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### ILA study group 'The conduct of hostilities and international humanitarian law: challenges of 21st century warfare' - Interim report

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**Publication date**

2014

**Document Version**

Submitted manuscript

[Link to publication](#)

**Citation for published version (APA):**

Gill, T., Heinsch, R., & Geiss, R. (2014). *ILA study group 'The conduct of hostilities and international humanitarian law: challenges of 21st century warfare' - Interim report*. International Law Association. <http://www.ila-hq.org/download.cfm/docid/806C2DED-87FF-4744-8CC8EDAF47787AE6>

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## ILA Study Group

# THE CONDUCT OF HOSTILITIES AND INTERNATIONAL HUMANITARIAN LAW

## CHALLENGES OF 21<sup>ST</sup> CENTURY WARFARE

Members: Terry Gill (Chair); Robin Geiss (Co-Rapporteur); Robert Heinsch (Co-Rapporteur); Louise Arimatsu; Jeroen van den Boogaard; Geoffrey Corn; Robert Cryer; Paul Ducheine; Charles Garraway; Robin Geiss; Terry Gill; Laurent Gisel; Robert Heinsch; Wolff Heintschel von Heinegg; Jann Kleffner; Erik Koppe; Heike Krieger; ; Oluwabunmi Lar; Thilo Marauhn; Kazuhiro Nakatani; Hector Olasolo Alonso; Eric Pouw; Yael Ronen; Aurel Sari; Kirsten Schmalenbach; Michael Schmitt; Sandesh Sivakumaran; Gabriella Venturini; Ken Watkin; Gentian Zyberi

## INTERIM REPORT

### PREFACE: THE WORK OF THE STUDY GROUP SO FAR

Having been established in 2011, the Study Group had their initial meeting at the 2012 ILA conference in Sofia where it presented their mandate, and set up a working agenda for the coming four years. During this first meeting, the members of the Study Group decided to focus on three sub-topics that derive from the larger topic of the study (“The conduct of hostilities under international humanitarian law - challenges of 21st century warfare”). These three sub-topics are:

- I. Between law enforcement operations and the conduct of hostilities: international humanitarian law (IHL) and human rights law;
- II. New technologies and challenges to the application of IHL; and
- III. Modern warfare and the general IHL principles governing the conduct of hostilities.

A first workshop of the Study Group was held from 22 to 23 November 2013 at Leiden University (The Netherlands). The following members participated in the session: Jeroen van den Boogaard, Geoffrey Corn, Charles Garraway, Robin Geiss, Terry Gill, Laurent Gisel, Robert Heinsch, Heike Krieger, Oluwabunmi Lar, Thilo Marauhn, Hector Olasolo Alonso, Eric Pouw, Aurel Sari, Sandesh Sivakumaran, Mike Schmitt, Gabriella Venturini, Ken Watkin, and Gentian Zyberi. Professor Frits Kalshoven attended as a guest.<sup>1</sup>

### THE MANDATE OF THE STUDY GROUP

Already after World War II, but increasingly with the end of the Cold War, there has been a change in the conduct of armed conflicts. We have witnessed a move away from the classical interstate war towards armed conflicts that are no longer characterized by two equal armies on each side. Rather, the majority of conflicts involve a (militarily) superior party, usually government troops opposed by armed rebel groups, insurgents, or terrorist cells – parties which are characterized by their conventionally weaker position. This inherent asymmetry creates a temptation for the inferior party to use war tactics which violate rules of international humanitarian law<sup>2</sup> in order to make up for disadvantages in matters relating to materiel, resources and fighters. This links in with the observation that today’s conflicts

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<sup>[1]</sup> In this context, the authors of this report would like to thank the research fellows and student assistants who supported the meeting and took minutes during the workshop for their invaluable work: Ms Thyla Fontein (general organization), Ms Emilia Richard (coordination minutes), as well as Ms Agata Czarnota, Ms Florence Henaut, Ms Susan Kennefick, Ms Pelin Manti, Ms Natalie Simpson, Ms Safi van’t Land, and Ms Florentine Vos (minute takers).

<sup>2</sup> For coherence purposes, this report mainly uses the term International Humanitarian Law (IHL) in order to denote the area of law which deals with the rules and principles governing armed conflict. This area of law is also regularly called Law of Armed Conflict, Law of War, or *Jus in Bello*.

(‘new wars’) are not characterized mainly by the objective to gain territory or military victory in the classical sense, but are rather about achieving independence, identity, ethnic cleansing, or spreading terror and publicity for their cause in the case groups resorting to acts of terrorism.

Although international humanitarian law has arguably already adapted in a certain way by providing special rules for non-international armed conflicts (NIAC), one needs to keep in mind that especially the Hague Law dealing with the means and methods of warfare was mainly designed to deal with interstate wars. Even though many of these rules are nowadays held to be equally applicable to NIACs on the basis of customary law, they were originally not drafted to cover the situation of these kinds of conflicts. What is more, in modern asymmetric conflict the conduct of hostilities increasingly seems to intersect/coincide with law enforcement operations. Thus, the central question is the extent to which the rules governing the conduct of hostilities need to be clarified, both in terms of their scope of application and their substantive aspect. Although some sub-aspects of this issue have been examined before, what is still missing is a coherent and more principled approach to the challenges of 21<sup>st</sup> century warfare. The central focus of the study group lies on the actual rules governing the conduct of hostilities, taking into account the three main areas highlighted above.

## METHODOLOGY / CHARTING THE CHALLENGES

Prior to the first work meeting of the Study Group in Leiden, members of the three sub-groups listed above were given a select number of questions to start off discussions. During the meeting, members of the group presented a discussion paper dealing with legal issues relating to the topics and sub-questions. Comments were provided by a other members of the working group, followed by discussion between all members of the Study Group. The following summary outlines the main areas of agreement and points of contention which emerged during those discussions and identifies the main questions which will receive further attention in the course of working toward completing a final report on these issues in the coming two years in preparation for the ILA Conference in 2016. The Study Group intends to spot and survey contemporary challenges and to address selected issues that are urgent, and where the group believes it can make a meaningful contribution towards clarification. It is important to note that the current report presents only a preliminary overview of the challenges identified by the Group.

### I. WORKING GROUP 1: BETWEEN LAW ENFORCEMENT OPERATIONS AND THE CONDUCT OF HOSTILITIES: INTERNATIONAL HUMANITARIAN LAW & HUMAN RIGHTS LAW

#### a. INTRODUCTION

In various contemporary armed conflict situations, armed forces in addition to traditional combat operations are also fulfilling law enforcement tasks in order to maintain or restore public security, law and order.<sup>3</sup> The situation in Afghanistan may serve as an illustrative example for this amalgamation of tasks. The Afghan and third-State armed forces that are involved in the on-going non-international armed conflict (NIAC) are simultaneously also carrying out law enforcement tasks in Afghanistan. They set up checkpoints and road-blocks for the general maintenance of security and at times they engage in counter-narcotics and other specific law enforcement operations. Modern armed conflict situations are thus highly complex operational environments. The tasks entrusted to the armed forces are very broad and potentially not always readily distinguishable. Indeed, it seems that often there is a continuum of tasks ascribed to the armed forces ranging from conventional, high-intensity warfighting on one end of the spectrum to peace-building support, counter-insurgency, counter-terrorism, anti-crime, stability and post-conflict operations on the other end of the spectrum, and anything in-between. Discussions in the Study Group showed that these factual complexities raise an array of complex legal questions, many of which have not been sufficiently resolved and clarified to date. In particular, from an international law perspective, the question arises which legal regime applies in specific instances along the continuum of such complex operations and how, in the context of an armed conflict, law enforcement operations and traditional combat operations can meaningfully be distinguished in today’s

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<sup>3</sup> See also ICRC Expert Meeting Report, *The Use of Force in Armed Conflicts, Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, November 2013, available at: <http://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf>.

(asymmetric) conflict scenarios<sup>4</sup> As a general rule, law enforcement operations are typically subject to a different set of norms (mainly foreseen in human rights law) that are,<sup>5</sup> in particular, more restrictive when it comes to the use of force but also in relation to internment and detention. Therefore, consequences of applying either the legal paradigm applicable to law enforcement operations or the legal paradigm applicable to the conduct of hostilities may have far reaching consequences.

b. THE TEMPORAL AND GEOGRAPHICAL SCOPE OF APPLICATION OF IHL

Given that human rights law applies at all times whereas IHL only apply in times of armed conflict,<sup>6</sup> the problem of concurrent applicability only arises if there is an armed conflict. In this context, the Study Group noted that there is continuous controversy and discussion about the notion of armed conflict, in particular the geographical and temporal scope of application of IHL.<sup>7</sup> While views regarding possible interpretations of the geographical and temporal scope of application of the laws of armed conflict diverged considerably within the Study Group, there was general agreement that the temporal and geographical scope of application of the laws of armed conflict required further consideration and elaboration. The clarification of these issues will therefore be pursued by the Study Group with regard to international as well as non-international armed conflicts. In view of the complexities inherent in these discussions and taking into consideration the Study Group's capacity, it was decided to concentrate the focus of Working Group I, for the time being, on the preliminary question of the temporal and geographical scope of application of IHL. The discussion of other, equally pertinent, legal issues (below c) will therefore be postponed until a later stage.

c. IDENTIFYING THE APPLICABLE RULES IN THE CONTEXT OF AN ARMED CONFLICT

i. Distinction or Convergence?

