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GENERAL REMARKS

The International Society for Military Law and the Law of War has requested its national groups to respond to a questionnaire on the practice and customary law in military operations, including peace support operations. The responses to the questionnaire are to serve as a basis for the identification of the practice of States and of international organizations as such and for an examination of the role of the military forces in the formation of customary international law. It has been emphasized that “in part this questionnaire aims to identify practice by other means than those relied on by the ICRC in some areas where the conclusions of the ICRC Study on Customary International Humanitarian Law may not be convincing to all.” This objective may not be misunderstood as implying a fundamental opposition to the ICRC Study. Rather, the questionnaire is to be understood as a contribution “to the dialogue on the Study, as called for by the ICRC.”

It needs to be stressed from the outset that the responses received by the national groups as well as the conclusions drawn by the rapporteurs may not be considered as final and absolute statements as to the status of customary international law applicable to military operations. Therefore, the present report will merely add further aspects to the impressive compilation of State practice and other conduct that was relied upon by the authors of the ICRC Study. Neither the responses nor the findings of the present report are self-sufficient with a view to establishing the existence of customary international law. This limited value is due to the following aspects: On the one hand, only 31 responses¹ have been received, while the number of member States of the UN totals to 192. On the other hand, not all questions have been answered by all national groups. Sometimes, the rapporteurs took the liberty of making use of the responses to questions if it could be established that they also had a bearing on other questions. However, in the majority of cases the rapporteurs had to accept the lack of a response and felt unable to draw conclusions from other parts or sections. Moreover, it was not always sufficiently clear whether the responses merely reflected the views of the national group or those of their respective country. Finally, some of the responses are of limited significance because they deal with aspects that – at least to the rapporteurs – have no direct connection to the questions posed.

In sum, the present report only in rare cases contains findings that could be regarded as snapshots of the current state of customary international law. The responses have in most cases not contributed to a clearer picture but shown a remarkable division or divergence of opinions on many issues. This, however, does not mean that the effort has been in vain. Rather, a clear division of opinions is indicative of a lack of *opinio juris* and, thus, a strong piece of evidence for the non-existence of customary international law.

¹ For a list see Appendix 1.

PART I:
PRACTICE AND CUSTOMARY LAW

A. On the Formation of Customary International Law

It is not the task of the present report to provide a further theory of customary international law (CIL) and its formation or to present a comprehensive research paper on those issues. Still, in view of the necessity of transparent and comprehensible conclusions, it is important to briefly clarify the doctrinal and methodological basis. Since there is no overall consensus – either in State practice or in the literature – on how to establish the existence of a rule of CIL or on the formation of CIL the rapporteurs have come to the conclusion that the best way of approaching the theoretical foundations is to rely on the jurisprudence of international courts. Of course, the approach to CIL chosen by international courts have not remained undisputed. However, they seem to be the most reliable basis for a report like the present one, although that approach might be considered rather conservative by some.

I. Elements and Evidence

Despite a few allegations to the contrary there is widespread agreement that CIL consists of two elements: practice and *opinio juris*.² As stated by the ICJ in the Nicaragua Case, the “Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice”.³

As far as the objective element is concerned, it has always been uncontested that it consists of the actual conduct of States in their international relations.⁴ Accordingly, the ICJ closely scrutinizes the way States in fact acted in situations similar to that of the case it was to decide upon.⁵ However, international courts do not consider themselves limited by a narrow concept of practice. Rather, they apply a rather broad concept. Accordingly, they also rely on statements by governments and international organizations, judgments of domestic courts, national legislation, and on the conduct of State representatives in international organizations.⁶ Hence, a wide concept of State practice seems to be recognized in international jurisprudence.

Still, it is important to emphasize that that practice must be of a certain duration, uniformity (or consistency) and generality.⁷ While there are no absolute criteria and while it will depend upon the circumstances of each case whether the evidence suffices for determining that a rule of CIL has emerged, it is generally accepted that the importance of the temporal element decreases the more consistent and general that practice is. In the North Sea Continental Shelf Cases the ICJ held:

² See, inter alia, Article 38 of the 1945 Statute of the International Court of Justice (ICJ-Statute), UNTS Vol. 33 p. 993; I. Brownlie, *Principles of Public International Law*, at p. 6 et seq. (6th ed., Oxford 2003).

³ Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), Merits, Judgement of 27 June 1986, ICJ Reports 1986, p. 14 et seq., at para 184.

⁴ I. Brownlie, *supra* note 2, at p. 6.

⁵ North Sea Continental Shelf Cases (Germany v. Denmark, Germany v. Netherlands), Judgement of 20 February 1969, ICJ Reports 1969, p. 3 et seq., at para. 74; Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgement of 14 February 2002, ICJ Reports 2002, p. 3 et seq., at para. 58.

⁶ See, e.g., the Judgment of the ICTY Appeals Chamber, Prosecutor v. Dusko Tadic a/k/a “Dule”, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, at paras. 128 et seq.

⁷ I. Brownlie, *supra* note 2, at p. 7 et seq.

“Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law, on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it may be, State practice, including that of States whose interests are specially affected, should have been both, extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”⁸

If the practice of States does not conform to the requirements of uniformity (consistency) and generality it gives no sufficient evidence for a rule of CIL. That was made clear by the ICJ in the Asylum Case:

“The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the existence of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law [...]”⁹

Moreover, it may not be left out of sight that a practice that is not displayed by those States “whose interests are specially affected” will in most cases not contribute to the formation of a norm of CIL.¹⁰

From the latter quote in the Asylum Case it may also be concluded that, in general, a practice of States that is uniform, general and of a certain – varying – duration will in most cases provide sufficient evidence of the subjective element, i.e. of the *opinio juris*.¹¹ It is, however, important to always clearly distinguish between a recognition as law and considerations of ‘political expediency’ or of *courtoisie*.¹² If the organs of a State declare that a given conduct is due to political self-restraint it is obvious that that State is unwilling to characterize a certain conduct as mandatory under CIL. In other cases, it will depend upon the circumstances surrounding the respective conduct whether the subjective element can be established.

Finally, it should be recalled that public international law in general is a rather dynamic legal order. Norms characterized customary in character in the past may today be obsolete or may have become derogated by a changed practice and *opinio juris* contributing to a new and different norm of CIL.

II. Treaties Contributing to the Formation of CIL

The ICJ, in a number of cases, has recognized that treaties may either be declaratory for an existing norm of CIL or contribute to the emergence of new CIL. This has been summarized in the Continental Shelf Case between Malta and Libya as follows:

“It is of course axiomatic that the material of customary international law is to be

⁸ ICJ Reports 1969, para. 74.

⁹ Colombian-Peruvian Asylum Case (Colombia v. Peru), Judgement of 20 November 1950, ICJ Reports 1950, p. 266 et seq., at p. 277.

¹⁰ W. Heintschel von Heinegg, in: K. Ipsen, *Völkerrecht*, at § 16 para. 11 (5th ed., Munich 2004).

¹¹ I. Brownlie, *supra* note 2, at p. 8.

¹² W. Heintschel von Heinegg, *supra* note 10, at § 16 para. 12.

looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed developing them. [...] it cannot be denied that the 1982 Convention is of major importance, having been adopted by an overwhelming majority of States; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider in what degree any of its relevant provisions are binding as a rule of customary international law.”¹³

It is important to note that, according to the ICJ, a simple reference to a given treaty, although adopted by an overwhelming majority of States, will in most cases not suffice as evidence for a corresponding rule of CIL – the less so if those States whose interests are specially affected are not parties to the treaty.¹⁴ Moreover, as made clear by the ICJ in the Nicaragua Case, it cannot “be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties”.¹⁵ Norms of CIL are far less specific than treaty provisions. Hence, States may agree on the customary character of a rule or principle but may have divergent views on its scope and specific content.

III. Conduct of International Organizations

As already noted the ICTY considers the conduct of international organizations to have the potential of contributing to State practice or to provide evidence for the subjective element.¹⁶

The ICJ has regularly referred to UNGA Resolutions. However, the Court did so in a most cautious manner:

“The *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General assembly resolutions, and particularly resolution 2625(XXV) [...]. The effect of consent to the text of such resolutions cannot be understood as merely that of a ‘reiteration or elucidation’ of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolutions themselves.”¹⁷

In its Advisory Opinion in the Nuclear Weapons Case the Court identified the preconditions that UNGA resolutions must fulfil if they are to contribute to the formation of CIL:

“The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given general Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.”¹⁸

¹³ Case concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgement of 3 June 1985 ICJ-Reports 1985, p. 13 et seq., at para. 27 .

¹⁴ W. Heintschel von Heinegg, *supra* note 10, at § 16 para. 11.

¹⁵ ICJ Reports 1986, at para. 175.

¹⁶ ICTY Appeals Chamber, *supra* note 6, at paras. 128 et seq.

¹⁷ ICJ Reports 1986, at para. 188.

¹⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226 et seq., at para. 70.

It is, however, still doubtful whether there exists an overall consensus on the relevance of the conduct of international organizations or that of State representatives within international organizations for the formation of CIL.

On the one hand, international organizations, as partial subjects of public international law, are limited by their founding treaties and may not act outside their respective powers (although the doctrine of ‘implied powers’ may widen the powers conferred upon an international organization considerably). Moreover, their conduct is – if at all – of relevance for third States only if and insofar as those States have recognized them – either explicitly or implicitly.¹⁹ Of course, the United Nations Organization is an exception to that rule.

On the other hand, States have not yet provided sufficient evidence for the conclusion that the conduct of their representatives within an international organization could be considered State practice contributing to the formation of CIL. Rather, that conduct is predominantly regarded as an internal matter within the respective organization. Otherwise, States would run the risk that a certain position taken within an international organization in pursuance of aims limited to the organization’s purposes would be generalized in a manner contrary to their political agenda.

Finally, as regards the UN, it may not be left out of consideration that the Security Council disposes of wide-ranging powers and a wide margin of discretion. Its decisions are binding by virtue of Article 25 of the Charter. They, therefore, must be considered as separate parts of public international law (although derived from a treaty, i.e. the UN Charter). That is also the case if the Security Council decides upon obligations in a general and abstract manner, as was the case with resolution 1373²⁰ (terrorism) and 1540²¹ (proliferation of WMD by non-State actors). Hence, in most cases it will be unnecessary to regard such decisions as contributing to the formation of CIL. Moreover, the Council’s decisions aim at the maintenance or restoration of international peace and security in a concrete situation. Accordingly, they can only in rare cases be generalized. In view of these findings, the conduct of State representatives in the Council will rather not constitute ‘State practice’ contributing to CIL. It is conceded, however, that a decision of the Security Council may be indicative of the existence of a norm of CIL (or contribute to its formation) if the Council shows that it regards itself bound by certain rules or principles. For example, the constant reference to considerations of humanity is to be considered sufficient evidence that security operations may not be conducted in negligence of such considerations.²²

IV. Persistent Objector

The concept of ‘persistent objector’ was first addressed by the ICJ, although marginally only, in the *Anglo-Norwegian Fisheries Case*, where the Court held that an alleged rule of international law “would be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it”.²³ In the *North Sea Continental Shelf Cases* the ICJ without

¹⁹ V. Epping, in: K Ipsen. *Völkerrecht*, at § 31 para. 38 (5th ed., Munich 2004).

²⁰ UN Doc. S/RES/1373 (2001) of 28 September 2001.

²¹ UN Doc. S/RES/1540 (2004) of 28 April 2004.

²² G. Nolte, *Practice of the UN Security Council with Respect to Humanitarian Law*, in: K. Dicke / St. Hobe, / K.-U. Meyn / A. Peters / E. Riedel / H.-J. Schütz / Ch. Tietje (eds.), *Weltinnenrecht – Liber amicorum Jost Delbrück*, 487-501., at p. 489 (Berlin 2005); E. de Wet, *The Chapter VII Powers of the United Nations Security Council*, at p. 199 et seq. (Oxford 2004); E. Cannizzaro, ‘A Machiavellian Moment? The UN Security Council and the Rule of Law’, *IOLR* 3 (2006), 189-224, at p. 213 et seq.

²³ *Fisheries Case* (United Kingdom v. Norway), Judgement of 18 December 1951, ICJ Reports 1951, p. 116 et seq., at p.131.

using the term 'persistent objector' seems to have accepted its existence in public international law. As is well-known the Court held:

“Moreover, in the present case, any such inference would immediately be nullified by the fact that, as soon as concrete delimitations of North Sea continental shelf areas began to be carried out, the Federal Republic, as described earlier (paragraphs 9 and 12), at once reserved its position with regard to those delimitations which (effected on an equidistance basis) might be prejudicial to the delimitation of its own continental shelf areas.”²⁴

Hence, Brownlie maintains that a State may contract out of a custom in the process of formation if evidence of objection is clear. He further states: “Whatever the theoretical underpinnings of the principle, it is well recognized by international tribunals, and in the practice of states. Given the majoritarian tendency of international relations the principle is likely to have increased prominence.”²⁵

V. Conclusions

Despite the considerable controversies that surround the formation of CIL international courts and tribunals, while accepting a wide concept of State practice, in principle agree on the two elements. A practice of States that is uniform, general and of a certain (varying) duration may contribute to the emergence of a norm of CIL.

Of course, in view of the comparatively small number of responses to the questionnaire (31 out of 192 UN member States = 16%) those responses could as such not provide sufficient evidence as to the content of CIL even if they were uniform. Rather, they must be viewed together with further evidence of State practice. If that practice in its entirety fulfils the criteria of uniformity, generality and duration there will be good reasons to consider it as having contributed to the formation of CIL. However, if they are not uniform they are a strong piece of evidence for the non-existence of CIL.

B. State Organs Contributing to the Formation of CIL

Which national authorities are competent to determine your country's views on what rules are part of customary international law, internally and externally (e.g. may your domestic courts reach independent conclusions on this; does the Foreign Ministry have exclusive authority to express this view externally, etc.)?

I. Responses to I (a) of the Questionnaire

Most of the States responding to the questionnaire declare that the authority that is externally competent to determine the State's views on what rules are part of CIL is the Ministry of Foreign Affairs (e.g. Austria, Czech Republic, Germany, Ireland, The Netherlands, Tunisia). Other States (Estonia, Hungary) declare that both the Ministry of Foreign Affairs as well as the Ministry of Defence are competent in this field. An *exclusive* authority of the Foreign Ministry to express the State's view externally is merely recognized in the Czech Republic and in the UK.

²⁴ ICJ Reports 1969, at para. 26.

²⁵ I. Brownlie, *supra* note 2, at p. 11.

For internal purposes, particularly where it concerns the armed forces, numerous States involve the Ministry of Defence in determining which rules are part of CIL (e.g. Czech Republic, Germany, The Netherlands). Some States (e.g. Greece, Italy, Switzerland) declare that there is no specific authority charged with that task. In principle, any authority applying the law may pronounce itself as to the question what rules are part of CIL, but eventually it is up to the courts to determine a rule being part of it. The United States regards all three branches of government to have a role in determining what rules are part of CIL.

Most of the States agree that the domestic courts, alternatively the Constitutional Court, can reach independent conclusions by applying domestic or international law in relation to relevant court cases.

While some States recognize CIL to be part of the domestic law (Austria, Italy), the Czech Republic and Romania underline that custom does not constitute a source of law in their domestic legal order. However the Czech Republic states that in any case of controversy about this matter the only authorized body to resolve such issue would be the judicial power.

There are different positions concerning the binding effects of court decisions. On the one hand, some States consider the courts as competent to make general binding statements concerning the contents of CIL (e.g. Italy, Czech Republic). On the other hand, States like Belgium, Denmark and the United States consider the court's conclusions as non-binding statements out-of-court. A U.S. domestic court's decision may be limited in scope, and only determinative within that court's jurisdiction. For those States the court's conclusions have only effects *inter partes* and merely constitute indications for the contents of CIL.

Finally, the UK states that the domestic courts are at liberty to reach their own conclusions as to the existence, scope, interpretation and application of rules of CIL, but as a matter of internal constitutional law they must defer to legislation enacted by Parliament, which represents the supreme law of the land.

II. Conclusions

1. External Powers

It is a well-established principle of public international law that – apart from the Head of State and the Head of Government – the Minister of Foreign Affairs disposes of the *jus omnimodo repraesentationis*, i.e. that his or her acts are to be considered acts of that State without the necessity of producing appropriate powers.²⁶ Hence, in virtue of Foreign Ministers' functions they must always be considered as representing their respective State. This also holds true with regard to the position taken by the State with a view to CIL. It is, therefore, not surprising that all responding States seem to recognize that the Foreign Ministry is entitled to determine their country's views on what rules are part of CIL externally.

In view of the fact that only two States also consider the Ministry of Defence as competent to determine the State's view on CIL externally it would be difficult to establish that this is also the case under CIL. It needs to be emphasized, however, that this finding is without prejudice to the validity of the position of the State in question. If “it appears from the practice of States or from other circumstances”²⁷ that they consider the Minister of Defence as representing the State for the purpose of authoritatively stating his country's view on CIL there is no reason to

²⁶ See, inter alia, Article 7 of the 1969 Vienna Convention on the Law of Treaties (VCLT), UNTS Vol. 1155, p. 331.

²⁷ Article 7(1)(b) VCLT.

exclude the Minister of Defence from exercising that power externally. Still, the recognition of the Minister of Defence as representing the respective State would be limited to that State and would have no impact on the content of the customary rule that is limited to Heads of State, Heads of Government and to Ministers of Foreign Affairs.

2. Internal Powers

As regards the authorities competent to internally determine what constitutes CIL there seems to be wide (although not uniform) agreement that – within their respective powers as laid down in domestic law – the Ministries of Defence are entitled to determine what constitutes CIL. While it is not the task of the present report to evaluate the internal effects of such determinations the rapporteurs consider it important to note that statements by Ministries of Defence may thus provide evidence of a norm of CIL. There is, however, one important caveat: While it is irrelevant to clearly establish such powers under the respective domestic law a statement by a Ministry of Defence will provide sufficient evidence of CIL only if it conforms to statements by other organs of the respective State, especially of the Ministry of Foreign Affairs. In case of contradictions the latter will prevail.

All States responding seem to agree that domestic courts, especially Supreme and Constitutional Courts, have the power to (finally) identify a rule of CIL. It needs to be emphasized in this context that the recognition of custom as a source of domestic law must be clearly distinguished from CIL. Seemingly, that distinction has not always been observed in the responses received. Be that as it may. In any event it has become evident that the judicial power plays an important role in determining the existence of a rule of CIL for internal purposes. Of course, there are divergent approaches to the binding effects such findings may have.

Still, the latter aspect would not exclude the use of domestic court decisions as evidence for the existence of a norm of CIL. The ICJ has regularly made use of such decisions. For example, in the Arrest Warrant Case the Court examined decisions of national higher courts, such as the House of Lords or the French Court of Cassation.²⁸ It is important to emphasize, however, that – regardless of their internal effects – not all court decisions qualify. Therefore, only the decisions of higher courts, such as the Supreme Court, the House of Lords, the Cour de Cassation, or the Constitutional Court, will serve as sufficient evidence of the respective State's position vis-à-vis CIL.

3. Further Remarks

The rapporteurs consider it important to note that when it comes to the determination of CIL the law of State responsibility is, in principle, irrelevant. Hence, the rules on attributability of the ILC's Draft Articles²⁹ may not be made use of in the process of identifying State practice possibly contributing to the formation of CIL. The law of State responsibility aims at a restoration of the legal status quo that existed prior to a violation of international law. Therefore, it is logical and necessary that under that law the “conduct of any State organ shall be considered an act of that State [...], whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State”.³⁰ Both the responses to the questionnaire as well as the jurisprudence of international

²⁸ ICJ Reports 2002, at para. 58.

²⁹ UNGA Res. A/56/589 and Corr. 1, Responsibility of States for Internationally Wrongful Acts (28 January 2002).

