

## India's Conflict Strategy: The Legal Angle

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*Continued engagement with LOAC and IHL is ongoing with the Judge Advocates General Department taking the primary role. Its training institution in Kamptee is at the forefront. There has been increased interaction with the ICRC since India opened up to the ICRC in the mid nineties, after initially being defensive with respect to Kashmir. Not only has IHL been introduced into officer and subordinate ranks courses, but guest lectures are also organised. Increased scope of the engagement is possible, particularly if it finds mention in the next edition of the Army doctrine. Increasing the scope of adherence to IHL, such as by acceding to AP I and the ICC, can be debated. Even if India remains outside, it can be expected that it would follow the tenets as a responsible power.*

### Introduction

India has moved to a 'proactive' and 'offensive' doctrine over the last decade. The Army doctrine released in 2004 has been popularly dubbed 'Cold Start',<sup>1</sup> though

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it is axiomatic that any conflict would instead witness operationalisation of the classified Joint Warfare doctrine, formulated by HQs Integrated Defence Staff of 2006.<sup>2</sup> The Air Force doctrine is also classified, but not so the Naval doctrine, expansively termed 'India's Maritime Doctrine'.<sup>3</sup> These four doctrines would serve as guide for conventional conflict strategy. Response to terror provocations emanating from Pakistan, such as in the form of 'surgical strikes' and action on the Line of Control, would be subsumed in the Sub-conventional portion of the spectrum of armed conflict. The possibility of the latter escalating to a conventional level would be dependent on Pakistani reaction. Strategy in both cases would have multiple influences, principally: politically-determined conflict aims; strategic conjuncture; operational circumstance;

international pressures and military readiness. However, implications of law of armed conflict (LOAC) and international humanitarian law (IHL) would require

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factoring into war strategy and its implementation. This article reflects on these implications for India.

At the very outset for assessing the increasing impact of the international legal regime on conflict situations, the cases of the US and Israel are illustrative. Both states have in the recent past engaged in armed conflict. The US has undertaken conventional operations in Iraq and Afghanistan followed by sub-conventional counter insurgency thereafter, beginning in October 2001 and March 2003 respectively. Israel launched conventional attacks into Lebanon against the

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Hezbollah in 2006 and later in Gaza against the Hamas in early 2009. Both states were to a degree found to be afool of their obligations under both LOAC and IHL. This prevented the occupation of the political and moral high ground that is increasingly significant in yielding political aims in conflict. International opinion plays a significant role and is sensitive to the degree of conformity of a state to both strictures in the Charter era against aggression and to degree of compliance with humanitarian law in the event of conflict. Even though both the US and Israel made strong cases for their actions in terms of going to war and conduct in war, it has met with certain scepticism in public and international opinion. In the conflict zone, the asymmetric counter faced has in part been energised by the seemingly disproportionate application of force. The US had to relearn counter

insurgency strategy midway in order to stabilise the situation in both Iraq and Afghanistan. Israel was strategically wise to pull out from both conflict zones in an early timeframe to preserve itself from an asymmetric counter. While the US, being the sole superpower, could ride out criticism; Israel has had to face an enquiry into its conduct in the form of the United Nations Fact Finding Mission on the Gaza Conflict, the Goldstone Report.<sup>4</sup>

The foregoing indicates that being mindful of international obligations is a necessary stipulation in conflict initiation and conduct. This is so for India also in case of any future considerations of conflict. There is little doubt that India would continue to live up to its reputation of following the laws and rules contained in treaties it has acceded to. Its policy of 'restraint' against Pakistani provocations thus far indicates that it would only initiate conflict for reasons of self-defence and under extreme provocation. Its conduct in

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conflict would be determined by the Geneva Conventions of 1949 to which it is a signatory. The best example of awareness of responsibilities is in the inclusion of a section on international law in the naval doctrine of 2009 for the first time.<sup>5</sup> Nevertheless, revisiting tenets of both LOAC and IHL, as done here, serves the purpose of foregrounding these in case of future outbreak of conflict. This article attempts to refresh acquaintance with the relevant tenets by first looking at the LOAC provisions on conflict initiation and thereafter on IHL requirements in the conduct of conflict.

