

# A la guerre comme à la guerre:<sup>\*</sup> patterns of armed conflict, humanitarian law responses and new challenges<sup>†</sup>

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## **Abstract**

*Continuous transformation of armed conflict since the adoption in 1864 of the first international humanitarian law treaty compels international humanitarian law to adapt accordingly. These adaptations, through either customary law or new multilateral treaties, always have been towards greater protection, greater reach. As for treaty practice, international humanitarian law historically has been substantially revised every twenty-five to thirty years. This article links those revisions to specific conflicts which laid bare deficiencies in the existing law. What follows is thus a chronicle of conflicts with their most critical humanitarian issues. From this emerges a picture of the changing face of armed conflict since the middle of the nineteenth century. The article also considers recent challenges to international humanitarian law and speculates on possible responses.*

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\* French proverb, meaning that one has to go to war with the means available, and adapt to the circumstances.

† I dedicate this article to my friend, neighbour and colleague, physics professor Michael Wiescher, with whom I had the pleasure of co-teaching a course on nuclear warfare. An earlier version of this article is forthcoming in Jan Wouters and Sten Verhoeven (eds.), *Armed Conflicts and the Law*, 2007.

## Introduction

International humanitarian law (IHL), like most law, tends to develop *in response* to occurrences. Tracing the general principles of IHL – military necessity, humanity, proportionality and distinction – to particular events is impossible. Such is not the case with specific prohibitions or obligations stemming from them. This article sets out to identify historic events that decisively impacted upon the development of modern treaty-based IHL.<sup>1</sup> Historically, IHL has been substantially revised every twenty-five to thirty years by major new multilateral treaties. Explaining the historical context of these treaties and the rationale behind them is the principal goal of this paper. The evolution of customary IHL or a substantive analysis of IHL, on the other hand, is beyond its scope.<sup>2</sup> A recent *magnum opus* emphasizes the role of custom in responding to challenges to IHL.<sup>3</sup>

The overview here chronicles eleven armed conflicts spanning the development of modern treaty-based IHL, from its inception after the battle of Solferino of 1859 to its current application to the so-called global war on terror. For each conflict the most important humanitarian issue(s) and IHL response(s) are identified. Additionally, it seeks to detect unanswered challenges posed by more recent armed conflicts. As already stated, it is devoted almost exclusively to multilateral treaties, that is, international legal rules generated by the explicit consent of states. Other IHL sources, such as national legislation (e.g. military codes) and decisions of domestic and international tribunals – elements that are important to the formation of international custom – receive minimal consideration.

- 1 The continuous transformation of war – by whom war is fought, how war is fought, and why war is fought – has been described by military historians John Keegan and Martin van Creveld, by political scientist Mary Kaldor, and by writer-academic-politician Michael Ignatieff. This article owes much to their work. Sir John Keegan is the author of numerous books on the history of war, including *The Face of Battle*, Viking Books, New York, 1976, *The Second World War*, Penguin, New York, 1989, *A History of Warfare*, 1993, and *The First World War*, Alfred A. Knopf Inc., Westminster, Maryland, 1998; from van Creveld I consulted *The Transformation of War*, Free Press, New York, 1991, from Kaldor *New and Old Wars: Organized Violence in a Global Era*, Polity Press, Cambridge, 1999, and from Ignatieff *The Warriors' Honor: Ethnic War and the Modern Conscience*, Metropolitan Books, New York, 1997, and *Virtual War: Kosovo and Beyond*, Metropolitan Books, New York, 2000. Another important source has been the online treaty database of the International Committee of the Red Cross (ICRC), available with comments at <<http://www.icrc.org>> (last visited 27 November 2006). Extremely useful for studying the changing face of global violence and posing major challenges to conventional wisdom is *Human Security Report 2005: War and Peace in the 21st Century*, produced by the Human Security Centre of the University of British Columbia, Canada.
- 2 See e.g. Leslie Green, *The Contemporary Law of Armed Conflict*, 2nd edn, Manchester University Press, New York, 1993; Michael Howard, George Andreopoulos and Mark Shulman (eds.), *The Laws of War: Constraints on Warfare in the Western World*, Yale University Press, New Haven, 1994; Marco Sassoli and Antoine Bouvier, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law*, ICRC, Geneva, 1999; Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 3rd edn, ICRC, Geneva, 2001; Anthony Rogers, *Law on the Battlefield*, 2nd edn, Manchester University Press, Manchester and New York, 2004.
- 3 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, 2 vols., ICRC and Cambridge University Press, Cambridge, 2005.

Although some of the armed conflicts discussed below are poles apart, it should be noted that contemporary IHL knows only two categories: international armed conflict and non-international armed conflict.<sup>4</sup> Political scientists and (military) historians use additional categories or labels, some of which are considered below because they help us better understand the humanitarian issues and challenges posed over time by armed conflict.

## On wars small and big, old and new

Military historians like to distinguish between *small* and *big* wars. What do they mean? The distinction refers in essence to the various military endeavours of (former) empires such as France, Great Britain,<sup>5</sup> Russia or the United States.<sup>6</sup> Writing from an American perspective, Max Boot discerns at least four types of small wars: punitive (to punish attacks on American citizens or property), protective (to safeguard American citizens or property), pacification (to occupy foreign territory) and profiteering (to grab trade or territorial concession).<sup>7</sup> The *Small Wars Manual* of the US Marine Corps (1940) offers the following definition:

As applied to the United States, small wars are operations undertaken under executive authority, wherein military force is combined with diplomatic pressure in the internal or external affairs of another state whose government is unstable, inadequate, or unsatisfactory for the preservation of life and of such interests as are determined by the foreign policy of our Nation.<sup>8</sup>

How do small wars differ from the United States' big conventional wars such as the War of Independence, the Civil War, the First and Second World Wars, the Korean War and the Gulf War (1991)? The manual states that "In a major war, the mission assigned to the armed forces is usually unequivocal – defeat and destruction of the hostile forces." Big wars usually have clear battle lines separating the combatants. And there is usually a clear beginning and end. "This is seldom true in small wars", the manual continues. In these encounters, US forces

4 In the Middle Ages, Western Christendom distinguished between *bellum romanum* and *bellum hostile* (Michael Howard, "Constraints on warfare", in Howard et al., above note 2, pp. 2–5). The former could be waged against "outsiders, infidels, and barbarians". No holds were barred and all those designated as enemy, whether bearing arms or not, could be indiscriminately slaughtered. Within Christendom, however, *bellum hostile* – war characterized by constraints – was the norm. The applicability of what is now called IHL depended on who the enemy was. This self-serving distinction may seem archaic in the 21st century, but later in this article it will be shown that "terrorists" are often characterized as today's "outsiders, infidels, and barbarians."

5 For Britain see e.g. Hew Strachan (ed.), *Big Wars and Small Wars*, Routledge, London, 2006; see also <<http://www.britains-smallwars.com/>> (last visited 27 November 2006).

6 A very interesting read is Walter Laqueur, *Guerrilla: A Historical and Critical Study*, Weidenfeld & Nicolson, London, 1977, ch. 2: "Small wars and big armies".

7 Max Boot, *Savage Wars of Peace: Small Wars and the Rise of American Power*, Basic Books, New York, 2002, pp. xv–xvi.

8 All quotes from the *Manual* are taken from Boot, *ibid.*, p. 284. The *Small Wars Manual* (492 pp.) is available from the website of the Air War College: <<http://www.au.af.mil/au/awc/awcgate/swm/index.htm>> (last visited 27 November 2006).

have a more ambiguous mission, “to establish and maintain law and order by supporting or replacing the civil government in countries or areas in which the interests of the United States have been placed in jeopardy”. Small wars are messier, lesser conflicts: the adversary skirmishes, snipes, ambushes and sets off booby traps; often there is no clear distinction between combatants and non-combatants. As Bruce Berkowitz notes, “It’s tough to think of any small war that ended with a triumphal parade, partly because few small wars are popular, and partly because it is often hard to tell if the war is really over. Small wars can drag on indefinitely.”<sup>9</sup>

In *New and Old Wars: Organized Violence in a Global Era* (1999), Mary Kaldor argues that during the 1980s and 1990s a new type of organized violence has developed, especially in Africa and eastern Europe. Old wars were an activity of the centralized, “rationalized”, hierarchically ordered, territorialized modern state. As that type of state gives way to new types of polity emerging out of new global processes, so war as currently conceived is, she claims, becoming an anachronism. The new wars, she observes, involve a blurring of the distinctions between war, organized crime and large-scale violations of human rights, between internal and external, public and private, military and civil, and ultimately between war and peace itself.<sup>10</sup>

Kaldor contrasts the new wars with earlier wars in terms of how they are financed, their goals and their methods.<sup>11</sup> Only her argument regarding methods will be considered here, because financing and goals do not concern IHL. First, she observes, today’s ratio of civilian to military casualties (8:1) is almost the reverse of what it was a century ago.<sup>12</sup> Behaviour that was once proscribed by IHL, such as atrocities against non-combatants, sieges and destruction of historic monuments, now constitutes an essential component of the strategies of the new mode of warfare. Second, she notes, “In contrast to the vertically organized hierarchal units that were typical of “old wars”, the units that fight the new wars include a disparate range of different types of groups such as paramilitary units, local warlords, criminal gangs, police forces, mercenary groups and also regular armies including breakaway units of regular armies.” “In organizational terms, they are highly decentralized and they operate through a mixture of confrontation and co-operation even when on opposing sides.”<sup>13</sup>

This article will later discuss the principal humanitarian issues raised by these new wars. As Kaldor contends, old wars were an activity of the centralized, “rationalized”, hierarchically ordered, territorialized state, a polity which reached

9 Bruce Berkowitz, *The New Face of War: How War will be Fought in the 21st Century*, The Free Press, New York, 2003, pp. 102–3.