In practice and in view of the complexities of many armed conflict situations, it is often not clear how and where exactly to draw the line between operations that fall into the general rubric of law enforcement and operations that would qualify as combat/conduct of hostilities operations. Generally speaking there are two ways to approach this problem.<sup>8</sup> On the one hand, the distinction could be facilitated by identifying workable, objective criteria that allow clearer distinctions.<sup>9</sup> Should the location of the situation, *e.g.* its proximity to the 'hot-zone' of combat, or the degree of control over the area be taken into account when drawing such a distinction? Or does it mainly – or only – depend on the status, function or conduct of the person against whom force may be used?<sup>10</sup>

On the other hand, given that in many situations law enforcement and combat operations seem to have become virtually indistinguishable, is such a factual distinction on the basis of objective criteria still a

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<sup>4</sup> See *e.g.* Eric Pouw, *International Human Rights Law and the Law of Armed Conflict in the Context of Counterinsurgency - With a Particular Focus on Targeting and Operational Detention* (PhD) (Univ. Of Amsterdam, 2013).

<sup>5</sup> But see *e.g.* Article 43 of the 1907 Hague Regulations according to which "the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."; see K. Watkin, "Use of Force during Occupation: Law Enforcement and Conduct of Hostilities," *International Review of the Red Cross*, Vol. 94, No. 885, Spring 2012, pp. 267-315.

<sup>6</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226-593 (July 8), at para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. (July 9), at para. 106; *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, 2005 I.C.J. 116, (Dec. 19), at para. 119.

<sup>7</sup> Noam Lubell / Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, *Journal of International Criminal Justice* 11 (2013), 65-88; M. Sassoli, 'Use and Abuse of the Laws of War in the "War on Terrorism"', 22 *Law and Inequality: A Journal of Theory & Practice* (2004) 195, at 3; S. Sivakumaran, *The Law of Non-international Armed Conflict* (Oxford University Press, 2012), at 228-235; Y. Dinstein, 'Concluding Remarks on Non-International Armed Conflicts', in K. Watkin and A.J. Norris (eds), 88 *International Law Studies* (Blue Book Series), *Non-International Armed Conflict in the Twenty-first Century* (Naval War College, 2012) 400.

<sup>8</sup> See also E. Pouw (2013), *supra note 3*.

<sup>9</sup> ICRC Expert Meeting Report, *The Use of Force in Armed Conflicts, Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, November 2013, available at: <http://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf>.

<sup>10</sup> See also, for example, International Committee of the Red Cross Expert Meeting, *The use of Force in Armed Conflicts – Interplay between the Conduct of Hostilities and Law Enforcement Paradigms* (2013), p. 59: "for many experts, the main (if not the only) legal criterion for determining whether a situation is covered by the conduct of hostilities or law enforcement paradigms is the status, function or conduct of the person against whom force may be used".

feasible and realistic option? *De lege ferenda* would it not possibly be preferable to transfer certain legal concepts from international human rights law to IHL or vice versa, to (partially) merge aspects of both legal regimes ('unified use of force rules') and to devise a new, third legal regime which better answers to increasingly indistinguishable situations on the ground? The European Court of Human Rights as well as the Inter-American Court of Human Rights have already relied on humanitarian law considerations to better adapt human rights standards to armed conflict situations.<sup>11</sup> Whether this convergence should be seen as a positive or negative development, whether human rights law is indeed suited to address extreme levels of violence and whether human rights considerations could be imported into IHL is open to further debate and might be taken up by the Study Group at a later stage. Meanwhile, and notwithstanding such trends *de lege ferenda*, many commentators consider the standards developed by the International Court of Justice relating to situations in which IHL and human rights law concurrently apply to be the main point of departure. As is well known, according to the ICJ "[a]s regards the relationship between international humanitarian law and human rights law, 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. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, IHL".<sup>12</sup> The Study Group noted that the application of these standards – especially the *lex specialis* rule – to specific situations, including situations that involve a broader range of human rights and not merely the right to life in use of force-scenarios, still raises an array of questions that could benefit from further clarification.

#### ii. The 'concepts/paradigms' of law enforcement and the conduct of hostilities

The Study Group considered that the concepts/paradigms of 'law enforcement' and 'conduct of hostilities' that are commonly used in contemporary discussions could further be clarified. The term 'law enforcement' is usually understood to refer to measures undertaken by the State (or internationally mandated forces) with the aim of upholding or imposing public order, security and the rule of law. This particular understanding of the concept draws heavily on the notion of domestic law enforcement and it is ultimately based on a societal consensus on the State's monopoly of legitimate force. Whether and if so in how far, this concept is transposable to transnational law enforcement contexts requires further discussion. What exactly does law enforcement entail in an international context? Is there a difference between peace enforcement and law enforcement?

Conversely, the conduct of hostilities refers to the use of means and methods of warfare by the State with the specific aim of defeating the adversary and of causing (physical) harm in as far as is necessary to achieve this particular aim. On a rather abstract level there is thus a certain similarity between both models in that they both may involve the use of coercive means by a State for public ends. However, the public ends differ significantly and it stands to reason whether for this reason alone conceptions of (domestic) law enforcement and the conduct of hostilities are not inherently compatible and need to be kept separate.

On the other hand, especially in practice, the dividing line between the two 'concepts/paradigms' is not necessarily fixed, as such, placing them on opposing sides of the same continuum of public force. This is particularly obvious in the context of NIACs given that organized armed groups remain criminally responsible under the domestic law of the State in/against which they are fighting. But whereas violence in law enforcement is for the most part incidental and not an aim in itself, manifesting itself mainly as an underlying threat or sanction in the pursuance of a higher, legitimate aim, it plays a direct and central role in the conduct of hostilities where the use of force to defeat the adversary is a legitimate aim in itself.

#### iii. A Legal Pluriverse

During the discussions of the Study Group, it was noted that the intersection between IHL and international human right law is only one aspect of the legal pluriverse applicable to armed forces and hence, resolving frictions between the two will not necessarily stop the same frictions appearing in

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<sup>11</sup> See W. Abresch, Human Right's Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya, EJIL Vol. 16 (2005), pp. 741-767.

<sup>12</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (July 9), at para. 106.

other guises. The activities of the armed forces are subject to a multitude of partly distinct, partly overlapping international legal regimes, including the law governing the *jus ad bellum*, international humanitarian law, international human rights law, international environmental law, the law of the sea, the law of State jurisdiction and State immunity, the law of State responsibility, but also domestic law of the State to which they belong as well as (potentially) the law of the territorial State in which they are present to name some of the most important ones. These regimes derive from various sources, including international agreements, customary international law and general principles of international law. The mutual relationship between these different regimes and their different sources is not always clear and would benefit from further clarification. Some of the questions that were mentioned in this context were: How does this legal pluriverse play out in the case of multinational operations? Do derogations from human rights instruments have any effect on the corresponding obligations, if any, imposed by rules of customary international law? Are derogations an effective legal tool in the context of multinational operations? Even if certain norms are not applicable to a particular troop contributing State as a matter of strict law, will the same standards not constrain it in the form of Rules of Engagement? And if questions of international law are resolved at the level of international law, could they not arise again as questions of domestic law in the territorial state?

## II. WORKING GROUP 2: NEW TECHNOLOGIES AND CHALLENGES TO THE APPLICATION OF IHL

### a. INTRODUCTION

Working Group 2 within the Study Group is tasked with exploring some of the key legal questions which arise from the development of new technologies in warfare and the potential challenges these new weapons and (potential) methods of warfare pose to the application of international law to these new means and methods of conducting hostilities. Such new technologies include cyber warfare, either in conjunction with traditional kinetic warfare, or as a ‘stand-alone’ method of warfare, the development and use of unmanned aerial and naval vehicles with the capacity to strike targets anywhere and at any time, far from traditional notions of the ‘hot battlefield’, the potential development and use of autonomous weapons systems with an offensive capability (so-called ‘killer robots’) and the legal challenges posed by conducting hostilities in outer space.