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To begin with, a brief recall of the distinction between the two. LOAC subsumes *jus ad bellum* (law on use of force or, lately, the prevention of war) and *jus in bello* (laws on conduct of war). The former comprises international law stipulations on aggression and the latter can be equated with IHL. While *jus ad bellum*, based on the UN Charter, permits use of force only in self-defence or on authorisation of the UN Security Council; *jus in bello* deals with principles of conduct such as distinction, proportionality, definition of military objectives, protection of civilians and precautions

in attack. Conflict strategy would therefore have to be mindful of both. A justified war cannot be prosecuted through illegal means and methods. Likewise lawful means and methods cannot excuse unjustifiable resort to war.

### **LOAC and Cold Start**

The 'Cold Start' doctrine is product of India's experience with Pakistani provocations over the last two decades. The nuclear cover emboldened Pakistan in its proxy war. However, Pakistan was careful to keep it below Indian 'tolerance threshold' for most part, though this was breached by the Parliament attack and later at Mumbai 26/11. India's original strategy was one of 'deterrence by punishment' in that it maintained three strike corps, one more than Pakistan, for deterring Pakistan. Pakistan was indeed deterred from converting any gains made at the sub-conventional level by conventional thrusts, but was not deterred from proxy war. This owed to operation of the stability/instability paradox. The paradox – in its operation in the India-Pakistan equation – has it that provocation at the sub-conventional level is attributable to the possibilities of escalation to the nuclear level staying any counter at the conventional level. In effect, stability in mutual nuclear deterrence at the nuclear level has led to instability at the sub-conventional level. The Cold Start doctrine was to provide India options at the conventional level and thereby refurbish the deterrent at this level.

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makers that waging war is not taken as being in India's strategic interests. Its grand strategy is one of preserving its economic trajectory. The economic headway made over the past twenty years would stand to suffer in case of war. India's economic power is to take India into the great power league. In the interim, conscious of its civilisational heritage and potentiality, India conducts itself as a mature power. Central to this is its upholding of norms and international laws; even those, such as non-proliferation norms, though it is not a signatory to NPT.

### **Conventional level**

Nevertheless, India is mindful of the Charter Article 51 that states: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...'<sup>6</sup> In the famous Nicaragua case the International Court of Justice had ruled against the US, stating, 'Whether self-defence be individual or collective, it can only be exercised in response to an "armed attack". In the view of the Court, this is to be understood as meaning not merely action by regular armed forces across an international border, but also the sending by a State of armed bands on to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack had it been carried out by regular armed forces.'<sup>7</sup>

The ruling indicates that the nature of terror attacks against India are constitutive of an 'armed attack' taken together; a case enhanced by incidents as 26/11. While both the parliament attack and Mumbai 26/11 amount to an 'armed attack' - taken in conjunction with the preceding proxy war in J&K and expanded in terms of terror attacks to elsewhere in the country by Pakistan - there is a strong case for India under Article 51 for legitimacy for use of force. That is why India did not rule out the use of armed force in its response to the Mumbai attacks. This inclusion indicates that conflict, brought on by Pakistan being overly venturesome, is a possibility.

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legitimacy to resort to force. Its 'strategy of restraint' thus far, and attempts to engage Pakistan repeatedly in the interim, would have served it well politically in such resort. Its case to go to war would be much stronger and such resort then would not fall in the prohibited category of 'aggression',<sup>8</sup> but in the permitted category of 'self-defence'. However, it bears mention that Article 51 goes on further to state:

'Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'<sup>9</sup>

This means that the Security Council would likely seize itself of the matter in short order. The nuclear dimension of the conflict will certainly be played up by Pakistan to make such an intervention speedy. Intensive diplomacy would be required to gain the political high ground and the time necessary for ensuring that conflict objectives are met. Even though the war doctrine promises early launch and on that account quick gains of territory, it is envisaged that perhaps up to a week may be necessary for consequential gains in terms of territory gained and attrition inflicted. It bears recall that the territory along the Line of Control (LC) is mountainous, compelling slower operations. The diplomatic prong of strategy would therefore have to make two thrusts: one is to project the war as one of self-defence; and second, to gain time before the Security Council takes the 'necessary' measures such as to begin with calling for ceasefire. It is evident that the legal regime needs to be factored into any war initiation considerations and that it also affects conflict.