10 Kaldor, above note 1, ch. 1. See along the same lines Carolyn Nordstrom, *Shadows of War: Violence, Power, and International Profiteering in the Twenty-First Century*, University of California Press, Berkeley, 2004.

11 Kaldor, above note 1, pp. 6–12.

12 These figures are contested in *Human Security Report 2005*, above note 1, p. 75 (“The myth of civilian war deaths”).

13 Kaldor, above note 1, p. 8.

its zenith in the nineteenth century. The adoption of the very first IHL convention can be traced back to one of the greatest battles of that century: the battle of Solferino of 1859.

## War as a tournament: Solferino

A most graphic and literary eyewitness account of battle is *A Memory of Solferino* (1862) by Henry Dunant.<sup>14</sup> While on a business mission to northern Italy this Swiss notable chanced to witness at Solferino the battle between the allied armies of Napoleon III and King Victor Emmanuel II of Sardinia and the army of the Austrian emperor Franz Joseph:

On that memorable twenty-fourth of June [1859], more than 300,000 men stood facing each other; the battle line was five leagues long, and the fighting continued for more than fifteen hours ... Among all the troops which are to take part in the battle, the French Guard affords a truly imposing sight. The day is dazzlingly clear, and the brilliant Italian sunlight glistens on the shining armour of Dragoons and Guides, Lancers and Cuirassiers ... What tragic, dramatic scenes of every kind, what moving catastrophes were enacted! In the First African Light Infantry Regiment, besides Lieutenant-Colonel Laurans des Ondes who fell suddenly, mortally wounded, Second Lieutenant de Salignac Fenelon, only twenty-two years old, broke an Austrian square, and paid with his life for his brilliant exploit. Colonel de Maleville, at the farm of Casa Nova, found himself outnumbered and his battalion's ammunition gone. Seizing the regiment's flag, he rushed forward in the face of terrific fire from the enemy, shouting: "Every man who loves this flag, follow me!" His soldiers, weak with hunger and exhaustion, charged behind him with lowered bayonets. A bullet broke de Maleville's leg, but in spite of cruel suffering he got a man to hold him on his horse and remained in command ... When the sun came up on the twenty-fifth, it disclosed the most dreadful sights imaginable. Bodies of men and horses covered the battlefield; corpses were strewn over roads, ditches, ravines, thickets and fields; the approaches of Solferino were literally thick with dead.<sup>15</sup>

*A Memory of Solferino* is more than just an eyewitness account of one of the bloodiest battles of the nineteenth century. Dunant also made proposals for the future, in an appeal aimed at preventing a repetition of the horrific suffering of some 40,000 wounded lying in agony for days. He began a campaign that was eventually to result in the establishment of the International Red Cross and the adoption in 1864 of the first international humanitarian law treaty, the Geneva

14 Original title: *Un souvenir de Solf erino*; English translation published in 1986 by the ICRC, by courtesy of the American Red Cross; both the French and English version are available from the ICRC website. Page references are to the English printed version.

15 *Ibid.*, pp. 16–41.

Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. The roots of modern IHL are thus traceable to the mid-nineteenth century, and it was one person's actions rather than popular indignation or governmental initiative that sparked its development.

Until then all the treaties concerning the protection of war victims were circumstantial and binding only for the signing parties. These agreements were purely military-designed and based on strictly binding mutual obligations, and they were in force only for a specific armed conflict. The 1864 Geneva Convention laid the foundations for contemporary humanitarian law, characterized by standing written rules of universal scope to protect the victims of conflicts and multilateral in nature, open to all states.

Modern war theory dates back to the same period, with the publication in 1832 of Carl von Clausewitz's great work *Vom Kriege* (On war). Clausewitz's ideas were rooted in the reality that ever since the Peace of Westphalia of 1648, war had been waged overwhelmingly by *states*.<sup>16</sup> Westphalia had ended the Thirty Years War and ushered in the modern international system based on the nation-state. Prior to that, wars in Europe had been fought by diverse social entities: barbarian tribes, the Church, feudal barons, free cities, even private individuals. By the nineteenth century, however, war was seen as something that could be waged only by the state: *governments* made war, their instrument for doing so consisted of *armies*, and the *people* were excluded from it as far as possible.<sup>17</sup> Hence the central idea of what van Creveld calls "trinitarian war" is that the military constitute a separate legal entity which, alone among the organs of the state, is entitled to wage war.<sup>18</sup>

The promulgation in 1863 of the Lieber Code (see below), and in 1864 of the original Geneva Convention, heralded the era of "civilized" warfare between sovereign "civilized" nations, that is, nations that engage in ordered diplomacy, enter freely into legally binding treaties and govern effectively within their territory. Therefore, and despite the universal aspirations of the emerging international humanitarian law, the coming colonial wars against "savages" in the so-called "Scramble for Africa" (1884–1914) were waged with little restraint. Sure enough, "Exterminate all the brutes!" was to become one of the most famous sentences in European colonial literature.<sup>19</sup>

Civilized warfare went hand in hand with an unrestricted *jus ad bellum*, even among "civilized" nations. "The law of nations allows every sovereign government to make war upon another sovereign state",<sup>20</sup> and war was a

16 For a critique of Clausewitz, see Keegan (1993), above note 1, pp. 3–60.

17 Van Creveld, above note 1, p. 39.

18 *Ibid.*, p. 35.

19 Joseph Conrad, *Heart of Darkness*, Penguin Modern Classics, Harmondsworth, 1973 (1902), p. 71. For an inquiry into the origin and meaning of this one phrase see Sven Lindqvist, *'Exterminate all the Brutes' – One Man's Odyssey into the Heart of Darkness and the Origins of European Genocide*, The New Press, New York, 1996 (English translation; original Swedish 1992).

20 Article 67 of the Lieber Code (see below).

legitimate “means to obtain great ends of state”.<sup>21</sup> It was only around the turn of the century that international law began to regulate – and limit – the right to use force in international relations.

The 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was a direct response to Henry Dunant’s appeal. Laid down in that convention and maintained by subsequent Geneva Conventions were the obligations of (i) providing relief to the wounded without any distinction as to nationality, (ii) respecting the neutrality (inviolability) of medical personnel and medical establishments and units, and (iii) respecting the distinctive sign of the red cross on a white background.

During this same period Abraham Lincoln, the president of the United States, promulgated the Instructions for the Government of Armies of the United States in the Field (or Lieber Code, after its author Professor Francis Lieber).<sup>22</sup> Prepared during the American Civil War,<sup>23</sup> the Code represents the first attempt to codify the laws of war. Although it is binding only on the forces of the United States, it largely corresponds to the laws and customs of war existing at that time. The Code formed the basis for the project of an international convention on the laws of war submitted to the Brussels Conference in 1874 and led to the adoption of the 1899 and 1907 Hague Conventions on land warfare.

Although it originated in the American Civil War, the Code primarily applies to (trinitarian) war between states. While the final section does deal with insurrection, civil war and rebellion, it was not incorporated into the said 1874 draft international convention. Not until after the Second World War was international regulation of armed conflict other than war between sovereign states introduced.

The first formal treaty regulating weaponry – the Declaration [of St Petersburg] Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight – stemmed from the invention, in 1863, by Russian military authorities of a bullet which exploded on contact with hard substances and whose primary object was to blow up ammunition wagons. In 1867 the projectile was modified so as to explode on contact with a soft substance. When used against human beings it was no more effective than an ordinary rifle bullet; it could put just one adversary *hors de combat*. Because of its design, however, it caused particularly serious wounds and would as such have been an inhuman instrument of war.<sup>24</sup> The St Petersburg Declaration of 1868, which has the force of law, led to the adoption at the Hague Peace Conferences of 1899 and 1907 of prohibitory

21 Ibid., Article 30.

22 The text of the Lieber Code is available on the ICRC website, <http://www.icrc.org> (last visited 1 December 2006).

23 Though President Lincoln never recognized the Confederate States’ claim to independence or sovereignty he did de facto recognize their belligerency and ordered that Confederates be treated as belligerents in war-related matters (e.g. affording prisoner-of-war status). The United States was thus willing to treat its own civil war for IHL purposes as if it were an international armed conflict. See Yair Looftstein, “The concept of belligerency in international law”, *Military Law Review*, No. 166, 2000, p. 109, at pp. 114–15.

24 Kalshoven and Zegveld, above note 2), p. 20.

declarations on expanding (or “dum-dum”) bullets and on the use of asphyxiating gases.

## Great war: the First World War

The idealistic turn-of-the-century Hague movement came to an abrupt end with the outbreak in 1914 of the First World War. What was so exceptional about it for it to be called the Great War or the “war to end all wars”?