### b. CYBER WARFARE

#### i. *Tallinn Manual*

Cyber warfare has received much attention in recent years and many of the issues connected to it have been analysed and commented upon,<sup>13</sup> notably in the recently published *Tallinn Manual*.<sup>14</sup> That publication extensively explored the application of international law to cyber warfare, both the application of the rules of the *ius ad bellum* relating to when cyber activities could amount to the use of force and can constitute an armed attack justifying recourse to self-defence, and the application of the *ius in bello* relating to the conduct of cyber hostilities in the context of an armed conflict. The members of the Study Group were unanimous in deciding that any work that Working Group 2 undertakes should not try to duplicate the extensive work already done on cyber warfare in the *Tallinn Manual*, nor go into the many areas of cyber activity, such as cyber espionage, cybercrime and general cyber security which occur outside the context of an armed conflict.<sup>15</sup> The term ‘cyber warfare’ is often used loosely to refer to a whole range of activities which do not, in themselves, constitute an armed conflict and there are few, if any, examples to date of such ‘stand-alone’ cyber operations which can be realistically considered to constitute either a use of force in the *ad bellum* context, or hostilities in the context of an armed conflict. While there is some doubt as to the realistic prospect of such ‘stand-alone’ cyber force amounting to an armed conflict, it cannot be ruled out. Likewise, there have been several (potential) examples of cyber means and methods of warfare being applied in the context of a traditional armed conflict alongside kinetic weapons. The members of the Study Group took the position that the application of international law to cyber hostilities was worth further attention, building upon the work of the *Tallinn Manual*, specifically in relation to a number of questions where the contributors to the *Tallinn Manual* did not reach full agreement, or where further study might be fruitful. All members of the Group seem to have agreed, just as the *Tallinn Manual* concluded, that in

<sup>13</sup> See United States Naval War College International Law Department, 89 Int’l Law Studies, US Naval War College, at <http://www.usnwc.edu/getattachment/08cf7daf-0155-454b-9f2d-c88c4fe01653/Vol--89---Compiled-on-March-11th,-2013,-additional.aspx>.

<sup>14</sup> *Tallinn Manual on the International Law Applicable to Cyber Warfare*, ed. M.N. Schmitt, Cambridge University Press, 2013.

<sup>15</sup> These aspects of cyber security were addressed in *Peacetime Regime for State Activities in Cyberspace*, ed. K. Ziolkowski, published by NATO CCDCOE, 2013.

any armed conflict in which cyber weapons were used, either in isolation as a ‘stand-alone’ method of warfare, or in conjunction with any other type of weapon, the law relating to the conduct of hostilities would be applicable to it and that while there were questions relating to the exact application of the law, it was capable of being applied to this form of warfare and that there were no significant gaps in the existing law.

ii. Destruction of Data as an “Attack”?

One such issue which was considered to warrant further analysis and discussion is the question whether and under which conditions the destruction of data constitutes an ‘attack’ in the sense of IHL, where it signifies “an act of violence against the adversary in either offence or defence” (Article 49 Additional Protocol I to the Geneva Conventions (AP I)).<sup>16</sup> If data were seen as an object, its destruction would automatically amount to an attack, but the Tallinn Manual implicitly rejected that approach by limiting the notion of attack to destruction of data which had reasonably foreseeable physical consequences. In the *Tallinn Manual* it was determined that an ‘attack’, within the context of an armed conflict in which cyber weapons were used, was a cyber operation expected to cause death or injury to persons, or damage to or destruction of objects. This could include destruction of data which had any of those effects, including reasonably foreseeable consequential damage, destruction, injury or death. Destruction of data which resulted in the loss of functionality of physical objects was considered by the contributors to the *Tallinn Manual* as potentially constituting an attack if it required replacement or repair to physical components.<sup>17</sup> The *Tallinn Manual* experts were divided on whether cyber operations, which did not result in such direct or reasonably foreseeable consequential effects amounting to physical damage, destruction, injury or death, but which had large scale adverse consequences, such as the blocking of e-mail communication throughout a country, constitute an ‘attack’ under IHL as it currently stands by the majority of the Tallinn Expert Group, although a minority of that group considered it might well be perceived as such by members of the public or by the international community, particularly if the consequences were especially disruptive.<sup>18</sup> The members of the Study Group decided that this issue was one which warranted further study in view of the widespread dependence upon digital communication. Whether the current law covers this, or whether there could be a need for additional rules in relation to such situations was an issue which deserved attention in the view of the majority of the Study Group.

Another related issue raised within the Study Group was whether and under which conditions an attack on data transmission systems (the physical components of the Internet such as the fibre optic cables and networks which transmit digital data) would be permissible under IHL. Analogies with attacking, for example, a railway bridge with telecommunications wires under it to take out communications, would suggest that this could be possible in relation to physical cyber transmission networks as well. However, the fact that digital data travels in diverse packages over un-predetermined routes and is reassembled at other un-predetermined points makes it difficult, if not impossible, to know in advance whether an attack on a specific component will render a tangible military advantage and how this relates to the generally accepted standards of ‘foreseeability’ in relation to targeting decision making. This made it an issue warranting further attention in the opinion of most members of the Study Group.

iii. Precautions

A third issue which was considered to be potentially worthy of further investigation was the requirement of precautions in attack (Article 57 AP I) and the issue of ‘feasibility’ in relation to the taking of precautions. Commanders will have to develop cyber intelligence capabilities and cyber effects modelling to comply with this requirement, especially in relation to secondary effects, without this resulting in a system of strict liability for any effects that were not reasonably foreseeable. However, how to do this in a way which balances military considerations and safeguarding civilians and civilian objects in an environment, which leaving aside discrete military data systems, is so interconnected requires further thought and discussion.

c. ARMED DRONES AND INTERNATIONAL LAW

A second topic related to the application of international (humanitarian) law to new technologies in warfare is the question of how contemporary IHL and other relevant regimes within international law can be effectively applied in relation to the use of armed drones. Unmanned aerial vehicles (UAVs), commonly referred to as drones, have been in use for many years. As such, they are not really new and

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<sup>16</sup> M. Schmitt, *The Law of Cyber Warfare: Quo Vadis?* Stanford Law & Policy Review, Vol. 25, 2014, Forthcoming, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2320755](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320755).

<sup>17</sup> *Tallinn Manual*, Rule 30 with accompanying commentary, p. 106-108.

<sup>18</sup> *Ibid.*, p. 109.

since they are – and for the foreseeable future will remain to be – simply remotely piloted aircraft, they are not significantly different in legal terms from conventional manned aircraft. However, it is only in the last decade that they have been equipped to carry out attacks on targets sometimes far removed from traditional battlefields or areas where military operations are being conducted. The Study Group concluded that while existing IHL was clearly applicable to armed drones in exactly the same way as it would apply to any other weapons system within the context of an existing armed conflict, there were two main questions which arose relating to the use of armed drones to target persons outside traditional armed conflict scenarios with a recognizable area of operations, sometimes referred to as a ‘hot battlefield’.

The first is the question of determining the conditions under which a NIAC can be said to have ‘spilled-over’ onto the territory of a neighboring State (*i.e.* a State not involved as a party to an existing NIAC in another State). Closely related to this is the question of whether IHL and other relevant regimes of international law pose geographical limitations upon the conduct of hostilities.<sup>19</sup> Both questions have wider dimensions and connotations than simply the use of armed drones, but the specific characteristics of drones and the possibilities they offer to a party to conduct attacks far removed from traditional notions of the battlefield, with virtually no risk to the attacking party and generally less political fallout than a strike by conventional military aircraft on a third State’s territory would cause, make these questions particularly relevant in relation to the use of armed drones for such purposes.<sup>20</sup>

The Study Group determined that the answers to these questions were not exclusively to be found within IHL, but include other areas of international law including the *ius ad bellum*, neutrality law (relevant in relation to international armed conflict), alongside rules and principles of international law relating to State sovereignty, territorial inviolability and non-intervention in situations of NIAC, as well as possible questions relating to the extra territorial applicability of international human rights law in relation to situations which fall below the threshold of armed conflict (which overlaps with Working Group 1 within the Study Group). There was no consensus as to how far outside IHL the Study Group should venture to answer these questions, but there was a general agreement that ‘conduct of hostilities’ could potentially include some consideration of relevant regimes of international law other than IHL to the extent necessary to adequately address these questions.