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#### **Sub-conventional level**

In case of resort to force at the sub-conventional level - such as by 'surgical strikes' launched independently or supplemented by minor operations along the LC - the levels of force would amount to nevertheless placing it in the ambit of an 'armed conflict'.<sup>10</sup> (Awareness of this perhaps partially explains why the Indian Army's Doctrine for Sub-conventional Operations of 2006, while including 'border skirmishes' in the category, does not dwell on it in the pamphlet.) In such a case, the UN Security Council would likely involve itself, irrespective of the operations beginning and finishing speedily. The UN's superimposition would likely be to help preclude escalation. This is not averse to India's interest in that India prefers that escalation is precluded.

Nevertheless, in wake of the termination of the short, sharp military engagement, diplomacy would require proving the culpability of Pakistan in face of Pakistani propaganda offensive to the contrary. The ammunition for diplomats can best be provided by legally sound arguments. The best argument would be to keep military action within legal bounds. The legal regime, while not precluding resort to use of force is only restrictive to the extent as to dampen its use as default option and to ensure that when used, it is within bounds. The legal argument would be strengthened in this case by the strikes being directly in response to 'armed attacks' and being limited in scope to identified military targets to fulfill the criteria of proportionality and discrimination. The close linkage between diplomacy and the military prong of strategy is apparent. The military and diplomatic prongs of strategy would require to be orchestrated by the National Security Council.

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Critical would be to how to prevail on Pakistan to make the necessary concessions to Indian demands. Levels of success in this would determine success of the military action. In case Pakistani stance hardens, then the option of military force would be exposed as a limited one. Limited success may entail successive strikes later

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or to conventional conflict next time round. Such action would place India's case under considerable strain in international law. The initial strikes having energised attention to the Kashmir problem would bring it back on the agenda. The focus on Pakistani use of and export of terror would be diluted. In case of Pakistani recalcitrance, subsequent strikes would be difficult to defend in law. The 'Israeli' model of repeated 'mowing of the lawn' would not carry conviction in law. This implies that coercion through precise application of force can only supplement the diplomatic prong of a political dominant conflict resolution strategy.

### **IHL and Cold Start**

The unfolding of 'Cold Start' offensives is taken in commentary as involving integrated battle groups, largely based on pivot corps offensive resources, being launched in an early timeframe of perhaps 48 hours. The strike corps resources are to build up and taking advantage of the gains already made, launch in perhaps 96 hours. The initial operations are expected to be broad front, but shallow.<sup>11</sup>

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However, balance of the strike corps - forming up in wake from cantonments slightly in the interior - increase psychological pressure on the Pakistani leadership. The cumulative impact of territorial losses to integrated battle groups; attrition by the air forces; and posturing by the strike corps should be orchestrated for Pakistani concessions. The launch of strike corps would potentially be a move from Limited War to Total War. It would be more difficult to remain below nuclear thresholds after launch of strike corps.

There are consequently three situations of differing levels of IHL application in the war: first is the situation of launch of integrated battle groups; second is that of strike corps; and lastly is of introduction of nuclear weapons into the conflict. IHL has implications for all three stages to differing degrees. This owes to varying intensities of battle and levels of habitation of the locales. Initial offensives in border areas, sparsely populated, would likely witness more military targets. However, as the strike corps operations progress deeper, population density in affected areas would be higher. Strikes by the air force and missiles, intended to disrupt, degrade and destroy command and control targets, infrastructure - both military and civilian - and military wherewithal would also be liable to IHL considerations. The nuclear stage has its own particularity and is discussed in the last section.