³⁰ *Ibid.*, Article 4(1).

courts, however, reveal that acts of States contributing to the formation of CIL or constituting evidence of CIL are limited to the conduct of State organs that either dispose of genuinely external powers or to other State organs holding the highest positions in the organization of a State.

Finally, as regards court decisions it should be recalled that the judgments and opinions of international courts and tribunals, despite their inter-partes effects, are very often relied upon by international courts. For example, in the Arrest Warrant Case the ICJ examined the decisions of the Nuremberg and Tokyo international military tribunals and of the International Criminal Tribunal for the former Yugoslavia.³¹ Of course, the Court very often also bases its decisions on its own former judgements and findings.

C. Relevance of Military Manuals

To what extent can military manuals on the law of armed conflict or on operations law or other military documents (military training handbooks, handbooks on the use of armament, military doctrinal documents, etc.) of your Country be considered as reflecting a relevant practice participating in the emergence or confirmation of a rule of customary international law?

I. Responses to I (b) of the Questionnaire

A considerable number of the responding States consider military manuals or other military documents to constitute State practice contributing to the formation or confirmation of CIL. According to that position the manuals reflect the legal views of the State concerned and hence can be taken as authoritative statements having relevance for the assessment of what constitutes CIL (Finland, Greece, Lebanon, Moldova, Sweden, Tunisia).

However, the majority takes a more cautious position. They underline that the content of military handbooks/manuals is based not only on legal considerations but also on military-operational and political considerations. The manuals may provide important indications of State practice and *opinio juris*, but they are not intended to and cannot replace a meaningful assessment of operational State practice in connection with actual military operations (The Netherlands, United States).

Denmark states that manuals have no or very limited value in the formation of CIL. The reason is that the guidelines and similar instruments are not a reflection of legal considerations alone but also of political, military and practical considerations.

According to others, manuals may help to identify trends in international law in some contentious cases but they cannot be regarded as constitutive instruments in regard to the creation of customary norms (Estonia, Italy).

Finally Switzerland states that only official practice is to be regarded as relevant State practice. Military training handbooks or doctrinal documents contribute only to the creation of CIL as long as they have been published or been communicated to at least one State or international organization and if there is a belief that the practice reflected in these texts is required as a matter of law. Thus, Switzerland considers that military manuals or other military documents may be considered as reflecting relevant State practice contributing to the emergence or confirmation of a rule of CIL if the said criteria are fulfilled.

³¹ ICJ Reports 2002, at para. 58.

II. Conclusions

While military manuals as well as doctrinal documents are very often heavily relied upon in the legal literature for the purpose of identifying norms of CIL it has become evident from the responses received that such manuals and documents may not as such be considered State practice or evidence of *opinio juris*. This does not altogether rule out the use of such documents. However, if the statements found in military manuals or documents are not accompanied by further State conduct qualifying as a norm-creating State practice they are of limited value only.

Moreover, as emphasized in the response by Switzerland, such manuals and documents can only contribute to the formation of CIL if they are not classified and if they have been published. This is a necessary precondition for any conduct to qualify as norm-creating State practice. If practice must be general in order to contribute to the formation of CIL any secrecy or classification will prevent other States to take notice of the documents and will by necessity not contribute to a general and uniform *opinio juris*. However, even if such documents are published they at best reflect the respective State's position at the time of publication. If later modifications or amendments are not published as well the potential norm-creating character of those documents must be severely doubted.

In many of the responses it is rightly emphasized that military manuals and other documents aim at combining legal and operational or political considerations. They will, therefore, very often not exhaust the framework provided by public international law, including CIL. Moreover, the respective domestic law of the State concerned may prevent that State and its armed forces to make use of the entire spectrum provided by public international law and international humanitarian law. For example, in some States there is a strict separation of military and law enforcement functions preventing the armed forces from conducting certain operations although under public international law they would be perfectly entitled to do so. Finally, it may not be left out of consideration that in their majority military manuals and especially handbooks on armament will reflect the respective State's obligations and commitments under international treaties. Accordingly, they are of relevance for the determination of CIL only if it is made sufficiently clear that the State in question characterizes a given legal norm as customary in character, i.e. as binding on States not parties to the respective treaty as well. For example, a military manual may prohibit the use of certain means of warfare, such as anti-personnel land mines or cluster munition. If that statement is not accompanied by a prohibition of a participation in a multinational military operation in which the armed forces of other contributing nations use such weapons that is a strong piece of evidence that the respective State does not consider the prohibition of certain means of warfare as binding under CIL.

D. Relevance of Agreements, including SOFAs, and of RoE

What importance does your Country/National Group attach to following elements respectively to determine the existence of a rule of customary international law:

- **Memoranda of understanding, technical arrangements and other similar agreements**
- **Status-of-forces agreements**
- **Rules of engagement?**

For a synopsis of the responses to Question I (c) see Appendix 2.

I. MoUs, TAs, and Other Agreements

1. Responses to I (c) (i) of the Questionnaire

As regards the importance of MOUs, TAs and similar agreements for the determination of the existence of a rule of CIL, the responses indicate that there are three different approaches while the arguments presented within each group slightly differ in nuances.

A considerable number of States, such as for instance the USA, the UK, Italy or the Czech Republic, share the view that MoUs, TAs and similar agreements cannot be used to determine rules of the CIL, stating that they are not legally binding and hence constitute rather political, technical, operational and/or administrative instruments.

The vast majority of the States responding are convinced that MoUs, TAs and similar agreements may be used to determine the existence of a rule of CIL as they incorporate already existing CIL. However, while agreeing upon the fact that MoUs, TAs and similar agreements can be indicative of an existing State practice, most of those States stress that this practice has to be accompanied by an *opinio juris* and therefore these instruments can only be a useful indication if they also reflect *opinio juris*.

The third position represented is by Germany and Sweden. Germany is convinced that MoUs, TAs and similar agreements may generally contribute to the formation of new customary rules, however, it is usually a case-by-case decision. Sweden agrees that they have to be considered as acts of the State and part of State practice and that they could be considered as reflecting CIL if their content is consistent over time. It maintains, however, that, this does not necessarily hold true for the respective document as such or the entirety of their content.

Finland takes the position that it is a case by case decision whether or not MoUs, TAs and similar agreements have legal effects.

2. Conclusions

The position taken by the States representing the first group is somewhat surprising and may be due to their respective domestic legal order or their national approach to MoUs, TAs and similar agreements. Obviously, to those States the denomination implies that such agreements are legally non-binding. However, there are two aspects that may not be overlooked.

On the one hand, this position is not easily reconcilable with the definition of the term ‘treaty’ in Article 2(1) lit. (a) VCLT according to which ‘treaty’ “means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”. While the customary definition is not limited to written agreements³² this is of no importance for the present purposes because most MoUs etc. will be in written form. However, the denomination of any such agreement is without prejudice to its character as a source of international law, i.e. as a treaty. This is not only the approach chosen with the VCLT. As held by the ICJ in the Aegean Continental Shelf Case:

³² I. Brownlie, *supra* note 2, at p. 581 et seq.

“[...] whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form – a communiqué – in which that act or transaction is embodied. On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.”³³

Since MoUs, TAs and similar instruments are concluded between States and since in most cases they contain provisions on the powers, rights and immunities of foreign armed forces within the territory of the host nation they constitute international agreements and they are, thus, legally binding upon the States parties thereto. They are also “governed by international law”³⁴ because usually the domestic legal order of none of the parties is applicable to them.

On the other hand, the argument that such agreements are legally irrelevant does not necessarily rule out the possibility of considering them acts of States or as indicative for CIL. For example, there always has been general agreement that the Final Act of the Helsinki Conference (CSCE) is a legally non-binding instrument. Nevertheless, there has never been serious doubt that parts of the Final Act reflect certain principles of CIL.

Still, in view of that position a cautious approach ought to be taken vis-à-vis the relevance for CIL of MoUs, TAs and similar agreements. Hence, the question whether they are reflective of existing CIL must be answered in light of State practice and an accompanying *opinio juris*. Whether they can contribute as such to the formation of CIL is a different matter. First of all, it may not be left out of consideration that the very fact that there exists a treaty or even a series of identical or similar treaties provides a rebuttable presumption for the non-existence of CIL. The classical example given is that of bilateral extradition treaties. Although their number is considerable (generality) and although they more or less contain identical or similar provisions (uniformity) such bilateral extradition treaties are generally NOT regarded as evidence for the existence of a customary obligation to extradite. Since MoUs, TAs and similar agreements – like extradition treaties – very often lie at the core of State sovereignty there are good reasons to conclude that in case of doubt they may not be considered as evidence of *opinio juris* with regard to a corresponding norm of CIL.

II. SOFAs

1. Responses to I (c) (ii) of the Questionnaire

As to SOFAs, most of the responding States declare – similarly to their opinions concerning MOUs and TAs – that SOFAs can reflect an already existing State practice and hence may be an indication of the position of the States.

According to the view of some of the States, such as Italy or the UK, SOFAs do not reflect CIL since they lack the requisite of *opinio juris* as SOFAs traditionally represent a development and departure from CIL.

Finland and Estonia underline that SOFAs contribute to the formation of CIL as much as any other international treaties, whereas Germany, Sweden and Norway merely are not prepared to exclude this possibility. Germany maintains that it is usually a case-by-case decision.

³³ Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgement of 19 December 1978, ICJ Reports 1978, p. 3 et seq, at para 96.

³⁴ W. Heintschel von Heinegg, supra note 10, at § 9 para. 5.

Norway limits its opinion to SOFAs reflecting long-time deployments. Sweden states that SOFAs may contribute to the formation of a new rule of CIL provided that their content is consistent over time. Sweden emphasizes that although their content could be considered as CIL, this does not necessarily concern the documents as such or the agreements in their entirety.

2. Conclusions

As in the case of MoUs, TAs and similar agreements the divergence of opinions does not allow a conclusion to the effect that SOFAs could be treated differently, i.e. that they are relevant for CIL. Moreover, if SOFAs contain provisions infringing upon the core of the host nation's sovereignty – e.g. on the exercise of criminal jurisdiction – there is a presumption of their purely contractual character. Accordingly, SOFAs may not be considered as contributing to the formation of CIL. Of course, in some instances they may be reflective of existing CIL. This, however, is to be determined in the light of (other) State practice and the corresponding *opinio juris*.

III. RoE

1. Responses to I (c) (iii) of the Questionnaire

As regards the relevance of RoE the responding States are again divided into three groups.

A clear majority takes the position that ROE incorporate already existing CIL and hence may be used to determine State practice and the existence of a rule of CIL, however, under the presumption that they also reflect *opinio juris*.

A minority of States, including Italy, the Netherlands and the USA, take the contrary position, i.e. that RoE are not relevant for the determination of the existence of CIL, since they are often more restrictive than what the law allows; whereas the UK maintains that although RoE are checked for their legality, they only constitute operational and strategic means.

According to the position held by Germany RoE may contribute to the formation of rules of CIL, however, it is usually a case-by-case decision whether or not they do; while Sweden maintains that they have to be considered as acts of the State and part of State practice. Hence if their content is consistent over time, they could be considered as customary law, but not necessarily the documents as such or the RoE in their entirety.

2. Conclusions

The responses lacking the necessary uniformity (consistency) and generality do not justify the conclusion that RoE either contribute to the formation of CIL or that they are declaratory for CIL.

Although a majority of the responding States is willing to take a position to the contrary the rapporteurs – while recognizing that States are free to determine which acts may be considered a norm-creating State practice – believe that it is of overall importance to not lose out of sight the very object and purpose of RoE. It is of course true that RoE must comply with CIL and with the treaty obligations binding upon the State issuing the RoE in question. However, RoE are a command and control tool aiming at the regulation of the use of force for a specific operation in order to enable the States concerned and their armed forces to achieve

a certain operational and political goal. Without prejudice to the terms of art used, e.g. in NATO's MC 362/1, RoE will in most cases be restrictive, i.e. they will not permit the use of force to an extent as permissible under the applicable international law. Thus, they will always be in compliance with the applicable international law, including CIL. However, their value in determining the scope and content of that law will – if at all – be rather limited. This may be explained by the following example. During an operation aiming at the stabilization of a given region the applicable RoE may prohibit attacks against religious buildings at all times, i.e. even if they are abused for the enemy's military purposes or for attacks against the armed forces operating under the RoE. The object and purpose of that prohibition is the political aim of not upsetting the local population. However, the applicable international law, including international humanitarian law, would permit the use of force against religious buildings if they are abused for the said purposes. Accordingly, these RoE may neither be considered as providing evidence for an absolute prohibition of the use of force against religious buildings, nor for the existence of a norm of CIL to that effect, nor for an *opinio juris* of the issuing State.

E. Relevance of the ICRC Study

What is the position of your Country with respect to the study carried out by the ICRC about customary international humanitarian law? Has your Country reacted officially to this study? If so, has this reaction been published? If not, does your Country intend to react?

I. Responses to I (d) of the Questionnaire

Almost all of the responding States declare that they have not officially reacted to the ICRC study. Only Moldova and the USA have formally commented upon the ICRC study: Moldova – in the Order No 275 issued by the Minister of Defence on 5 December 2006; the USA in the statement by John B. Bellinger III and William J. Haynes II.³⁵

As regards the possibility of future official reactions to the ICRC study, most States rather do not intend to make such a statement in the near future.

Many States appreciate the ICRC's initiative to undertake the study. They also organize conferences and seminars to disseminate the content of the study. Some States consult the study regularly when dealing with legal training and as an academic reference tool. Moreover, they mention that there exist at the national level academic and professional responses to the ICRC study³⁶ although they do not constitute in any respect the official governmental reactions to the study.

A few States, for instance Finland and Cyprus, consider the study to be a valuable contribution to the clarification of the current state of customary IHL as to the ICRC conclusions concerning both international and non-international armed conflicts.

However, there are States that expressly underline that they are not bound by the study even if they consult it (for instance Ireland) or that they disagree with certain of the rules asserted in the study (for instance the UK), as well as States (such as the Netherlands) that express their

³⁵ J.B. Bellinger III / W.J. Haynes II, 'A US Government Response to the International Committee of the Red Cross study Customary International Humanitarian Law', 89 (866) IRRC, 443-471.

³⁶ See, inter alia, the contributions in: E. Wilmshurst / S. Breau, *Perspectives on the ICRC Study on Customary International Humanitarian Law*, (Cambridge University Press, 2007).

concern as to the methodology used to carry out the study and to a number of the ICRC's conclusions.

II. Conclusions

It may be recalled that *Yves Sandoz* in his foreword to the ICRC Study considers it not to be “the end of a process but [...] a beginning. It reveals what has been accomplished but also what remains unclear and what remains to be done.”³⁷ He then, however, emphasizes that “though it represents the truest possible reflection of reality, the study makes no claim to be the final word. It is not all-encompassing – choices had to be made – and no one is infallible.”³⁸ These words of caution seem to be appropriate. Not many governments participated in the drafting of the study and some of its findings need to be discussed within the international community in order to establish whether and to what extent they may indeed be considered a quasi-authoritative statement of CIL applicable in international and non-international armed conflict. Unfortunately, the responses to the questionnaire reveal that not many States seem to be prepared to enter into a constructive discourse either with the ICRC or amongst themselves. The ICRC, while acknowledging that “the formation of customary international law is an ongoing process”³⁹, “believes that the study does indeed present an accurate assessment of the current state of customary international humanitarian law. It will therefore duly take the outcome into account in its daily work.”⁴⁰ Hence, the stance taken up on the study by the majority of the responding States, i.e. using it as a reference tool for dissemination and training purposes but not recognizing it as binding, may not be the final word and ultimately the study might be generally recognized as an authoritative assessment of the current state of CIL.

It is to be stressed, however, that the ICRC Study has not remained undisputed. Besides the critical response by the US Government⁴¹ there have been academic assessments as well that may not be left out of consideration when it comes to an assessment of the validity of the Study's findings.⁴² For example, *Yoram Dinstein*, with a view to the law of international armed conflict, states that “the Study clearly suffers from an unrealistic desire to show that controversial provisions of AP I are declaratory of customary international law (not to mention the occasional attempt to go even beyond AP I). By overreaching, I think that the Study has failed in its primary mission. After all, there is no practical need to persuade Contracting Parties to AP I that it is declaratory of customary international law. Whether or not such is the case, Contracting Parties are bound by AP I by virtue of their consent to ratify or to accede to it. But there is a need to persuade non-Contracting Parties that they must comply with a large portion of AP I: not because it is a treaty but because it is general custom. I do not think that non-Contracting Parties will be persuaded by the conclusions of the Study. Thus, the authors missed a golden opportunity to bring Contracting and non-Contracting Parties to AP I closer together. Indeed, at least on some central points, far from bridging over the present abyss, the Study will only drive the two sides of the ‘Great Schism’ farther away from each other.”⁴³

³⁷ I. Sandoz, Foreword, in: J.-M. Henckaerts / L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, at p. xvii (Cambridge 2005).

³⁸ *Ibid.*

³⁹ J. Kellenberger, Foreword, *ibid.*, at xi.

⁴⁰ *Ibid.*

⁴¹ Bellinger / Haynes, *supra* note 35.

⁴² E.g. *supra* note 36.

⁴³ Y. Dinstein, ‘The ICRC Customary International Humanitarian Law Study’, 36 *IsrYBHR* 1-15, at 14 et seq. (2006).

F. Persistent Objector

What is the position of your Country concerning the concept of «persistent objector» with respect to the rules of international humanitarian law? Which type of behaviour, beyond a refusal to ratify a treaty or to have reservations, should a country adopt to be considered as persistent objector?

I. Responses to I (e) of the Questionnaire

While most of the responding States agree that the concept of persistent objector is generally recognized they do not agree on the conditions, especially on the intensity of an objection to an emerging rule of CIL. Moreover, there seems to be no consensus as to whether the non-ratification falls within the scope of the concept.

Those States recognizing the concept of persistent objector all agree that the intention not to be bound by a certain rule must be expressed during the formation of the norm concerned. The objecting State may not conduct in a manner that could be interpreted as acting in accordance with the norm concerned. Ultimately, the decision has to be taken on a case-by-case basis.

Some States (e.g. Italy, Hungary, Lebanon) have no official position. Nevertheless some of them seem to accept the concept of persistent objector.

However, several States do not answer the question whether the concept of persistent objector is valid in cases of rules of international humanitarian law. It seems difficult to figure out if those States recognize the general applicability of the concept or whether they are not prepared to recognize its application to international humanitarian law.

About 20 % of the responding states explicitly deny the application of the concept of persistent objector at least in cases of norms of *jus cogens* (e.g. The Netherlands, Lebanon) and in cases with regard to violations of fundamental international humanitarian law and human right guarantees (Finland, Norway).

Switzerland, while hesitantly recognizing the concept (also with a view to international humanitarian law), points out that if a State whose interests are specially affected persistently objects to a norm that norm will not mature into CIL.

Latvia does not support the concept of persistent objector at all.

The UK national group does not see itself able to answer this question hypothetically or in a general sense.

China merely explains that its reservations in the international treaties were all made in accordance with the regular procedures provided by these treaties and in compliance with the rules of the international law.

II. Conclusions

Although there have been no uniform responses as to the applicability of the concept of 'persistent objector' to international humanitarian law States seem to agree that it remains applicable. However, they emphasize that there is no room for its application if fundamental

rules of international humanitarian law or peremptory norms of international law (*jus cogens*) are affected.

There are some doubts whether that position is consistent with the very character of *jus cogens*. According to Article 53 VCLT “a peremptory norm of international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Since such norm must be accepted and recognized “by the international community of States as a whole” and persistent objection would successfully prevent a norm from becoming *jus cogens*. Moreover, the fundamental rules of international humanitarian law, especially those contained in the four 1949 Geneva Conventions or in the 1907 Hague Conventions are already recognized as customary in character. Therefore, there is no room for the concept of ‘persistent objector’, since it does not apply to a ‘subsequent objection’.

However, the said position is absolutely correct insofar as it emphasizes that violations of fundamental rules of international humanitarian law may never be considered as any form of objection. Rather they remain what they are: violations of the law.

