls within the scope of two aforementioned resolutions, about which the ICTY affirmed that they affirmed customary International humanitarian law applicable to every armed conflict, whether internal or international (ICTY, Appeal Court, *Order relating to the appeal of the defending party concerning the prejudicial exception of incompetence*, in *Prosecutor v. Dusko Tadic, alias "Dule,"* 2 October 1995, Case No. IT-94-1-AR72, §§ 101, 111 and 112.):

- Resolution of the Assembly of the League of Nations, dated September 30, 1938, entitled "*The protection of civilian populations against aerial bombardments in case of war,*" § 2;
- Resolution 2675 (XXV) of the United Nations General Assembly, dated 9 December 1970, on the "*Fundamental principles concerning the protection of civilian populations during a period of armed conflict,*" § 5.

Resolution of the Institute of International Law on *the distinction between military and non-military objectives in general, and the problems caused by the existence of massive destruction weapons* (1969), § 4 (resolution adopted by the Institute during its Edinburgh session, September 4-13, 1969, *Ann. I.D.I.*, 1969, Volume II, pp. 358-360).

ICRC, *Draft rules limiting the risks incurred by civilian populations in wartime* (1956), Article 6 al. 2 and Article 7.

ICRC and the League of Red Cross and Red Crescent Societies, *Fundamental Rules of Humanitarian Law Applicable in Armed Conflicts* (1978), § 7 (*I.R.R.C.*, 713, Sept.-Oct. 1978, pp. 247-249.)

The general obligation prohibiting an attack on civilian objects during an armed conflict is generally confirmed by the accumulation of protests against attacks on civilian objects or "protected objects" as defined in the Geneva Conventions. In view of the aforementioned declarations, to which many more may be added, attacks are prohibited on "civilian areas," "population centres of a civilian nature" and "residential areas," cities, villages, dwellings or buildings, schools, hospitals, medical centres and medical units, historic monuments, places of worship and cultural objects, etc.

V.d. Cessation of the protection of civilian objects

The aforementioned conventional provisions make it perfectly clear that the immunity enjoyed by civilian objects and protected objects is not absolute and that this immunity is waived if such objects are used to hostile ends. Thus, certain civilian objects (ships, planes, vehicles, buildings) housing military staff, military equipment or supplies, or objects that, in any manner, provide an effective contribution to the war effort incompatible with their civilian status, constitute legitimate targets.

In addition to the aforementioned conventional provisions, see Article 56 § 2 of Protocol I (*relating to the conditions of cessation of special protection granted to works and facilities containing dangerous forces*); Article 4 § 1, Article 8 § 1 (b), Article 11 of the *Convention for the protection of cultural goods in case of armed conflict* (1954) and Article 13 and 14 of the second Protocol addition to the said Convention (26 March 1999)

Elements of international practice or that reflect *opinio active juris* in this sense, namely the immunity conferred to certain protected objects:

Aforementioned resolution of the Institute of International Law (1969), § 4 (*Ann. I.D.I.*, 1969, Volume II, p. 360).

United Kingdom

The Declaration of the United Kingdom, when Protocol I of 1977 was being signed, reiterated in 1998 at the time of its ratification, relating to Article 53 (*Protection of cultural objects and places of worship*) of Protocol I.

United Kingdom, the War Office, *The Law of War and Land*, *op. cit.*, §§ 300-303.

United States

U.S. Department of Defense, Report to Congress on the Conduct of the Persian Gulf War, *loc. cit.*, pp. 622 et 626.

U.S. Field Manual, FM 27-10, The Law of Land and Warfare, 1956, § 45 a.

France

Article 9 (b) of the aforementioned *General Disciplinary Regulations in the French Armies*.

UN Secretary General

UN, Circular of the Secretary General, ST/SGB/1999/13, 6 August, 1999, *Respect of International Humanitarian Law by the United Nations Armed Forces*, § 9.3.

Statute of the International Criminal Court

Article 8 § 2 (b) (ix) and Article 8 § 2 (e) (iv).

All of these factors combined confirm that the International Humanitarian Law contains a customary rule according to which civilian objects must not be the object of attacks. These factors reveal an *opinio juris communis* as to the existence of this rule in common law, and its applicability to all armed conflict, whether international or internal. The general protection granted to civilian objects is, however, not absolute, insofar as the use of these objects for hostile ends instantly dissolves the immunity that they would otherwise enjoy.