The four Geneva Conventions of 1949, to which India is a signatory, are well known. A national legislation, The Geneva Conventions Act of 1960, places these in the corpus of national law. The military is therefore bound to follow the protections that are offered by these four conventions to the wounded, sick and shipwrecked; to prisoners of war and to civilians in the time of war. Of the four, the first three are better known. However, the fourth dealing with civilians and conduct in occupied territory, gains significance as offensive operations leading to capture of territory progress. At a minimum, reprisals, hostage taking, pillage and coercion to extract intelligence, deportations are prohibited and protection of the hors de combat is essential.

Alongside, obligations as occupying power would devolve on India in areas other than in Pakistan Occupied Kashmir. The exemption of POK made here owes to the area being Indian. However, the inhabitants would require protection nonetheless, particularly as they would be hostile. Therefore, even if the territory is Indian, it is not axiomatic that its occupants can automatically be taken Indians and subject to Indian laws. They would instead be treated as civilians in occupied territory, even if the territory in question does not meet the definition in the Indian logic of 'occupied territory'. Input of constitutional lawyers is needed for conceptual resolution of this.

A levee en masse or a civilian uprising, instigated by Islamists in their midst, may occur. This would likely be so along border areas and more so along the LC. For instance, reports of training of women at Kotli have been reported in the media earlier, pointing to the possibility of an uprising in face of the offensives. These are considered legitimate in LOAC and the civilian so participating is to be accorded combatant status.<sup>12</sup> However, it is unlawful for civilians to be participating in armed action against the occupying power once the occupation has begun.

The point at which occupation begins is indistinct.<sup>13</sup> There are two opinions. One is that it begins along with the invasion. The idea is to keep the invading state attuned to its obligations from the word go in order to hold it accountable. The second is that it begins once the occupying state stabilises enough for it to exercise authority in the occupied territory. This way it is able to fulfill its obligations as occupying power. To the ICRC, the essential ingredient for applicability of the law of occupation is the actual control exercised by the occupying forces.<sup>14</sup> India's position on this would be in sync with that of the ICRC. This would require to be catered for in operations. Provision for immediate take over of occupying power duties and sensitisation of rear area troops, such as the Rashtriya Rifles, to their roles needs be done to stabilise the situation earliest. It would make strategic sense to do so since Pakistan can be expected to have plans to disrupt occupation.

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Towards this end, additional non-military resources, comprising civil administrators etc., may be initially placed under command of follow-on forces charged with stabilising the territory. The civil affairs component would require to operate in conjunction with an enhanced 'A' Branch in Headquarters charged with rear area security and communication zone protection.<sup>15</sup> Their role would be informed by provisions of Chapter VI, 'Civil Defence', of AP I, in particular Arts 62 and 63 respectively on 'general protection' and 'civil defence in occupied territory' respectively. 'Martial law' may be proclaimed and the handing over to civilian authority, assisted by the functioning governing apparatus of the enemy state, needs be done speedily. While there is no provision for martial law in the Indian Constitution, in occupied territory the legal cover for military control needs be thought through. The appointment of then Major General JN Chaudhuri as military governor in the immediate aftermath of police action, 'Operation Polo', in Hyderabad may serve as model.<sup>16</sup> He however had on hand a civil affairs staff of non-military men.

It can reasonably be expected that irregular armed action would persist, with Islamists mounting a spirited and provocative challenge, unmindful of the

predicament of civilians. In fact, their strategy would be to make the civilian situation untenable in order to make the occupation inhospitable for India. This way they gain propaganda advantage and in case of harsh measures by occupying troops, then gain cannon fodder for their cause. However, where an armed group is acting as a resistance movement and conforming to the laws of war, then its members are entitled to combatant status. These rules principally include being accountable to a commander, wearing a distinctive sign recognisable from a distance, carrying arms openly in an engagement and following the laws of war.<sup>17</sup> It is highly unlikely that religious extremists taking on the occupation would follow these rules.