Furthermore, there seems to exist considerable agreement that a State wishing to prevent to become bound by a norm of CIL is under an obligation to object as soon as possible in the formation process of the norm concerned. Moreover, there is agreement that the mere refusal to ratify a treaty is not sufficient to be recognized as a persistent objection. Rather, the State concerned is obliged to repeat and to increase the intensity of its objection over the time.

It is difficult to maintain that the concept of ‘persistent objector’ implies that a State unwilling to become bound by a rule of CIL is under an obligation to manifest itself at the very first stage of the formation process. Rather, such obligation presupposes that the State concerned must have reasonable grounds for assuming that the formation process has begun. However, in the majority of cases the question when the formation process was initiated can only be answered from a hindsight perspective. That perspective is of no relevance for the concept of persistent objector since the State which wishes to prevent to become bound by a new rule of CIL will have to judge the (future) conduct of other States. Accordingly, the obligation to persistently object comes into operation only if that conduct is to be understood as contributing to the emergence of a new rule of CIL. For example, a treaty may, under certain conditions, contribute to the formation of CIL. However, the mere fact that a treaty has been concluded or entered into force is not indicative of its potential customary character. If, however, States not parties to that treaty refer to its provisions, if member States apply the treaty’s provisions to non-members then there are reasonable grounds for assuming that the treaty or some of its provisions may mature into CIL. Then, and only then, there is room for the obligations arising from the concept of persistent objector.

Finally, it is important to note that States whose interests are specially affected may, by way of persistent objection, not only succeed in preventing an application of a norm of CIL as to themselves. Rather, in view of their importance for the formation of CIL recognized by the ICJ they will prevent the formation of a norm of CIL altogether.

G. Regional Customary International Law

Are there, according to your Country/National Group, regional customs in international humanitarian law? If so please specify to what extent.

I. Responses to I (f) of the Questionnaire

The overwhelming majority of the responding States (except Tanzania) deny the existence of any regional custom in their respective geographical area.

In addition many countries (e.g. Ireland, Lebanon, Switzerland, USA) maintain that in the field of international humanitarian law regional CIL should not exist since international humanitarian law is of a global character and should be prevented from being weakened by regional customs.

Other States (e.g. Belgium, Cyprus, Finland, Greece, Sweden, the Netherlands, Tunisia, Uruguay) are prepared, under certain circumstances, to take into account the existence of regional customs, but most of them agree on the following preconditions: Regional customs may not fall below the standards of fundamental rules of international humanitarian law, but may only set higher/stricter standards.

Only Tanzania unconditionally accepts regional customs. Those have been in existence and practiced since long time before the independence of Tanzania in 1961 and have been acknowledged by tribal warriors in fighting and are practiced even in contemporary military operations. However, there are no further specifications of the said regional customs.

II. Conclusions

In contrast to general public international law that recognizes regional CIL almost unconditionally, there is a consensus among the responding States that there is no room for regional customs within the scope of applicability of international humanitarian law unless such customs provide higher standards than the general rules. Accordingly, most of the responding States recognize the concept of regional customary international humanitarian law. The fact that they are prepared to consider regional customs relevant only if they set higher (humanitarian) standards is, of course, an important limitation. Still, in view of the emphasis laid on the global character of international humanitarian law by a considerable number of other responding States it is far from settled whether international humanitarian law allows for regional modifications even if they resulted in a further limitation of the use of force in armed conflict.

Indeed, it should not too easily be left out of consideration that international humanitarian law as it stands today is the product of a long development that has begun clearly prior to the first codifications of the middle of the 19th century. These achievements are far too important than to be made subject of a variety of different regional customs. Even if such customs set higher standards they would jeopardize some of the fundamental principles of international humanitarian law, i.e. the principles of the equal application and of reciprocity.

Still, the rejection of regional customs does not prevent States or a group of States in a given region to apply higher standards than those set by international humanitarian law. This self-restriction would, however, have no impact on CIL and would rather be political than legal in character.

H. Practice of International Organizations and Practice within International Organization

Does your Country/National Group agree that the practice of international organizations can contribute to the formation of customary international law (Q.1)?

Is the participation of a State in the voting procedure within these organizations a relevant state practice (Q. 2)?

And does the practice of the international organization as a whole contribute to the development of customary international law, irrespective of the practice of the States that are part of it (Q 3)?

I. Responses to I (g)

All responding States – either explicitly or implicitly – distinguish between international governmental organizations (IGOs) and non-governmental organizations (NGOs). As regards the ICRC many States seem to be prepared to assimilate it to an international organization proper.

1. Responses to I (g) (i)

A majority of the responding States answer the first question in the affirmative. Most of them (China, Cyprus, Czech Republic, Estonia, Finland, Greece, Ireland, Italy, Moldova, Norway, Tanzania, Tunisia, Uruguay) unconditionally accept the conduct of IGOs to contribute to the formation of CIL.

Others take a differentiated approach. According to Switzerland and Lebanon it depends on whether the IGO has acted within its powers. In addition, Switzerland recognizes that the practice of the ICRC as an important factor in the formation of customary international humanitarian law. Belgium is prepared to attribute relevance to the practice of IGOs only and insofar as the member States have transferred parts of their sovereignty with the consequence that they are no longer able to autonomously act within the field concerned. The Netherlands concedes that the practice of IGOs can contribute to the formation of ICL insofar as the organization concerned can be subject to international humanitarian law, such as the UN.

The remaining States are not prepared to recognize the practice of IGOs to directly contribute to the formation of CIL (Austria, Germany, Hungary, Sweden, the UK, and the USA). They are only prepared to accept the member States' conduct as a norm-creating practice while conceding that decisions of IGOs may be reflective or declaratory of existing CIL. This also holds true for Latvia which emphasizes the fact that IGOs are composed of States and that a recognition and application of acts of IGOs by member States will ultimately contribute to the formation of CIL.

2. Responses to I (g) (ii)

It follows from the responses to the first question that a clear majority accepts that a State's participation in the voting procedure can be considered State practice relevant for the formation of CIL (Austria, Belgium, China, Cyprus, Latvia, Lebanon, Moldova, Norway, Tanzania, Tunisia, the UK).

The Czech Republic seems to be prepared to consider participation in the voting procedure as State practice if and insofar as the representative has acted within the powers conferred upon him by domestic law. Finland and the USA maintain that the conduct of State representatives within an IGO must be accompanied by actual State practice. Germany, Greece and Hungary maintain that this question has to be answered on a case-by-case basis, whereby Hungary stresses that the conduct in question may be limited to the respective IGO and that States may

wish to enter into obligations different from those of the IGO. A similar position is taken by Ireland. According to Italy only proposals, motions and settlements of State representatives within an IGO constitute State practice, whereas declarations of vote and other similar voting practices do not. Sweden merely considers voting within the UNSC as State practice. The Netherlands emphasizes the consistency of voting behaviour.

Only Estonia answers the question in the negative but is prepared to attach some relevance to the participation in a voting.

3. Responses to I (g) (iii)

In correspondence with the reactions to the first question the majority of responding States believe that the practice of international organizations as a whole contributes to the development of customary international law. Cyprus and the Czech Republic explicitly mention the practice of the UN as a source of international humanitarian law. Greece urges to take into account the practice of States not members of the organization concerned.

The Czech Republic and Hungary wish to decide this issue on a case-by-case basis. Finland establishes a link to the law of international responsibility.

However, as with the first question, a considerable number of the responding States is not prepared to characterize the independent practice of IGOs a norm-creating practice (Austria, Belgium, Germany, Sweden, Tunisia, the UK, USA).

II. Conclusions

1. Practice of International Organizations

Despite the fact that a majority of the responding States is in favour of a direct contribution of the practice of IGOs to the formation of CIL this is not sufficient evidence for the assumption that this position reflects CIL. A considerable number of the responding States is clearly opposed to this position. They, therefore, reject any independent relevance of the practice of IGOs and continue to concentrate on the conduct of States.

Seemingly, this also holds true for the ICRC because, so far, only Switzerland and China take the view that the practice of the ICRC contributes to the formation of customary international humanitarian law. It should, however, not be left out of consideration that, according to the 1949 Geneva Conventions (that are generally considered as customary in character) the ICRC is a most privileged organization with specific powers when it comes to international humanitarian law. Therefore, the reserved position vis-à-vis IGO practice is not necessarily indicative of the special status the ICRC enjoys under both treaty and customary law.

2. Participation of State Representatives in the Voting Procedure

The responses to the second question are almost unanimous and they correspond with the general approach to State conduct within an IGO. Accordingly, participation by State representatives in the voting procedure of an IGO, in principle, qualifies as norm-creating State practice. However, this is not an absolute rule. Rather, there must be sufficient evidence that that conduct is not limited to the respective IGO, i.e. where the State concerned indicates that it intends to be legally bound by the outcome of such a voting system.

3. Practice of IGO Independent from State Practice

In view of the obvious division of opinions it is impossible to conclude that the conduct of an IGO may be considered norm-creating if that conduct is not accompanied by actual State practice. It is to be re-emphasized that the law on international responsibility, in view of its object and purpose, is not necessarily conclusive as to which acts qualify as (State) practice contributing to the formation of CIL.

4. Further Remarks

As regards the first and third question the following example may be illustrative with a view to the necessity that the conduct of an IGO must regularly be accompanied by State practice. The formation of CIL may be initiated through a new interpretation of a treaty provision by an organ of an international organization even if that norm has, so far, been considered declaratory of CIL. That was the case with UNSC resolutions 1368 (2001) and 1373 (2001). Since then it has been widely recognized that the inherent right of self-defence is not limited to armed attacks attributable to another State but that it also applies to armed attacks by terrorists, i.e. by non-State actors. It should be stressed, however, that that development has been brought about not only by a new interpretation of Article 51 of the UN Charter but also by the conduct of the international community (States, especially those participating in Operation Enduring Freedom, and International Organizations, e.g. NATO and the OSCE). Some maintain that the International Court of Justice, in its Advisory Opinion on the Israeli wall, objected to such a modification of the customary right of self-defence. Indeed, the Court seems to have stressed that an armed attack must be imputable to a State. However, the Court's rejection of the right of self-defence was mainly based on the fact that the relevant attacks from Palestinian territories lacked a transboundary element: "The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence."⁴⁴ Therefore, the Advisory Opinion may not be considered as rejecting the above findings.

J. Overall Evaluation of the Responses to Part I of the Questionnaire

Despite the diversity and divergence of opinions on many issues the responses received allow for some general conclusions on the formation of CIL.

There is wide agreement that the objective element is not restricted to the actual conduct of States but that it may also comprise statements, judgments of domestic courts, national legislation, and the conduct of State representatives in international organizations. That approach is in conformity with the jurisprudence of international courts, especially of the ICJ. As regards governmental statements there is a clear tendency to regard them as relevant if they stem from the highest governmental level. Accordingly, statements by the Ministry of Foreign Affairs and – to a lesser extent – by the Ministry of Defence are considered a norm-creating State practice. In principle, the conduct of State representatives within IGOs also qualifies if it can be established that it is intended to have effects beyond the respective IGO. The fact that domestic court decisions are dealt with in the context of their internal effects only is without prejudice to their potential value in the process of identifying norms of CIL.

⁴⁴ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136 et seq., para. 139.

These findings are, however, without prejudice to the potential relevance of military manuals and RoE. Accordingly, a wide concept of State practice does not necessarily mean that military manuals and RoE are to be considered acts of State practice. Indeed, a considerable number of the responses received stress that they are guided not only by legal but also by policy and operational considerations and therefore they are – if at all – of minor value when it comes to the identification and formation of norms of CIL. The same seems to hold true for MoUs, TAs, and SOFAs.

Moreover, there is no sufficient consensus on the relevance of the practice of IGOs. If that conduct is not accompanied by actual State practice it does not qualify as a norm-creating practice. Of course, all responding States agree that decisions of IGOs may be reflective/declaratory of existing CIL.

However, it has also become evident that the practice of the ICRC may contribute to the formation of CIL. Still, this does not mean that all statements by the ICRC on issues of CIL are to be considered relevant. Therefore, the ICRC Study – although widely welcomed and made use of – may not be considered an authoritative statement as to the current state of customary international humanitarian law.

The concept of ‘persistent objector’ is generally recognized. However, some States favour a restrictive application of the concept vis-à-vis international humanitarian law, especially if fundamental and peremptory norms are concerned. Apart from that there is wide agreement that the mere non-ratification of a treaty will not suffice to prevent a State from becoming bound by a norm of CIL. Rather, that State is under an obligation to regularly confirm its position and, if necessary, to intensify its objection. It has remained unclear, however, at which point in time the obligation to object comes into existence.

Finally, there is a clear rejection of regional customs. The vast majority is not prepared to attach to such custom any relevance because, thus, the global character of international humanitarian law and the principle of equal application of that law to all parties to an armed conflict would be put into question and the achievements of that body of law could be severely jeopardized.

PART II:
APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW IN PEACEKEEPING OPERATIONS

Please detail concrete examples of situations in peacekeeping operations where your Country's peacekeepers decided to act specifically with reference to one or more fundamental principles and rules of international humanitarian law.

A. Background

While the question of an extraterritorial applicability of (regional) human rights instruments has been, and probably continues to be, one of the most contentious issues surrounding peacekeeping operations⁴⁵ the problem of the applicability of international humanitarian law to such operations was seemingly resolved by the UN Secretary-General and by the 1994 Convention.

It may be recalled that Article 2(2) of the 1994 Convention on the Safety of UN Personnel⁴⁶ provides:

“This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.”

Of course, this provision is not as clear as it seems to be at first glance. It is far from settled whether the authorization of the use of force by the UN Security Council by necessity brings into operation the law of international armed conflict. An authorization of the use of force may, of course, relate to an existing international armed conflict or it may indeed initiate an international armed conflict. However, the respective UN Security Council resolution may relate to a non-international armed conflict and it may aim at an assistance to the respective government. Or there may only be a threat to the peace without armed hostilities and the authorization of the use of force may be limited to the aim of mission accomplishment. Hence, it remains unclear whether Article 2(2) of the 1994 Convention is indeed meant to be as limited as its wording suggests. Since the concept of ‘combatant’ is limited to situations of international armed conflict in the sense of common Article 2 of the 1949 Geneva Conventions there are good reasons to assume that that is the case. However, it would be counterproductive and not very helpful for the forces operating under a UN Security Council authorization if the law of non-international armed conflict were inapplicable.

As regards peacekeeping operations a further clarification seems to have been provided by the 1999 Secretary-General’s Bulletin⁴⁷ that, according to Section 1.1, provides:

“The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.”

⁴⁵ See, e.g., the judgment of the ECHR in the Case of Behrami and Saramati, No. 71412/01 and 78166/01, Decision of 31 May 2007.

⁴⁶ Convention on the Safety of United Nations and Associated Personnel, UNGA Res. 49/59, UN Doc. A/49/49 (9 December 1994).

⁴⁷ United Nations, Secretary-General’s Bulletin, ST/SGB/1999/13, 6 August 1999.

Indeed, one question left open by Article 2(2) of the 1994 Convention has been answered in a useful way: If UN Peacekeepers find themselves in a situation of armed conflict international humanitarian law applies. However, the use of the term 'combatant' seems to suggest that the Bulletin is limited to situations of international armed conflict. This problem could be overcome by conceding that the Secretary-General did not intend to use the legal term 'combatant' but that he merely used it in a descriptive manner. But it is not as easy to solve the difficulties brought about by the second sentence. Firstly, not every enforcement action necessarily amounts to a situation of armed conflict. In cases, in which the authorization of a use of force is limited to mission accomplishment the actual use of force against those endeavouring to interfere with the mission may rather be considered a law enforcement action. Secondly, the Bulletin suggests that all peacekeeping operations are governed by international humanitarian law since all peacekeepers are entitled to exercise their inherent right of self-defence. Such a position is certainly not reflected in the practice of States contributing to UN peacekeeping operations.

It may not be left out of consideration, however, that the UN Secretary-General has not stated that international humanitarian law technically applies to the situations dealt with in the Bulletin. Rather the Secretary-General has borrowed from international humanitarian law and has decided that only those fundamental rules and principles of international humanitarian law expressly set out in the Bulletin are to apply to UN peacekeeping operations. Moreover, the scope of the Bulletin's applicability is limited to "United Nations forces conducting operations under United Nations command and control". Accordingly, other peacekeeping operations are not affected. Finally, it needs to be stressed that the Bulletin is without prejudice to any technical applicability of international humanitarian law. If a peacekeeping operation develops into an armed conflict the respective rules and principles of either the law of international armed conflict or of the law of non-international armed conflict become applicable. Of course, such a determination may be rather difficult in situations that have been described as 'three-block warfare'. Then, parts of a peacekeeping operation may be governed by international humanitarian law whereas other parts will not.

The question posed to the Society's national groups has to be seen against the background just described. It is not meant to acquire general statements on the applicability of international humanitarian law. Rather, Part II aims at gaining a deeper insight into the actual conduct of armed forces engaged in peacekeeping operations.

B. Responses to the Questionnaire and Conclusions

I. Responses to Part II of the Questionnaire

Most of the responding States do not present an answer to the question or declare that it has not been possible to answer it or that they are unable to give any specific example of situations during peacekeeping operations in which peacekeepers decided to act in accordance with fundamental principles and rules of international humanitarian law (for instance Germany, Greece, Hungary, Lithuania, Namibia, Norway, UK). Some of them point out that they simply do not have any data concerning the required information (for instance Hungary).

Some States, while declaring themselves unable to provide examples, stress that their armed forces are obliged to act in accordance with international humanitarian law and within the scope of the respective operation's mandate (Latvia, Belgium), whereas Belgium asks additionally for the clarification of the phrase "*to act specifically with reference to one or more fundamental principles and rules of IHL*".

Others, such as Cyprus or Lebanon, respond that – since their participation in the peacekeeping operations is so far limited or non-existent – they are unable to give any pertinent example.

Similarly, many responding States only indicate that their peacekeepers apply the rules and principles of international humanitarian law, including the fundamental rules (for instance China, Denmark, Moldova, Tunisia, Uruguay and United States). However, the United States underlines that US peacekeepers apply those rules and principles as a matter of policy only, which does not mean that the USA regards itself bound by these rules in peacekeeping operations under CIL.

Several States, including Switzerland and Austria, declare that they cannot offer an answer to that question based on their own experience since the existence of an armed conflict is a prerequisite for the application of international humanitarian law.

Sweden remarks that even if international humanitarian law had been applicable in an armed conflict, the Swedish Armed Forces taking part in the respective peacekeeping operation have never been part of that armed conflict. Hence, the fundamental principles of international humanitarian law have never been formally applied by them during the peace operations or peace support operations. Rather, their conduct has been regulated by the principles and rules of human rights law.

Finally, several States present some examples of situations in peacekeeping operations where their peacekeepers decided to act in accordance with selected principles and rules of international humanitarian law.

The Czech Republic refers to the so-called "March Riots" in Kosovo in 2004 where a squad of Czech soldiers was protecting a Serbian church and cemetery against rioting Albanians. The Czech soldiers decided to withdraw because, under the principle of proportionality, they considered themselves prohibited to use lethal force.

Ireland gives a similar example on the observance of the principle of proportionality that also concerns the "March Riots" during the peacekeeping operation in Kosovo.

Estonia gives three examples from the mission in Afghanistan: two of them relate to the principle of humanity, one to the principle of distinction. The last example concerns the internment for security reasons as well as warning shots to intimidate unarmed civilians

employed by anti-governmental groups in Afghanistan who could not be considered as having directly participated in the hostilities. The examples concerning the principle of humanity include the minimising of the risk of injury to the civilian population by explosive devices and the calling of a British medical helicopter in order to help a wounded child.

Italy briefly mentions its specific approach to the treatment of “captured persons” although it does not indicate any further details as to the exact operation.

