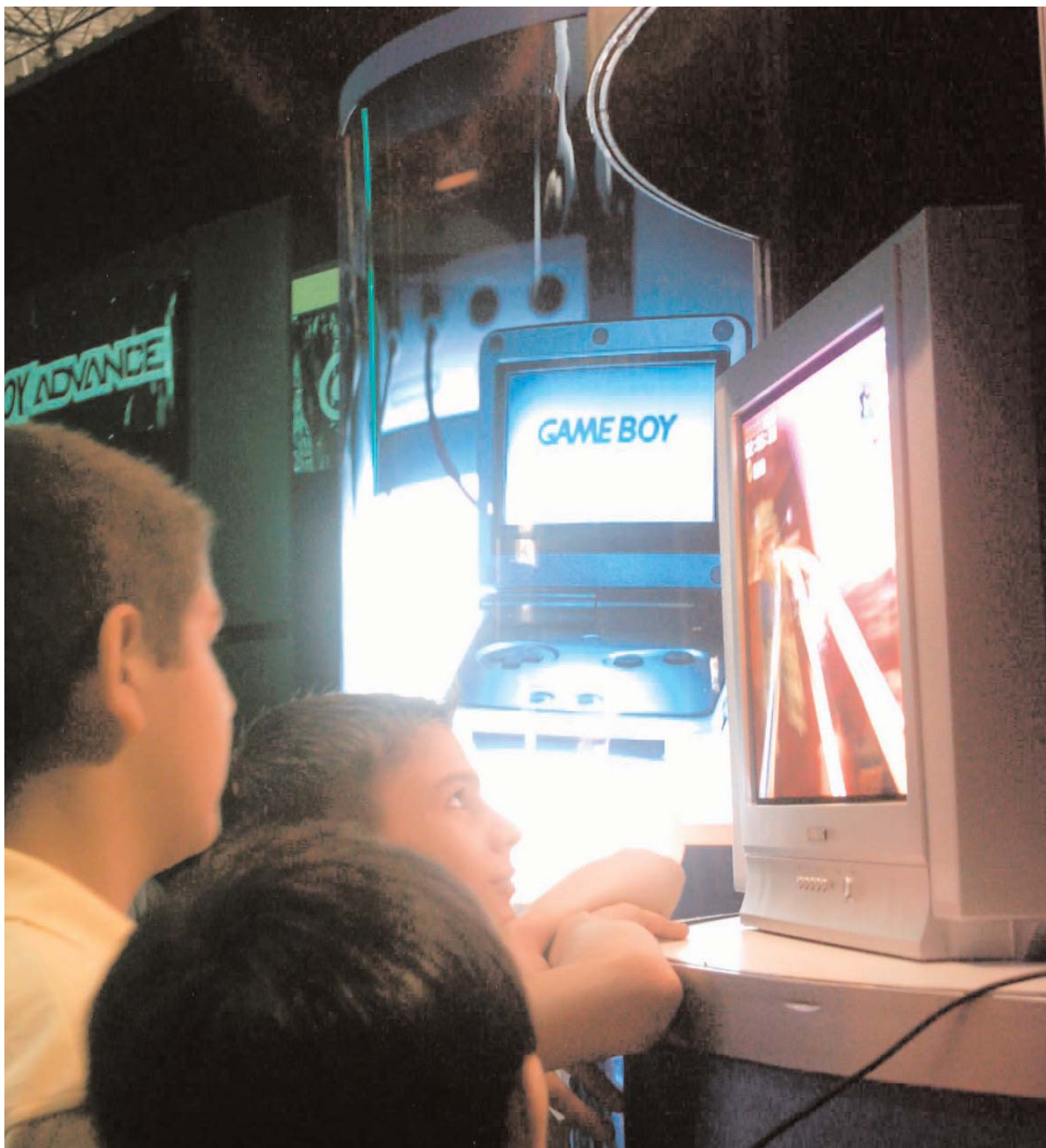


Playing by the Rules:

Applying International Humanitarian Law to Video and Computer Games



Impressum

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Geneva/Zurich, October 2009

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Playing by the Rules: Applying International Humanitarian Law to Video and Computer Games

1. Introduction

In computer and videogames, violence is often shown and the players become “virtually violent”. While much research has been done on the effect of such games on the players and their environment, little research exists on whether, if they were committed in real life, violent acts in games would lead to violations of rules of international law, in particular International Humanitarian Law (IHL), basic norms of International Human Rights Law (IHRL) or International Criminal Law (ICL).

Pro Juventute Switzerland and TRIAL (Track Impunity Always), a Swiss NGO assisting victims of grave violations of human rights and aiming at the promotion of international criminal law, have tested various computer and videogames for their compatibility with internationally valid and universally accepted rules of IHL and IHRL. The question they posed themselves was whether certain scenes and acts committed by players would constitute violations of international law if they were real, rather than virtual.

The selected games were played by young gamers under the auspice of Pro Juventute and TRIAL and the legal assessment of the critical scenes was done by three lawyers, particularly trained in the areas of IHL, IHRL and ICL. Professor Marco Sassóli from the University of Geneva, a well known expert in the area of IHL, supervised the legal analysis.