It was the first large-scale industrialized conflict, and it gave birth to the concept of total war. Industrialized warfare added a new dimension to fighting: men now battled machines; combat became anonymous; new weapons of mass destruction, such as poison gas, were used for the first time; and problems of supply assumed unprecedented proportions. At sea, submarines produced a new kind of combat that was particularly cruel when used without restriction. Put together, new technology, mass warfare, and the surprising strength of national economies created a terrible impasse. Neither side could win a rapid victory, and thus the war continued. Under these circumstances, everything depended on the integration of armies in the field, navies at sea, and citizens on the home front. More than ever before, whole nations became integrated fighting units. This tendency underlay the idea of total war, although its theoretical fine-tuning took place only in the 1920s and 1930s.<sup>25</sup>

Early in the First World War civilized warfare gave way to total warfare, though the percentage of civilian casualties directly caused by the war (5 per cent) remained far below that of the Second World War (close to 50 per cent). From an international legal point of view, however, *jus ad bellum* restrictions adopted after the war are more important than the IHL responses. First the Covenant of the League of Nations (1919) and later, explicitly, the Kellogg-Briand Pact (1928)<sup>26</sup> condemned recourse to war for the solution of international controversies. No longer did the law of nations allow every sovereign government “to obtain [through war] great ends of state”, as provided for in the Lieber Code.<sup>27</sup> Moreover, it was intended that within the framework of the League the world would disarm and the arms trade be brought under control. Under these circumstances the development of IHL took second place to *jus ad bellum* restrictions and disarmament.

There were nonetheless some developments in IHL in response to the war. The use by both sides of various chemical agents (such as chlorine, phosgene and mustard gas) became one of the most feared, and longest remembered, horrors of

25 Roger Chickering and Stig Förster (eds.), *Great War, Total War. Combat and Mobilization on the Western Front, 1914–1918*, Cambridge University Press, Cambridge, 2000, pp. 6–7.

26 Also known as the Pact of Paris.

27 See note 24 above.



the war. The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare was adopted at the conference for the supervision of the international trade in arms and ammunition, held in Geneva under the auspices of the League of Nations in 1925. This by-product of the conference (also known as the Geneva Gas Protocol) turned out to be its only positive result.

Another major humanitarian issue of the First World War was the unprecedented number of prisoners of war (POWs). The Hague Regulations of 1899 and 1907 contained provisions concerning the treatment of POWs, but the war had revealed their deficiencies and lack of precision. The existing regulations did not, for example, provide for neutral inspection of prison camps, for the notification of prisoners' names or for correspondence with prisoners. Under ICRC auspices, the Convention relative to the Treatment of Prisoners of War was adopted in 1929. The most important innovations consisted in the prohibition of reprisals and collective penalties, the organization of prisoners' work, the designation, by the prisoners, of representatives and the control exercised by Protecting Powers.

In response to the experience of the First World War, the earlier Geneva Convention on the wounded and sick of armies in the field was also overhauled. The 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field contained provisions concerning the protection of medical aircraft and the use of the distinctive emblem in time of peace. Furthermore, the emblems of the red crescent and of the red lion and sun were recognized for countries already using those signs in place of the red cross. The provisions on repatriation of the seriously wounded and seriously sick prisoners were transferred to the convention on prisoners of war.

Far from marking the end of all wars, the Treaty of Versailles (also dubbed the *Diktat von Versailles*<sup>28</sup>) and unfinished business sowed the seeds of a truly total war barely twenty years later. These seeds began to sprout in the prelude to the Second World War – the Spanish Civil War.

## Passionate war:<sup>29</sup> the Spanish Civil War

Hitherto, international humanitarian law had been concerned only with *international* armed conflict, that is, war – whether declared or not – between (absolute) sovereign states.<sup>30</sup> As such IHL was ill-prepared for the approaching age

28 The Treaty of Versailles, which ended the First World War, imposed responsibility for the conflict on Germany. This entailed the loss of German territories and payments of huge reparations, which led to resentment among many Germans and undermined their acceptance of the new post-war regimes. The widespread dissatisfaction was used by Adolf Hitler, who denounced the treaty as a *diktat* (a decree/settlement imposed by the victorious nations).

29 Expression borrowed from Peter Wyden, *The Passionate War: The Narrative History of the Spanish Civil War, 1936–1939*, Simon & Schuster, New York, 1983.

30 But see note 22 and related text above on the Lieber Code, the American Civil War and the recognition of belligerency.

of eroding sovereignty in which many challenges were to come from without and *within*. The Spanish Civil War (1936–9) was a watershed in that it defied the prevailing legal notions of war.<sup>31</sup>

History calls it the Spanish Civil War, but it was no more a Spanish war or a civil war than the Vietnam war was a struggle between North and South Vietnam. In Spain the world was choosing sides for the years to come. The Republican *causa* stood against Hitler, the priests, the landowners, the military caste, the privileged. The opposing Nationalist *movimiento*, led by General Francisco Franco, lined up against Marxism, the labor unions, the land-hungry, the blasphemers. It was a holy war for both sides; the Great Divide of our age; the overture to fascism, the concentration camps, World War II. It was the rehearsal for Stuka dive-bombers, Molotov cocktails, total war against civilians. Never before had defenceless cities been set on fire by air raids. It was a war of protest. It brought to Republican Spain the most passionate young ideologues from fifty-five countries, some 50,000 dropouts of a committed time, including more than 3,000 American volunteers ... Stalin helped them with 1,000 pilots, with planes, tanks and more than 2,000 “advisers”. To the other side, Hitler contributed an entire air force with some 10,000 pilots and weapons specialists so that “Bolshevism will not take over Europe”. Mussolini, proclaiming victory “absolutely indispensable” to fascism, volunteered 75,000 Italian troops. More than 500,000 people died, 130,000 of them by execution.<sup>32</sup>

The Spanish Civil War (and the Second World War thereafter) provided compelling evidence of the need for the continuous adaptation of IHL in order to meet the challenges of the changing character of warfare. When the Geneva law on the protection of victims of armed conflict was updated and consolidated in 1949 (see below), states adopted for the first time a provision applicable to internal armed conflicts. It appears in each of the four new Geneva Conventions, and is known as “Article 3 common to the Geneva Conventions”. This mini-convention within a convention removes “armed conflict not of an international character” from the exclusive jurisdiction of the state concerned: all belligerent parties have the duty of treating humanely persons who take no direct part in hostilities or who have ceased to fight; summary executions are prohibited; and judicial guarantees necessary for a fair trial must be granted.

One of the novel elements that complicated the legal situation presented by the Spanish Civil War was the participation of foreign volunteers, of whom about 35,000 belonged to the (communist) International Brigades.<sup>33</sup> A similar situation was to occur half a century later in countries such as Afghanistan, Algeria, Bosnia and Herzegovina, Chechnya, Iraq and the Philippines, to which the

31 Antonio Cassese calls the Spanish Civil War a conflict *tertium genus*: “The Spanish Civil War and customary law”, in Antonio Cassese (ed.), *Current Problems of International Law*, Oxford University Press, Oxford and New York, 1975, pp. 287–317.

32 Wyden, above note 29, pp. 19–20.

33 *Ibid.*, pp. 982–4.

“Islamist International” dispatched thousands of mujahidin to fight against infidels.<sup>34</sup>

## Total war: the Second World War

The waging of war in increasingly urbanized and industrialized societies and the conversion of national economies to war economies challenged another fundamental IHL principle, namely the distinction between civilians and combatants, and between civilian and military objects.

In a war economy much of the civilian infrastructure became targets for attack. The battlefield, no longer limited and clearly defined as at Solferino, was everywhere and was occupied by civilians and soldiers alike. As victims of war, the former were not merely collateral damage: Nazi ideology targeted certain groups *as such*, and the Allied powers resorted to “strategic bombing” of civilian population centres to break the enemy’s morale (“coercive warfare”).<sup>35</sup> As a result, close to 50 per cent of the casualties in the Second World War were civilians and major historical cities were reduced to rubble, albeit the aforementioned Declaration of St Petersburg had established the principle that “the only legitimate object which States should endeavour to accomplish during war is to weaken *the military forces* of the enemy” (emphasis added).

The immediate legal response to the horrors of the Second World War was the prosecution of the major German and Japanese war criminals before the International Military Tribunals of Nuremberg and Tokyo, as well as thousands of domestic trials for war crimes and crimes against humanity. The statutes of the International Military Tribunals and the body of Second World War jurisprudence constitute an important contribution to the development of IHL.

The war sealed the fate of the first multilateral security organization, the League of Nations. Its successor, the United Nations, was given a mandate that prominently includes the promotion of human rights. This and the subsequent shift in conflict trends to non-international armed conflict have led over time to a convergence of IHL and the new international human rights law, or between “the law of Geneva” and “the law of The Hague” on the one hand and “the law of New York” on the other. It is no coincidence that the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the first UN treaty addressing a humanitarian issue, applies in time of peace *and* of war.

As stated in the previous section, the Second World War prompted an overhaul of the Geneva law on the protection of victims of international armed conflicts. In 1949, four new conventions were adopted under ICRC auspices: on

34 Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, New York, 1997, pp. 272–91. See also the case of Enver Hadzihasanovic and Amir Kubura (IT-01-47) before the International Criminal Tribunal for the former Yugoslavia. Part V (over 150 pages) of the judgment of 15 March 2005 exclusively deals with the question of the presence of foreign Muslim combatants or mujahidin in central Bosnia in 1992 and 1993.