Finally, some responding States only in a generic manner refer to principles of international humanitarian law they consider applicable to peacekeeping operations. According to the Netherlands: the principles of military necessity, humanity, distinction and proportionality as well as the definition of military objectives (Article 52 para. 2 AP I) and the concept of direct participating in hostilities According to Tanzania: the principles of distinction, humanity and the prohibition of unnecessary suffering.

II. Conclusions

The first conclusion that can be drawn from the responses to Part II is that a considerable number of the responding States do not necessarily consent with the 1999 UN Secretary-General’s Bulletin because they consider themselves bound by international humanitarian law only if there exists a situation of armed conflict – in the sense of either common Article 2 or of common Article 3 of the 1949 Geneva Conventions.

The second conclusion is that for an equally considerable number of responding States the fundamental rules and principles of international humanitarian law constitute an operable yardstick for assessing the legality of the use of force. There is, however, a clear division of opinions on whether those rules and principles apply as a matter of law or as a matter of policy. Still, there is consensus on the following limitations: civilians may not be attacked unless and insofar as they directly participate in the hostilities. Attacks must be limited to opposing armed forces and to objects qualifying legitimate military objectives. The wounded and sick must be respected and taken care of appropriately. Methods and means of warfare may not be used if their use may inflict unnecessary suffering or superfluous injury.

It is, however, unclear whether the reference to proportionality is guided by international humanitarian law or by another branch of public international law. According to the former the required proportionality test is governed by Article 51(5)(b) of the 1977 AP I. Hence, collateral damage is in violation of that principle only if it “would be excessive in relation to the concrete and direct military advantage anticipated”. ‘Excessiveness’ must be clearly distinguished from ‘disproportionality’ that would probably be the correct yardstick under human rights law. Moreover, it is at least questionable whether the so-called “March Riots” in Kosovo were governed by international humanitarian law at all. Be that as it may. The use of deadly force against a rioting crowd is considered lawful in exceptional cases of self-defence only. It would certainly be prohibited for the purpose of protecting property.

PART III:
MEANS AND METHODS IN THE CONDUCT OF MILITARY OPERATIONS

A. Introduction

The third part of the Questionnaire comprises 15 questions aimed at identifying practice and opinio juris of Respondent States with regard to means and methods in the conduct of military operations. The issues aborded include precautions in attack (B) and reprisals (C), while the vast bulk of questions concentrate on means of combat – weaponry (D): the general rule prohibiting the use of weapons that cause unnecessary suffering or superfluous injury (E) , legal review mechanisms (F), and state practice and opinion with regard to specific weapons (G).

B. Precautions in Attack

The principle of precautions in attack imposes a general duty on military authorities to take constant care in the conduct of military operations in order to spare civilians and civilian objects. Codified in API art 57, this principle translates into a duty on the military commander to carry out a precise identification of objectives selected for attack - a requirement upon which the effective implementation of the principle of distinction largely depend. The duty of verification consists of an obligation on the part of military authorities to *inform themselves sufficiently* to enable a verification of the lawful nature of selected targets.

The general duty of military authorities of precautions in attack is undisputed. It conveys an obligation on military authorities to take certain “ active precautions”. Prior to making the decision to launch an attack, the military authorities must make sure to have *sufficient* and *appropriate* information about the target selected for attack. This information must enable them to make sure that the target is indeed a lawful military objective, it must provide a solid basis for choosing the appropriate means and methods for attack with a view to avoid or minimize indiscriminate effects, and finally it must enable them to carry out a sound assessment of proportionality. However, the more specific and concrete content of the duty of verification remains uncertain.

The duty as it appears in API 57(2) a (i), is formulated in relatively abstract terms. Military leaders must take every precaution practically possible, formulated in API as a duty to “*do everything feasible* to verify”. Certain other treaties have more specialised duties⁴⁸. “Feasible precaution” is defined elsewhere as “ those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”.⁴⁹ The provision in API art 57 did provoke certain reservations by States.

In the midst of military operations, access to reliable information is often scarce. It may be entirely dependent upon intelligence, and sources of intelligence vary in availability, reliability and detail. An essential problem relates to the quantity and quality of

⁴⁸ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26. March 1999. art.

⁴⁹ See Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices Geneva 10. October 1980. (CWC. Prot II) art 3 (4), amended Protocol II art 3.(10) and Protocol on Prohibitions or Restriction on the Use of Incendiary Weapons. Geneva . 10. October 1980 (CWC Prot III) art 1(5)

information required in order to satisfy the requirement “ do everything feasible to verify”. What amount of information must a military commander collect before the duty of verification is satisfied ? Is human intelligence sufficient, given the often unreliable nature of such intelligence ? It is clear that a certain margin of fault is acceptable. It is less clear to what extent this margin of error must be traceable back to other factors than that of insufficient or unreliable information.

The principle of precautions requires commanders to collect information about the nature of an objective before launching an attack. When does your Country consider that intelligence can be considered as sufficiently reliable to launch an attack?

I. Responses to III (b) of the Questionnaire

At the heart of this question lies the issue of reliability of tactical intelligence information, a question that posed some difficulty for the responding States to answer. A few States pointed to the problem of answering in *concrete* terms because of the nature of their current military engagements, or due to the sensitivity of the information requested. Almost half of the respondents made comments to the effect that it was not possible to answer the question in *general* terms, noting that it must be decided on a case-to-case basis, that no clear rule with regard to “sufficiently reliable “ intelligence exists, or that no quantifiable criteria for the reliability of tactical intelligence can be identified.

Although the Questionnaire asks for “intelligence”, some respondents seem to interpret this term broadly, using intelligence, intelligence information and information interchangeably.

The point of departure is that command authorities must employ all means of reconnaissance and intelligence available to them *unless* and *until* there is sufficient certainty of the military nature of the objective. The various comments made by responding States for when intelligence information is deemed sufficiently reliable for an attack to be initiated, primarily relate to quantity and quality of the information, and to the time- factor.

1. Quantity

The duty of verification entails a duty to collect *sufficient* information to clarify the nature of the objective. Several respondent States address the issue of quantity of intelligence information. Italy refers to information from *all* sources available to them at the relevant time, while Romania notes that an attack can take place when what it refers to as “all military and humanitarian intelligence” is well known. Switzerland stress that the commander must balance existing information with his professional skills , and that this might include a duty to request *additional information*. China states that “sufficient information” would include a combination of military information and a legal analysis of the environment and situation to make sure no other legal impediments would preclude a lawful attack. Cyprus and Switzerland make comments to a similar effect.

2. Quality

An essential dimension of the duty of verification relates to the quality of intelligence information that the military commander in charge of planning or deciding upon an attack must have in order for the intelligence to be “sufficiently reliable”.

Two States emphasize the *military* character of the information, Belgium observing that different military sources would provide basis for information sufficient to launch a lawful attack, while Cyprus uses the term “precise military information”.

The UK, US and Sweden note that commanders should use the *best information available* to them at the time and under the circumstances before launching an attack.

Lebanon, Tanzania and the Czech Republic emphasizes *verification of available information*, observing that intelligence is sufficiently reliable once the nature of the target is determined, and all available information related to it is *verified*. Ireland adds that intelligence should be verified by *independent means* (e.g visuals) in order to remove uncertainty or ambiguity about the objective prior to an attack. Tunisia notes that intelligence information will be regarded as reliable if it is certain, unambiguous, and without any doubts attached to it, while Tanzania adds that in the examination of information gathered from intelligence, it is crucial how *updated* the information is. The US stress that the *risk of deception*, such as the use of involuntary human shields, is a factor to consider with regard to reliability.

The possibility in given instances of relying *exclusively* on intelligence was noted by Ireland, while the Czech Republic limits such a possibility to cases of urgent exigency.

3. Time- factor

A number of States emphasise the importance of the temporal factor, i.e. that the standard relates to reliability as it appears to the commander *at the time of decision*. Two additional dimensions of the temporal factor were commented on by respondent States : time-sensitivity of the attack and the issue of subsequent information.

Denmark and the US observe that critical time factor would influence the feasibility-standard - Denmark adding that in some circumstances, eg. when very little time is available to make the decision of engagement or disengagement, or it is impossible to disengage without considerable casualties, feasible precaution would be limited to making sure that the target is a lawful military objective, and that the principle of proportionality can be respected. On the contrary, in other situations, there might be sufficient time to conduct a very thorough planning and to include all relevant legal considerations. The Czech Republic make such an altering of the standard contingent upon the target being of a very high relevance in terms of military necessity.

Austria, Ireland and the US took the opportunity to emphasize that the military commander responsible for an attack can be *judged* only based upon information reasonably available to him *at the time* of his decision, and not upon information subsequently learned. Austria recalls that the Commander must be judged according to an objective assessment of his decision making process based on the intelligence available at the time of launching the attack. (i.e. the subjective knowledge of the commander), and not by a standard of perfection based on post-analysis of the attack.

II. Conclusions

The conclusion must be that no *common* standard for the reliability of tactical intelligence could be detected from the National Reports. A large amount of respondents explicitly state that no such general criteria exists, a view largely confirmed by the content of the answers.

If anything, responses support the widespread assumption that the standard is *subjective* – what is required is subjective certainty. As noted by Switzerland, the commander must balance existing information with his military knowledge, training and personal common sense. It is *relative* – there is no duty to employ all means until the ultimate attack. And it is *contextual* - when would a reasonable attacker consider intelligence to be sufficiently reliable in order to satisfy the duty of verification in the same or similar circumstances.

Yet, the answers leave little doubt that military commanders retain considerable discretion, exercised primarily according to military and operational considerations.

C. Reprisals

Belligerent reprisals belong to the classical controversies of IHL. Disagreement exists with regard to the form they may take, the overall conditions for their use – and increasingly, if they are lawful at all. Reprisals are *prima facie* unlawful acts undertaken against a party to an armed conflict who is violating the law, for the purpose of coercing the party to cease its unlawful conduct. It is one of the oldest and most fundamental means of enforcement of the laws of war, owing their origin to a system based on reciprocity and equality of belligerents, ideas increasingly under pressure by a system of international law emphasizing universality, offering alternative avenues of enforcement.

One approach to reprisals regards them as infringements of fundamental and universal principles of humanitarian law– subject to no exception. Principles of this stature are absolute in character, and cannot be wilfully breached by a belligerent, irrespective of the intent. Proponents of this view will point to the Geneva Conventions Common art 1 obliging State Parties to “ undertake to respect....the Convention *in all circumstances*”⁵⁰ . An opposite approach view reprisals primarily in light of their enforcement function. Provided they comply with a set of stringent conditions, they are perceived as lawful acts, and should not be classified as infringements of these principles at all. Proponents of such an approach will emphasize the obligation of State Parties in Common art 1 to “ *ensure respect* for the Convention”.

Over the years, international humanitarian law has increasingly limited the scope for reprisals by excluding certain categories of persons and objects from the panoply of lawful targets for acts of reprisal. Reprisals are prohibited in treaties against specific targets, persons and objects⁵¹. To a much lesser extent, treaties have imposed

⁵⁰ For an example, see the Judgement of the ICTY, *Prosecutor v. Josipovic et al . (Kupreskic)* Case No IT-95-16-A. Appeals Chamber. 14. January 2000 at para. 517

⁵¹ Reprisals are prohibited against the wounded, sick, personnel, buildings or equipment protected by GC I art 46, the wounded, sick, shipwrecked persons, personnel, the vessels and equipment protected by GC II art 47, prisoners of war in GC III art 13 (3), protected persons and their property in GC IV 33, cultural objects in Cultural Convention 1954, 4(4): protected persons such as wounded, sick and shipwrecked in API art 20, civilians and the civilian population in API art 51 (6), civilian objects in API art 52(1), cultural objects or places of worship in AP art 53 (c), objects indispensable to the survival of the civilian

restrictions on weapons that can be used by way of reprisals⁵². As such, belligerent reprisals have been subject to ever more stringent conditions. With increasing support for the notion of using diplomatic channels, combined with the development of other enforcement mechanisms such as international sanctions and international criminal law, there is a certain trend towards outlawing reprisals altogether. As expressed by the ICTY in Kupreskic :” while reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner “.⁵³

The access of a belligerent to wilfully commit breaches of the laws of war in response to a infringement by the adversary does, as famously stated by Kalshoven, offer to warring parties “ an opportunity to violate the laws of war with impunity”⁵⁴. Yet, to outlaw them altogether, or reduce their field of application or form to an avenue of irrelevance, could potentially remove an enforcement mechanism of the laws of armed conflict - a deterrent in the ‘heat of battle’ - that other enforcement mechanisms such as subsequent criminal proceedings could not easily fulfil.

What is the practice in your Country and its opinion about the use of reprisals in the eyes of international humanitarian law? In the event your Country considers them as permitted, at which political decision level are they ordered? What form can they take according to your Country? Can the use of illegal arms lead to reprisals with the use of illegal arms (for instance the use of dum-dum bullets)? In the event your Country does not permit them, is it the result of a rule of international humanitarian law and/or a policy choice?

I. Responses to III (b) of the Questionnaire

To this question, Belgium, China, the UK and the Netherlands submitted extended lists of conditions for reprisals. Most respondents seem to exclusively address the situation in international armed conflicts.

With regard to *practice*, Belgium, Cyprus, Hungary, Latvia and the US explicitly state that they have no record of resorting to reprisals. Ireland notes that it is extremely unlikely that it will resort to reprisals, while only one responding State refers to *actual* practice of use of reprisals – the well-known example of the UK responding to the German first use of poison gas with its own use of such gas on the Western Front during WWI.

The *opinions* about reprisals expressed in the responses were divided into three main categories : prohibited, lawful only under the stringent authorisations of IHL, and lawful to the extent not specifically restricted by IHL. Cyprus, Romania and Uruguay express opposition to the use of reprisals as such – as a matter of law and policy. A clear majority of States express views to the effect that reprisals are largely restricted by IHL, authorised only under very strict conditions of IHL (18) . A slightly more liberal view is presented by Belgium, the Netherlands and the US noting that reprisals are permitted as

population in API54(4), the natural environment in API55(2), work and installations containing dangerous forces in API56(4).

⁵² The CCW Amended Prot II prohibits the use by way of reprisals of mines, booby-traps and other devices against civilians in art 3 (7). A similar prohibition is found in CWC prot II art 3(2).

⁵³ ICTY Appeals Chamber, *Kupreskic*, supra note 50, at para 530.

⁵⁴ F.Kalshoven, *The CCW. Functions of Underlying Legal Principles*. Reprinted in *Reflections on War* . pp 393-397. at 367

long as they are not specifically prohibited or restricted by IHL, although this group also agrees that they are subject to stringent conditions.

Ireland and Sweden present strong cautions with regard to the use of reprisals, pointing to the lack of proven effectiveness of reprisals combined with the significant risk of exacerbating violence, Sweden expressly discouraging the use of reprisals in view of their inhuman effects .

The Questionnaire invited States to specifically comment on the level of authorization. All States who comment on the issue (14) answer that only authorities at the *highest level* are competent to authorise reprisals. A majority of responses (10) also imply that the right of decision is reserved for *political* authorities, referring to the highest level of government, 3 States seem to demand authorisation from military *and* political authorities, while 1 State refers to the military commander. Belgium notes that the rationale for the requirement of political authorisation is to make sure that decision makers can evaluate the legality of the original violation, assure that the purpose is in fact to coerce the adversary to respect the law, and make sure that the stringent conditions of reprisals are respected. An additional argument is indirectly referred to by the UK, citing its manual in which authorization is necessary at the highest level of government given that reprisals entail state responsibility.

Another issue specifically addressed was the form reprisals may take. 7 responding States refer to targeting of civilians, the civilian population or other protected persons as a prohibited form of reprisals, mostly alluding to treaty obligations.

The issue of illegal weapons in response to a first use of illegal weapon was commented on by numerous most States, although several noted the hypothetical nature of the response given the lack of illegal weapons in their inventories. Austria, Cyprus, Czech, Ireland, Moldova, Romania, Tunisia and Uruguay gave explicit answers to the effect that it is unlawful to resort to the use of illegal weapons in reprisal. Austria explained its view with regard to conventional weapons by reference to general IHL rules of necessity and humanity, while the use of WMD in reprisal to first use would constitute inherent violations of the principles of distinction and proportionality. 8 States refer to the use of illegal weapons in reprisals as not permitted, 7 indicating the opinion that the resort to use of illegal weapons in reprisal is prohibited by international humanitarian law.

Tanzania declares that the use of illegal arms or tactics may lead to reprisals with the use of illegal arms emphasizing, yet warning against such use due to the damage it might cause to civilians. Belgium submitted a paper dedicated to belligerent reprisals, in which the author excluding the use of illegal weapons in reprisal *if* explicitly restricted by treaty obligations such as CCW prot. II. Lebanon and Switzerland do not exclude the possibility that it might be permissible to use illegal weapons in reprisal to first use of illegal weapons, the latter stating that reprisals might still be permitted in relation to prohibited weapons. It does caution, however, that utmost restraint should exercised due to the risk that prohibited weapons might be declared as “a permitted reprisal” in order to justify their use. The US states that the form of reprisal would depend upon the illegal action taken – thus neither affirming nor rejecting the possibility, while the UK refers to the increased regulation of unlawful weapons and the trend towards outlawing their development and possession, as a reason for why it is *unclear* whether the UK would be in a position to use illegal weapons as a reprisal in response to an adversary's use of illegal weapons.

II. Conclusions

The overwhelming majority of respondents maintain the opinion that reprisals are permitted, albeit subject to very strict conditions, with only 3 States explicitly taking the view that they are prohibited.

Acts undertaken in the name of reprisals must conform to numerous established rules in order for their inherent unlawfulness to be removed. In their responses, States overall confirmed these rules. The following conditions for reprisals were mentioned by respondents : (1) *Response to a serious violation of the laws of war*. Five States underline that reprisals must be in response to a manifestly unlawful act. Minor illegal acts cannot qualify for reprisals, neither can reprisals be taken preventatively. (2) *Last resort*. Three respondents emphasise the principle of subsidiary - every other means of ending the violation must have failed. (3) *Warning or Notice*. Two States note that reprisals can only follow a warning which has failed to bring about the discontinuance of the adversary's crimes, citing ICTY Kupreskic (§ 535). (4) *Announced as reprisal*. The same two States also note a related, but slightly different requirement - they must be identified as reprisals *prior* to their undertaking. (5) *Proportionate to the original violation or damage*. Five states highlighted that effective but disproportionate acts of reprisals are not justifiable, recalling the ICJ stating that "any right of recourse to .. reprisals would.. be governed *inter alia* by the principle of proportionality"⁵⁵. Some have raised questions about what they must be proportionate in relation to. Judging from the respondents, there seems to be an understanding that it is with regard to the original violation and the damage caused by it. (6) *Only for the purpose of compelling the adversary to comply with the laws of war*. Five States emphasise that reprisals can only be undertaken for the objective of coercing the adversary to compliance. This excludes the use of reprisals as a means of retaliation or revenge , and certainly it prohibits a " tu Quoque" – approach. (7) *Ending once the purpose has been satisfied*. Two States emphasise that reprisals must be terminated once the adversary again complies with the laws of war, citing the Oxford Manual and the Kupreskic case, one respondent adding that reprisals would also have to stop once the effects of the reprisals have reached the same amount of damage that the original violation. (8) *No reprisal against reprisal*. One respondent underlines that reprisals can never be resorted to if the original "violation" is itself taken in reprisal. (9) *Comply with the laws of humanity and morality*. One State notes the overall requirement of compliance with humanity, citing the Oxford Manual, Martens Clause, the ICTY Kupreskic case (§ 535) and the Draft Articles on State Responsibility art 50(1)

(10) *level of authorization*

The traditional requirement for authorisation of reprisals is that they must only be ordered by a competent authority. This can be traced back to the Oxford Manual, stating that they must be "authorised by the commander in chief" . There is *unanimous* consensus among responding States (14) that the only authority competent to order reprisals is the " highest" authority. The ICTY refers to the " highest political or military level", and that reprisals may not be decided by local commanders⁵⁶. Responses to the Questionnaire however, seem to indicate a prevailing consensus among States that authorisation for reprisals is required at the highest *political* level.

