

Commentary

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As I have been Director of International Law and Communication at the International Committee of the Red Cross (ICRC), an institution which devotes much energy to promote the Geneva Conventions of 1949 and their Additional Protocols of 1977, for 16 years and as I am co-editor of the Commentary to those Protocols, you will not be surprised that I don't share the negative views expressed by John Murphy, echoing those of Hays Parks, on both the Additional Protocols and their Commentary, even if they are certainly far from being perfect.

What can at least be said about the Additional Protocols of 1977 in a few words is that it is not possible simply to affirm that they are or that they are not part of international customary law. As stated in the title of the Diplomatic Conference of 1974–1977, which negotiated and adopted the Protocols, this Conference had the double ambition to reaffirm and to develop international humanitarian law (IHL). That means that in part the Protocols reaffirm and clarify customary rules of IHL and in part they develop that law. For the first part their rules bind all States, for the second only the States parties to the Protocols are bound. But the borderline is not always easy to determine for two reasons. The first is that the Diplomatic Conference has not clearly declared what was reaffirmation and what was development. The second is that some rules which were considered as a development in 1977 may be considered today as part of customary law. But being commentator I will now base my next points on the very good papers presented by John Murphy and Ove Bring and enter into discussion on the Protocols and their Commentary only on the occasion of remarks to those papers.

Let me start with some words on international customary law. John Murphy has quoted an author who went as far as questioning even the existence of international customary law. I will not comment on this not very serious declaration, but I would have something to add on the description given by John Murphy on how to establish that there is customary law, with a particular focus on the difficulty of establishing State practice.

A reference to the notion of “specially affected States” by the ICJ in the *North Sea Continental Shelf* case would be, for example, an important additional element to mention. I will not go further here and now on that question, but I wish to mention that lawyers from the ICRC are finalizing a broad study on the customary rules of IHL, done with the contribution of legal and governmental experts, and based on the work of working groups, from all regions of the world. This study will be published next year. Of course, the question to know how to establish the practice and the *opinio juris* of States is discussed in that study to determine the existence of customary rules and the criteria taken into account will be explained. That being said and without entering into the substance of this study, I would like to stress three points. First, the aim of the study is to determine if a rule can or cannot be considered as a customary rule, but not to give an in-depth interpretation of that rule. For that reason we cannot expect too much from this study for the clarification of the exact and practical meaning of existing rules, which is the central problem debated by this colloquium. Secondly, there will always remain a certain degree of uncertainty as to the customary nature of certain rules, and therefore customary law is not a substitute to the formal adoption by States of treaties aiming to be universally accepted, as those of IHL. Thirdly, the problem of the existence or not of a normative restriction is particularly delicate with the emergence of new weapons, due to the fact that there cannot be a largely established practice during a long period of time in those cases. I will come back to this last question later.

My next remark will be on the principle of proportionality, to affirm my strong conviction that this principle does exist in *jus ad bellum*—a State which has to use force as a last resort does not have the right to do more than what is imposed by the situation—as in *jus in bello*—there is an obligation in military operations to keep a balance between the military advantages anticipated and the expected incidental civilian damages. It is even a central principle of those laws. I was therefore surprised to read in the paper of John Murphy that Hays Parks has reported that “the American military review of Protocol I concluded that the concept of proportionality is not a rule of customary international law.” All that I read and even what we heard yesterday from James Baker

reinforce my conviction. James Baker reminded us that this principle was at the center of the discussions on legitimate targets during the Kosovo bombings, as well for NATO members party to Additional Protocol I as for those, like the United States, that were not. Therefore I can conclude in quoting Bill Fenrick, the well-known Senior Legal Adviser of the Office of the Prosecutor of the International Criminal Court on Yugoslavia: "That the principle of proportionality exists is not seriously disputed." The problem we have to address is the *interpretation* of the principle, not its existence.

Without entering in-depth into this issue, I would signal that another problem is the confusion in some military operations between the political objective and the military objectives *stricto sensu*. Such confusion took place in the NATO operations in Kosovo, where the political objective—to oblige Milosevic to accept conditions previously fixed—was not well distinguished from military objectives. In fact, the question was not to win the war, but to put enough pressure on Milosevic to cause him to end the conflict. Therefore traditional notions of military objective and military advantage were used in an ambiguous way. This question would need serious consideration for operations of this nature. But I do not pretend to start a serious discussion here and now. It would require in-depth analysis of this and other concrete cases.

