

## **Autumn 2018 Semester**

**Course leader: Professor Gentian Zyberi**

**Bachelor level: JUR1730 International Humanitarian Law (The Law of Armed Conflict)**

Respond to **all three** questions below. Each of the first two questions counts for ¼ of the grade, whereas question 3 counts for ½ of the grade.

### **Question 1**

**What is the difference between perfidy and ruses of war? Give examples of each.**

Perfidy is prohibited as a war crime, whereas ruses of war are allowed under IHL. Ruses of war are essentially distinguished from perfidious acts, because they do not invite the confidence of an adversary with respect to protection under IHL, with the aim to abuse that confidence. Issues concerning ruses of war and perfidy have been covered in the 2005 ICRC CIHL chapter 18, entitled 'Deception', in Rules 57-65.

#### **Perfidy**

Under Article 37(1) of AP I, perfidy is an act that invites "the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence". Perfidy is the intentional misuse of a protected or particular status to invite or encourage an adversary to believe that the person acting perfidiously is immune from attack. Rule 65 of the 2005 ICRC CIHL Study provides that 'Killing, injuring or capturing an adversary by resort to perfidy is prohibited'.

Perfidy is listed as a war crime in Article 8 (2)(b)(xi) of the Rome Statute of the ICC. Perfidy can be said to have three elements, first, the perpetrator claims specific protection under IHL (the element of legal protection), second, the perpetrator aims to abuse such protection (the element of criminal intent), and third, the perpetrator intends to cause harm, namely by killing, wounding, or capturing the enemy (the element of intended or caused harm).

#### **Some examples of perfidy include:**

1. simulation of being disabled by injuries or sickness because an enemy who is disabled is considered hors de combat and may not be attacked, but must be collected and cared for;
2. simulation of surrender because an adversary who surrenders is considered hors de combat and may not be attacked, but must be captured or released;

3. simulation of an intent to negotiate under a flag of truce because a person advancing under a flag of truce must be respected;
4. simulation of protected status by using the red cross or red crescent emblem because medical and religious personnel, units and transports displaying the distinctive emblems must be respected and protected;
5. simulation of protected status by using United Nations emblems, signs or uniforms because peacekeeping personnel and humanitarian relief personnel using United Nations emblems, signs or uniforms must be respected, as long as they are entitled to the protection given to civilians, and those emblems, signs or uniforms may not be used without authorization;
6. simulation of civilian status because civilians not taking a direct part in hostilities must be respected and may not be the object of attack.

### **Ruses of war**

Article 37(2) of API states: Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. In a similar fashion, Rule 57 of CIHL provides that ‘Ruses of war are not prohibited as long as they do not infringe a rule of international humanitarian law.’

### **Examples of ruses of war**

The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation, moving landmarks, constructing dummy airfields and aircraft, or bridges not intended for use, pretending to communicate with troops or reinforcements that do not exist.

Such ruses of war have been used during the Second World War, but also more recently in the armed conflict in Iraq.

### **Question 2**

**When is a civilian considered as taking a direct part in hostilities, and what are the consequences of such participation?**

### **General protection of civilians and the principle of distinction**

Parties to an armed conflict have a standing obligation to distinguish between civilians and combatants or fighters. This obligation, known and referred to as the fundamental principle of distinction, is included in Article 48 of API. This article provides that “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Also, Rule 1, of the 2005 ICRC CIHL Study provides that “The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”

### **Direct participation in hostilities**

In IHL the concept of “direct participation in hostilities” refers to conduct which, if carried out by a civilian, suspends his protection against the dangers arising from military operations. Most notably, for the duration of his direct participation in hostilities, a civilian may be directly attacked as if he were a combatant. IHL does not define direct participation and some clarity was needed. Hence, in 2009, the ICRC issued its Interpretive Guidance which provides recommendations concerning the interpretation of IHL as it relates to the concept of direct participation. The recommendations in the Interpretive Guidance reflect the ICRC’s institutional position as to how existing IHL should be interpreted in light of the circumstances prevailing in contemporary armed conflicts.

### **Criteria for direct participation in hostilities (DPH)**

The Interpretive Guidance states that direct participation in hostilities consists of specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (**threshold of harm**);
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (**direct causation**); and

3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (**belligerent nexus**).

Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.

In a non-international armed conflict, an individual whose continuous function involves the preparation, execution or command of operations amounting to direct participation in hostilities on behalf of an organized armed group is considered a member of that group (“**continuous combat function**”) and loses his protection against the dangers arising from military operations for the duration of that membership.