(11) *form of reprisals*

⁵⁵ ICJ Reports 1996, *supra* note 18, at para 46.

⁵⁶ ICTY Trial Chamber, Kupreskic, *supra* note 50, para 535, reiterated in the ICTY Judgement *Prosecutor v. Milan Martić* Case. No IT-95-11-A, Trial Chamber 12. June 2007 at para 466.

The ICTY stated in the Kupreskic case that “the sacrosanct character of the duty to protect civilians, [which] entails, amongst other things, the absolute character of the prohibition of reprisals against civilian populations”⁵⁷. This judgment has been heavily criticized by States and academics alike, raising doubts about its binding force of precedent⁵⁸. 7 responding States note that reprisals against civilians, the civilian population and other protected persons are prohibited, while the UK alludes to its reservation to API on the matter. Of more interest to this report, however, is the dimension observed by Belgium : to the extent that civilians, POW, and other categories of persons are protected from lawful reprisals, resort to the use of *illegal means and methods of war against combatants* seems to remain the only possible avenue for reprisals.

With regard to the use of illegal weapons in reprisal, responses show no consensus among respondent States. 7 States do not rule out the possibility that they could use illegal weapons in reprisals, while 8 States report that such use would be illegal. 2 States refer to both law and policy, while 5 maintain that such use is unlawful as a matter of IHL. Curiously, though, some of these States do not view reprisals as prohibited, but they do consider both reprisals against civilians *and* reprisals against combatants with illegal weapons to be prohibited. None of the States indicate what form reprisals may then take.

With regard to *state practice*, there is a striking absence of recent state practice reported by respondents. However, it bears repeating that reprisals are means of exceptional and extreme circumstances, subject to stringent conditions. The fact that state practice show little or no resort to reprisals can thus hardly serve as an argument that they are becoming obsolete or unlawful. Rather, the lack of recent state practice serves to emphasize precisely the exceptional and extreme nature of these measures.

D. Weaponry

As David Turns has eloquently put it: “of all topics in IHL, the regulation of weaponry is the least constant, because it is subject to evolving technology and ever changing assessments of strategic objectives and consequent military necessities”⁵⁹. The limitations that apply to the choice of means and methods of war derive from the principle of humanity. In the 1868 St. Petersburg Declaration, States claimed that they had “*by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity*”⁶⁰. The ICJ reaffirmed the principle of humanity in its Advisory Opinion on Nuclear Weapons, observing that it was not only applicable to nuclear weapons, but every weapons category⁶¹.

Currently, three main avenues exist with regard to prohibiting or restricting the use of weapons: (I) the general rule of CIL prohibiting weapons causing unnecessary suffering or superfluous injury, (II) specific prohibitions or restrictions on the use of particular

⁵⁷ ICTY Trial Chamber, Kupreskic, supra note 50, para 513

⁵⁸ See Kalshoven *Reprisals and the Protection of Civilians – Two Recent Decisions of the Yugoslavia Tribunal* in Vohrah et al. (eds) *Man’s Inhumanity to Man : Essays in Honour of Antonio Cassese* (2003) at 508.

⁵⁹ Turns, David *Weapons in the ICRC Study on Customary International Humanitarian Law*. 11 JCSL (2006) p 201 at 236.

⁶⁰ The St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Dec. 11 1868, *reprinted* in 1 AJIL, 95 (Supplement 1907).

⁶¹ ICJ Reports 1996, supra note 18), at paras 77 and 78.

weapons resulting from treaty regulations or CIL, and (III) prohibitions or restrictions made by States in their internal reviews of weapons, which in practice is a domestic implementation mechanism for the former two.

(I) The General Rule of Unnecessary Suffering or Superfluous Injury.

From 1899 to 1974, the law relating to the legality of weapons was limited to the very general and undefined prohibition of unnecessary suffering and superfluous injury, the oldest and most firmly established of all customary rules pertaining to weaponry. Its modern version dates from the St. Petersburg Declaration of 1868. It was formulated in the Hague Regulations of 1899⁶², reiterated in the Hague Convention IV of 1907 with slightly different wording in the English version⁶³, and is currently codified in API art 35(2). In its Advisory Opinion on Nuclear Weapons, the ICJ enumerates this provision as one of the two cardinal principles contained in the texts constituting the fabric of IHL, stating:

“It is prohibited to cause unnecessary suffering to combatants : it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of (this) principle, States do not have unlimited freedom of choice of means in the weapons they use”⁶⁴.

The Court further notes that :

“ these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law”⁶⁵.

The principle recognizes that some level of suffering and injury in conflict is inevitable. The question is when the amount of suffering and injury must be deemed to exceed that which is necessary to achieve legitimate military objectives. Most weapons could be *used* in a manner that would cause unnecessary suffering or superfluous injury. The issue is whether normal and expected use of a weapon causes such suffering or injury. Conversely, weapons constructed with the *sole purpose* of inflicting unnecessary suffering, would clearly be prohibited. The legal rules require that a sensible balance be maintained with a view to avoiding the excesses which certain weapons or technologies may be *expected* to produce. Yet, there is uncertainty with respect to how it can be determined that a weapon breaches the provision. Is the suffering or injury caused by the weapon subject to an intent-oriented approach, taking into account only effects that the weapon is „calculated to cause“? Such an understanding would, among other things lead to an exclusion of anti-materiel weapons from the ambit of the provision. Or does it primarily rely on an effects-oriented approach in which de facto effects are taken into account – all effects that a weapon is “ of a nature to cause”, i.e. *forseeably could cause* or even *might in certain instances* cause.

⁶² The Second Hague Convention with Respect to the Laws and Customs of War on Land and its annex : Regulation concerning the Laws and Customs of War on Land, July 29- 1899. art 23(e) “ arms, projectiles or material of a *nature* to cause superfluous injury”. (French original: d'employer des armes, des projectiles ou des matières propres à causer des maux superflus)

⁶³ The Fourth Hague Convention respecting the Laws and Customs of War on Land and its annex : Regulations Respecting the Laws and Customs of War on Land. Oct 18. 1907. *reprinted* 1908 2 AJIL Supp 90 . art 23 (e) “arms, projectiles or material *calculated* to cause unnecessary suffering”.(French original: d'employer des armes, des projectiles ou des matières propres à causer des maux superflus)

⁶⁴ ICJ Reports 1996 , supra note 18, at para 78.

⁶⁵ Ibid at para 79.

The provision of ‚unnecessary suffering‘ has two purposes in international law⁶⁶. Firstly as inspiration and justification for the negotiations of specific weapons treaties, under the CCW and otherwise, although there are divergent opinions with regard to the role it effectively plays in this regard. Secondly as a rule in its own right. There is general agreement about the existence and customary nature of this provision. In this latter function, however, opinion differ with respect to its precise ambit - how to determine that a weapon causes unnecessary suffering or superfluous injury, and whether the general rule can serve as a basis for prohibition independently of prohibitions in treaties.

II. Prohibitions or Restrictions on the Use of Specific Weapons

In addition to the CCW –process and its 5 Protocols adopted since 1980, the Convention on Biological Weapons, the Chemical Weapons Convention, the Ottawa treaty and the Convention on Cluster Munitions form part of an ever increasing web of treaties prohibiting or regulating the use of specific weapons. However, absent overt exclusion clauses in treaties, there are frequent disagreements which are not easily resolved. Opinions are divided as regards the legitimacy of the use of a large number of weapons and projectiles, or on the more detailed conditions for their use.

The first treaty prohibition on the use of weapons in modern times dates back to the 1868 St. Petersburg Declaration, in which contracting States agreed to abstain from the use of „any projectiles of a weight below 400 grammes , which is either explosive or charged with fulminating or inflammable substances“, or exploding bullets. The customary nature of parts of this declaration has been firmly established. The status and specific reach of the substantive prohibition of the Declaration, however, is not entirely undisputed.

Further, in the 1899 Hague Declaration (IV,3) concerning expanding bullets⁶⁷, State Parties agreed to “ abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions”, a formulation reiterated in the ICC Statute art8(2)(b)(xix). Roberts and Guelff conclude that the 1899 IV Hague Declaration codifies one aspect of the customary rule prohibiting weapons that cause unnecessary suffering⁶⁸. Originally only binding on State parties, there is a prevalent view among States according to which they regard themselves as prohibited from using dum-dum bullets in IACs. In the light of this State practice, the Declaration should be regarded as reflecting CIL, binding on all states and all individual combatants. However, certain States (both Parties and non-State parties to the Declaration) object to the customary nature of at least some of its content. Another issue of contention is the actual reach of the provision – is it primarily an effects based or a purpose oriented rule, is it limited to situations of international armed conflict, and ultimately which projectiles are in fact covered by the rule.

In the recent ICRC Study on Customary International Law, 16 rules of CIL are dedicated to weapons. According to some critics, however, only 5 reflect rules that were “ incontestably covered by customary international law at the date of the publication of the Study”⁶⁹, namely the two general provisions on unnecessary suffering and indiscriminate weapons, the rules on poison, expanding bullets and exploding bullets.

⁶⁶ Some, such as Kalshoven, identifies three: rhetoric, yardstick or guidelines. See Kalshoven supra note 54.

⁶⁷ Declaration IV,3 concerning Expanding Bullets. The Hague , 29 July 1899.

⁶⁸ Roberts and Guelff *Documents on the Laws of War*. 3rd ed. at 63.

⁶⁹ D. Turns *Weapons in the ICRC Study on IHL* Journal of Conflict and Security Law 2006 11(2):201-237 at 205.

The main criticism is directed at the lack of state practice and opinion juris, one observer noting that the remaining 11 “seek to extrapolate customary rules from treaty prohibitions, most of which are of notably recent derivation and deal with weapons which were not previously specifically prohibited in international law »⁷⁰.

III. Legal Reviews

Another avenue of regulation of weaponry is one that is left to States themselves. During the negotiations of API art 36, States opted for a model in which States Parties themselves would take on the task of ensuring compliance with their international obligations in the „study, development, acquisition or adoption of a new weapon, means or method of warfare”.

Each State has an independent responsibility for meeting its obligations in international humanitarian law. Legal principles to limit weapons have little or no effect unless States develop mechanisms of evaluating the legitimacy of new weapons against the principles developed in order to limit them. API art 36 mandates that contracting Parties must review weapons in all phases of development in order to determine their legality under all international obligations binding to that Party. Art 36 does not prescribe how reviews or determinations should be made. What it does, is to imply adoption of some type of coherent national measure – formal or informal. The shape of the mechanism is irrelevant, the important point is for States to actually conduct reviews. This absence of a uniform review system has obvious weaknesses, yet the arrangement in which States are given freedom to determine how such a process can best be integrated into its own system is generally perceived to be highly valuable for a successful implementation of Art 36.

The main challenge of review mechanisms relate to the very modest number of States actually conducting such reviews. Reviews demonstrate commitment to a legally compliant arsenal, it tend to have a constructive influence on weapons manufacturers, and ultimately are conducive to the ability of States to comply with their international legal obligations under specific weapons treaties and under general IHL principles and rules.

E. General Rule Prohibiting Unnecessary Suffering or Superfluous Injury

1. „Of a Nature to Cause“ and „ Calculated to Cause“

Does your Country make a terminological difference between the weapons that are of a *nature* to cause superfluous injury or unnecessary suffering and the weapons *calculated* to cause superfluous injury or unnecessary suffering and are there any consequences attached to this distinction? If yes, please explain.

I. Responses to III (c) of the Questionnaire

Responses indicate that 15% of States do make a terminological difference, while the overwhelming majority (85%) makes no terminological difference between the two terms.

⁷⁰ L. Green *The Contemporary Law of Armed Conflict* (2000) p 133- 135.

Among States that *do* make a terminological difference, Greece observes that a weapon of “a nature to cause” may cause unnecessary suffering depending on the ways and the general circumstances of its use, whereas weapons “calculated to cause” are by definition designed, developed and manufactured to cause such results under any circumstances, noting that the former would in principle be lawful unless explicitly prohibited by treaty. Switzerland notes that the terminological difference does not influence its responsibility to ensure respect for IHL with regard to both categories.

Among States making *no* terminological difference, Austria and Tanzania identify the decisive criteria to be the *effects* of a weapon, irrespective of whether these are caused due to its nature or whether the effect is calculated. Denmark and Italy note that “nature to cause” is a more *objective* criteria, given that it is not reliant upon the intent of producers, but that the de-facto effects of the weapon is what causes the breach. Denmark provide the example that a weapon not constructed to impose superfluous injury or unnecessary suffering would be acceptable under the Hague regime, but could nevertheless have the de-facto effect, and would constitute a breach of AP 35 (2). Estonia reports that it understands the terminological difference to arise from a misinterpretation of the Hague 1907 Convention, and that this misunderstanding was corrected in API and subsequent treaties referring to „of a nature to cause“. Italy and the UK equally refer to the treaty obligation of API as the reason why they do not make any distinction. Italy noting that the term „calculated“ is so vague it lacks any practical value.

A minority among the States that make no terminological difference, presents a different notion of the content of the rule. The Netherlands observes that it considers that the term “of a nature to” refers primarily to the *design* of a weapon. The US provides a similar understanding, in which the two are regarded as synonymous, with an emphasis on the intent of or purpose for the weapon or munitions being developed and acquired. These explanations partly differ from that of the majority, emphasising either that “calculated” is a misinterpretation, and that the meaning is closer to that of an objective standard with an emphasis on actual effects of normal use. The minority seems to emphasise that both refer primarily to the *intended* effects of the weapon. Czech Republic, Ireland and Norway place themselves somewhere in-between these two main positions.

II. Conclusions

Responses indicate that the overwhelming majority of States agrees that there is no terminological difference between „calculated to cause“ and „of a nature to cause“. They support the prevalent view that ambiguities in the language of Hague art 23e) inherent in “calculated” are now resolved in API which uses the term “of a nature to cause”⁷¹, indicating that there is currently not an intentions-based “Hague –regime” distinct from an “API effects –based regime” of the provision of ‘unnecessary suffering’.

Despite this demonstrable consensus, however, it is obvious that there are significant inconsistencies in the understanding of the actual content of the provision on unnecessary suffering. The US still reiterates that it considers this term „not to have altered its meaning from that of the Hague IV regulations”⁷², several other responding States confirming that they view the provision as one primarily focusing on intended

⁷¹ B.Boothby. *The Law of Weaponry – Is It Adequate ?* pp 297-316 in (eds) Michael Schmitt and Jelena Pejic *International Law and Armed Conflict : Exploring the Faultlines. Essays in Honour of Yoram Dinstein 2007* International Humanitarian Law Series . Martin Nijhoff Publishers. at 300.

⁷² W. Hays Parks, *Conventional Weapons and Weapons Reviews*, *Yearbook of International Humanitarian Law* 8 (2005), pp. 55-142 at p. 87, fn 123

design and purpose, while a majority of States seem to have an effects based understanding. Consequently, although responses seem to confirm that States view no terminological difference between “nature to cause” and “calculated to cause”, such a finding has limited value all the while the underlying disagreement about whether the „unnecessary suffering“ provision is in essence intent-oriented or effects-oriented remains unsettled.

2. Prohibitions Based on the General Rule

Does your Country prohibit the use of any weapon that is not specifically prohibited by treaties or rules of customary international humanitarian law? If so, which ones and is this prohibition based on the general rule prohibiting weapons causing superfluous injury and unnecessary suffering or on policy considerations?

I. Responses to III (d) of the Questionnaire

Responses indicate that 36% of responding States have at some point prohibited weapons that are not specifically prohibited by treaties or CIL, while 64% did not report any such practice. States were asked to indicate the basis for the prohibition – among the 36% that reported prohibitions, Ireland, the Netherlands, Romania, the UK and the US (5) pointed to the general rule as basis for the prohibition, while Belgium, Italy and Norway(3) indicated policy considerations. Austria gave no specific answer.

States were invited to identify which weapons had been prohibited based on the general rule. Examples given of weapons that have been prohibited were anti-personnel mines (2) and cluster munitions (4). Also mentioned were munitions and plating containing depleted/industrial uranium, anti-tank mines with anti-handling devices, flechette munitions (ad hoc), and “improvised weapons”.

For a complete overview of the weapons reported – see Appendix 3 Fig. 2b)

The US emphasize that military necessity for a proposed weapon or munition is an essential component in determining its legality with regard to the general principle, and that several munitions have not been given approval because no military purpose or necessity could be identified.

Several states that do not identify any prohibitions under questions III(d), however identified in subsequent questions that they deemed a weapon prohibited because they cause unnecessary suffering or superfluous injury (eg. Tanzania under III (g) with regard to rubber or plastic bullets, Czech, Denmark, Estonia, Greece, Switzerland, Tanzania under III (h) with regard to fragmenting projectiles and Spitzer bullets, Denmark, Greece under III (k) concerning half-armoured projectiles.

II. Conclusions

The scarcity of practice by States in halting the use of a weapon in the absence of a treaty provision, and solely with reference to the principle of unnecessary suffering or superfluous injury, has led some to suggest that it is a cardinal principle of *moral* rather

than strictly *legal* value, providing a rationale for outlawing certain weapons by treaty⁷³. Some countries, such as France and Russia, also maintain the position that weapons can only be prohibited by virtue of this rule if States choose to prohibit the weapon by treaty⁷⁴. Responses to question (d) demonstrate that States do judge weapons to be illegal based on the general rule without an express treaty prohibition. However, practice still seems to be all but extensive, and it is difficult to discern any uniform approach to the application of the general rule in these instances. Added to that, almost half of respondents do (d) explicitly refer to policy considerations as their basis, and in most cases prohibitions concern weapons already in a process of being banned by treaties (mines and cluster munitions). Overall, responses still seem to confirm what the ICJ expressed with regard to the general rule and WMD, that „the pattern until now has been for weapons..... to be declared illegal by specific instruments“.⁷⁵

Some States clearly view the general provision as sufficient in and of itself to prohibit a weapon that otherwise is not prohibited in treaties or in CIL. This might happen either as part of a legal review of new weapons or as an ad hoc prohibition for use in certain operations. Judging from the responses, however, what seems to be most common, are prohibitions in the form of political decisions, either due to rising public concern about a weapon, or as a political signal aimed at strengthening efforts to promote international treaty prohibitions.

Other States report (under different questions) instances in which weapons that are not prohibited in treaties, but are nonetheless perceived prohibited in IHL due to the ‘unnecessary suffering’ provision. This is an approach according to which States perceive the weapon to be *in fact* prohibited as a matter of CIL. In which case the provision takes on a function of *providing a rationale* for the *opinio juris* about the existence of a rule, thus contributing to the emergence of rules of CIL prohibiting particular weapons. However, the more specific and precise ways in which this determination is made, responses give no further indication about.

Moreover, responses to the Questionnaire seem to confirm the common perception that the relationship between the rather abstract general provision on ‘unnecessary suffering’ on the one hand, and very definite prohibitions of certain specific weapons in treaties or as a matter of CIL on the other is a complex one, both with respect to what function the provision has in the development of the law on weaponry, and concerning the extent to which and the way in which the provision is applied as a rule in its own right.

(F) Legal Review of Weapons

Is there a legal review of new weapons, means and methods of warfare mechanism in your Country? If so, please describe it.

I. Responses to III (e) of the Questionnaire

⁷³ D.Turns, *supra* note 69, at 211, 212.

⁷⁴ See submissions to the ICJ in the Nuclear Weapons case - *Written Statement and Comments of the Russian Federation on the Issue of the Legality of the Use or Threat of Nuclear Weapons*. p 13 et seq, and *Written Statement of the Government of the French Republic* at para 26

⁷⁵ ICJ Reports 1996, *supra* note 18, para 57

The National Reports reveal that 34 % of respondent States have formalized review mechanisms., while an equal amount of respondents conduct no legal review (34%). 18% indicate some kind of review, ad hoc or on a case by case basis, while 14% indicate review, but without providing any details. All in all 66% report that they do conduct some kind of generic or ad hoc legal review of weapons.