My next remark is that I cannot agree with the affirmation that the balance between the obligations of the defenders and those of the attackers has been broken down in Additional Protocol I of 1977 to the detriment of the attackers. In reality, the obligations of the defenders are very clearly stated in Protocol I, as we can read particularly in Article 51 (7):

The presence or movements of the civilian population or individuals civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations. The Parties to the conflict shall not direct movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

Article 58 then goes on to provide:

The Parties to the conflict shall, to the maximum extent feasible; (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; (c) take the other necessary precautions

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to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

Thus, as we can see, the Protocol is very clear in imposing on a Party to the conflict a requirement not to use civilians to protect its military objectives. Nevertheless, it is also true that it requires as well that the attackers take into consideration the situation as it is in reality. They can't just ignore the fact that civilians are used as "human shields." But this is common sense. Imagine your own citizens being used; you cannot pretend you just don't care. And it is also true if innocent civilians of one party, particularly children, are used for this purpose. This element has to be taken into account in the balance and the crime of your enemy does not give you the right to ignore the situation created by that crime. But the Protocol doesn't prohibit action; it requires that all of these elements be taken into account in the appreciation of the situation. I think, as was clearly explained yesterday, that this position was adopted without hesitation by those deciding on the NATO bombings in Kosovo.

Where I am in total agreement with John Murphy is that a real and crucial problem of clarification remains for the definition of a military advantage, and ascertaining the level where a decision must be taken or the determination of responsibilities. These are undoubtedly delicate questions which can only be clarified through practical examples in order to establish a kind of jurisprudence. We could certainly add some other questions to the list, as the one just mentioned by Ove Bring on the dual-use objects, which precisely has, in my opinion, a close link with the principle of proportionality—in fact the attack of a dual-use object can be considered as the attack of a military objective with collateral damages.

Mentioning again the principle of proportionality I want to stress another element of this principle, the fact that it has to be observed at different levels. Some would confine this principle to the strategic level and I cannot agree with that opinion. There is no doubt, for example, that a soldier cannot blow up a school full of children under the pretext that an enemy soldier has entered the school. Such a restriction is an application of the principle—the military advantage being overthrown in such a hypothesis by the expected collateral damages—even if the enemy soldier has himself committed a violation of the law in taking children as a shield.

That being said, I don't deny that the appreciation of those rules is complex, but we cannot totally avoid such complexity. War is complex; life is complex; and the complexity of a problem is not a good reason to refuse facing it. We

have to solve those questions because they are at the heart of the necessary limitations in war.

On the other hand, I am the first to admit that the military must have precise orders and that the trend to take more seriously the obligation to punish war crimes renders still more indispensable this clarity, even if I cannot share the criticisms of the ICRC lawyer's commentary, in particular on the meaning of military objectives. In reality, the recent German military manual goes exactly in the same direction, as well as the excellent commentary written by Michael Bothe, who is present with us, and by the late Karl Josef Partsch and Waldemar Solf, the latter playing, as you know, a very important role in the American delegation to the 1974–1977 Diplomatic Conference. That being said, I do agree that this Commentary does not give a precise reply to all those delicate questions.

Therefore we have to go further and to find the best way to do it. And for that, I think it is worth reading what Bill Fenrick has written in a recent article:

If the application of the law applicable to targeting and proportionality is to become more transparent and, one hopes, more humane, outsiders, including military experts and legal advisers not directly involved in particular conflicts, should learn from the military planning process. A vigorous informed discussion of targeting and proportionality issues based on case studies, both historical and hypothetical, can contribute substantially to clarification of how the law can and should be applied.

Then Fenrick draws the conclusion that “[t]he law applicable to targeting and proportionality must be brought down to earth.” I totally agree with this statement and I think that the Naval War College is precisely the type of place where the discussion suggested by Fenrick could take place.

I will not really enter into the problem of high-altitude air bombings, as I have not the basic factual elements to do it seriously. But I think nevertheless that it is important to reaffirm at this occasion at least one basic principle on which a certain confusion emerged in the discussion on those bombings: one cannot affirm that the security of its own soldiers have an absolute priority over the protection of the civilian population. Both elements have to be put into the balance and taken into account. If the price to absolute security of one's own soldiers is heavy casualties among civilians, this price is too high.