35 See Bert Röling, “The significance of the laws of war”, in Cassese, above note 31, pp. 143–4.

the sick and wounded on land; on the wounded, sick and shipwrecked members of the armed forces at sea; on prisoners of war; and on civilian victims – this last group had previously not been covered as such by the law of armed conflict. The events of the Second World War had shown the disastrous consequences of the absence of a specific convention for the protection of civilians in wartime, and the Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) takes account of some of those experiences. So-called “carpet bombing” of civilian areas, however, was not to be specifically outlawed until the adoption in 1977 of an additional protocol to the four Geneva Conventions of 1949 (see below).

During the Second World War millions of combatants were taken prisoner under widely varying circumstances and experienced treatment that ranged from excellent to barbaric. The 1949 Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) continued the concept expressed in earlier treaties that prisoners were to be removed from the combat zone and humanely treated, without loss of citizenship. The Convention broadened the term “prisoner of war” to include not only members of the regular armed forces who have fallen into the power of the enemy but also militia forces, volunteers, irregulars and members of resistance movements – if they form part of the armed forces, and subject to certain conditions – as well as persons who accompany the armed forces without actually being members thereof, such as war correspondents, civilian supply contractors and members of labour service units. The various forms of protection to which prisoners of war are entitled under the Convention remain with them throughout their captivity and cannot be taken from them by their captor or renounced by the prisoners themselves. Further provisions stipulate that during a conflict prisoners may be repatriated or handed over to a neutral nation for custody, and that at the end of hostilities all prisoners must be released and repatriated without delay, except those held for trial or serving sentences imposed by judicial processes.

Aerial bombardment in the Second World War caused unparalleled destruction of the cultural heritage. Adopted under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) places such property under international protection. The great humanitarian issues of the Second World War – the extraordinarily high civilian death toll, the Holocaust, the inhumane treatment of prisoners of war and the large-scale destruction of cultural property – were thus addressed by IHL.

But what IHL conspicuously failed to deal with was the use of the atomic bomb. Whereas states have outlawed the production, stockpiling and use of biological<sup>36</sup> and chemical<sup>37</sup> weapons, they have merely focused on the

36 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972). Available at <http://disarmament.un.org/wmd/bwc/fifth/documents.htm> (last visited 23 January 2007).

37 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993). Available at [http://www.opcw.org/html/db/cwc/eng/cwc\\_menu.html](http://www.opcw.org/html/db/cwc/eng/cwc_menu.html) (last visited 23 January 2007).

*non-proliferation* of nuclear arms and not on a total ban.<sup>38</sup> Attempts by the anti-nuclear movement to litigate the issue have yielded limited results. The 1996 Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons is inconclusive.<sup>39</sup>

## Decolonization war: Algeria

As pointed out above, the mandate of the United Nations prominently includes the promotion of human rights. The UN Charter and the 1966 UN Covenants on human rights<sup>40</sup> also refer to the “self-determination of peoples”, and Chapter XI of the Charter contains a demand for decolonization. Not surprisingly, a salient feature of the post-1945 era of armed conflict has been decolonization, often by means of national liberation wars.<sup>41</sup>

The Algerian War of Independence (1954–62), more than any other event, contributed to the extension of IHL to non-international armed conflicts. From the initial stages of the conflict, the insurgent Algerian Front de libération nationale (FLN) tried to reach an agreement with the French government concerning the applicability of Article 3 common to the Geneva Conventions of 1949. France resolutely refused to regard the conflict as anything other than an internal one – it considered Algeria to be an integral part of France – in which domestic law and order provisions were applicable.<sup>42</sup> In 1958 the ICRC, in accordance with Article 3 entitling it to offer its services to parties to conflict, presented a draft by which both parties would pledge to comply with the provisions of that article. The French government, however, maintained until the end, despite its 500,000 troops on Algerian soil, that the whole situation did not qualify as an “armed conflict not of an international character” within the meaning of Article 3.<sup>43</sup>

38 The most important instruments in this respect are the Treaty on the Non-Proliferation of Nuclear Weapons (1968) and the Declaration of the UN Security Council, meeting at the level of heads of state on 31 January 1992, that “the proliferation of all weapons of mass destruction constitutes a threat to international peace and security.” (UN Doc S/23500).

39 The Court held that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law. However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake. (Paragraph 105.E)

40 Covenant on Civil and Political Rights G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force Mar. 23, 1976 and Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966).

41 See extensively George Andreopoulos, “The age of national liberation movements”, in Howard et al., above note 2, pp. 191–225.

42 Ibid., p. 202.

43 Ibid., p. 204.

The Algerian War was primarily a *guerrilla* war (Spanish for “small war”, but the term refers to the tactics employed, not to the scale of combat).<sup>44</sup> A French veteran of the conflict, Roger Trinquier, became a major theorist of guerrilla warfare.<sup>45</sup> His *Modern Warfare: A French View of Counterinsurgency*<sup>46</sup> captures its fundamentals:

Since the end of World War II, a new form of warfare has been born. Called at times either *subversive warfare* or *revolutionary warfare*, it differs fundamentally from the wars of the past in that victory is not expected from the clash of two armies on a field of battle. This confrontation, which in times past saw the annihilation of an enemy army in one or more battles, no longer occurs. Warfare is now an interlocking system of actions – political, economic, psychological, military – that aims at the *overthrow of the established authority in a country and its replacement by another regime*. To achieve this end, the aggressor tries to exploit the internal tensions of the country attacked – ideological, social, religious, economic – any conflict liable to have a profound influence on the population to be conquered. Moreover, in view of the present-day interdependence of nations, any residual grievance within a population, no matter how localized and lacking in scope, will surely be brought by determined adversaries into the framework of the great world conflict. From a localized conflict of secondary origin and importance, they will always attempt sooner or later to bring about a generalized conflict. ... We know that the *sine qua non* of victory in *modern warfare* is the unconditional support of a population. According to Mao Tse-tung, it is as essential to the combatant as water to the fish. Such support may be spontaneous, although that is quite rare and probably a temporary condition. If it doesn't exist, it must be secured by every possible means, the most effective of which is *terrorism*. ... Terrorism in the service of a clandestine organization devoted to manipulating the population is a recent development. After being used in Morocco in 1954, it reached its full development in Algiers in December, 1956, and January, 1957. The resultant surprise gave our adversaries an essential advantage, which may have been decisive. In effect, a hundred organized terrorists were all that was necessary to cause us to give up the game quickly to the Moroccans. In *modern warfare*, we are not actually grappling with an army organized along traditional lines, but with a few armed elements acting clandestinely within a population manipulated by a special organization.<sup>47</sup>

44 According to Walter Laqueur the term *guerrilla* originated in Spain during the war against the invading army of Napoleon Bonaparte (1808–13): Laqueur, above note 6, pp. 21–41.

45 Other important works on guerrilla warfare are Laqueur, above note 6, and Mao Tse-tung, *Yu Chi Chan (Guerrilla Warfare)*, International Publishers, New York, published in English with an introduction by Samuel Griffith, 1961.

46 Original French title: *La Guerre Moderne: Une vision française de la contre-insurrection* (1961); English translation with an introduction by Bernard Fall available online at <<http://www-cgsc.army.mil/carl/resources/csi/trinquier/trinquier.asp>> (last visited 1 December 2006).

47 Quotes taken from *ibid.*, online English version (no pagination, emphasis in original).

The main vehicle of insurgency warfare is the *civilian soldier*, a notion that encapsulates not only the inextricable link between the fighter and the population on whose behalf the struggle is waged, but the fighter's categorical refusal to be reduced to a single identity.<sup>48</sup> The ability of the guerrilla fighter to melt into the population makes one of the most fundamental IHL principles untenable, namely the distinction between combatants and non-combatants.<sup>49</sup>

On the other hand, the inability to make that distinction (owing to the guerrilla's refusal to accept a single identity) coupled with the inability to force a decisive encounter (owing to the guerrilla's strategy of choosing the time and place of engagement) was often to generate levels of frustration among their opponents that resulted in questionable rules of engagement or outright brutalities.<sup>50</sup> In the Algerian War torture and (counter-)terrorism were some of the main instruments employed to break up the insurgency's support network.<sup>51</sup>

What was the impact of wars of decolonization on IHL? In 1973 a new majority in the UN General Assembly (mostly made up of former colonies) proclaimed the basic principles of the legal status of combatants struggling against colonial and racist regimes for the right to self-determination.<sup>52</sup> The ICRC, for its part, convened the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, which met in Geneva from 1974 to 1977. The Conference resulted in the adoption of two Additional Protocols to the 1949 Conventions.