The Study Group showed a clear division of opinion on the question of geographical limitations to the applicability of IHL and the conduct of hostilities. One body of opinion took the position that the notion of ‘boundaries of the battlefield’ has a flawed foundation and that IHL did not set out any strict geographical limitations to the conduct of hostilities, but rather that any such limitations are determined by ‘threat dynamics’ (whether there are enemy forces located outside the traditional battle-space which pose a threat to one’s own forces, territory or other interests), desired operational effects and policy considerations. A second body of opinion took the position that both IHL and the other previously mentioned areas of international law (*e.g.* neutrality law, the *jus ad bellum*, rules of international law relating to sovereignty) were all potentially relevant to prohibit or pose territorial limitations upon the geographical scope of the conduct of hostilities (subject to various exceptions) outside the borders of a State or States party to an armed conflict (and in international airspace and international waters in the context of an international armed conflict).<sup>21</sup> It was decided that this required further discussion before deciding whether to include considerations of other regimes of international law outside IHL in relation

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<sup>19</sup> These issues were discussed at a symposium held at the TMC Asser Institute in The Hague on 10 and 11 January 2013 entitled “Boundaries of the Battlefield: A Critical Look at the Legal Paradigms and Rules in Countering Terrorism”, abstract and download of conference papers available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2251866](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2251866). For a quick overview of the discussions see the commentary posted by Prof. P. Marguiles on the “opinio juris blog at <http://opiniojuris.org/2013/01/14/boundaries-of-the-battlefield-symposium-insight/>.

<sup>20</sup> The legal issues relating to the use of armed drones in transnational strikes were explored in a recent Paper of the Advisory Committee on Issues of Public International Law to the Dutch Government and Parliament. This paper is available in an English translation at [http://www.sg.unimaas.nl/\\_OLD/oudelezingen/CAVV\\_advisory\\_report\\_on\\_armed\\_drones.pdf](http://www.sg.unimaas.nl/_OLD/oudelezingen/CAVV_advisory_report_on_armed_drones.pdf).

<sup>21</sup> See *e.g.* T. Gill, ‘Some Considerations Concerning the Role of the *Ius ad Bellum* in Targeting’, in: P. Ducheine, F. Osinga, M. Schmitt (eds.) *Targeting: The Challenges of Modern Warfare* (The Hague: TMC Asser Press, 2014)(Forthcoming).

to the question of the existence, or lack thereof, of geographical limitations upon the conduct of hostilities. In addition, it might be necessary to gain clarity whether this discussion is about the law governing IAC or NIAC, especially with regard to the application of neutrality law.

Finally, it should be pointed out that the question of unmanned naval platforms received no attention during the discussions, probably due to the general perception that these pose far fewer challenges to the application of the existing law due to the environment in which they are used, with correspondingly far less danger of collateral effects upon civilians.

#### d. AUTONOMOUS WEAPONS SYSTEMS

When speaking of autonomous weapons systems (AW), it is important to make clear what is meant by this term and where the issues lie. There are already (and long have been) AW in the sense of a weapon which activates itself under a particular (set of) circumstance(s). One could think of various types of mines, close in weapons systems (CIWS) for warships utilizing rapid fire guns to destroy incoming anti-ship missiles, such as ‘Goalkeeper’ or ‘Phalanx’, along with CIWS missile systems which do essentially the same type of platform or perimeter defence at a somewhat longer range. These do not pose significant legal problems and will not be considered. What does raise questions are AW with offensive capacity; so-called ‘hunter killer’ systems, which potentially (as none are yet in use) can be used to search out and engage targets, both objects and persons, without any human intervention in a variety of environments using pre-programmed algorithms.<sup>22</sup>

Such offensively capable AW pose a number of questions, some of which relate to the application of the proportionality test where this would be relevant (it would not be relevant in all circumstances as it only plays a role when there is expected damage or injury to civilians and civilian objects). One challenge which is not proportionality specific lies in determining whether a person who was an intended target was subject to attack, particularly, but not only in the context of non-international armed conflict and counter insurgency operations, where distinctions are often difficult to make for a human operator and would be probably be even more difficult for an AW using pre-programmed algorithms to select targets. The most important challenge within the context of applying the proportionality equation, where it was relevant is that relating to the calculation of expected military advantage from an attack, which is both a partly subjective determination and one that is subject to rapidly changing circumstances. This would make the use of AW in scenarios where civilians could be affected extremely problematic or even impossible to do in compliance with IHL rules relating to the conduct of hostilities. The situations in which AW could be used or not and the degree of autonomy which should be allowed in different situations is a related issue. Where the risk of collateral injury to civilians is low or virtually non-existent (for example in attacking concentrations of opposing troops or armored vehicles), more autonomy would be possible and where the risk to civilians is high (for example in many scenarios where civilians and combatants are closely mixed and recognition of combatants is not self-evident), the scope for their use would be limited or even non-existent, to ensure compliance with IHL.

Another question raised was whether it would be legal to use an AW to kill a human for the reason that the AW itself cannot be injured or killed and will always win in any encounter with a human opponent. In the views of some members of the group, the reason that IHL allows for the killing of opposing members of the armed forces is that both sides in an armed conflict face at least some risk in combat, but an AW risks nothing, so why not make it impossible for an AW to kill, when it can achieve the deploying side’s objectives by simply disabling the opponent? Other members of the group, however, disagreed with this suggestion. While there is no rule in IHL (nor has such a rule ever existed) that says that the rules relating to attack, including the potential killing of members of opposing only apply to equally matched opponents, the differences between a ‘robotic warrior’ and a human are of a different

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<sup>22</sup> The debate around the use of fully autonomous offensive weapons has gained momentum in the past months, with the release of a report in November 2012 by Human Rights Watch entitled “Losing Humanity: The Case Against Killer Robots” which paralleled calls in the UN and by several States to place the question on the agenda of The First Committee of the UN General Assembly on issues relating to disarmament and international security and calls by the UN Special Rapporteur on Extrajudicial Killings calling for a moratorium on the development of such weapons and the institution of a High Level Panel of Experts to consider the issue. The question was also debated in the UN Human Rights Committee in May 2013 where some two dozen States put forth views on the matter. For an overview of these and other initiatives see <http://www.hrw.org/news/2013/10/21/un-hold-international-talks-killer-robots>.

order. Perhaps this militates in favor of a greater limitation on the degree of latitude that should be allowed for the use of AW that use lethal force in encounters with human opponents. This may require further reflection in order to come up with a rule which accurately balances military requirements and humanitarian considerations in a way that reflects the basic character of IHL and its underlying purpose which is to achieve a workable balance between the two main principles of IHL; military necessity and humanity, and which would be acceptable to States and to the broader international community.

A third question which all members of the Study Group found to be of particular relevance to AW was that of the notion of ‘responsible command’ and ‘command responsibility’. If an AW committed a violation of IHL, how would possible criminal liability be assessed? And which duties does a commander or civilian superior have in relation to such weapons? Does this start with the development of the weapon, its procurement and subsequent deployment, or at another point? How could a commander “prevent or punish” a potential violation of IHL by an autonomous machine? This issue requires further study and discussion before reaching any conclusion.

Finally, weapons reviews in order to ensure that weapons design takes account of legal considerations, which also form part of IHL, were considered to be crucial in contributing to compliance with the law. In applying the law relating to weapons reviews to the development of AW, specific challenges emerge. Reference was made to the need for States to develop robust policy guidelines to ensure compliance with IHL standards. The recent release of the US DOD Directive on AW was given as an example of how this could be done.<sup>23</sup>

e. CONDUCTING HOSTILITIES IN OUTER SPACE

The topic of the conduct of hostilities in outer space must be seen in conjunction with a number of basic international legal principles and non-legal factors. Firstly, outer space forms part of the international commons and as such is not subject to the sovereignty of any State, and all States have a right to conduct exploration of outer space in accordance with the principles of the UN Charter and international law and are under a duty to cooperate with each other in conducting space exploration and scientific investigation. Secondly, the stationing of weapons of mass destruction, the conducting of military exercises, the stationing of troops and military installations and the testing of weapons on celestial bodies is prohibited. Thirdly, States bear international legal responsibility for all activities conducted under their jurisdiction, whether these are carried out by State agencies or by private or corporate persons.<sup>24</sup> Fourthly, the crucial importance of satellites for global communications and navigation and the dependence of all States upon them makes the potential destruction of such objects a matter of particular concern for all States, both those which could be engaged as belligerents in an armed conflict and those which are neutral or non-participants. If satellites which were crucial to such activities were prevented from carrying out their functions or were destroyed, this could have enormous repercussions for all States and the civilian population at large. Finally, the fact that such satellites are in many cases, used for both military and for civilian communications and navigation, along with reconnaissance and observation for a variety of purposes, makes them potential ‘dual use objects’. While ‘dual use objects’ is not a term of art within IHL, it is often used to refer to objects which inherently have both a (substantial) civilian function alongside a military one, which makes them, of course, military objectives in IHL terms. However, due to the aforementioned dependence of all States upon such satellites and their importance for global communications and navigation, the calculation of expected military advantage in relation to collateral harm to civilian activities is probably of a different order than an attack on most other dual use objects would entail. Moreover, it would be difficult, if not impossible, to prevent harm to neutral States and their interests resulting from such attacks.