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Therefore, they would not be combatants and entitled to prisoner of war status. Instead, as per Additional Protocol I (AP I),<sup>18</sup> Article (Art) 47, they could be treated as 'mercenaries'. The case of the US treatment of the Al Qaeda and Iraqi fighters, called 'unlawful combatants', is instructive on this score. Their treatment of captured Taliban was as PWs in the initial period of the conflict, since the conflict in its initial phase met parameters of international armed conflict.<sup>19</sup> However, the Abu Ghraib episode serves as example of 'black demonstration', of how not to behave.

Taking a leaf out of Israel's book, India could consider pulling out early, since occupation has potentiality to get as ugly.<sup>20</sup> This not being relevant for POK, may not in the event be done there.<sup>21</sup> Pulling out early does not help with using territory as a bargaining chip in negotiations. Therefore, war aims will be influenced, moving from control of territory to inflicting attrition. IHL explicitly forbids infliction of gratuitous and targeted pain on civilians. However, collateral damage would perhaps be extensive in targeting the Pakistani Army, since the major portion of it in a short duration war would not have not been engaged with extensively, particularly its strategic reserves. The strategic reserves, wanting to escape annihilation, may like to outlast the war so that once India pulls out, the Pakistan Army can return to ruling Pakistan. However, in punishing the Pakistan Army there would be considerable collateral damage. This has potential to further inflame the asymmetric counter that Pakistan will launch for India's early exit.

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IHL rules, particularly those in the AP I of 1977, to which India is not a signatory, may acquire relevance. It may make strategic sense to abide by these to the extent possible since in so far as they are a restraint on permissive firepower, they would

dampen the insurgency in occupied areas. They would help maintain a distinction between the Pakistani regime and the people, a stand India has consistently taken, knowing that the people have been subject to manipulation by the praetorian regime. The Islamist challengers would do everything including provocative terror action to break down this distinction. Therefore, sensitisation of troops to the Additional Protocols is necessary. That this is already being done needs highlighting. The HQ Army Training Command (ARTRAC) publication in the open domain, *Laws of Armed Conflict*, brings out AP I requirements also.<sup>22</sup> This is useful since certain provisions have acquired the status of customary international law, figuring in the International Committee of the Red Cross's Customary Law Study.<sup>23</sup>

### **Relevant Extracts**

Select provisions are reflected here for ready reference. The Basic Rule in Art 48 that leads Part IV on 'civilian population' and Section I providing for 'general protection against effects of hostilities' is a comprehensive guide:

'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.'

Additional Articles of AP I, that acquire salience in the event of the war progressing into Pakistani innards on launch of strike corps, are below:

#### *Art 51 - Protection of the civilian population*

2. The civilian population as such, as well as individual civilians, shall not be the object of attack.
4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
  - (a) those which are not directed at a specific military objective; (b):those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
5. Among others, the following types of attacks are to be considered as indiscriminate:
  - (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be

expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

The rules find mention among the first 24 rules of the 161 rules deemed to have customary law status in IHL as determined by the Customary Law Study of March 2005 (Extract reproduced in the Annex). The significant rule is below:

*Art 52 (AP I). General Protection of civilian objects*

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

### **Relevance of IHL**

Military planners would require being mindful of this aide memoire. Bringing these to foreground is necessary since military considerations would tend to dominate in war, especially one vitiated by essentially indiscriminate asymmetric action. The International Criminal Court, charged with jurisdiction over war crimes, has within its ambit violations of these provisions.<sup>24</sup> Even though India is not a signatory, as a responsible state and a power interested in a rules-based world order, it is axiomatic that India and its forces would be mindful of these.<sup>25</sup> There would also be a requirement of distinguishing their action from the indiscriminate attacks of insurgents. The political prong of strategy would be greatly furthered to the extent Indian forces exercise control in military operations.