Protocol I<sup>53</sup> deals with the protection of victims of international conflicts. One of its main innovations is the provision in Article 1.4 that armed conflicts in which peoples are fighting against "colonial domination and alien occupation and against racist regimes" are to be considered international conflicts. To its supporters this was an acknowledgement of the failure of traditional international law to address the needs of colonized peoples. Critics of national liberation movements point to the illegality of the whole strategy of guerrilla warfare, the blurring of the combatant/non-combatant distinction and the resultant impossible burden on their opponents.<sup>54</sup>

Protocol II<sup>55</sup> aims to protect the victims of certain high-intensity internal armed conflicts, defined as those occurring between the armed forces of a

48 Andreopolous, above note 41, p. 193.

49 Ibid., p. 195.

50 Ibid. A Prussian officer serving with the French in the Napoleonic war against Spain recorded in his diary an observation that reflects the frustrations of regular soldiers fighting against guerrillas: "Wherever we arrived, they disappeared, whenever we left, they arrived – they were everywhere and nowhere, they had no tangible centre which could be attacked" (quoted in Laqueur, above note 6, pp. 40–1).

51 Andreopolous, above note 41, pp. 205–7.

52 Resolution 3103 (XXVIII) of 12 December 1973.

53 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.

54 Andreopolous, above note 41, p. 212.

55 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.

government and dissidents or other organized groups which exercise such control over part of its territory as to be able to implement the Protocol. The Protocol does not apply to internal disturbances and tensions in the form of riots or other isolated and sporadic acts of violence.

## Identity wars: the Balkans and Rwanda

When the Berlin Wall began to crumble in 1989, the American political philosopher Francis Fukuyama developed the controversial theory in his article “The end of history”<sup>56</sup> that the end of the cold war signalled the end of the progression of human history: “What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government.”<sup>57</sup> One manifestation of the end of history, according to Fukuyama, would be a decline, or perhaps even the end, of armed conflict, at least among certain types of nation-state. Only in the last chapters in his book did he recognize the possibility of rising ethnic and nationalist violence “since those are impulses incompletely played out”.<sup>58</sup>

As it happens, Yugoslavia violently disintegrated in the course of the following years. “Identity wars” came to replace ideological conflict. Some, such as Samuel Huntington, explain them in terms of ancient conflicts between civilizations. In places like Iraq, Afghanistan, the Balkans and Chechnya he sees “fault-line wars”.<sup>59</sup> A more common, though not uncontroversial,<sup>60</sup> explanation stresses the ethnic dimension of post-cold war conflicts, especially in Africa.

While the end of the cold war did not usher in world peace, it brought about circumstances in the UN Security Council conducive to the creation of ad hoc international criminal tribunals to prosecute serious violations of IHL committed in the identity wars in the former Yugoslavia and Rwanda. This in turn led to a dramatic surge in interest in IHL, which in turn spurred the establishment of more international and mixed war crimes tribunals, namely the Special Court for Sierra Leone (SCSL), the Serious Crimes Panels in the District Court of Dili (East Timor), the “Regulation 64” Panels in the Courts of Kosovo, and the

56 *The National Interest*, No. 16, summer 1989, pp. 3–18. See also his book, *The End of History and the Last Man*, Avon Books, New York, 1992.

57 Fukuyama, *End of History*, above note 56, p. 4.

58 *Ibid.*, pp. 14–15 and 18.

59 Huntington, above note 34, ch. 10.

60 E.g. David Lake and Donald Rothchild (eds.), *The International Spread of Ethnic Conflict*, Praeger Publishers, New York, 1998. For a critique of ethnicity as a blanket explanation of wars outside the Western ken, see Ann Hironaka, *Neverending Wars: The International Community, Weak States, and the Perpetuation of Civil War*, Harvard University Press, Cambridge, Mass., 2005, ch. 4. Filip Reyntjens, an expert on Rwanda, convincingly challenges the reduction of the conflicts in Rwanda and Burundi to ethnicity in *Rwanda: Trois jours qui ont fait basculer l’histoire*, Institut Africaine-CEDAF (l’Harmattan), Paris, 1995, conclusions.



Extraordinary Chambers in the Courts of Cambodia. In particular, the establishment of the International Criminal Court by the adoption of the Rome Statute in July 1998 and its entry into force in 2002 marked a considerable breakthrough in ensuring the prosecution of persons accused of war crimes in both international and non-international armed conflicts.

Among the most significant contributions of these tribunals are the abandonment of the nexus requirement between crimes against humanity and armed conflict; the international criminalization of breaches of Article 3 common to the Geneva Conventions and of Protocol II; the extension to private citizens of criminal responsibility for grave breaches of the Geneva Conventions; the application of IHL outside the narrow geographical context of the actual theatre of combat operations; the shift from (military) command responsibility to (civilian) superior responsibility; the extension of the notion of complicity beyond aiding and abetting to include “those who otherwise assist”, without requiring a direct or substantial contribution to the commission of the crime; and the international criminalization of sexual violence beyond rape.

### Neverending wars:<sup>61</sup> Angola, Burundi, Congo ...

In post-Westphalian Europe the state’s role was to confiscate weaponry from the militias and retinues of the medieval warrior barons and to secure for a single authority the monopoly over the legitimate use of force.<sup>62</sup> Decolonization, however, for all its gains, left in place many weak states, particularly in Africa.<sup>63</sup> Exacerbating the situation is the emergence of a global market in small arms – old Kalashnikovs for the most part – which has undermined the state’s (supposed) monopoly on the means of violence.<sup>64</sup> The result is a situation of *no peace – no war* in which “[w]ar breaks out from time to time, like a midsummer riot in a jail. It spreads unaccountably, like a fashion”.<sup>65</sup>

*Postmodern war*, as Ignatieff calls it, has obvious humanitarian consequences: “[I]f the state loses control of war ... – if war becomes the preserve of private armies, gangsters, and paramilitaries – then the distinction between battle and barbarism may disappear”.<sup>66</sup> One of the direst humanitarian problems today is that of child soldiers, caused, *inter alia*, by a combination of

61 I have borrowed the term “neverending wars” (and its spelling) from Hironaka, above note 60.

62 Ignatieff, *Warrior’s Honor*, above note 1, p. 160.

63 For an analysis see Hironaka, above note 60, and Kaldor, above note 1.

64 A video documentary on this subject is *Small Arms and Failed States* (1999, 29 min.) produced by the US *Defense Monitor*.

65 Paul Richards, “New war: an ethnographic approach”, in Paul Richards (ed.), *No Peace. No War: An Anthropology of Contemporary Armed Conflicts*, Ohio University Press and James Currey, Athens, Ga., 2005, pp. 2–3. See also Nordstrom, above note 10, ch. 12, “The time of not-war-not-peace”.

66 Ignatieff, *Warrior’s Honor*, above note 1, p. 158. For a similar account of the wars in Angola and Mozambique see Nordstrom, above note 10). For video material see *Small Arms and Failed States* (*op. cit.* note 68).

cheap light weapons and what Samuel Huntington calls the “youth bulges”<sup>67</sup> in those societies. In Sri Lanka for example, the Tamil Tigers have been accused of waging an “under-age war” by relying on what amounts to a “children’s army”.<sup>68</sup>

Drawing a parallel with the Thirty Years War in pre-Westphalian Europe, some have suggested that (post-colonial) Africa is in its Seventy or perhaps even Hundred Years War. Consider, for example, Angola, which after a fourteen-year-long war of independence lapsed into thirty years of civil war; or the eastern Congo where Africa’s Great War was fought from 1996 – the fall of the Mobutu regime – until 2003; or the continuing “diamond wars” in west Africa. In *The Coming of Anarchy* Robert Kaplan depicts endemic warfare in a failed state:

There is no other place on the planet where political maps are so deceptive – where, in fact, they tell such lies – as in West Africa. Start with Sierra Leone. According to the map, it is a nation-state of defined borders, with a government in control of its territory. In truth the Sierra Leonian government, run by a twenty-seven-year-old army captain, Valentine Strasser, controls Freetown by day and by day also controls part of the rural interior. In the government’s territory the national army is an unruly rabble threatening drivers and passengers at most checkpoints. In the other part of the country units of two separate armies from the war in Liberia have taken up residence, as has an army of Sierra Leonian rebels. The government force fighting the rebels is full of renegade commanders who have aligned themselves with disaffected village chiefs. A pre-modern formlessness governs the battlefield, evoking the wars in medieval Europe prior to the 1648 Peace of Westphalia, which ushered in the era of organized nation-states.<sup>69</sup>

The return of ragged armies and warlords brings to full circle the development described in this article. Constraining such chaotic violence arguably is beyond humanitarian law, beyond aid or emergency relief, and beyond peacekeeping. As Ignatieff – and others<sup>70</sup> – put it: “[T]hese societies need states”.<sup>71</sup> “[T]he police and armies of the nation-state remain the only available institutions we have ever developed with the capacity to control and channel large-scale human violence”.<sup>72</sup> The civil war in Iraq following the US invasion in 2003 underscores this view: an authoritarian, even criminal, state is perhaps better than no state at all.

67 Huntington, above note 34, p. 259.

68 *The Economist*, 5 August 1995, No. 32 (quoted in Huntington, *ibid.* ).

69 Published in *The Atlantic Monthly*, February 1994; quotations taken from the online edition available at <<http://www.theatlantic.com/doc/prem/199402/anarchy>> (last visited 1 December 2006). Kaplan covers the same theme in a book: *The End of the Earth: A Journey at the Dawn of the 21st Century*, Papermac, London, 1997. For case studies on failed states see Robert Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Brookings Institution Press Washington, DC, 2003.