These basic principles and factors received some attention and limited discussion during the first working meeting of the Study Group, but due to lack of time, more extensive consideration and discussion of these principles and factors was postponed to a later meeting. The Study Group was of

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<sup>23</sup> For the US Department of Defense Directive on autonomous and semi-autonomous weapons systems, *see* <http://www.dtic.mil/whs/directives/corres/pdf/300009p.pdf>.

<sup>24</sup> *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies 1967. This and other treaties and international instruments relevant to the use of outer space are available as *United Nations Treaties and Principles on Outer Space* United Nations Publication, 2002, Sales No. E.02.I.20 ISBN 92-1-100900-6, available online at <http://www.unoosa.org/pdf/publications/STSPACE11E.pdf>.

the general opinion that in the event hostilities were conducted in outer space, the principles and rules of international law, including IHL, would be applicable in principle to such hostilities. However, there was no consensus as to how this would work in practice. One member of the Study Group suggested that since outer space resembled the high seas in the sense of forming part of the international commons, the rules of naval warfare could be applied by analogy. But, despite certain similarities between the high seas and outer space, there are equally significant differences in conducting hostilities in these two environments, which would make such an analogy difficult to apply and perhaps inappropriate for many purposes. Another idea was to provide space vehicles and satellites with enhanced protection against attack, analogous to nuclear power plants, dykes, dams and cultural objects of special importance in land warfare. This idea is appealing, but would require a global convention or annex to existing conventions with wide ratification and this may not be achievable in the proximate future, due to a number of factors such as the probable difficulty of reaching consensus and the potentially high importance of space in strategic terms, especially that area of space where satellites are in orbit. Other members of the Study Group pointed to the emphasis in existing conventions on the use of outer space for peaceful purposes, which would suggest a far-reaching or even total ban on military activities and the conduct of hostilities in and against objects located in outer space as, for example, exists in Antarctica. However, this too would require a broad international consensus and either a new convention, or amendment of existing conventions to that effect, with the same difficulties as previously mentioned. It was decided that these and other possible related issues would receive further attention before deciding whether any or all of these approaches were ripe for concrete proposals on how to proceed further.<sup>25</sup>

### III. WORKING GROUP 3: MODERN WARFARE AND THE GENERAL IHL PRINCIPLES GOVERNING THE CONDUCT OF HOSTILITIES

#### a. INTRODUCTION

In this working group, the Study Group intended to identify new issues and collect opinions and ideas regarding the general IHL principles on the conduct of hostilities and modern warfare. The aim was therefore not to reach consensus or agreement at this point of the process. The particular issues which were pointed out to be discussed in this focus area of the Group include the meaning, scope and definition of ‘military objectives’, the terms ‘effective contribution to military action’, ‘military advantage’, ‘proportionality’, ‘indirect damages’, ‘excessive’, and ‘effective warnings’. Not all of these issues have been discussed, but views have been put forward concerning military objectives, proportionality, precautions of attack and the conduct of hostilities in urban or densely populated areas.

#### b. MILITARY OBJECTIVES<sup>26</sup>

##### i. Definition

According to Article 52(2) API and Rule 8 of the ICRC customary IHL study:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>27</sup>

The Study Group agrees that this definition has two cumulative elements:

- i) Objects which by their nature, location, purpose or use make an effective contribution to military action; and

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<sup>25</sup> For an overview of some of the problems posed by targeting space objects see: P.J. Blount, Targeting in Outer Space: Legal Aspects of Operational Military Actions in Space in *Harvard Law School National Security Journal*, November 2012, available online at <http://harvardnsj.org/2012/11/targeting-in-outer-space-legal-aspects-of-operational-military-actions-in-space/>.

<sup>26</sup> For an overview see: Dinstein, Y., *Legitimate Military Objectives Under The Current Jus In Bello*, 78 *International Law Studies*, p. 148. Retrieved from <https://www.usnwc.edu/getattachment/7d740b13-6bd2-4924-919c-b6ce3671fb8b/14--Legitimate-Military-Objectives-Under-the-Curre.aspx> on 20 February 2014; Fenrick, W., *Applying IHL Targeting Rules to Practical Situations: Proportionality and Military Objectives*, 27 *Windsor Yearbook of Access to Justice* 271 (2009); Watkin, K., *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing*, 15 *Duke Journal of Comparative & International Law* 281 (2005); Quindry, F., *Aerial Bombardment of Civilian and Military Objectives*, 2 *Journal of Air Law* 474 (1931).

<sup>27</sup> International Committee of the Red Cross, Customary IHL, retrieved from [http://www.icrc.org/customary-ihl/eng/print/v1\\_cha\\_chapter2\\_rule8](http://www.icrc.org/customary-ihl/eng/print/v1_cha_chapter2_rule8) on 29 January 2014.

- ii) Objects whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

The Study Group seems to be in consensus that this definition of military objectives should be maintained. It was emphasized that the elements need to be judged on a case-by-case basis in view of the prevailing circumstances. One member raised the issue that the definition of a military objective could benefit from greater elaboration and clarity, specifically the terms ‘purpose’, ‘effective’ and ‘definite military advantage’. Others were of the opinion that the term ‘nature’ could also be elaborated.

- ii. War-sustaining Objects

One of the questions raised within the Study Group was “what are war sustaining capabilities and what is their relevance in qualifying an object as a legitimate military objective?” In considering whether objects of war-sustaining capability constitute effective contribution to military action, it was mentioned that there are diverse views on this matter. In this context, the difficulty was noted, that war-sustaining capabilities are one step removed from making an effective contribution to military action, and therefore it will ultimately depend on the object rather than the war-sustaining quality in which way it is qualified.

The Study Group recognized that both elements of the definition of military objectives need to be satisfied for any object to be considered military objectives. The objects must make an effective contribution to military action; it is not sufficient that they merely contribute to a party’s general war effort. In this context, the Group mentioned a decision in the Ethiopia-Eritrea Claims Commission concerning the destruction of an electric facility.<sup>28</sup>

The majority of the Study Group was of the opinion that it should not further discuss the issue of war-sustaining capabilities. The arguments raised included that this concept weakens IHL, and that it erroneously migrated across to land-warfare from naval law.

- iii. “Dual-use Objects”<sup>29</sup>

With regard to the characterization of dual use objects, it has to be stressed that “dual-use objects” need to satisfy *both* elements of the definition to be considered legitimate military objectives, taking into account the specific circumstances. While some commentators might say that “dual-use objects” are a objects which inherently have both a substantial civilian function alongside the fact that they are military objectives, the Study Group has not yet agreed on what is exactly meant by the term, and therefore the use of the term and its precise definition is left for further discussion.

In academic literature, there remains disagreement about which objects are ‘by nature’ a military objective<sup>30</sup> and there were voices within the Group that dual-use objects cannot qualify as a military objective under the ‘nature’ criterion because this criterion refers to the intrinsic and permanent attributes of the object.<sup>31</sup> It was also mentioned that the apparent problem lies in the situation when an object is not used for military ends, but could only potentially be used for military purposes in the future (any civilian object). In principle, this should not be sufficient to fulfil the first element of the

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<sup>28</sup> The Commission awarded US\$500,000 to Eritrea to restore two buildings of the Senafe Electric Authority and related equipment (Eritrea Ethiopia Claims Commission, Final Award – Eritrea’s Damages Claims between The State of Eritrea and The Federal Democratic Republic of Ethiopia, 17 August 2009, p. 30).

<sup>29</sup> The examples of transportation (such as railway) and electricity networks were mentioned. *See*: Shue, H., & Wippman, D., *Limiting Attacks on Dual-Use Facilities Performing indispensable Civilian Functions*, 35 *Cornell International Law Journal* 559 (2002).

<sup>30</sup> For example with regard to bridges and railway tracks. For an overview of different opinions, *see*: Dinstein, Y., *Legitimate Military Objectives Under The Current Jus In Bello*, 78 *International Law Studies* 139, pp. 146-147; *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations* (1997), pp. 8.2-8.3; Program on Humanitarian Policy and Conflict Research at Harvard University, *Manual on International Law Applicable to Air and Missile Warfare* (2009), p. 13 (retrieved from <http://ihlresearch.org/amw/HPCR%20Manual.pdf> on 26 February 2014); Robertson, H.B., *The Principle of the Military Objective in the Law of Armed Conflict*, *Journal of Legal Studies* 36, p. 49 (retrieved from [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1080&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1080&context=faculty_scholarship) on 26 February 2014); UK LOAC Manual (2004) states “‘Nature’ refers to the type of object, for example, military transports, command and control centres or communications stations.” (retrieved from [http://www.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_gb\\_rule8](http://www.icrc.org/customary-ihl/eng/docs/v2_cou_gb_rule8) on 26 February 2014); .

<sup>31</sup> Such as military equipment.

definition. However, the ICRC commentary defines ‘purpose’ as intended future use.<sup>32</sup> It remains difficult to determine the exact moment in time at which it is sufficiently clear or reasonable to assume that the object’s purpose is to make an effective contribution to military action.