The Netherlands describes a model consisting of a reviewing *Committee* which makes binding decisions, supported by an expert *Working group*. Both bodies comprise representatives from the Ministry of Defence, the working group also has subject – matter experts. The working group prepares advice for the high-level committee.

Belgium describes a *Commission* for Legal Evaluation, consisting of representatives from the Ministry of Defence, in addition to one or more external experts. The commission oversees the process of acquisition of all weapon projects, making an assessment of whether a project conforms with the State’s legal obligations. Decisions are consensus based, and the final opinion is communicated to the Chief of Defence. Also Uruguay has a Special Commission to carry out legal review.

Sweden describes an “Independent *Delegation*” which oversees the process of acquisition of weapons, its representatives being elected by the Government. This independent authority is composed by individuals with expertise in relevant fields, overseeing all relevant projects, either following request or at its own initiative. Decisions are consensus based. It does not have authority to halt production, but can notify the Government. It does not review weapons exclusively meant for export.

Norway relies on a model with a review procedure within the Armed Forces under the authority of the Chief of Defence. An International Law *Committee* assists with reviews, operating on request, but also has the right of initiative. The Committee may also be given assignments other than those strictly related to the review process.

Switzerland describes a similar review mechanism within the Chief of Staff, comprising legal specialists, with the right to call upon external experts. However, the final decision is taken by Parliament through the procurement budget. Austria describes a process in which assessment of a new weapon is made at a technical level by military authorities, while the political and legal evaluations are done at the MoD with cooperation from the MfA, or at the governmental level.

Some States without any specific mechanism recognize their responsibility to implement a weapons review process. Hungary, Romania and Tanzania indicate plans to establish such mechanisms.

There seems to be some confusion among respondents with regard to who is responsible for conducting review among producers and purchasers. It is incumbent to underline that a purchasing State has an *independent* obligation to assure compliance of the weapon with the international law binding upon it. The term „new weapons“ as referred to in API art 36, entails that the weapon must be new for the purpose of the State in question. The Rapporteurs wish to emphasize that the fact that other States have produced or use a specific weapon, does *not* absolve the obligation to conduct a review for the State acquiring this weapons by way of purchase.

II. Conclusions

There are several possibilities for categorizing review mechanisms. Committee versus individual reviewer, where the former may provide high representation, but inflexibility on frequency, while the latter offers flexibility, but might entail low representation and a high workload. Another parameter is executive power mechanisms versus arrangements with advisory bodies, where the existence of veto-mechanisms might influence how the legal review is incorporated.

Responses confirm that the ways in which States approach their obligations under API art 36 differ markedly. For States which do conduct some form of review, the scope of the review process appears to vary substantially. About half of these States identify specific mechanisms for internal review, while the other half either does not identify a specific mechanism, or reports to conduct legal assessments on an *ad hoc* basis if needed. No further details were provided with regard to the ad hoc reviews.

The answers overall seem to confirm the prevalent view that relatively few States have formalized review mechanisms – bodies that presumably enhance both the quantity and the quality of the review process. They equally corroborate that the number of States not affording any review at all is still high : close to 40% report no such practice.

Legal review is a mechanism that is suited to promote a convergence of humanitarian interests and operational interests, given that weapons that are accurate and reliable to engage a military objective, or the most militarily significant element of an objective, are least likely to cause excessive damage. It bears repeating that both humanitarian and military interests stand to benefit from a full implementation of Art. 36.

(G) Prohibition or Restrictions of Specific Weapons

For an overview of all responses on specific weapons, see Appendix C Fig 3 - 11. Numerous respondents left some questions unanswered. The following numbers are based on the National Reports actually answering the question posed. The amount of “total respondents” consequently vary with the questions.

(1) Non-Lethal Weapons in Military Operations and PSOs

What is the practice of your Country as to the use of non-lethal weapons within the framework of military and peace support operations? Which are the weapons prohibited and the weapons permitted or explicitly authorised?

I. Responses to III (f) of the Questionnaire

A considerable number of responding States (69%) indicate that they practice the use of non-lethal weapons in the framework of military or peace support operations, while 31% report no such practice.

Many States highlight the rationale for the use of non-lethal weapons. The US emphasizes the protection it affords to civilians, while Denmark notes the possibility to use the least harmful means to solve a given situation. Germany observes that non-lethal weapon can provide flexibility and reliability to military action also below the lethality threshold. Most respondents do not explicitly differentiate between military operations and PSOs, although some made implicit distinctions. Numerous reports underline that

the only purpose(s) for which non-lethal weapons can be used by their armed forces or in PSOs are *law-enforcement*, *defensive crowd control* and other *riot control* purposes (eg. Latvia, Norway, Sweden, Switzerland, Romania).

Estonia conditioned its support for the use of non-lethal weapons within military and PSOs on the weapons being operated by members of the armed forces with specific training in their use. Also Norway and the US emphasized the importance of training and educating the military in this regard.

For an overview of the weapons mentioned, see appendix 3 fig. 3 b)

II. Conclusions

The term “non-lethal weapon” is often referred to as contradiction in terms, given that such technology *can* cause fatalities. Denmark and the US prefer the term “less-lethal”, given the lack of evidence that the weapons are in fact non-lethal. Although the assumption of temporary incapacitation may not always be warranted, the term might still be appropriate since it captures the essence : non-lethal weapons are designed not to destroy or kill, but to *incapacitate*, giving military commanders more flexibility in strategy and tactics. They represent an alternative to protect soldiers and non-combatants in complex and potentially volatile situations. However, complicating the issue is the fact that “lethal” weapons do not always have a 100% lethality rate, and added to that, more sinister practices (e.g. rape) may be non-lethal, but are universally condemned. Another issue of contention is the fear that if non-lethal weapons are established as a category of its own, it might lead to an altering of the threshold for the provision of ‘unnecessary suffering’ and proportionality : if a military objective can be achieved by using non-lethal weapons, would not the use of lethal weapons be excessive? The UK noted that the term “non-lethal” is simply not recognized – something is either a weapon or it is not, adding that if it is a weapon and a candidate for use during armed conflict, it will be reviewed according to API art 36. That such weapons are subject to legal review on an equal footing was also mentioned by Belgium and the US, while the Netherlands emphasized that despite authorization, the use of non-lethal weapons is subject to further decision-making and circumstances.

There is no general treaty dealing with non-lethal weapons as such, and while some conventions mention specific types of weapons (such as prot IV to CCW⁷⁶), most technologies of non-lethal weapons fall outside of current conventional frameworks. Although relevant principles can be extracted from the conventional weapons regime that can be applied to non-lethal weapons, such application is not required under existing treaties. Non-lethal weapons will primarily fall under the principles of CIL , such as the duty not to cause unnecessary suffering and superfluous injury. Yet, the conventional, biological and chemical arms control regimes severely limit the potential use of non-lethal weapons - a limitation that further reinforces the problems noted with the concept of non-lethal weapons. Calling weapons non-lethal does not render them susceptible to a lower standard of legal scrutiny, a point noted by numerous States, emphasizing that weapons must comply with international humanitarian law – provided they are used in situations of combat. Tanzania referred to rules such as the principle of proportionality, the provisions on ‘unnecessary suffering’ and indiscriminate attacks.

⁷⁶ Protocol on Blinding Laser weapons (Protocol IV to the 1980 Convention) 13, October 1995. obliges Parties to take all feasible precautions to avoid the incidence of permanent blindness to unenhanced vision. It specifies that such precautions shall include training of their armed forces “ art 2 (2).

One state recalls the 'perverse' effects that might follow if non-lethal weapons were to be outlawed. Still, numerous respondent States only allow for the use of non-lethal weapons for riot control purposes and other law-enforcement tasks. The Czech Republic notes that their use of non-lethal weapons are subject to standards similar to that of the civil police, but still emphasises the importance of conformity with international law, while Norway observed that the use of non-lethal weapons must comply with the international obligations arising both from its obligations under IHL and international human rights.

(2) Rubber Bullets and Plastic Bullets in Pokes

To what extent is your Country favourable to the ban on use of rubber bullets and plastic bullets during peacekeeping operations? (Cf. Decision of the police chief for the UN Mission in Kosovo, Mr Monk of 3 July 2007)? Is the use of such bullets acceptable from a legal point of view?

I. Responses to III (g) of the Questionnaire

Following an incident in 2007 in which two protesters were killed by rubber bullets used by police forces in UNMIK, the UN Police Commissioner Richard Monk imposed a ban on the use of rubber bullets by any police unit in the UN-run province, and a process with a view to banning their use in peacekeeping missions was initiated.

A clear minority of responding States (22%) expresses that they are in favour of a ban. More than half (56%) are of the opinion that their use is acceptable from a legal point of view, while some States (22%) have not formulated an official position on the issue.

Among States in *favour* of a ban, Cyprus and Lebanon note that a ban is preferable, or else their use should be subject to strict limitations. Tunisia cautions that the use of such bullets risk breaching the principle of proportionality, while Ireland notes that the ban on their military personnel to use rubber bullets or plastic bullets during PKOs is not a legal prohibition, but a matter of policy.

Switzerland refers to the jurisprudence of the European Court of Human Rights - (*Güleç v. Turkey*) as a rationale for its stance *not* to ban the use of non-lethal capacities such as rubber and plastic bullets, while Belgium adds that availability of such bullets could facilitate proportionate use of force in a mission.

Among States arguing that the use of such bullets is legally acceptable, certain caveats are mentioned : Italy conditioning their lawfulness on the existence of a UN Chapter VII mandate for the operation, Uruguay noting that their use should be reserved for protection of persons and objects that the PKO forces are responsible for. The Czech Republic note that rubber bullets may be used only if it allows to realize the task without resorting to lethal weapons, or is a reasonable alternative short of deadly force (US).

Italy and Estonia express the view that the use of such bullets should be left to military forces rather than civilian police, while Romania notes that only its Gendarmerie can use such bullets, not the armed forces.

II. Conclusions

Responses to the Questionnaire reveal that only a small minority of respondents supports a general ban on plastic or rubber bullets during PKOs, some of whom are also

open to a restriction in their use as an alternative to a complete ban. With reference to the ban by Monk, Italy observes that the ban was limited to the UNMIK Police, and did not affect the MSUs under the authority of the NATO military command, while Estonia clarifies that a ban during a PSO would be interpreted as a ban affecting only the mission in question.

There is a prevailing consensus among the majority of respondents that the use of such bullets is legally acceptable, provided other provisions of humanitarian law are complied with.

Some respondents, on their part, do not rule out to the possibility of ad hoc prohibitions on such bullets, but they clearly indicate that they are unfavourable to a general ban.

(3) Bullets of a Nature to Fragment or Tumble Early in the Human Body or Spitzer Nosed Bullets

Does your Country consider that bullets of a nature to fragment or to tumble early in the human body or Spitzer nosed bullets are prohibited?⁷⁷

I. Responses to III (h) of the Questionnaire

A clear majority of responding States (59 %) answers that such bullets are prohibited. A small minority (11%) insists they are not prohibited, while some respondents have a differentiated approach, identifying them as “partly prohibited”(15%). Another 15% have no opinion on the issue.

Among States that perceive these bullets to be *prohibited*, responses demonstrates disparate views on the legal basis for the prohibition : (5) give no specific legal source, the St. Petersburg Declaration is referred to by (1) State, the 1899 IV,3 Hague Declaration by (7), the 1907 IV Hague Convention by (2), while (7) referred to the general provision on ‘unnecessary suffering’ and/or API art 35.2). (2) respondents observe that they are favourable to a prohibition. Explicit reference to the “CIL” rule prohibiting bullets that expand or flatten easily is made only by (1), while other States refer to the CIL rule of ‘unnecessary suffering’.

Cyprus observes that as far as the ability of such bullets to tumble early in the human body, this is related to the weapon and its velocity, and not the munitions itself, suggesting that pressure must be put on weapons manufacturers to reduce the velocity speed. Switzerland notes that Spitzer nosed bullets that are designed as tumbling and frangible FMJ bullet may fall under the provision of ‘unnecessary suffering’, recalling the Swiss initiative to actualise the dispositions of the Hague VI 1899 Declaration through a new international provision under the CCW umbrella, a proposal based on an effect-based evaluation of such bullets.

Some States have a *differentiated* approach, distinguishing between Spitzer nosed bullets and other fragmenting bullets. The Czech Republic considers Spitzer bullets with FMJ design to be allowed, while bullets *designed* to fragment early are prohibited. Ireland notes that the tendency to fragment is not a design characteristic of the Spitzer bullet, but Spitzer bullets pierced with incisions etc. are prohibited, while Norway adds

⁷⁷ The Questionnaire does not explicitly identify whether it seeks to clarify national prohibitions of these projectiles or whether it wants respondents to clarify opinio juris of IHL. However, given the very scarce number of respondents having in fact prohibited weapons “not prohibited by treaties or CIL” under III d), the Rapporteurs will equate a national prohibition under this question with the opinion that the bullets are prohibited under IHL.

that Spitzer bullets would be prohibited depending on whether the munitions has the mentioned *effect* on the human body, and if so, whether this effect is inherent in the munitions *design*. Estonia expresses that although Spitzer bullets may fragment in the human body, the injury and magnitude of this fragmentation is justified by military necessity and does not reach the threshold of ‘unnecessary suffering’.

Among States that believe that they are *allowed*, the US submits a critical comment to the term “tumble”, recalling that the term implies a 360° rotation within the human body, an effect it describes as physically impossible, suggesting that a more accurate term would be “yaw”. The US further notes that in discussions within the CCW forum concerning small arms ammunition, “yaw” was regarded as a part of projectile performance on impact with a target, and not as such prohibited by the laws of war. With regard to Spitzer bullets, the US also observes that their extensive use in all wars of the 20th century must lead to the conclusion that they are legal as a matter of CIL, noting that this point was acknowledged on two separate occasions within the CCW forum. Italy reports that Spitzer bullets are allowed for personal defence and hunting purposes, and that they are used by the army, together with jacketed lead, armour piercing and tractor bullets. The US clarifies that it does not employ small arms ammunition specifically designed to fragment in the human body *at all ranges*“.

II. Conclusions

The first observation to be made, is that the responses leave the impression of a significant divergence of opinions concerning the legality of bullets whose casing fragment on impact. All small calibre munitions will to a certain extent fragment in soft parts of the human body. Generally, State practice is believed to permit such munitions, unless they “expand or flatten easily in the human body”, or otherwise cause unnecessary suffering or superfluous injury.

No State challenges the notion that bullets that are *specifically designed* to fragment in the human body (at all ranges) are prohibited – either under the general provision of ‘unnecessary suffering’, or subject to the prohibition on expanding bullets. With regard to bullets that ‘tumble’ (or yaw), the picture seems more uncertain, while the positions on Spitzer bullets reveal highly divergent views concerning their lawfulness. Spitzer design rotates earlier than round-nosed projectiles, especially at close range, due to high velocity. Often this causes bullet fragmentation, increasing the damage to tissue within the body. Resulting in an increase in suffering, it is still believed by some States to be lawful given their increased (legitimate) military necessity. Although a majority hold the view that they are prohibited, responses do not conform to the extent that it allows to draw any general conclusions beyond that of an unsettled picture. During the CCW process, there was an acknowledgment about the lawfulness of such bullets as a matter of CIL. The responses provided to question III h) clearly lack the necessary uniformity (consistency) and generality to draw a different conclusion.

Some observations may nonetheless be added. Part of the difference in opinions can be explained by reference to the divergent understandings apparent in the National Reports concerning which bullets are in fact addressed, which bullets are covered by the 1899 IV Hague Declaration, the importance of bullet construction versus other parameters such as range and velocity, and which effects such bullets in effect cause. Moreover, the answers largely confirm the diverging views among responding States concerning *intentions based* or *effects based* approaches to the provision on ‘unnecessary suffering’ demonstrated under questions III(c) and (d). States that either do not view such bullets as prohibited or have a differentiated approach, tend to emphasize that the

bullets must be *specifically designed* to cause unnecessary suffering. These States seem to have a similar understanding of the actual reach of the 1899 IV Hague Declaration. States that view these bullets as prohibited, generally seem to take a more effects oriented approach.

(4) Dum-Dumb Bullets

I. Responses to III (i) and (j) of the Questionnaire

(I) Are the armed forces of your Country permitted to use dum-dum bullets or bullets with similar effects during a peace support operation? If so, do they effectively use them?

The overwhelming majority of responding States (87%) do not permit their armed forces to use dum-dum bullets in PSOs, while a small minority (13%) declare that they do. Actual use, however, is less clear.

21 States either explicitly prohibit them in PSOs, do not have them in their inventory, or perceive them to be unlawful. Italy states that such bullets are now prohibited under international law and domestic law, while Denmark makes no distinction between their use in different operations. Other states give varied reasons for their prohibition. The Netherlands and the Czech Republic (with regard to its military police) note that their prohibitions are based on policy considerations.

3 States take a different approach - Austria and Norway note that international humanitarian law does not prohibit the use of such bullets in PSOs. Austria, however, does not have them in its inventory, while Norway mentions no practice. The US, noting that no military requirement has been identified for their use and that conventional forces are not authorized to use them, adds that certain limited mission-specific use has occurred where its use would reduce risk to civilians, friendly forces or sensitive equipment such as aircraft.

(j) Are the police forces of your Country permitted to use such weapons, either on national territory or in peace operations (question posed for comparative purpose)?

Responses to this question showed somewhat stronger divergences. With regard to police forces operating on national territory, 67% do not permit the use of dum-dum bullets, while 28% do. The use of dum-dum bullets by police in PSOs gave a slightly different number : States that prohibit their use rose to about 71%, while 17% stated that they permit them.

Czech Republic observes that outside situations of armed conflict, such bullets are allowed for police purposes, Norway noting that they may be used if they are more suitable for ensuring the safety of bystanders, while the US adding the risk of over-penetration, reducing the risk of civilians and friendly forces.

II. Conclusions

The 1899 IV Hague Declarations and its corresponding rule of CIL banning bullets that "expand or flatten easily in the human body" is applicable to war between contracting states. Their use is not however, believed to be prohibited by police forces for law-

enforcement purposes. The UN Secretary's Bulletin section 6 para 2 for its part, confirms that the prohibition on such bullets are to be respected by UN forces "when in situations of armed conflict they are actively engaged therein as combatants". The question relates to situations in which armed forces are involved in law enforcement like assignments during PSOs. It is apparent from the respondents that with regard to the use of dum-dum bullets, an overwhelming majority of States prohibits the use of dum-dum bullets by their armed forces in PSOs, while a small minority does not. However, some respondents explicitly note that their prohibition is based on *policy* considerations, bringing the total amount of respondents explicitly *not* of the opinion that such use is prohibited as a matter of international law to 6, or about 25%.

With regard to their use by *police forces*, responses show that there is a high degree of correspondence between how States practice and view the use of such bullets by police forces on national territory, in PSOs and by armed forces in PSOs. With regard to *police forces* in PSOs, a somewhat lower number of States prohibit them. It is clear that most of the States that *do* permit the use of expanding bullets by police on national territory, either permit their use by police in PSOs too, or have identified policy decisions as the reason why they do not authorize it. Countries that do *not* permit their police forces to use such ammunition in PSO as a matter of policy, generally apply the same policy to their armed forces. Among those who do permit their police forces in PSOs to use such ammunition, however, two states have no such authorization for their armed forces, while one State permits the use by armed forces in PSOs as well.

Responses show that practice with regard to the use of dum-dum bullets by armed forces in PSOs is very scarce. However, with regard to *opinio juris*, about 25% explicitly do not believe that their use by armed forces in PSOs is prohibited by international law. The conclusion must be that responses clearly lack sufficient uniformity (consistency) to indicate a conclusion to the contrary.