70 E.g. Kaldor, above note 1, p. 10; Jeremy Rabkin, *The Case for Sovereignty*, AEI Press, Washington, DC, 2004, p. 19.

71 Ignatieff, *Warrior’s Honor*, above note 1, p. 106.

72 *Ibid.*, p. 160.

Two sorts of legal initiatives, however, try to curb violent conflict in the weak states. The first addresses the problem of child soldiers, the second the Kalashnikov culture. IHL prohibits the recruitment and direct participation in hostilities of children under the age of fifteen years.<sup>73</sup> Under the Rome Statute of the ICC, the recruitment and use of children under the age of fifteen years in hostilities is recognized as an international crime, both in international and non-international armed conflicts. It is noteworthy that the first person arrested on behalf of the International Criminal Court has been charged with conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities in the eastern Congo.<sup>74</sup> The issue has also been dealt with in international human rights law, namely the Convention on the Rights of the Child<sup>75</sup> and its Optional Protocol on the involvement of children in armed conflict. The latter raises the minimum age to eighteen and extends the prohibition on the recruitment or use of underage persons to armed groups.

As for the scourge of the proliferation of small arms, a remarkable success – on paper at least – is the [Ottawa] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on Their Destruction (1997).<sup>76</sup> Following this accomplishment the Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.<sup>77</sup>

The International Court of Justice (ICJ) has also been called on to help tame the violence in a region where the state has virtually disappeared. In *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)* the Court found that Uganda, “by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian

73 Article 77 of Protocol I (note 53 above); Article 4.3(c) of Protocol II (note 55 above) also prohibits their indirect participation.

74 *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, arrest warrant of 10 February 2006, available at <[http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2\\_French.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_French.pdf)> (last visited 1 December 2006).

75 In Article 38, states Parties undertaketo respect and to ensure respect for relevant rules of international humanitarian law;to ensure that children under 15 do not take a direct part in hostilities;to refrain from recruiting those under 15 and give priority to the oldest among those under 18;in accordance with international humanitarian law, to ensure protection and care of children affected by armed conflict.

76 Richard Price, in “Reversing the gun sights: transnational civil society targets land mines”, analyses the campaign that led to the total international ban on anti-personnel mines. See *International Organization*, No. 52, 1998, pp. 613–44.

77 More information can be found at UN website <<http://disarmament2.un.org/cab/salw.html>> (last visited 1 December 2006). For a non-governmental source see International Action Network on Small Arms (IANSA) at <<http://www.iansa.org>> (last visited 1 December 2006).

law”, and that Uganda, “by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law”.<sup>78</sup>

As argued earlier, however, to curb the endemic warfare plaguing weak states may well be beyond treaties, programmes or, for that matter, ICJ decisions. Such societies find themselves in a veritable catch-22 situation: a state is needed to reclaim (or finally establish) the monopoly on the use of force and to enforce the law, but all nation- and institution-building efforts are doomed as long as there is no peace.

*Jus ad bellum* considerations are usually extraneous to discussions on civil war. Yet a thought-provoking study suggests a link between the sacrosanct norm of respect for territorial integrity (prohibition on territorial aggression and non-recognition of secession) and the perpetuation of civil war in certain parts of the world. That norm, the argument goes, prevents the formation of strong states and artificially keeps alive unviable ones. “The recently independent states have not experienced the kind of interstate warfare that forced the European states to either develop their domestic capabilities or be weeded out by more powerful neighbors.”<sup>79</sup> The deceptively simple Hobbesian solution – “let them fight it out” or “give war a chance” – clashes, however, with contemporary ideologies of human rights and humanitarianism.<sup>80</sup>

## Virtual war: NATO’s Kosovo “campaign”

On the other end of the scale of contemporary armed conflict stands what Ignatieff – writing about seventy-eight consecutive days of NATO missile strikes against Serbia to stop the bloodshed in Kosovo – aptly calls *virtual war*. Another commentator used the expression *zero-casualty warfare* in the Kosovo context.<sup>81</sup> This is how Ignatieff put it:

The Kosovo conflict looked and sounded like a war: jets took off, buildings were destroyed and people died. For the civilians and soldiers killed in air strikes and the Kosovar Albanians murdered by Serbian police and paramilitaries the war was as real – and as fraught with horror – as war can be. For the citizens of the NATO countries, on the other hand, the war was

78 Respectively §3 and §4 of the operative paragraph of the judgment of 19 December 2005.

79 Hironaka, above note 60, p. 17.

80 I should point out that this is *not* something Hironaka suggests. It is, however, advocated by Edward Luttwak in a provocative article “Give war a chance”, *Foreign Affairs*, Vol. 78, No. 4, 1999, pp. 36–44.

81 Anthony Rogers “Zero-casualty warfare”, *International Review of the Red Cross*, No. 837, 2000, pp. 165–81 (available at the ICRC website <<http://icrc.org>> (last visited 1 December 2006)).

virtual. ... Although the war galvanized opinion across the planet, the number of people who actually went to war was small: 1500 members of the NATO air-crews and thirty thousand technicians, support staff and office staff from headquarters. On the opposite side were the air-defense specialists of Serbia, numbering less than a thousand, and forty thousand soldiers, dug into redoubts and bunkers in Kosovo and Serbia. Face to face combat occurred rarely and then only between KLA guerrillas and Serbian forces on the Kosovo-Albanian border. ... The Kosovo campaign achieved its objectives without a single NATO combat fatality. From a military standpoint, this is an unprecedented achievement. From an ethical standpoint, it transforms the expectations that govern the morality of war. The tacit contract of combat throughout the ages has always assumed a basic equality of moral risk: kill or be killed.<sup>82</sup>

The issue of equality of risk was at least as acute in two US-led “operations” against Iraq. Operation Desert Storm (1991) and Operation Iraqi Freedom (2003)<sup>83</sup> combined claimed fewer than 300 Allied casualties (through hostile action), whereas some 100,000 Iraqi troops reportedly died in Desert Storm alone, not to mention the many times larger number of wounded. Strictly speaking, though, IHL is not concerned with inequality of risk on the battlefield, even when it stands at roughly 1:1,000, as long as the force used (i) is necessary to achieve as quickly as possible the partial or complete submission of the adversary; (ii) is no greater than needed to achieve this; and (iii) is not otherwise prohibited.<sup>84</sup>

Conversely, the *privatization* of traditionally military tasks by the most powerful nation on earth does have IHL implications.<sup>85</sup> Private security has long been a feature of daily life in the United States. Now the industry is increasingly becoming involved in US military operations abroad.<sup>86</sup> Up to 10 per cent of the US occupation force in Iraq consists of private military contractors (PMCs), or hired guns, so to speak. Veterans of the wars in the Balkans, Central America, and southern Africa help US troops to “spread freedom and democracy”. PMCs are

82 Ignatieff, *Virtual War*, above note 1, “Introduction”. The issue of blatant inequality of risk is at least a century old. For example, in the battle of Omdurman (1889), one of the greatest battles of the “scramble for Africa” (1885–1914), the entire Sudanese army of some 20,000 was annihilated within hours, while the British lost only 48 men. In the words of Winston Churchill, Omdurman was “the most signal triumph ever gained by the arms of science over barbarians”. Winston Churchill, *The River War: An Account of the Reconquest of the Sudan*, 1899, p. 300.

83 I only consider the casualties between the start of Operation *Iraqi Freedom* on 19 March 2003 and the end of major combat operations announced by President Bush on 1 May 2003.

84 These are the basic elements that make up the concept of military necessity. See US Air Force, *Air Force Pamphlet* (AFP) 110–31, “International law: the conduct of armed conflict and air operations”, 1976, pp. 1–6.

85 An up-to-date comprehensive bibliography on private security and military companies and the implications for IHL can be found at <<http://www.iilj.org/pmcbibliographicalreferences.htm>> (compiled by James Cockayne and Chia Lehnardt) (last visited 1 December 2006), and at <[http://www.dv.admin.ch/sub\\_dipl/g/home/thema/psc/fid/biblio.ContentPar.0002.UpFile.tmp/dc\\_060116\\_longbiblio\\_e.pdf](http://www.dv.admin.ch/sub_dipl/g/home/thema/psc/fid/biblio.ContentPar.0002.UpFile.tmp/dc_060116_longbiblio_e.pdf)> (last visited 1 December 2006).