Nevertheless, provisions of AP I, Section II, 'Repression of breaches of the conventions and of this protocol', acquire significance for the command channel. Art 85 deals with necessity of repression of grave breaches and includes a description of such breaches. Art 86 makes repression a disciplinary responsibility with 'failure to act' making the superior culpable. Lastly, Art 87 specifies duties of commanders in regard to suppression of breaches. While Geneva Conventions of 1949 mention eight grave breaches, the ICC Rome Statute adds another twenty six points as 'Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law'.<sup>26</sup> This movement in IHL should figure in the Commanders' Handbook as a handy 'ready reckoner'. The Navy's beginning with mention of the San Remo Manual of 1994 in its doctrine should be taken further to its logical conclusion with respect to land warfare also.<sup>27</sup>

Clearly, military necessity would rule. 'Military necessity', according to the US Department of Defence is, 'The principle whereby a belligerent has the right to apply any measures which are required to bring about the successful conclusion of a military operation and which are not forbidden by the laws of war.'<sup>28</sup> There is considerable leeway given to the judgment of the commander, given the uncertainty of war. The understanding is that the need to win the war and thereby shorten it, may take precedence, but not inordinately so.

Balancing with humanitarian principles would not only be a moral necessity, but also makes for sensible strategy. Post-conflict peace is predicated also on the manner the war is conducted. Since the quality of peace after the war is best index of levels of success attained by going to war, strategy needs to be mindful of law. While war has its own grammar, its logic is political. Laws of war stipulate that choice of means and methods is not unlimited keeping in mind that peace is the intended outcome.

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### **The Nuclear Dimension**

The beginning of any discussion on nuclear use legitimacy can only be with the International Court of Justice ruling below:

**C**redibility requires that the forces be configured for delivering this promise and display of resolve to do so. However, in the event of deterrence breakdown, the nuclear realm would not be of deterrence doctrines but of employment doctrines.

"The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."<sup>29</sup>

The implications are that only the last resort - 'Samson Option' - can at all be considered legitimate. Even in this case, higher order indiscriminate nuclear attacks would be prohibited by relevant provisions of the customary law (See Annex, Rules 7 onwards.) Such attacks can only be counter force or counter military. However, nuclear doctrines

are not configured solely along these lines. These doctrines are meant to deter. This requires that they promise dire consequences. Credibility requires that the forces be configured for delivering this promise and display of resolve to do so. However, in the event of deterrence breakdown, the nuclear realm would not be of deterrence doctrines but of employment doctrines. These could be influenced by the law provisions, among other aspects as in-conflict deterrence; operational circumstance; political imperatives; technological capacities etc.

India's nuclear doctrine needs to be seen in this light. So far the legal perspective has not been used to discuss nuclear doctrine.<sup>30</sup> That it is a No First Use doctrine enhances nuclear legitimacy. However, in so far as such retaliation promises to be 'massive' it may be suspect,<sup>31</sup> if 'massive' is taken to mean infliction of counter city damage of 'unacceptable' levels. Infliction of 'unacceptable damage' is valid in case such damage is sought from military and nuclear force targeting. Counter value targeting in any case would be unlawful, though collateral damage after taking the necessary precautions would be permissible. Even as the law appears expectedly restrictive, it bears consideration whether abiding by it makes sense.

India's promise of inflicting 'unacceptable damage' is intended to deter the adversary nuclear state. In case of nuclear first use by the adversary, then India's

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default recourse to its stated nuclear doctrine may not be sensible nuclear strategy. It bears recall that doctrine is a guide, it is not be tie down strategy. In such circumstance, in case India were to carry out counter city targeting, then it would be likewise vulnerable to a counter strike causing unacceptable damage to it. This may not make sense in light of the stakes in the conflict. There is no call for the stakes to be exponentially raised in an escalatory dynamic. Therefore, a nuclear retaliatory strategy eschewing population centers may incentivise the adversary to similarly restrict himself in any further exchange. In fact, further exchanges can be made less automatic, since the spirit of vengeance would be moderated. Ending exchanges at the lowest level makes sense for both states. Therefore, there is a case of nuclear strategy – as distinct from doctrine – to be mindful of IHL. A nuclear strategy such as that suggested by

General Sundarji, that rules in quid pro quo and quid pro quo plus counter, so as to limit the exchange to the lowest escalatory level, makes sense.<sup>32</sup>

## Conclusion

The Indian armed forces are familiar with the Geneva Conventions and have over past conflicts implemented the provisions. In fact, their record of treatment of