Furthermore, it was noted that there are not many objects that might make an effective contribution to military action, but whose destruction would not offer a definite military advantage at the same time. Examples for this might be the physical infrastructure of cyber space,<sup>33</sup> such as cables and routers. Some might also want to argue that the entire cyber-infrastructure is dual-use because the military employs it during armed conflicts for command, control and communications. However, destroying a router or cable will lead to data automatically rerouting through other network paths. Therefore, the opinion was expressed that destruction brings no military advantage and hence, internet infrastructure is not a military objective (unlike other dual-use objects), unless destruction or neutralization offers a definite military advantage due to a specific characteristic of the object or its location in cyberspace.

There was some disagreement on whether discussing the concept of dual-use objects would add anything to the debate and several members refrained from commenting on this subject.

#### iv. List of military objectives

Although the idea of making a list of military objectives and civilian objectives was introduced into the discussion,<sup>34</sup> the vast majority of the group was of the opinion that this could lead to various problems. For example, it might result in a negative obligation not to attack the listed civilian objects, leaving the risk that the impression is created that any objects not included are legal objects of attack. Although the list could serve the purpose of verification, the risk of misinterpretation would carry undesirable consequences. Furthermore, if something is included in a list of military objectives, the specific facts and circumstances of the case still need to be considered.

It was also noted that with regard to the first element of the definition of military objectives, it would only be possible to identify objects that by their nature make an effective contribution to military action. A list would be practically impossible for objects that by their location, purpose or use make an effective contribution to military action. It was added that although a list could offer some value because it would be illustrative and offer examples, the problem would be that anything that could be included on the list is obvious enough.<sup>35</sup> The situations that are not immediately obvious, are far too complex and contextual to include in a list.

For the above reasons, the idea of creating a list of military or civilian objectives was rejected by the Study Group.

#### v. Treaty-Protected Objects

It was also noted that the relationship between the rule concerning military objectives and certain protected objects could benefit from clarification, specifically those that are protected under treaties such as diplomatic/consular premises and UN premises. The fact that the operation of a treaty is not terminated or suspended during armed conflict, suggests that these objects cannot be lawfully targeted even if they constitute a military objective. The Study Group did not comment on this matter.

### b. PROPORTIONALITY<sup>36</sup>

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<sup>32</sup> According to Dinstein this cannot be hypothetical, but must be “predicated on intentions known to guide the adversary” (Dinstein, Y., *Legitimate Military Objectives Under The Current Jus In Bello*, 78 *International Law Studies*, p. 148. Retrieved from <https://www.usnwc.edu/getattachment/7d740b13-6bd2-4924-919c-b6ce3671fb8b/14--Legitimate-Military-Objectives-Under-the-Curre.aspx> on 20 February 2014.)

<sup>33</sup> Gervais, M., *Cyber Attacks and the Laws of War*, 30 *Berkeley Journal of International Law* (2012), pp. 525-579. Retrieved from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1939615](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1939615) on 26 February 2014.

<sup>34</sup> It was noted that some lists of objectives can be found in literature e.g. Rogers, A.P.V., *Law on the Battlefield* (1996) pp. 33-35.

<sup>35</sup> A judge would not struggle with obvious objectives such as army barracks.

<sup>36</sup> For an overview on the principle of proportionality see: Fenrick, W., *Applying IHL Targeting Rules to Practical Situations: Proportionality and Military Objectives*, 27 *Windsor Yearbook of Access to Justice* 271 (2009); Barber, R., *The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan*, 15 *Journal of Conflict and Security Law* 467 (2010); Geiss, R., & Siegrist, M., *Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?*, 93 *International Review of the Red Cross* (2011), pp. 29-35; J. van den Boogaard, *Fighting by the Principles: Principles as a Source of International*

According to rule 14 of the ICRC customary IHL study, the principle of proportionality states:

Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.<sup>37</sup>

The questions which the Study Group initially dealt with were “[u]nder which circumstances can long-term repercussions be seen as relevant civilian damages? What are ‘damages’ in the sense of Article 51 AP I – loss of functionality (cyberspace) or only physical destruction? Do damages to the environment have to be taken into account? Are psychological effects on civilians relevant as well? Can the issue of force protection be factored in with regard to the military advantage?”

The Study Group has various views on the issue of proportionality. On the one hand, the concern has been raised that the question of proportionality as a whole is too broad to be dealt with by the Group. On the other hand, it was suggested that proportionality should be looked at from strategic, tactical and operational levels. Furthermore, it was proposed that a number of issues need clarification such as what is meant by ‘excessive’ and the scope of ‘incidental loss of civilian life, injury to civilians, [and] damage to civilian objects’. With regard to the word ‘excessive’, it was mentioned that this needs to be as objective as possible, by, for example, considering the reasonable military commander.

A number of specific issues relating to the principle of proportionality have been outlined by the Study Group as deserving further elaboration.

i. Incidental loss of civilian life, injury to civilians and damage to civilian objects

With regard to the question on what constitutes incidental loss of civilian life, injury to civilians and damage to civilian objects, particularly with respect to long-term repercussions, psychological effects on civilians and damage to the environment, one possibility which was highlighted is that this has to be considered in light of the treaty language. Although some may claim that it only concerns direct harm, it was expressed that this claim finds no support in the rule. Instead, *indirect* effects must also be considered, otherwise the rule would include the word direct, like it does for military advantage. It was added that incidental harm must be assessed from the commander’s perspective based on what he/she knew or should have known at the time of the attack, and not on the basis of hindsight. Furthermore, the need to focus on the meaning and scope of a ‘reasonable military commander’ was highlighted. It was further noted that the destruction of dual use objects in any case entails incidental harm to civilians. The Study Group is also considering whether to focus on the meaning and scope of ‘civilian life’. This is particularly important with regard to members of non-state armed groups in NIACs.

1. Mental Injury

One aspect that has been outlined as worth looking into is the question of ‘psychiatric injury’. The opinion was expressed that mental injury falls within the notion of injury to civilians, whereas mere psychological harm does not, noting that in the domestic criminal law of some states, mental injury constitutes grievous bodily harm whilst psychological harm does not. It is generally recognized that psychiatric injury is generally biological and treated medically, whereas psychological disorders are usually treated through psychotherapy and psychological or behavioral interventions. The latter include anxiety, depression, anger, addictions, Post Traumatic Stress Disorder (PTSD), and Attention Deficit Hyperactivity Disorder (ADHD). Within the group the need for, and significance of, the distinction between psychiatric injury and psychological harm was questioned, also wondering whether this has to do with proving a causal link. It was stated that the causal link to hostilities is often difficult to prove. There was also some concern as to how a military commander would evaluate this distinction.

Various group members shared the view that this issue should be further looked into, bearing in mind the topic of PTSD and the limited available literature. However, there is also the view that this issue should not be dealt with except for when it is measurable and can point to a causal link, because war is intrinsically harmful. Furthermore, it was added that psychiatric damage could be a result of terrorizing and that the issue of drones is also important to consider with respect to this topic.<sup>38</sup> Finally, the issue

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*Humanitarian Law*, in: Matthee, Mariëlle, Toebes, Brigit, Brus, Marcel (Eds.), *Armed Conflict and International Law: In Search of the Human Face - Liber Amicorum in Memory of Avril McDonald* (The Hague TMC Asser Press, 2013) 3-32.

<sup>37</sup> International Committee of the Red Cross, Customary IHL, retrieved from [http://www.icrc.org/customary-ihl/eng/print/v1\\_cha\\_chapter4\\_rule14](http://www.icrc.org/customary-ihl/eng/print/v1_cha_chapter4_rule14) on 20 February 2014.

<sup>38</sup> Stanford International Human Rights and Conflict Resolution Clinic & Global Justice Clinic at NYU School of Law, *Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan*, retrieved from <http://www.livingunderdrones.org/report/> on 26 February 2014.

of attacks the intention of which is to cause terror amongst the civilian population might also be discussed in this context.

## 2. Environmental damage<sup>39</sup>

The Study Group is of the view that the environment is to be dealt with under the issue of proportionality. It should be considered a civilian object pursuant to Article 52(1) AP I, as long as the elements for military objective are not satisfied. However, the opinion was also expressed that the high threshold in treaty and customary law may not leave much room for discussion. The example of depleted uranium in the *Nuclear Weapons* case was given. Finally, there is also the opinion that there was no need for environmental issues to factor into the proportionality equation as such.