86 See e.g. Ted Koppel, “These guns for hire”, *New York Times*, 24 May 2006 (opinion page).

reportedly involved in the operation of detention facilities and the interrogation of prisoners.<sup>87</sup> Outsourcing such tasks to private for-profit entities raises the question of the accountability of these companies and their employees. After the return of warlords in failed states (see above), the privatization of classic military responsibilities in Iraq and elsewhere is another example of warfare in the post-Westphalian age coming full circle. Recognizing that this phenomenon is only likely to increase in importance in the future, the Swiss government, in conjunction with the International Committee of the Red Cross, has launched an initiative which aims to clarify and strengthen the responsibility of states for the actions of private security and military companies.<sup>88</sup>

### War without borders: “global war on terror”

“There was a before-9/11 and an after-9/11”, the director of the CIA’s counterterrorist unit was reported to have told the US Congress in 2002. “After 9/11, the gloves came off.” The US Department of Defense, for its part, proclaimed an open-ended global war:

The United States is a nation engaged in what will be a long war. Since the attacks of Sept. 11, 2001, our nation has fought a global war against violent extremists who use terrorism as their weapon of choice, and who seek to destroy our free way of life. Our enemies seek weapons of mass destruction and, if they are successful, will likely attempt to use them in their conflict with free people everywhere. Currently, the struggle is centered in Iraq and Afghanistan, but we will need to be prepared and arrange to successfully defend our nation and its interests around the globe for years to come. ... The long war ... includes many operations characterized by irregular warfare – operations in which the enemy is not a regular military force of a nation-state. ... Today, efforts large and small on five continents demonstrate the importance of being able to work with and through partners, to operate clandestinely and to sustain a persistent but low-visibility presence. Such efforts represent an application of the indirect approach to the long war.<sup>89</sup>

The so-called “global war on terror” (GWOT)<sup>90</sup> represents a shift by the United States from a criminal justice approach to terrorism<sup>91</sup> to a war

87 Julian Borger, “Outsourcing warfare”, *Amnesty International Magazine*, summer 2004, available at <[http://www.amnestyusa.org/magazine/summer\\_2004/outourcing\\_warfare/](http://www.amnestyusa.org/magazine/summer_2004/outourcing_warfare/)> (last visited 1 December 2006).

88 For preliminary reports see [http://www.dv.admin.ch/content/sub\\_dipl/e/home/thema/psc.html](http://www.dv.admin.ch/content/sub_dipl/e/home/thema/psc.html) (last visited 1 December 2006).

89 From the *Quadrennial Defense Review* by the United States Department of Defense, 6 February 2006, pp. v, 11.

90 This is one of the expressions used by the US government to brand the conflict. Other names are “global struggle against violent extremism” and “the long war”.

91 E.g. the Lockerbie case in which the United States strove to obtain the suspects’ extradition from Libya; another example is the trial in the United States of a number of militant Islamist conspirators for their part in the 1993 World Trade Center car bombing.

paradigm,<sup>92</sup> thereby obscuring important differences between armed conflicts covered by the laws of war (and terrorist acts committed in the course of those armed conflicts) and terrorist acts committed independently of armed conflict,<sup>93</sup> as well as the fact that terror is a *tactic*, not an enemy. Basic IHL assumptions – that armed conflict takes certain narrowly definable forms, that wars have a beginning and an end, and that there are enemy states, allied states and neutral states – are ignored in several ways.

First, the war on terror can take any form: domestic eavesdropping, freezing assets, criminal prosecution, abduction, rendition, secret detention, torture, covert or indirect actions, targeted killing, full-scale military invasion – nothing is excluded *a priori*. Second, as the name indicates, that global war knows no borders: mountains in Afghanistan, a village across the border in Pakistan, the streets of Milan<sup>94</sup> – the battlefield can be anywhere. Third, it concerns all nations. As President Bush put it, “Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.”<sup>95</sup> Fourth, it involves the entire security apparatus: the military, secret services, the police, special operations forces, even bounty hunters and PMCs. Finally, the war on terror “will not end until every terrorist group of global reach has been found, stopped and defeated”.<sup>96</sup> It is thus a global war in every sense, seemingly restrained minimally by IHL, human rights law, *jus ad bellum*<sup>97</sup> and international law *tout court*.

Commenting on the “indirect approach to the long war”, that is, working with and through partners and operating clandestinely,<sup>98</sup> RAND Corporation senior analyst Bruce Berkowitz observes that US operations begin to resemble those of its adversaries. “In direct action, soldiers wear insignia when they fight. This is the important distinction between covert action and direct action. It is a key difference between using innovative military tactics to eliminate terrorists, rather than acting like terrorists to eliminate terrorists. Direct action complies with international law.”<sup>99</sup> As American journalist Sidney Harris once put it, “Enemies (as well as lovers) come to resemble each other over a period of time.”

92 The shift was officially proclaimed by President George W. Bush on 13 November 2001 in his military order regarding the “Detention, treatment, and trial of certain non-citizens in the war against terrorism”, available at <<http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>> (last visited 1 December 2006).

93 David Wippman, “Do new wars call for new laws?”, in David Wippman and Matthew Evangelista (eds.), *New War, New Laws? Applying the Laws of War in 21st Century Conflicts*, Transnational Publishers, Ardsley, NY, 2005, p. 4.

94 “Italy seeks arrests in kidnapping case”, *New York Times*, 24 December 2005, Section A, p. 5, col. 4.

95 Address to a Joint Session of Congress and the American People, 20 September 2001, available at <<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>> (last visited 1 December 2006).

96 *Ibid.*

97 I am referring to the concept of pre-emptive action as formulated in the National Security Strategy of the United States of America (17 September 2002), available at <<http://www.whitehouse.gov/nsc/nssall.html>> (last visited 1 December 2006).

98 See the excerpt from the US *Quadrennial Defense Review*, above note 89.

99 Berkowitz, above note 9, ch. 12.

The UN Commission on Human Rights,<sup>100</sup> the UN Committee against Torture,<sup>101</sup> the UN Human Rights Committee,<sup>102</sup> the ICRC<sup>103</sup> and the Inter-American Commission on Human Rights<sup>104</sup> have criticized the lack of respect for IHL (where applicable) and human rights law in the operations of the global war on terror. The US response so far has been either to challenge the factual findings, question the applicability of IHL or human rights law in the prosecution of that war to the situations in question, or say that it abides by IHL or acts consistently with the principles thereof.<sup>105</sup>

One cannot fail to notice the parallels between the US-led global war on terror and the anti-terrorism policy of one of its closest allies, Israel. As a matter of fact, the former may be considered the continuation – on a much larger scale – of the latter’s long-standing practice of relentlessly pursuing its enemies by all possible means and wherever they may be.<sup>106</sup> Compare also the responses of both countries to criticism of disrespect for IHL and human rights law in the prosecution of that war and in the ongoing occupation of Palestinian territory, the next conflict discussed here.

## Occupation – annexation war: Gaza and the West Bank

It lasted less than a week and had all the ingredients of trinitarian inter-state war on which IHL is premised – the Six-Day War of June 1967 in which Israel captured territory from its neighbours Egypt, Jordan and Syria. Since then Israel has occupied the Gaza Strip,<sup>107</sup> the West Bank and East Jerusalem, home to

100 United Nations Economic and Social Council (Commission on Human Rights), Situation of detainees at Guantánamo Bay (15 February 2006), E/CN.4/2006/120, available at <[http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16\\_02\\_06\\_un\\_guantanamo.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_02_06_un_guantanamo.pdf)> (last visited 1 December 2006).

101 CAT/C/USA/CO/2, 18 May 2006 (advance unedited version), available at <<http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf>> (last visited 1 December 2006).

102 Human Rights Committee, eighty-seventh session, 10–28 July 2006 (advance unedited version), available at <[http://indianlaw.org/UN\\_HR\\_Committee\\_CCPR\\_USA\\_2006-07-28.pdf](http://indianlaw.org/UN_HR_Committee_CCPR_USA_2006-07-28.pdf)> (last visited 1 December 2006).

103 “Report of the International Committee of the Red Cross (ICRC) on the treatment by the Coalition forces of prisoners of war and other protected persons by the Geneva Conventions in Iraq during arrest, internment and interrogation” (February 2004), available at <[http://www.globalsecurity.org/military/library/report/2004/icrc\\_report\\_iraq\\_feb2004.pdf](http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf)> (last visited 1 December 2006).

104 Detainees in Guantánamo Bay, Cuba: request for precautionary measures (13 March 2002), available at <<http://www1.umn.edu/humanrts/cases/guantanamo-2003.html>> (last visited 1 December 2006).

105 E.g. Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantánamo Bay, Cuba (10 March 2006), available at <<http://www.asil.org/pdfs/ilib0603212.pdf>> (last visited 1 December 2006); or the US Additional response to the request for precautionary measures – detention of enemy combatants at Guantánamo Bay, Cuba, Inter-American Commission on Human Rights (15 July 2002), at <<http://www.state.gov/s/1/38642.htm>> (last visited 1 December 2006).

106 From the kidnapping of Adolf Eichmann to the full-scale invasions of Lebanon in 1982 and 2006. See e.g. George Jonas, *Vengeance: The True Story of an Israeli Counter-Terrorist Team*, Simon & Schuster, New York, 1984.

107 In September 2005 Israel withdrew all Israeli settlers and soldiers and dismantled its military facilities in the Gaza Strip. It continues to control airspace, offshore maritime access and most other access to the Gaza Strip.



some four million Palestinians. It has also built settlements there for some 300,000 Jews.

Military occupation is regulated by IHL.<sup>108</sup> Israel has both used and dismissed IHL to justify its policies in the Palestinian territories.<sup>109</sup> A military decree of June 1967 said that the Geneva rules on occupation applied; diplomats and politicians, however, later argued that the West Bank and Gaza should not be considered occupied under IHL. This ambiguity has practical import: if those territories are occupied, Israel does not have to integrate the Arab population living there into its polity; if they are not occupied, then the IHL prohibition on establishing (Jewish) settlements does not apply.