Allow me then a further comment on the issue of precision-guided ammunition. I agree with John Murphy that there is no obligation to use it exclusively. In fact there are many interdictions and restrictions on the use of

weapons in IHL, but no obligation to use a specific weapon. I don't think those weapons are an exception. But that does not mean the possession of these weapons is without legal consequence in certain circumstances. It may help, for example, to keep the military action in conformity with IHL, particularly in densely populated areas, in changing favorably the balance between the anticipated military advantages and the expected civilian collateral damages.

Another question is the following: if you have the choice between weapons causing more or less collateral damages to obtain the *same* military advantage, have you an obligation to use the second? My reply is yes, and that even if the principle of proportionality would still be in a favorable balance with the use of weapons of the first type—i.e., that the anticipated military advantage would overcome the expected incidental civilian damages. This affirmation is based on another principle which has been reaffirmed in Protocol I and which is often confused with the principle of proportionality, the principle of the least feasible damage, which is clearly stated at Article 57(2)(ii). This provision requires those who plan or decide upon an attack to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”

Let me now say a few words on the ethical dimension of the question. My opinion is that the problem has not been correctly posed. To have or not to have a weapon doesn't change the ethical basis of your action, even if it can change your behavior, because this one depends on one hand on your ethical values, which remain constant, but on the other hand on the means you have at your disposal, which vary. As an example I would take a medical doctor. If he practices here or in a region of Africa far from any well-equipped medical center, he will keep the same ethic. But his decision and responsibility will be different if he has the capacity to test blood before an emergency transfusion or if he hasn't, with the same objective to best serve the interest of his patient. It is exactly the same if you have or don't have certain weapons.

Finally I would like to make some comments on the future. I heard with sympathy the suggestions made by Ove Bring. I agree with him that some specific rules could be elaborated, or at least that an agreed interpretation of existing rules should be discussed, about enforcement measures, where there remain some unsolved questions. That being said, I am not sure that the best way to do it would be to start the drafting of an additional protocol III to the Geneva Conventions.

Just recently the Secretary-General of the UN promulgated in a bulletin the rules of IHL which must be applied by UN forces engaged in enforcement

operations. This was the result of fruitful informal discussions organized by the ICRC between senior UN officials, military experts, the ICRC and other legal experts. This informal and smooth way to deal with such problems could inspire us for other necessary clarifications or developments. I am afraid that if we open formally the procedure to adopt a third additional protocol (or even a fourth as we know that there are ongoing discussions on the elaboration of a third additional protocol on the protective emblems) so many obstacles and oppositions will emerge that it would require very long and tremendous work for an end result which has a good chance to be very disappointing. My hesitation, therefore, is on the procedure, not on the necessity to clarify the points mentioned by Ove Bring.

My second remark for the future is to insist again on the importance to discuss further the practical meaning of some IHL provisions on the conduct of hostilities and to find the right place to do it. I insist again on the fact that a place like this prestigious Naval War College would be ideal for such discussions.

Finally my last remark is the following. There are no doubts for me that the United States has to play a leading role in further discussions on IHL provisions, particularly those concerning the conduct of hostilities. It is the greatest military power, with many recent war experiences. But those discussions and this leading role would be much easier and more credible if everyone accepted the same basic rules. The crucial problem nowadays is the *application* of the rules as we have seen in the discussion on the NATO operations in Kosovo. But as long as the United States is not party to Additional Protocol I, there will be some hesitations on what rules can be taken as a basis for this discussion.

I know that there are still many obstacles to United States' ratification of the 1977 Additional Protocols, but I cannot refrain from affirming again my conviction that the US could ratify them without endangering its own security in using, where deemed necessary, the possibility of express reservations, as many other States did. Over this internal problem, I would stress also my conviction that the ratification of the United States would have a decisive effect on the uniformity of IHL in the whole world, in the universal acceptance of this law, and on the possibility for United States to play a leading role in the necessary clarification of some of its provisions. We need the United States in that role.

I hope you will accept my apology for using this opportunity to reaffirm my strong conviction on this issue and I thank you very much for your patience.