(5) Half- Armoured Projectiles

Does your Country consider that any half-armoured projectile (soft-nosed) is prohibited by international humanitarian law?

I. Responses to III (k) of the Questionnaire

58% of responding States consider such projectiles to be prohibited by international humanitarian law. 21% consider the projectiles to be legal, while 13% condition their legality on additional factors.

Most States that consider the projectiles to be prohibited, refer either to the 1899 Hague Declaration or the 1907 Hague Convention, or both. Estonia noting that the important factor is not the design of the projectile, but the fact that it expands or flatten easily, adding that its *effect* is similar to that of dum-dum bullets.

Some states take a more cautious approach, Ireland noting that if it is *designed* to cause unnecessary suffering, it would be considered prohibited, while Norway notes that they may be prohibited under the 1899 Hague Declaration, the 1907 Hague Convention and AP 35(2), and that the assessment is made on the basis of certain relevant factors – the *design* of the projectile, whether it in its normal mode will create unnecessary suffering compared to the military necessity. This assessment also relates to *damage likely to occur* : the effect they are constructed to achieve, the effect likely to occur when striking

human targets, specific or permanent handicap or disfiguration, type of injury (graduated wounds or wounds channels) and reparability.

Belgium , Czech Republic, Italy, Moldova and the US conceive them not to be prohibited, the US noting that it does not consider the 1899 Declaration to be declaratory of CIL. The US adds however, that no military requirement for such ammunition has been identified for anti-personnel use in IACs, and thus no legal consideration has been given to such employment of the projectile. Practice with regard to such bullets, however, seems very scarce.

II. Conclusions

With regard to half-armoured projectiles or soft nosed bullets that may mushroom on impact, despite the overall scarcity in use, responses do not give sufficient basis to conclude that a general or uniform (consistent) practice or opinio juris exist with regard to these projectiles. Moreover, while (2) States referred to the 1899 IV Hague Declaration as the legal basis for their view, (6) referred to the general provision on 'unnecessary suffering', while (2) States referred to both.

(6) Projectiles under 400 Grammes Charged with Fulminating or Inflammable Substances

Is the use of a projectile of a weight below 400 grammes (the 20 mm projectiles for instance) which is charged with fulminating or inflammable substances authorised or prohibited by your Country? If it is not prohibited, which kind of anti-personnel use, if any, is permitted or explicitly authorized?

I. Responses to III (I) of the Questionnaire

Answers to this question reveal that responding States were divided with regard to practice - about half authorise or permit the use of such bullets (52%), while a slightly lower number of States prohibits them (40%). Among States that do authorize such use, there seems to be an almost unanimous approach with regard to the prohibition of anti-personnel use.

Among States that *do not* authorize the use of such projectiles, Tanzania refers to its indiscriminatory effects, while Tunisia points to the excessive effects they might cause. Among States that *do* authorize or permit their use, most respondents make reference to the 1868 St. Petersburg Declaration. The Czech Republic notes that technology has made the prohibition in the St. Declaration outdated, the US adding that State practice has made the rule obsolete with regard to weight since WWI.

Some States trace the prohibition on *anti-personnel use* of such munitions back to this Declaration, Estonia observing that the rule has been modified into a prohibition of anti-personnel use by subsequent practice. Italy and the US refer to the 1923 Hague Rules on Air warfare and subsequent state practice, concluding that anti-materiel use of such projectiles is not covered by the prohibition. Denmark and the US further note that *incidental* damage to personnel from anti-materiel use of such projectiles is not a violation of the prohibition.

Estonia and Italy refer to the CWC Prot III definition of incendiary weapons, excluding munitions in which the incendiary effect is not specifically designed to cause burn injury, but to be used against military objectives". The only reference to any anti-personnel use, is that mentioned by Belgium with regard to multipurpose use of 12.7 mm in open terrain against combatants. Belgium states that such use is subject to general limits of the laws of armed conflict, with particular emphasis on military necessity.

II. Conclusions

Responses indicate that practice is divided with regard to national prohibitions of projectiles charged with fulminating or inflammable substances. A slight majority of responding States authorise their use, while an almost equal amount of respondents prohibit them.

The 1868 St. Petersburg Declaration, in which the contracting States renounced the use of „any projectiles of a weight below 400 grammes , which is either explosive or charged with fulminating or inflammable substances“, or exploding bullets, is often considered obsolete in its substantive part, in particular with regard to weight – a view also confirmed by responses to the Questionnaire. Although some objections have been raised with regard to the CIL nature of this provision⁷⁸, responses to the questionnaire generally seem to confirm that the prohibition on such bullets is considered a reflection of CIL. An exception might be the US, although clearly stating that it perceived the 1923 Hague Air Rules to be customary in nature.

More controversial, however, is the question of the application of the prohibition to anti-personnel use of such bullets. It is not clear from the Declaration whether anti-materiel bullets were also contemplated. Among respondents that *do not prohibit* the use of exploding bullets, responses show a unanimous agreement that the anti-materiel use of such bullets is permitted. Some refer to the 1923 Hague Draft Rules on Air-Warfare, others to the CCW prot. III art. 1(b) (ii), while others simply refer to the Declaration or subsequent practice to support this position. It is also clear that the use of exploding bullets *designed* for anti-personnel purposes are unanimously considered to be prohibited by respondents. At the core of the controversy, however, lies the position maintained elsewhere by the US that the 1923 Hague Draft Rules establish an exception to the prohibition on exploding bullets for their use by aircraft „ without categorical target restrictions“, supported by subsequent state practice in use such as aircraft strafing of enemy forces ⁷⁹, and leading the US to conclude that there is no *total* prohibition on the anti-personnel use of exploding bullets in CIL. Responses to the Questionnaire, however, do not seem to provide any example of State practice to support this understanding. With the exception of Belgium, making a reservation for the use of multipurpose 12.7 mm in the open, the prevailing view among responding States clearly is that anti-personnel use of such bullets is prohibited.

(7) Incendiary weapons

Which type of use of incendiary weapons is permitted or explicitly authorised by your Country? Does your Country make a distinction in this respect between

⁷⁸ H.Meyrowitz, *Réflexions à propos du centenaire de la Déclaration de Saint Petersburg* , 59 RICR (1968 – 541-555).

⁷⁹ Bellinger / Haynes, supra note 35 at 463.

international armed conflicts, non-international armed conflicts and peace support operations?

I. Responses to III (m) of the Questionnaire

Responses indicate a rather diverse practice with regard to the use of incendiary weapons. 29% of responding States do not authorise or permit the use of incendiary weapons at all. A slightly larger group of States (37%) prohibits them, except for certain authorized use, while another 29% of States have certain restrictions on their use. 5% have no official position on the issue.

Most states that *partly prohibit* their use, refer to the CCW prot III as the basis for restrictions, some specifying the restrictions therein, such as the prohibition to use air-delivered incendiary weapons against military objectives located within a concentration of civilians. Tunisia in addition refers to the anti-personnel use of incendiary weapons being prohibited “ unless it is not feasible to use a less harmful weapon to render a person *hors de combat*”, while the Czech Republic notes that incendiary weapons are used against light target, but that their use against personnel is prohibited.

Among States that *permit* the use of incendiary weapons with the restrictions contained in the CWC Prot III, Denmark, Italy and the Netherlands add that their use will otherwise be subject to the general provision of ‘unnecessary suffering’. Norway specifies that the restrictions on their use are for the protection of the civilian population. None of these respondents made any general statements to the effect that their anti-personnel use is prohibited. The US , however, notes that it regards the use of incendiary weapons to be lawful for anti-materiel *and* anti-personnel purposes, adding that it ratified CCW protocol III on September 23 , 2008, with a reservation to art 2 Para 2 & 3, reserving the right to use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons, but in so doing will take all feasible precautions with a view to limiting the incendiary effects to the military objective. The US explains that the rationale for this reservation is that incendiary weapons are the only weapons that can destroy certain targets for which high heat is required to eliminate bio-toxins (eg. biological weapons facilities), since the use of only high explosives could risk widespread release or dangerous contaminants with potentially disastrous consequences for the civilian population. The State concluded that with this reservation, it can retain its ability to employ incendiaries to achieve the destruction of high -priority military targets in a manner consistent with the principle of proportionality.

With regard to the distinction between international and non-international armed conflicts, no distinction was made by responding States, albeit Denmark noting that *policies* might differ. Two states show a slightly different approach with regard to PSOs. Italy observing that in situations that do not amount to an armed conflict, their use is prohibited under international law, adding that due to restrictions on the use of force for their troops during PSOs, the use of such weapons would not be considered. Norway notes that in any UN PSO covered by the UNSG’s Bulletin the use of incendiary weapons will not be allowed, regardless of whether it is used as anti-personnel or anti-materiel weapon.

For weapons that are permitted / authorised mentioned by respondents – see Appendix 3 fig. 9 b).

II. Conclusions

There is no general prohibition in treaties or CIL on the use of incendiary weapons. The CCW Prot III subjects their use to certain restrictions, regulating the use of napalm, flame-throwers and other incendiary weapons in order to protect civilians. However, it does not contain any rules prohibiting the use of such weapons against combatants, despite proposals to that effect. Moreover, incendiary weapons are subject to general treaty limitations and principles of international humanitarian law.

The ICRC Study on CIL suggests in rule 85 that there is a prohibition of CIL applicable in both international and non-international armed conflicts against the anti-personnel use of incendiary weapons, “unless it is not feasible to use a less harmful weapon to render a person *hors de combat*”.⁸⁰ Among respondents that either authorize or permit the use of incendiary weapons, there is little basis for identifying either practice or opinion juris among States to the effect that the anti-personnel use of incendiary weapons is prohibited. Cyprus and Italy mention prohibition of anti-personnel use, but for specific weapons whose anti-personnel use may be prohibited under other provisions of IHL. Apart from this, no mention is made by respondents of a general prohibition or restriction on anti-personnel use of incendiary weapons. On the contrary, States mostly focus on the strict prohibitions of *indiscriminate* use of incendiary weapons, aimed at protecting civilians, while some States implicitly or explicitly perceive their anti-personnel use to be lawful. Added to that, States refer to treaty obligations to explain their obligations, only one respondent State alluding to the rule of the ICRC Study, although no explicit reference being made to CIL.

Hence, State practice and opinio juris expressed in the responses strongly suggest the non-existence of a CIL rule prohibiting or restricting the use of incendiary weapons to anti-materiel use only. It goes without saying, of course, that anti-personnel use is subject to the general provision on ‘unnecessary suffering’.

The conclusion that follows is that the practice and opinion provided in the responses, does not allow for a general conclusion that there is a rule of CIL restricting the use of incendiary weapons for anti-personnel use.

With regard to distinction between IAC and NIAC, the CCW Prot III is applicable to both classifications of armed conflict following the amendment to art. 1 in 2001. No responding State made any distinction between the two, with Denmark noting simply that policies might differ. Concerning PSOs, States generally report no distinction either. Italy reiterates that the requirement for the use of such weapons is the existence of an *armed conflict*, while Norway recalls that the SG Bulletin prohibits both anti-personnel and anti-materiel use of incendiary weapons in operations to which it is applicable. In practical terms, this effectively reduces the use of incendiary weapons in PSOs to a minimum.

(8) Tear-gas

Is any type of use of tear gas authorized by your Country within the framework of an international armed conflict or occupation? If so, under what circumstances (Use against civilians, prisoners of war, within the framework of « search and rescue » operations...)?

⁸⁰ ICRC Study, supra note 37, at 289.

I. Responses to III (n) of the Questionnaire

46% of States indicate that they authorise the use of tear gas in situations of IAC or MO. 42% of respondents do not authorise such use. 12 % have no use or position on the issue.

Among States reporting *no* such authorisation, Austria, Germany and Hungary note that common types of tear gas are defined as RCA by the CWC, and their use as a means of warfare is prohibited by the Convention. Sweden adds that its armed forces can only use tear gas in law enforcement operations in PSOs, and then only outdoors.

States indicating authorisation emphasize that the critical factor is the concrete *situation*, not the overall classification of the situation. A majority of States observe that they authorise such use exclusively in *non-combat situations*. Denmark noting that the *type of operation*, not the category of persons involved in it is decisive, while Norway adding that the character of the operation must be determined on a case-by-case basis.

Certain situations are deemed *not* to be covered by respondents: Estonia restricts the use of tear gas in „search and rescue“ operations, due to the risk of being misinterpreted as first use of chemical weapons. Denmark adds situations with a high risk of turning into combat situations. Italy notes that the prohibition of CWC extended to quelling riots in prison camps, or against combatants/fighters, adding that tear gas would be unlawful if the crowd is not protesting, but “ fighting against an occupant”.

Circumstances under which authorisation *is* given, mainly concern various situations of *law-enforcement*. Belgium notes the handling of demonstrations by local populations, in which tear gas may facilitate proportionate use of force. Estonia mentions disbanding of rioting civilians and use in POW camps to ensure discipline. The Netherlands emphasizes that it could be used against non-combatants for law-enforcement purposes, while Italy notes against civilians not actively participating in hostilities.

The US shows a markedly different approach from that of other respondents, authorising use of tear gas for the purpose of controlling rioting enemy POWs, for the purpose of reducing civilian casualties in situations where civilians are used to mask or screen attacks, and in rescue missions. The US also recalls its reservation to the CWC on the right to first use of RCA in „defensive military modes“ to save lives (US – Executive order 11850).

II. Conclusions

The Chemical Weapons Convention regulates the use of RCA, making non-lethality a precondition for any chemical agent to pass as a riot control agent, and thus falling outside the definition of chemical weapon. A precondition, however, is that the use of RCA is prohibited on the battlefield, as a „ method of warfare“⁸¹.

Given that tear gas and RCA are lawful means for law-enforcement purposes, the question consequently arises with regard to their use in situations bordering that of an armed conflict, in the grey zone between that of pure military operations where the use of such substances are clearly prohibited „ as a means of warfare“, and operations related to law enforcement tasks. Situations may arise in the course of an international armed conflict , or in particular during a belligerent occupation, where the availability of

⁸¹ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. Jan. 13. 1993 (CWC), art I(5) and II(7)

such means would clearly have beneficial effects, facilitate the use of appropriate amount of force demanded by the situation, thus preventing escalation etc.

Judging from the respondents, there is no uniform practice with regard to the use of tear gas in situations of armed conflict or military occupation. Close to half of respondents do not authorise their use in such situations, while slightly more than half do.

Among States that authorise use of tear gas, some elements were common to most States. Respondents emphasize the *nature* of the situation : it must be a non-combat situation, the *function* that the use of tear gas must have : it must be for law-enforcement purposes, crowd riot control and the like, and limits must be drawn with a view to the *persons* it can be used against : rioting civilians/ non-combatants / persons not actively participating in hostilities (and according to Estonia and the US , rioting POWs). In short, persons that may not be targeted with conventional weapons. Once a situation evolves into a situation in which civilians are “fighting against an occupant” or otherwise a combat-like situation, the use of tear gas will be prohibited.

(9) RCA

Is the use of riot control agents permitted or explicitly authorised by your Country with respect to non-international armed conflict, either as a means of warfare and/or otherwise?

I. Responses to III (o) of the Questionnaire

About 75% of responding States permit or authorise the use of RCA in NIAC, the overwhelming majority of whom expressly prohibit RCA as a means of warfare in NIAC. 12% of States prohibit their use in NIAC altogether, while 12% had no official position on the issue.

Greece, Ireland and Sweden report that no authorisation or permission exists for the use of RCA in NIACs.

Among States that permit or authorize the use of RCA in situations of NIAC, the vast majority condition the use on situations of *non-combat*. In situations of combat or situations amounting to combat, RCA cannot be used.. The US recalls its declaration made to the CWC in which it notes that the CWC does not restrict the use of RCA in situations where the US is not engaged in the use of force of a scope, duration and intensity that would trigger the laws of war. In addition, the US does not consider the CWC to restrict its use of RCA – even against combatants who are parties to a conflict, in cases where the US is *not a party* to the conflict, in *consensual* (UN Charter Chapter VI) PKOs, or in UN Charter Chapter IIV PKOs or peace enforcement operations.

The Czech Republic notes that armed forces are authorised to use tear gas in NIAC only for *police purposes* such as crowd riot control. The Netherlands, Denmark, Italy add that its use is lawful for law enforcement purposes, including crowd and riot control. Switzerland emphasises that its use is strictly limited to the maintenance of public order, while Italy notes that it is permitted for the maintenance of public order and safety, or other law-enforcement activity. Estonia provides examples such as disbanding of rioting civilians and use in POW camps to ensure discipline.

Norway, Switzerland and Romania note that RCA are prohibited as a means of warfare. The US for its part, observes that CWC does not restrict the use of RCA in circumstances in which they are *not* being used as „ method of warfare“, such as counter-terrorist operations.

Some states seem to reply exclusively with a view to the situation on national territory, while others, the US in particular, has a much broader approach.

II. Conclusions

There is unanimous agreement among States that the use of RCA in IAC or in NIAC against combatants or persons directly participating in hostilities is prohibited.

Provided a situation amounts to that of an armed conflict, some States emphasize the *nature* of the situation (that of a combat) as the important issue, irrespective of the overall classification, while others (in particular the US) distinguishes between situations in which it is itself a traditional party to the conflict (IAC and NIAC on territory), and situations other than that. The majority of responding States permit or authorize the use of RCA in situations of NIAC, under the strict and unanimous limitation that they should not be used as a “method of warfare”.

Some States seem to operate with a very strict definition of what situations might entail the use of RCA - maintenance of public order and other traditional law enforcement tasks. Others concede to the use of RCA for riot control purposes. The practical problem is obviously that in situations of non-international armed conflict, there is often a very fine line between certain law enforcement tasks and what may amount to a situation of combat or a situation that develops into a situation of combat.

E. Overall Evaluation of Responses to Part III

Generally, responses indicate a high degree of common understanding among respondents concerning the *general principles* regulating means and methods in the conduct of military operations. On closer examination, however, national reports reveal substantial differences in how such provisions are understood and practiced by responding States. In particular with regard to the provision on unnecessary suffering and superfluous injury, approaches vary substantially. Perhaps this can account for some of the large discrepancies in practice and opinion evident from the responses. Because the main preliminary conclusion that must be drawn from part III is that practice and opinion among responding States show a remarkable divergence, and more than anything responses serve to confirm the *non-existence* of rules of customary law relating to means and methods of military operations, in particular for what concerns rules on specific weapons.