Prisoners of War has been impeccable. This is in contrast to the manner their adversary Pakistan treated hors de combat Indians in its custody.<sup>33</sup> Continued engagement with LOAC and IHL is ongoing with the Judge Advocates General Department taking the primary role. Its training institution in Kamptee is at the forefront. There has been increased interaction with the ICRC since India opened up to the ICRC in the mid nineties, after initially being defensive with respect to Kashmir. Not only has IHL been introduced into officer and subordinate ranks courses, but guest lectures are also organised. Increased scope of the engagement is possible, particularly if it finds mention in the next edition of the Army doctrine. Increasing the scope of adherence to IHL, such as by acceding to AP I and the ICC, can be debated. Even if India remains outside, it can be expected that it would follow the tenets as a responsible power. As seen here, this would have beneficial fallout in case of launch of Cold Start offensives and should be incorporated into both the doctrine and its execution.

### **Annex: The Principle of Distinction<sup>34</sup>**

#### *Distinction between Civilians and Combatants*

Rule 1. 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.

Rule 4. The armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.

Rule 5. Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.

Rule 6. Civilians are protected against attack, unless and for such time as they take a direct part in hostilities.

#### *Distinction between Civilian Objects and Military Objectives*

Rule 7. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.

Rule 8. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

Rule 9. Civilian objects are all objects that are not military objectives.

Rule 10. Civilian objects are protected against attack, unless and for such time as they are military objectives.

*Indiscriminate Attacks*

Rule 11. Indiscriminate attacks are prohibited.

Rule 12. Indiscriminate attacks are those:

- (a) which are not directed at a specific military objective;
- (b) which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Rule 13. Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited.

*Proportionality in Attack*

Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.

*Precautions in Attack*

Rule 15. In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Rule 16. Each party to the conflict must do everything feasible to verify that targets are military objectives.

Rule 17. Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects.

- Rule 18. Each party to the conflict must do everything feasible to assess whether the attack 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.
- Rule 19. Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack 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.
- Rule 20. Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.
- Rule 21. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

*Precautions against the Effects of Attacks*

- Rule 22. The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.
- Rule 23. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas.
- Rule 24. Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives. *idsa*

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Notes:

- 1 'Cold Start' to new war doctrine', *TOI*, April 14, 2004.
- 2 'Reforms in management of defence', MOD website - <http://mod.nic.in/aboutus/welcome.html>
- 3 MDCC, *India's Maritime Doctrine*, New Delhi: Naval HQs, 2009.
- 4 'United Nations Fact Finding Mission on the Gaza Conflict', <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>
- 5 'Maritime doctrine makes subtle changes in principles of war', *The Hindu*, 30 Aug 2009.