Occupation, by definition, is temporary; for if not temporary it amounts to colonization or annexation. IHL on occupation, therefore, does not contemplate a *no peace – no war* situation of indefinite occupation. Yet for generations of Palestinians occupation has become the way of life, which calls into question the original conceptual distinction between IHL (as *lex specialis* in wartime) and international human rights law (as *lex ordinaria* in peacetime). Israel, for its part, has exploited this self-generated uncertainty as an argument against the applicability of international human rights law. In the words of a commentator, “Israel’s practice is to extract from each (but mainly from international humanitarian law) its benefits, while neglecting its obligations.”<sup>110</sup>

In its sweeping advisory opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, a nearly unanimous International Court of Justice 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” and noted that “there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law”.<sup>111</sup> Regarding the question put to it, the Court held that “The construction of such a wall ... constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.”<sup>112</sup>

108 The 1907 Hague Convention IV and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) of 1949.

109 The arguments in this paragraph are based on Gershon Gorenberg, “Israel’s tragedy foretold”, op-ed. contribution to the *New York Times*, 10 March 2006, and on Kathleen Cavanaugh, “Rewriting law: The case of Israel and the occupied territories”, in Wippman and Evangelista, above note 93, pp. 227–58. See also Emma Playfair (ed.), *International Law and the Administration of Occupied Territories: The Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, Clarendon Press, Oxford, 1992.

110 Cavanaugh, above note 109, p. 228.

111 ICJ, Advisory Opinion 9 July 2004, para. 106. Available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited 23 January 2007).

112 *Ibid.*, para. 137.

## Occupation wars: Afghanistan and Iraq

Meanwhile two other inter-state wars – both dubbed “freedom” operations<sup>113</sup> – have evolved into open-ended intricate de facto occupations. Five years after the toppling of the Taliban regime in Afghanistan some 30,000 troops of the International Security Assistance Force (ISAF) find themselves fighting the resurgent Taliban and a booming opium production and trade. ISAF was created in December 2001 in accordance with the Bonn Conference, is made up of members of the North Atlantic Treaty Organization (NATO) and is deployed under the authorization of the UN Security Council.<sup>114</sup> Its initial six-month mandate “to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas”<sup>115</sup> has been constantly extended and expanded and now includes all of Afghanistan. What was originally conceived as primarily a peace-keeping/nation-building operation has developed into a deadly counter-insurgency, counter-terrorism, and counter-narcotics conflict.<sup>116</sup>

In Iraq, three years after a victorious President Bush declared an end to major combat operations<sup>117</sup> and two years after the formal restoration of its sovereignty, the situation on the ground – humanitarian, political, military – appears even direr than in Afghanistan. Some 160,000 troops of a multinational coalition force (144,000 of whom are from the US), deployed with a mandate from the Security Council,<sup>118</sup> together with a newly constituted Iraqi army and police force are battling a Sunni-dominated insurgency, parts of an international terrorist network (al Qaeda in Iraq), foreign volunteer mujahidin, Shiite militia and organized crime, while also trying to win “the hearts and minds” of the Iraqi population.

In both countries the situations defy the existing IHL categories, since they are neither international nor civil war nor military occupation. The anarchy in Iraq in particular recalls Ignatieff’s notion of *postmodern war* – and its consequences: “[I]f the state loses control of war ... – if war becomes the preserve of private armies, gangsters, and paramilitaries – then the distinction between battle and barbarism may disappear.”<sup>119</sup> As argued earlier, constraining such anarchic violence is beyond humanitarian law. Yet I would like to formulate some questions for further consideration elsewhere: can a military occupation, and all

113 Operations Enduring Freedom (Afghanistan) and Iraqi Freedom.

114 Resolutions 1386, 1413, 1444, 1510, 1563, 1623 1659 and 1707.

115 Resolution 1386, para. 1.

116 According to an Associated Press count based on reports from US, NATO and Afghan officials, 2,800 people have died in the first nine months of 2006 in violence nationwide, including militants and civilians, thus about 1,300 more than the toll for all of 2005 (quoted in “Afghanistan body count raises scepticism”, *Guardian Online*, 15 September 2006).

117 Note 83 above.

118 In Resolution 1637 of 8 November 2005 the Council “Notes that the presence of the multinational force in Iraq is at the request of the Government of Iraq and having regard to the letters annexed to this resolution, reaffirms the authorization for the multinational force as set forth in resolution 1546 (2004) and decides to extend the mandate of the multinational force as set forth in that resolution 1546 (2004) until 31 December 2006” (italics in original).

119 Ignatieff, *Warrior’s Honor*, above note 1.

the responsibilities of an occupying power as laid down in the laws of war, end at a single moment in time and without the actual departure of the foreign military forces involved?<sup>120</sup> Is the latter's self-granted blanket immunity from Iraqi jurisdiction compatible with IHL?<sup>121</sup> When an occupying power miserably fails in its obligation<sup>122</sup> to establish law and order – after recklessly dismantling the existing state apparatus and defiantly challenging insurgents,<sup>123</sup> or when its continued presence *exacerbates* the security situation – as the head of the British army said in a comment on Iraq,<sup>124</sup> does armed insurgency then become legitimate?

## Conclusion

This article has demonstrated how transformations, revolutions and changes of all kinds in armed conflict constantly challenge international humanitarian law and compel it to adapt. Since the adoption of the first modern IHL instruments in the nineteenth century, that law has been substantially revised every twenty-five to thirty years by major new treaties. These adaptations have always been towards *greater protection*, greater reach than had existed before a particular conflict laid bare deficiencies.

IHL currently faces challenges resulting from the emergence of transnational terrorist networks and criminal organizations, an aspiring hegemony's militarization of its foreign and counter-terrorism policies, the privatization of traditional military activities and the near or total collapse of some states. Over the past ten years a number of new IHL norms and institutions (courts) have been created, not in Geneva, but in New York, Ottawa, The Hague and Arusha. In turn, these new institutions have contributed considerably to the development of customary IHL. The question then becomes whether expansion or revision of the Geneva law is desirable and likely. Do new wars call for new laws? Is IHL still one war behind?

I have argued that constraining endemic violence caused by the collapse or dismantlement of the state is beyond humanitarian law. As regards the challenges posed by non-state entities – transnational terrorist networks, criminal organizations, and PMCs – only the last can be regulated, both nationally and

120 Sir Adam Roberts deals with this question in “The End of Occupation in Iraq”, a policy paper published by the Harvard Program on Humanitarian Policy and Conflict Research, available at <<http://www.ihlresearch.org/iraq/pdfs/briefing3461.pdf>> (last visited 1 December 2006).

121 Order No. 17 (Revised) of the Coalition Provisional Authority (CPA) stipulates that Coalition forces, diplomatic personnel and contractors working for Coalition forces or for diplomats “shall be immune from the Iraqi legal process”. A subsequent CPA order provided that the order would remain in force until the final Coalition forces left Iraq, unless it was rescinded or amended by later legislation. The Iraqi parliament apparently has not ended or amended the order.

122 In accordance with Article 43 of the Regulations respecting the Laws and Customs of War on Land (Hague Regulations) of 18 October 1907.

123 US President Bush in a White House press conference on 2 July 2003 challenged Iraqi insurgents “to bring them on”.

124 “Sir Richard Dannatt: A very honest general”, *Daily Mail*, 12 October 2006 (online edition).

internationally, since by definition terrorists and criminals operate outside the law. The answer to attempts by certain states to circumvent the existing law does not lie in promulgating more IHL but in urging more respect for it. And wherever deficiencies or ambiguities exist, customary IHL has an important role to play. For these reasons I submit that expansion or revision of the law of Geneva is not desirable.

Is it nonetheless likely? David Wippman notes that “most governments and many human rights and humanitarian law experts prefer an informal process leading to the evolution of international humanitarian law through state practice informed by expert analysis”, and points to the “cautious, research-oriented approach [of the ICRC] to the further development of IHL”.<sup>125</sup> Noteworthy in this regard are several recent ICRC initiatives and reports: the Project on the Reaffirmation and Development of IHL, the report “International humanitarian law and the challenges of contemporary armed conflicts”,<sup>126</sup> and the initiative, in collaboration with the Swiss government, to clarify and strengthen the responsibility of states for the actions of private security and military companies.<sup>127</sup>

Through brief descriptions of the relevant conflicts this article also has shown that warfare since the 1648 Peace of Westphalia has, despite (or because of) its many changes, in several ways come full circle. And so has IHL: consider, for example, the Hague peace movement at the end of the nineteenth century and the Hague International Criminal Court movement at the turn of this century. *Plus ça change, plus c'est la même chose.*<sup>128</sup>

125 Wippman, “Do new wars call for new laws?” in Wippman and Evangelista, above note 93, p. 6. See also Jean-Philippe Lavoyer, “Should international humanitarian law be reaffirmed, clarified or developed?”, *Israel Yearbook on Human Rights*, Vol. 34, 2004, pp. 1–24, available at the ICRC website, <[http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/659JXZ/\\$File/Lavoyer-01-05-04.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/659JXZ/$File/Lavoyer-01-05-04.pdf)> (last visited 1 December 2006). For more on this topic see Yves Sandoz, “International humanitarian law in the 21st century”, *Yearbook of International Humanitarian Law*, Vol. 6, 2003, pp. 3–40.

126 Available at <<http://www.icrc.org>> (last visited 1 December 2006).

127 Note 88 above.

128 The French version of the proverb, “The more things change the more they remain the same.”