APPENDIX 1

List of responding States / National Groups

Austria
Belgium
Bosnia and Herzegovina
China
Croatia
Cyprus
Czech Republic
Denmark
Estonia
Finland
Germany
Greece
Hungary
Ireland
Italy
Latvia
Lebanon
Lithuania
Moldova
Namibia
Netherlands
Norway
Romania
Serbia
Sweden
Switzerland
Tanzania
Tunisia
United Kingdom
Uruguay
USA

Total: 31

APPENDIX 2

Table to question I c)

<p>A. The document in question can constitute customary international law (primary source of law) or contribute to generate the rules of customary international law (emergence of a new rule of CIL)</p>	<p>B. The document at hand can be understood as a secondary source of law which means that it is a confirmation of an existing CIL and may be used to determine the existence of a rule of CIL as it incorporates rules of CIL already existing; under the presumption that it reflects not only State practice but also <i>opinio iuris</i> of the State (is followed by the <i>opinio iuris</i>)</p>	<p>C. The document at hand does not constitute even the secondary source of law (CIL) viz. it does not reflect the existing CIL and cannot be used to determine the content of the rules of CIL; hence it constitutes only either a political instrument or concerns general technical, military and/or administrative issues</p>	<p>D. The document contributes to the determination and emergence of CIL as any other international treaty</p>	<p>E. It is a case by case decision whether a document can be used to determine the existence of a rule of CIL or can contribute itself to the creation of CIL</p>
<p>1. Memoranda of understanding, technical arrangements and other similar agreements</p>				
<p>Germany (generally yes) but see E Sweden (not as such but if further practice consistent it can contribute to the generation of new rule of CIL)</p>	<p>Austria Belgium (indication of the position of the State as an act of the State's organ) Estonia (subtreaty level obligations indicating State practice) Greece Ireland Lebanon Moldova Norway (cannot be considered to establish new customary law but are intended to be in conformity with the existing international law) Switzerland Tanzania The Netherlands Tunisia</p>	<p>Cyprus (general issues) Czech Republic (only politically binding documents) Denmark (generally not but Danish courts decide themselves upon the importance of the document while making an estimate of CIL) ☒ see E Hungary (MOU's and TA's do not focus on PIL) Italy UK USA</p>		<p>Denmark ☒ see C Finland (case by case decision whether they have legal effects or not) Germany but see A</p>
<p>2. SOFAs</p>				
<p>Germany (generally yes) but see E Norway (yes as regards long lasting SOFAs in contradiction to the SOFAs for the short time deployments) Sweden (not as such but if further practice consistent it can contribute to the generation of new rule of CIL)</p>	<p>Austria Belgium (indication of the position of the State as an act of State's organ) Czech Republic (under reservation that Czech Parliament recognizes a rule of CIL incorporated in the SOFA while enacting it by national ratification) Greece Ireland</p>	<p>Cyprus (general issues) Italy (political instruments; lack of <i>opinio iuris</i>) UK USA</p>	<p>Estonia (though SOFAs do not seem to elevate to CIL with much ease) Finland</p>	<p>Denmark Germany but see A</p>

	Latvia Lebanon Moldova Switzerland Tanzania Tunisia			
3. ROE				
Germany (generally yes) but see E Sweden (not as such but if further practice consistent it can contribute to the generation of new rule of CIL)	Austria Belgium (only if followed by <i>opinio iuris</i>) Cyprus (national ROEs in accordance with CIL) Czech Republic (under reservation that a Czech court recognizes a rule of CIL incorporated in the national ROEs while deciding upon their breach) Denmark (can reflect both law and policy) Estonia Greece Ireland Lebanon Moldova Norway (while being tried upon by national and international courts and tribunals -in this process the existence of CIL may be determined) Switzerland Tanzania Tunisia Croatia	Italy (as they are often even more limited than what law allows) The Netherlands UK (ROEs checked for the compliance with IHL but they are operational means of ensuring that action taken at the tactical level is consistent with strategic objectives) USA (ROEs can be more restrictive than CIL)		Germany but see A

Hungary as to the ROE: *"Since all rules in an ROE are lawful in itself, it is difficult to determine which part of it could be deemed as CIL" ??*

Uruguay - ROEs conform to IHL

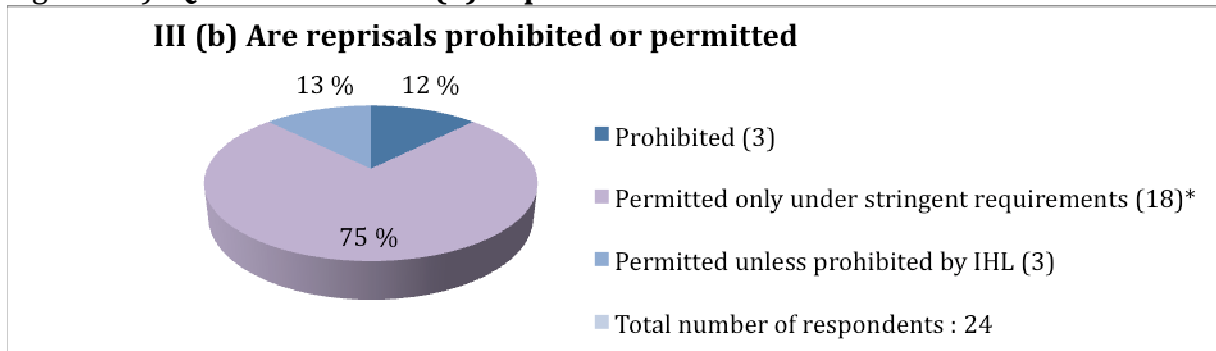
Croatia - ROEs, MOUs, TAs conform to IHL and LOAC

China, Namibia - no answer

APPENDIX 3

Figures and Tables to Part III

Figure 1 a). Questionnaire III (b) Reprisals



* 6 of the 18 States report that they consider reprisals against combatants by way of illegal weapons to be prohibited.

Figure 1 b) Questionnaire III (b) Reprisals

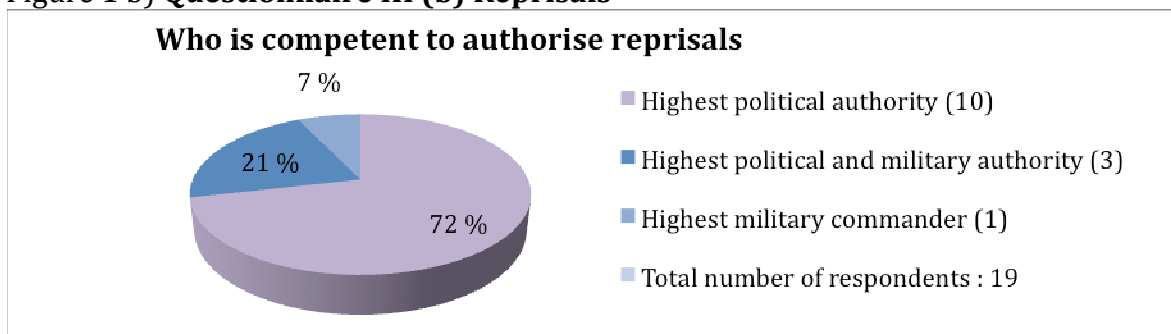


Figure 1 c) Questionnaire III (b) Reprisals

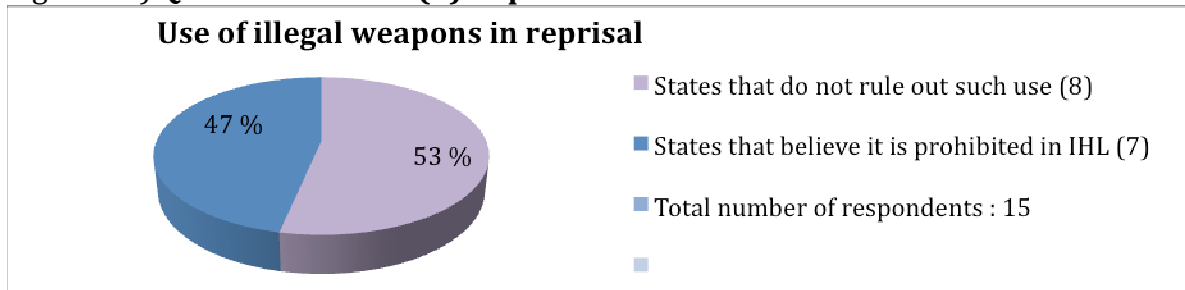


Figure 2 a). Questionnaire III (d) Prohibition of Weapons not Prohibited in Treaty or CIL

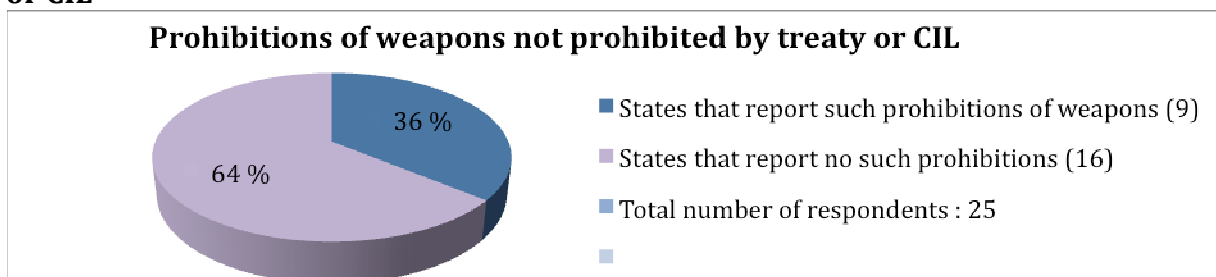


Figure 2 b) **Questionnaire III (d) Prohibition of Weapons not Prohibited in Treaty or CIL**

Weapons prohibited		Based on general rule	Policy considerations
Cluster munitions	(4)	1	3
Anti-personnel mines	(2)		2
Anti-tank mines	(1)		1
Munition /plating containing depleted or industrial uranium	(1)		1
Flechette	(1)		1
Improvised weapons	(1)		
Other weapons		3 (practice)*	

*The UK, the US and the Netherlands report that in the review process, all weapons are assessed with reference to the general rule on unnecessary suffering and superfluous injury.

Figure 3 a) **Questionnaire III (f) Non-Lethal Weapons**

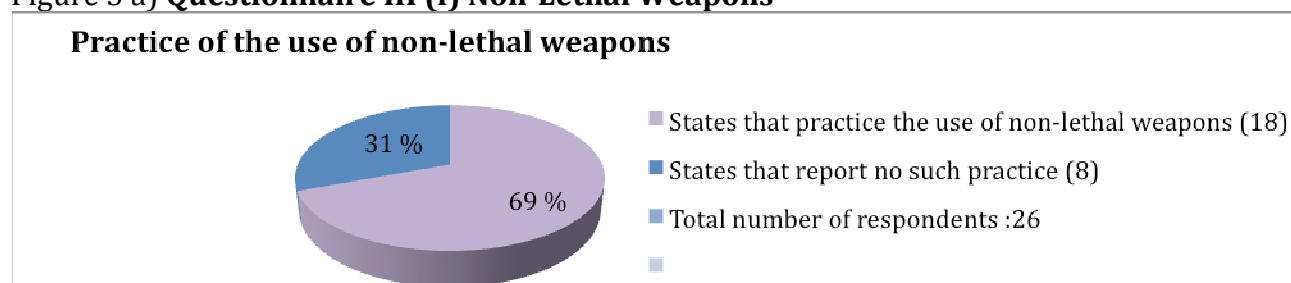


Figure 3 b) **Questionnaire III (f) Non-Lethal Weapons**

Weapons that have been given as examples by Respondent States under (f)

Prohibited weapons	Permitted weapons	Explicitly authorised
Taser (as weapon) (1)	RCA in PSO (2)	Taser X26 (1)
Tear gas (in combat) (2)		Tear Gas (7)
Laser dazzler (1)		Rubber bullets (4)
Plastic bullets (1)		Plastic bullets (1)
		Water canon/squirt (2)
		Truncheons (3)
		Irritant (2)
		Foam batons (1)
		GVAD (1)
		Acoustic shells (2)
		Kinetic energy munitions (1)
		Stun weapons (1)
		Directed energy weapons (1)
		Abrasive weapons (1)

Figure 4. Questionnaire III (g) Rubber Bullets and Plastic Bullets

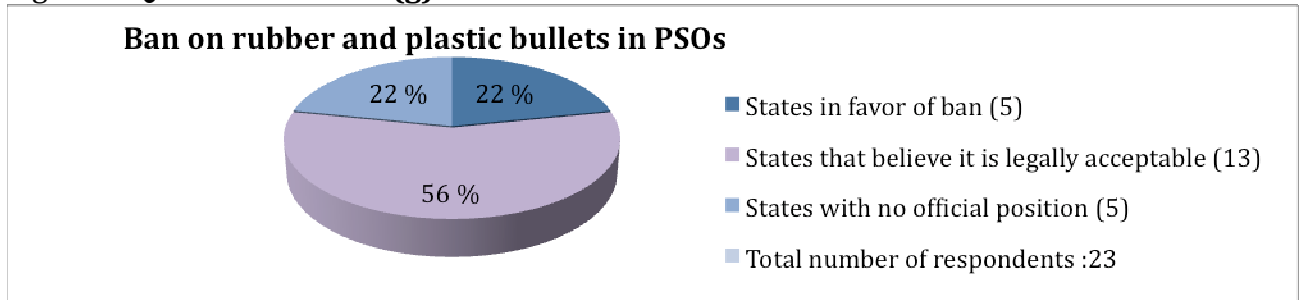


Figure 5. Questionnaire III (h) Bullets of a Nature to Fragment or Tumble Early in the Human Body or Spitzer Nosed Bullets

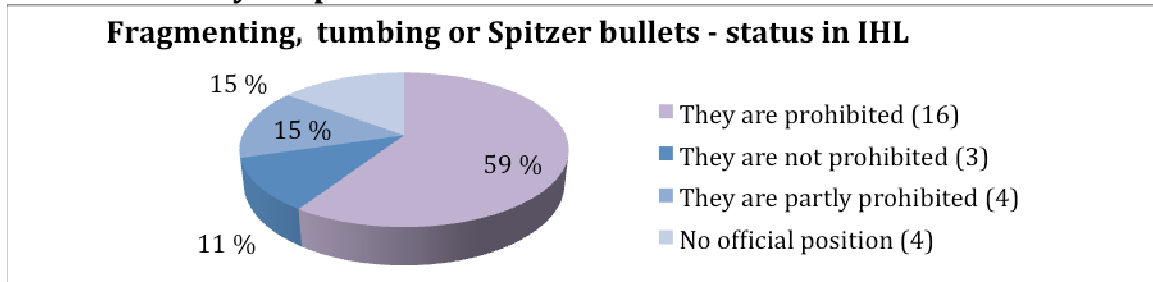


Figure 6 a) Questionnaire III (i) Dum-Dum Bullets in PSO by Armed Forces

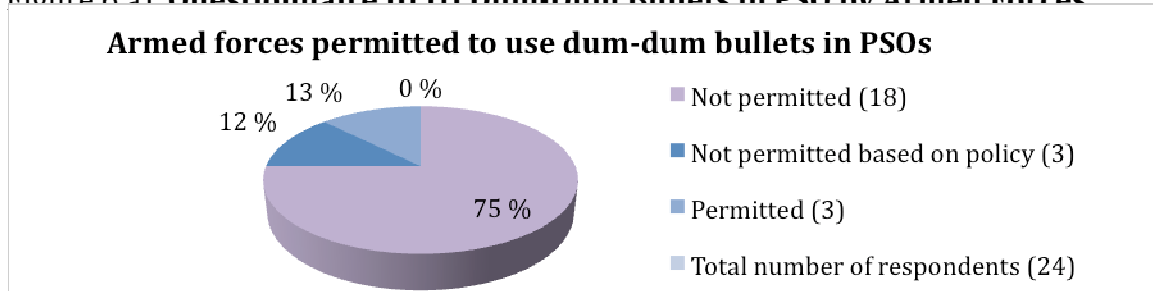


Figure 6 b). Questionnaire III (j) Dum-Dum Bullets

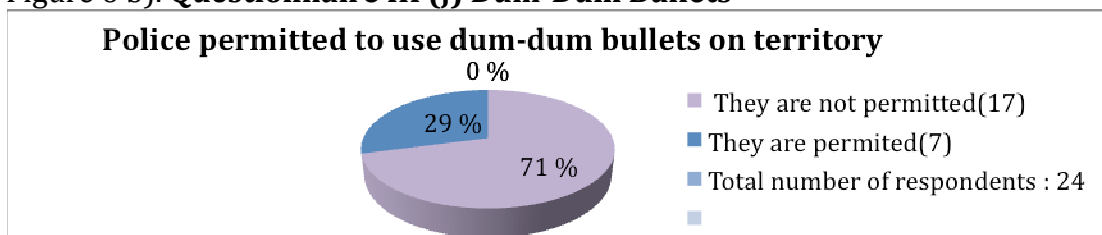


Figure 6 c) Questionnaire III (j) Dum-Dum Bullets

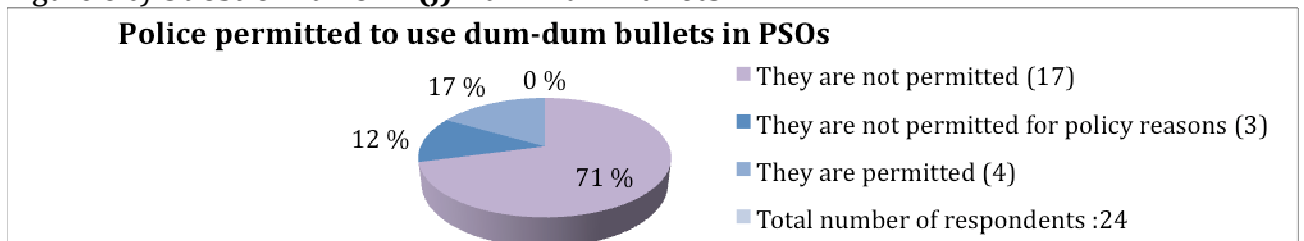


Figure 7, Questionnaire III (k) Half -Armoured Projectiles (Soft Nosed)

Half-armoured (soft nosed) projectiles - status in IHL

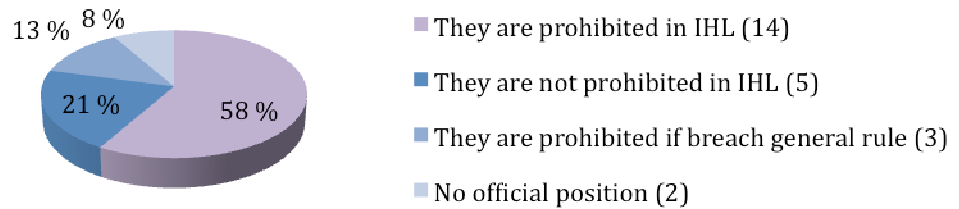


Figure 8. Questionnaire III (l) Projectiles under 400 gr. Charged with Fulminating or Inflammable Substances

Authorised use of bullets charged with explosive substances



Figure 9. Questionnaire III (m) Incendiary Weapons

Prohibition on the use of incendiary weapons

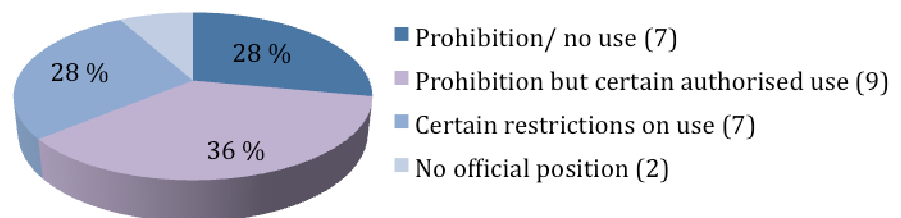


Figure 9 b) Incendiary Weapons Permitted

Authorised /permitted	
SMK RP	(1)
API -20/25 mm	(1)
Ammunition with incendiary projectiles	(1)
Incendiary hand grenades	(1)
Artillery /mortar shells containing white phosphorus for illuminating purposes	(2)
Stun grenades with mercury and magnesium powder	(1)

Figure 10. Questionnaire III (n) Tear Gas in International Armed Conflicts and Military Occupation

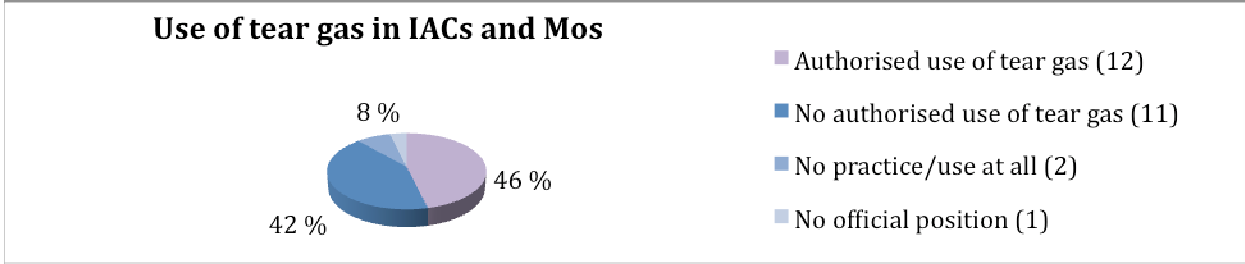


Figure 11. Question III (o) Riot Control Agents in Non-International Armed Conflict