- 6 UN website - <http://www.un.org/en/documents/charter/index.shtml>
- 7 Case Concerning The Military And Paramilitary Activities In And Against Nicaragua (Nicaragua V. United States Of America) (Merits), Judgment of 27 June 1986, <http://www.icj-cij.org/docket/?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5>
- 8 General Assembly resolution 3314 (XXIX), with the Definition of Aggression annexed to it, was adopted on 14 December 1974.
- 9 UN website - <http://www.un.org/en/documents/charter/index.shtml>
- 10 IHL is operational in any clash of arms of any level between two states. This is true even in isolated cases of clashes such as shooting down of Pakistani naval surveillance aircraft Atlantique by an Indian fighter when it intruded into Indian air space in Gujarat just after the Kargil War - [http://indianairforce.nic.in/show\\_page.php?pg\\_id=29&page\\_type=command&comm\\_id=4](http://indianairforce.nic.in/show_page.php?pg_id=29&page_type=command&comm_id=4). Common Article 3 of the Geneva Conventions has universal applicability.
- 11 M Sabharwal, 'Joint Operations in Modern Warfare', *Air Power Journal*, 3 (1), Spring 2006, p. 9.
- 12 Art 4 A (6) of the Third Geneva Convention states: 'Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.
- 13 Chapter 9, Law of Armed Conflict, ICRC states: 'Territory is considered 'occupied' when it is placed under the authority of the hostile army. The occupation extends only to the territory where this authority has been established and can be exercised. The law on occupation applies to all cases of partial or total occupation...The beginning and end of application of GC IV is specified in Art. 6 (1) and (3) GC IV. A territory has been invaded, but not occupied, when enemy armed forces stay or fight on it but the enemy's authority is not yet established. In such cases, in particular Arts. 13-26 and 27-46 GC IV are applicable.' [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5P8EX4/\\$File/LAW9\\_final.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5P8EX4/$File/LAW9_final.pdf)
- 14 Ibid
- 15 The lessons from India's Jaffna experience are valid here in that there was inadequate civilian specialist representation in the Town Commandant's HQs.
- 16 See profile of the former COAS on Indian Army website - <http://indianarmy.nic.in>. The US model from Iraq headed first by General Jay Garner and later by Paul Bremer may be instructive.
- 17 Art 4 A (2) of the Third Geneva Convention states: '(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.
- 18 ICRC, *The Geneva Conventions of 12 August 1949 and Protocols Additional To the Geneva Conventions of 12 August 1949*, Geneva: ICRC, 1996.
- 19 Armed conflict is taken as having two variants and the laws applicable are different accordingly: international armed conflict and non-international armed conflict. The former involves states and states backing non-state actors against state actors; the latter involves non-state actors fighting state authorities or other non-state actors. Common Article 3 covers both. GC 1-IV are for international armed conflict along with AP I. AP II is meant for non-international armed conflict.
- 20 Even in Israel's case it was not a 'neat' war in that the government sacked the Chief, General Dan Halutz, once it was over.
- 21 Witness the criticism of Indian withdrawal from Haji Pir post Tashkent peace conference. However, this is a political call and the government may decide otherwise in the interests of peace and the wider national interest.
- 22 HQ ARTRAC, *Laws of Armed Conflict*, Vol 1-2, Shimla: HQ ARTRAC.
- 23 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, 3 vol., 2005.
- 24 See Arts 5 and 8 of the Rome Statute. Art 5 states: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this

- Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression. 2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted.' <http://www.icc-cpi.int/Menu/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm>
- 25 In any case, signatory states would be bound to take action against individual violators. The President of Sudan, who has an arrest warrant for war crimes and acts against humanity in Darfur, for instance, has had to be discreet in his travel arrangements.
  - 26 Art 8 of Rome Statute of the International Criminal Court, 17 July 1998; <http://www.icrc.org/ihl.nsf/WebART/585-08?OpenDocument>
  - 27 In particular, see, 'Part III - Basic Rules And Target Discrimination; Section I : Basic Rules' of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 12 June 1994 (<http://www.icrc.org/ihl.nsf/WebART/560-10?OpenDocument>).
  - 28 Joint Publication 1-02, *DOD Dictionary of Military and Associated Terms*; [fas.org/irp/doddir/dod/jp1\\_02.pdf](http://fas.org/irp/doddir/dod/jp1_02.pdf)
  - 29 ICJ, 'Legality of the Threat of Use of Nuclear Weapons', and 'Legality of the Use by a State of Nuclear Weapons in Armed Conflict', Advisory Opinion of 8 July 1996.
  - 30 Ali Ahmed, 'Nuclear Targeting Caveats', IDSA Strategic Comment, Apr 2010.
  - 31 The 04 Jan 2003 press release of the Cabinet Committee on Security that explicates the nuclear doctrine states: "(ii) A posture of "No First Use": Nuclear weapons will only be used in retaliation against a nuclear attack on Indian territory or on Indian forces anywhere; (iii) Nuclear retaliation to a first strike will be massive and designed to inflict unacceptable damage."
  - 32 Ali Ahmed, 'In Tribute: Recalling the Sundarji Doctrine', *USI Journal*, Jan-Mar 2008.
  - 33 Press release on Pakistan's violation of Geneva Conventions, 15 June 1999.
  - 34 See 'Annex' to Larry Maybee and Benarji Chakka (ed.), *Customs as a source of international humanitarian law*, New Delhi: ICRC-AALCO, 2006, pp. 287-89.