### **Consequences for a civilian directly participating in hostilities**

The consequences for a civilian directly participating in hostilities are that the person **loses its immunity from attack** for such period of involvement and can thus be targeted and killed. The person **can also be detained** and **can be prosecuted for what otherwise would be lawful acts of war**.

### **Question 3**

After several provocations and military clashes at the border which have gone on for decades, though with varied frequency and intensity, States A and B engage in a fully-fledged armed conflict. The troops of State A are advancing in military formation towards the capital of State B through a fairly large desert area which lies between the two countries. Before sending in the troops, the President of State A declares that their army is invincible and they are finally going to teach their opponents a good lesson once and for all. Outnumbered and frightened by these strong declarations, the chief commander of the troops of State B is considering to drop a medium yield nuclear bomb on the approaching enemy troops.

**As his main legal adviser, you have to answer these two questions:**

- 1. Can nuclear weapons be used in an armed conflict?**
- 2. Would their use in this specific case be lawful?**

States A and B are parties to the four 1949 Geneva Conventions and the 1977 Additional Protocol I to the Geneva Conventions.

## **Memo on the potential use of nuclear weapons**

The facts of the case point clearly to the existence of an international armed conflict. The use of nuclear weapons in armed conflict is subject to significant legal and moral controversy. I have been asked to and will address from a legal perspective the following two questions:

1. Can nuclear weapons be used in an armed conflict?
2. Would their use in this specific case be lawful?

### **Can nuclear weapons be used in an armed conflict?**

Nuclear weapons are among the most dangerous weapons on earth, standing at the apex of the broader category of weapons of mass destruction (WMDs). These weapons have been used only once in the context of an armed conflict, namely at the end of the Second World War when the US dropped two bombs in Japan, respectively on Hiroshima and Nagasaki.

However, despite their stigma, several States possess nuclear weapons and use them as part of their national defence strategies. The doctrine of mutually assured destruction (MAD) holds that the existence of nuclear weapons is to be credited with the lack of outbreak of fully-fledged war among some of the most powerful countries.

From a legal perspective, there is no general ban on the use of nuclear weapons. This has been pointed out by the International Court of Justice (ICJ or Court) in the Nuclear Weapons Advisory Opinion. However, the international community has been trying for a long time to ban these WMD. Because of these efforts, most recently in 2017 the UN General Assembly adopted the Treaty on the Prohibition of Nuclear Weapons (TPNW), which has not yet entered into force. The ICJ has held in its 1996 advisory opinion that IHL provisions applied to any use of force, regardless of the weapons employed. More generally, the Court stated that the use of nuclear weapons would be generally contrary to the principles and rules of IHL, but that it ‘cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake’. This brings me to considering the other question, namely whether these weapons can be used in this specific case.

### **Would their use in this specific case be lawful?**

First, as stated above, the current armed conflict is an international armed conflict, given it takes place between the armed forces of two States. This is clearly stated in the facts, noting

the troops of State A are advancing in military formation towards the capital of State B through a fairly large desert area which lies between the two countries.

### **Criteria for the assessment of legality**

The legality of use of nuclear weapons in this case can be analyzed through the fundamental principle of IHL, namely distinction, proportionality, and prohibition of unnecessary suffering or superfluous injury. These criteria are codified in API, in Article 35 on Basic rules, and Article 57 on Precautions in attack.

In this case, we have armed forces moving in formation in a large desert area, so it is possible to target directly the armed forces. In terms of applying the principle of proportionality, there is small likelihood that there will be significant collateral damage, as there will not be many civilians living in the deserted area. In its 1996 advisory opinion on Nuclear Weapons, the ICJ has stated that the principle of proportionality might not in itself exclude the use of nuclear weapons in self-defence in all circumstances. Article 57(2)(iii) provides that a party to an armed conflict must '(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'. In this case, potential collateral damage to civilians would not be excessive in relation to the concrete and direct military advantage anticipated. Some concern should be raised here about the long-term effect to the environment, but given this is a desert area most likely the use of nuclear weapons will not cause such widespread, long-term and severe damage at the level requiring the prohibition of their use because of environmental considerations.

Given the threatening language of the President of State A, that his army is going to 'teach a lesson once and for all', it could be argued that this could amount to a serious threat, amounting to an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

### **Conclusion**

Considering the arguments above, my advice is that in this case, in view of the serious threat and the special circumstances where the weapon would be deployed, the use of a strategic nuclear weapon could be considered as lawful under IHL, as it currently stands.