## 3. *Hors de combat*, civilians taking direct part in hostilities, and military medical doctors

The Study Group generally agreed that the issue of wounded and sick belligerents needs clarification. There is the need to discuss whether wounded and sick combatants (*hors de combat*) should be factored into the definition of civilian loss because they are to be “respected and protected in all circumstances”.<sup>40</sup> Apart from that, it was raised that the interpretations in literature stating that casualties among military medical doctors are not considered incidental casualties because they are not civilians, is contrary to the object and purpose of rules governing the conduct of hostilities and the protection of the medical mission. One of the suggestions regarding combatants *hors de combat* and medical personnel was to stick to their own specific rules because they are not civilians and should not be put in that category when discussing proportionality.

### ii. Military advantage

With regard to the issue of ‘military advantage’, there are various problems which need to be addressed: it has been mentioned that the ‘military advantage anticipated’ usually consists of gained ground or weakening enemy forces, but it has also been highlighted that it is not limited to this aspect because these aims are not relevant in some NIACs; for example, leaders of rebel groups do not always want to gain territory. The qualifiers ‘concrete’ and ‘direct’ mean that the military advantage should be substantial and relatively close. Advantages that are vague, hypothetical, indirect, long-term, political, economic and moral are therefore excluded. An ‘attack’ involves a finite, delimitable event, and should not be confused with the entire war.

### iii. Force Protection<sup>41</sup>

Commanders have a duty under national law to protect their soldiers, but this must be in accordance with IHL. Complete disregard of IHL on grounds of force protection is incompatible with IHL.<sup>42</sup> The majority of the Study Group agreed that the notion of force protection is relevant for the implementation of both the proportionality and precautionary principle and that this debate needs clarification in both of these contexts (the precautionary principle is dealt with further in this report and for simplification purposes the aspect of force protection will be discussed here). However, the opinion has also been raised that force protection is not a component of proportionality, in line with a view suggested in literature, and that it is to be dealt with by the rules on precautions (Article 57 AP I and Rule 15 of the ICRC customary IHL study). In this regard, it seems to be important to clarify the impact of the aspect of force protection on the two principles without confusing them.

Furthermore, and in light of proportionality, it was raised that force protection is included in the concept of ‘concrete and direct military advantage anticipated’. It was also stated that force protection

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<sup>39</sup> See: Jensen, E.T., *The International Law of Environmental Warfare: Active and Passive Damage during Armed Conflict*, 38 Vanderbilt Journal of Transnational Law 145 (2005); Thomas, C., *Advancing the Legal Protection of the Environment in Relation to Armed Conflict: Protocol I's Threshold of Impermissible Environmental Damage and Alternatives*, 82 Nordic Journal of International Law 83 (2013); Leibler, A., *Deliberate Wartime Environmental Damage: New Challenges for International Law*, 23 California Western International Law Journal 67 (1992).

<sup>40</sup> Article 12 Geneva Convention I.

<sup>41</sup> For a general overview see Neuman, N., *Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality*, 7 Yearbook of International Humanitarian Law (2004), pp. 79-112, retrieved from [http://journals.cambridge.org/download.php?file=%2F10457\\_59A545C6398BB85B613DD70B9BC5DDD6\\_journals\\_YHL\\_YHL7\\_S1389135904000790a.pdf&cover=Y&code=e58aabfc5cb979b36ca4bcf617ba24df](http://journals.cambridge.org/download.php?file=%2F10457_59A545C6398BB85B613DD70B9BC5DDD6_journals_YHL_YHL7_S1389135904000790a.pdf&cover=Y&code=e58aabfc5cb979b36ca4bcf617ba24df) on 26 February 2014; Geiss, R., *The Principle of Proportionality: Force Protection as a Military Advantage*, 45 Israel Law Review 71 (2012).

<sup>42</sup> Force protection cannot, for example, lead to indiscriminate fire in order to avoid exposure of forces.

cannot override the idea that when there is a doubt regarding civilian status, civilian status has to be assumed. In the end, one can also be of the view that the issue of proportionality ultimately depends on the circumstances. It would be incompatible with- and undermine the principle of proportionality to value one's own forces above that of civilians and civilian objects. It is necessary to look into the question whether force protection under the principle of proportionality means that an attack cannot take place if the only means and methods considered feasible for force protection are such that incidental casualties and damages are expected that would be excessive in relation to the anticipated concrete and direct military advantage.

With regard to precautions, it was stated that the impossibility to verify that a potential target is a military objective due to the risk created to one's own soldiers, does not render the attack lawful. If there are doubts, civilian status must be presumed and verification measures should take place, even at the risk of the soldiers. It was noted that the law is unclear on the level of risk that soldiers should accept to avoid or minimize harm to civilians. There was general concern that a policy to the effect that force security takes priority over civilians without humanitarian considerations is inconsistent with the precautionary principle.

It has also been noted that the concept of 'cover fire' would benefit from further analysis, and that the conflict with human rights law needs to be discussed as it obliges a state to minimize risks for its forces against enemy civilians. This obligation under human rights law is contrary to the IHL obligations with regard to enemy civilians. It was also raised that force protection might not be the same as capability sustainment, and hence, these two should not be conflated. In the same context it was stated that commanders calculate rather than speculate.

#### iv. Human shields<sup>43</sup>

Another question which could be discussed is the aspect of 'human shields' which would also fall under the principle of proportionality. The issue of human shields circles around the problem whether *voluntary* shields are civilians protected against direct attack, whereas others are of the opinion that they take direct part in hostilities. Furthermore, there are some voices which claim that when precautions have taken place in order to warn civilians, and they do not leave, that they factually become voluntary shields, while others underline that there might be many other reasons for being unable or unwilling to leave despite the warning. In any case, a party that issued an effective warning is not relieved from its obligation to take all other feasible precautions to avoid or minimize civilian harm. Moreover, it has been suggested that the Study Group should avoid talking about the issue of voluntary shields at all, especially because the topic as such has been exhaustively covered, even though there might be merit in looking further into certain special issues surrounding it.

#### v. Loss of functionality

It was finally raised that the loss of functionality, for example resulting from cyber warfare, also should be included as an aspect of 'damage'. In this regard, it would not be relevant how an object is disabled. There were no further comments on this issue.

### c. PRECAUTIONS IN ATTACK<sup>44</sup>

According to rule 15 of the ICRC customary IHL study, it is stated that:

In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.<sup>45</sup>

There was a general consensus within the Study Group with regard to the need for clarification concerning some aspects of the rules relating to the principle of precaution, as well as how they are to be applied. It has been noted that the standard of 'feasible precautions' still applies, but that it could differ depending on the party, the stage of the conflict and the conflict itself. As a feasible precaution

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<sup>43</sup> See: Rubinstein, A., & Roznai, Y., *Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality*, 22 *Stanford Law & Policy Review* 93 (2011); Al-Duaij, N., *The Volunteer Human Shields in International Humanitarian Law*, 12 *Oregon Review of International Law* 117 (2010); Schmitt, M., *Human Shields in International Humanitarian Law*, 47 *Columbia Journal of Transnational Law* 292 (2009).

<sup>44</sup> For an overview on the precautionary principle see: Geiss, R., & Siegrist, M., *Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?*, 93 *International Review of the Red Cross* (2011), pp. 35-39.

<sup>45</sup> International Committee of the Red Cross, Customary IHL, retrieved from [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter5\\_rule15](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter5_rule15) on 20 February 2014.

one could understand a measure that is practicable considering all the circumstances, including humanitarian and military considerations. The principle of precaution is maybe one of the IHL principles which is undervalued and it could hold great promise for tempering the scourge of war. It seems that it always is applied before the principle of proportionality.

i. Precautions in non-international armed conflicts

During the discussions of the group it was raised that the precautions that are to be taken in NIACs involve all feasible precautions in order to avoid and minimize loss of civilian life. The precautions can also be derived from the prohibition of disproportionate attacks and of direct attacks against civilians. This means that everything feasible must be done to verify that objectives are military objectives; establish whether an attack may be disproportionate; and to cancel or suspend attacks if it becomes apparent that the target is not legitimate. There was some concern that the concept of feasible precautionary measures might benefit from clarity due to the increasing number of armed conflict with the involvement of non-State actors.

ii. List of precautions

The Study Group looked at the question whether it is sensible to make a list of best practices. This idea received mixed reactions. On the one hand, such a list would create positive obligations and could serve and be useful as a list of best practices. It was mentioned that such a list would be especially useful in providing guidance to the judiciary, because judges often lack a military background and instead, interpret the rules from their legal and human rights background. A list could assist judges by providing the necessary guidance. It was also suggested that it might be better to make a list of illustrative examples on how precautions works, in order to disseminate to a broader group of people. However, it was also noted by a group member that it might be dubious for lawyers and academics to decide how soldiers should protect civilians and that the group might lack the expertise for this.

iii. New technologies<sup>46</sup>

Two questions raised by the Study Group were a) whether parties to a conflict with a higher developed military technology are required to use that, and b) to what extent new technologies need to be factored into what constitutes a feasible precaution.

It has been noted in particular the possibility that the obligation of a party to the conflict to use the most developed technology available on the market does not exist and that there remains discretion as to the choice of weapons to be included in the party's arsenal. There is no obligation for states to acquire the most precise and developed technology if there is no difference in expected civilian harm. However, the obligation to take all precautions to avoid or minimize harm to civilians and civilian objects still remains and when the use of new technologies would avoid or minimize harm, there is the view that this should be factored into the feasibility consideration.

On the other hand, the opinion is put forward that new technologies should not be considered in the feasibility test because it will not lead to different conclusions; it can always be argued that the new technology is needed for future use or in a different operation. The view has also been expressed that with regard to feasibility, the obligation to use new technologies provides a common but differentiated responsibility and should be further addressed by the working group.

iv. Advance warnings

It has been put forward that if circumstances permit, there is an obligation to give an effective advance warning. This has to be done in a way that reaches the target population and gives enough time for them to undertake action, while at the same time not causing unacceptable additional risk.<sup>47</sup> It has also been mentioned that the effectiveness of advance warnings depends on the circumstances and must be judged from the perspective of civilians, especially whether it enables them to take measures to protect themselves. The circumstances, as well as the effectiveness of a warning, will determine what is feasible and whether a warning needs to be specific and/or include instructions. It was added that advance warnings do not relieve an attacker from the obligation to take other feasible precautionary

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<sup>46</sup> See: Jiminian, J.M.C., *The Principle of Distinction in Virtual War: Restraints and Precautionary Measures under International Humanitarian Law*, 15 *Tilburg Law Review* 69 (2010); Wexler, L., *Limiting the Precautionary Principle: Weapons Regulation in the Face of Scientific Uncertainty*, 39 *U.C. Davis Law Review* 459 (2006).

<sup>47</sup> The example of dropping leaflets near mined areas was given.

measures. Finally, the view has been expressed that specific instructions must be given if doing so reduces damage to civilians and circumstances permit doing so.

v. Miscellaneous

The distinction between precautions in planning and carrying out attacks on the one hand and precautions against the effects of attacks has also to be mentioned. The difference between international<sup>48</sup> and non-international<sup>49</sup> armed conflicts was noted, as well as the subject-specific treaties.<sup>50</sup> With regard to this, it was stated that precautions found in these can be applied outside of their respective confines through customary international law.

d. THE USE OF EXPLOSIVE WEAPONS AND THE CONDUCT OF HOSTILITIES IN URBAN OR DENSELY POPULATED AREA

There is no express legal prohibition concerning the use of explosive weapons in densely populated areas. The suggestion was noted, however, that this use should be avoided because of the significant likelihood of indiscriminate effects due to their wide impact area.<sup>51</sup> IHL prohibits the use of these weapons where their use would be indiscriminate, disproportionate or when feasible precautions are not taken. What needs to be considered is the accuracy and capacity to strike a precise target relative to its surroundings, as well as the circumstances of delivery.<sup>52</sup> The impact area is said to be crucial because explosive weapons might not be able to distinguish within that impact area. The following key considerations could play a role: the long-term high humanitarian costs, explosive remnants of war, size of the military objective, and intermingling with civilians. It was suggested that there is the need for more clarity in order to inform commanders' decisions

A number of group members were of the view that this topic could benefit from further clarification and that the group should form a position on this, whereas others disagreed and said it should not be a point of discussion. Furthermore, it was noted that the weapons should not be clarified, but merely their use.

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<sup>48</sup> Articles 57 and 58 Additional Protocol I to the Geneva Conventions.

<sup>49</sup> Nothing on this in Additional Protocol II to the Geneva Convention, but the ICRC study considers some 'arguably' applicable as custom.

<sup>50</sup> Amended Protocol II to the Convention on Certain Conventional Weapons; Second Protocol to the Hague Convention on Cultural Property.

<sup>51</sup> ICRC report, International Humanitarian Law and the challenges of contemporary armed conflicts, 31IC/11/5.1.2, October 2011, p. 42, available at: <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>; United Nations, Security Council, Report of the Secretary-General on the protection of civilians in armed conflicts, S/2013/689, 22 November 2013, para. 69, available at: [http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2013\\_689.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_689.pdf).

<sup>52</sup> San Remo Handbook on Rules of Engagement Rule 27A: unobserved indirect fire, or even all indirect fire should be prohibited in a populated area. International Institute of Humanitarian Law, *Rules of Engagement Handbook*, November 2009. Retrieved from <http://lgdata.s3-website-us-east-1.amazonaws.com/docs/905/473836/San-Remo-ROE-Handbook.pdf> on 20 February 2014.

#### IV. MISCELLANEOUS COMMENTS

##### a. Military necessity<sup>53</sup>

Apart from the issues highlighted above, it has been put forward within the Group that the term ‘military necessity’ is used too loosely, questioning whether it is a foundational principle of IHL or a generally accepted rule to be applied in analysis. In this context, it was suggested that it is the underlying principle of the rule regarding military objectives, adding that it is both a foundational principle and a rule of IHL, acting as a principle and a gap-filler. This principle acts in a limiting way when there is no clear rule in a specific situation. Some members of the Group indicated that not much law refers to the concept as a principle, and that there are some areas of IHL where the concept of military necessity as such is not relevant or applicable. It was also stated that the principle of military necessity informs the entire body of IHL. At the moment, there is a certain disagreement about the exact scope of the principle. Finally, it has been suggested that military necessity reflects the balance between military considerations and humanitarian needs and that new contexts are now challenging this balance. However, this should not be understood as implying that the principles of humanity has no value independent from the principle of military necessity. In general, the principle of military necessity and the principle of humanity both underlie IHL.<sup>54</sup>

##### b. Principles in general

Two broad questions have also been raised. In the first place it was questioned how much detail can be read into principles of greater generality. In the second place, one could challenge how far one can extrapolate for the general understanding and application of the principles from the manner in which they are expressed in subject-specific instruments such as the Hague Convention on Cultural Property and the Convention on Certain Conventional Weapons. In this context, the need was expressed for the Study Group to decide on its methodology.

One approach could be to identify a number of issues and apply the general principles to them. There seems to be a majority within the group which favored not discussing the broad issues such as definitions, but rather to discuss specific matters. It was further noted by a member of the Group that the definitions of the principles try to attain a balance and that the application is ultimately context-specific. For that reason there are doubts as to focusing on the definitions, but rather a preference for looking at factors within contexts. It was added that the principles serve the purpose of clarifying and filling gaps left by rules in order to allow soldiers to determine their professional conduct in concrete situations.

Furthermore, the idea was put forward that principles and rules are used together in practice. Although a building might be a legitimate military objective due to a sniper hiding within it, the prohibition of disproportionate attacks and the requirement to take all feasible precautions does not mean the entire building can be destroyed. It was noted that this would, in most circumstances, be in violation of the principles of proportionality and precautions.

Finally, it was suggested that the general principles (as the title of the working group) should be listed and also that the fundamental principles should be identified. It was questioned whether there was an understanding of what the general principles are, at what levels they apply (tactical, strategic and operational) and how they apply (per type of armed conflict). This might also raise the need to integrate the principles in order to add to their value and significance. It was added that the group could look into the function, their relationship to customary and treaty law, their interpretation and their residual influence. The suggestion was made to at least identify what are *not* the purposes of the general principles, because they are not written.

##### c. Additional points

Some additional topics have been raised that could benefit from discussion. This includes the possible need for clarification in the field of due diligence, particularly outsourcing to private companies, the relation to command responsibility (ensuring control), how it relates to responsibility while protecting, and peace-enforcing operations. Other suggestions circle around discussing ‘knowledge’ and ‘accountability’; the responsibility/liability of a planner; the requirement to investigate; the right to life

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<sup>53</sup> For an overview see: Hayashi, N., *Contextualizing Military Necessity*, 27 *Emory International Law Review* 189 (2013); Downey, W.G., *Law of War and Military Necessity*, 47 *American Journal of International Law* 251 (1953).

<sup>54</sup> Cf., for example, Chapter 2 of UK Manual of the Law of Armed Conflict, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27874/JSP3832004Edition.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf).

of soldiers; the question of how many soldiers need to be risked to save a civilian; and whether there is an obligation on states to acknowledge the existence of an armed conflict. A further question might be that the current discussions are coming from a State-centric approach and whether it would maybe make sense to focus more on non-State actors.

## V. CONCLUSION & INDICATION OF NEXT STEPS

Overall, the work of the Study Group so far has flagged out various problems with regard to the three subject areas listed above. In many ways, possible solutions to the issues have already been indicated, but at the moment there is no general agreement on all of the issues. In a next step, the Study Group will make a choice with regard to the most pressing challenges of the three areas, and engage in a more detailed discussion on how to tackle these issues.