1.1. Aim of the Study

The aim of the study is to raise public awareness among developers and publishers of the games, as well as among authorities, educators and the media about virtually committed crimes in computer and videogames, and to engage in a dialogue with game producers and distributors on the idea of incorporating the essential rules of IHL and IHRL into their games which may, in turn, render them more varied, realistic and entertaining.

The goal is not to prohibit the games, to make them less violent or to turn them into IHL or IHRL training tools. The message we want to send to developers and distributors of video games, particularly those portraying armed conflict scenarios, is that they should also portray the rules that apply to such conflicts in real life, namely IHRL and IHL.¹ We would thus like

¹ While IHRL applies at all times, in both armed conflicts and times of peace, IHL applies only in situations of armed conflicts and occupation, dealing with the specific problems that arise in such situations. To define which IHL apply in a given situation, it is necessary to check what instruments were ratified by the state in question. While the 1949 Geneva Conventions were ratified universally, there are other IHL treaties, such as Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-

to propose the producers to incorporate the essential rules of IHL such as the obligation to distinguish between the civilian population and combatants and between civilian objects and military objectives, the prohibition of directly attacking civilians or civilian objects and the obligation to treat humanely those who do not or no longer take part in hostilities e.g. the wounded, the sick or those who have laid down their arms. In the same way, we propose that games which do not take place in armed conflict situations but which portray law enforcement operations also portray the international rules that apply to these situations, meaning the fundamental rules of IHRL, such as the prohibition of arbitrary deprivation of life and the prohibition of torture.

We have chosen video and computer games as the object of our analysis because, unlike literature, films and television, where the viewer has a passive role, in shooter games, the player has an active role in performing the actions. Thus, the line between the virtual and real experience becomes blurred and the game becomes a simulation of real life situations on the battlefield.

The link with reality is in fact so direct that nowadays several armies rely on video games both as a recruiting and as a training tool. Military from some states put video games on their websites to give the viewers a virtual experience of what being a soldier is like.² Such games allow them to virtually participate in trainings, be deployed on missions, fire weapons, take decisions in unexpected battlefield situations, etc. Military also use video games, or “simulations” more and more often as a training tool in addition to “on the field” training. This demonstrates the impact of video games on the players and their behaviour in reality.

Even considering that most of the game players will never become soldiers in reality, such games clearly influence their view of what combat situations are like and what the role of the military and of individual soldiers or law enforcement officials in such situations, is.

Games which portray conflict situations, law enforcement measures or intelligence operations in a very realistic manner, but not the rules that apply in international and national law to such operations, send the erroneous message that there are no limits in conflicts and in other extreme situations, e.g. in counter-terrorism operations. This is especially problematic in view of today’s reality. The recent controversy about whether so called “enhanced

International Armed Conflicts of 8 June 1977 (AP II), which have not been ratified by all states. So here too, it is necessary to verify, whether the states involved in the conflict have ratified the relevant instruments. Rules considered to be customary law on the other hand, apply to all states.

² E.g. the game "America's Army," is a computer game created by the US army. According to the description on the official website: http://www.goarmy.com/downloads/americas_army.jsp, this game is meant to "provide civilians with insights on soldiering from the barracks to the battlefields." The creators of the games went through an army training just as new recruits would, before creating the game, so that the viewers/players of the game "could virtually experience soldiering in the most realistic way possible." Moreover, the overview of the game establishes that America's Army provides "an inside perspective and a virtual role in today's premier land forces" and is meant to show "some of the career opportunities available to the soldiers in the U.S. Army, all this as a virtual soldier." See also: <http://www.americasarmy.com/about/>

interrogation methods” are allowed under international law,³ shows the dangerous tendency to step back from what has been achieved in the field of human rights in the last 60 years. It is not surprising that this theme comes up in the games that have been tested: in extreme situations players are allowed to torture, kill civilians and destroy civilian property wantonly, without considering international rules. Opposite developments, on the other hand, have not found their way into the games: nowadays, multiple international and mixed tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY),⁴ the International Criminal Tribunal for Rwanda (ICTR)⁵, the Special Court for Sierra Leone (SCSL)⁶, as well as the International Criminal Court (ICC) have shown that in real armed conflicts, those who violate international humanitarian law end up as war criminals, not as winners, and numerous decisions of international human rights bodies clearly tell states where they violated human rights norms in their law enforcement measures.⁷ These limits are not, or are insufficiently reflected in the games played by thousands of children and young people.

1.2. Choice of Games

Today there exist a wide variety of video games of the “shooter” genre, portraying combat-like situations or law enforcement operations (often in the context of fighting to punish or prevent terrorist attacks). There exist both first-person and third-person shooter games. Both are a genre of three-dimensional graphic action games in which the game play revolves around gun-based combat. However, while in first-person shooter games action is seen as if through the eyes of the main character i.e. the player, in third-person shooter games a camera is following the character from behind and thus the player can see the character he is playing on the screen. In both however, the player is most of the times the central character of the game and the one performing the operations and when possible, choosing the means and methods to carry them out.

Many of these games take place in present day scenarios e.g. Afghanistan, Iraq and certain African countries, while others are set during the First or Second World War or in the near or far future. There are also games which portray elements of science-fiction such as non-human like beings and games which mix real-life situations with science-fiction.

³ See for instance: Carrie Johnson and Julie Tate, in the Washington Post on 17 April 2009, “New Interrogation Details Emerge As It Releases Justice Dept. Memos, Administration Reassures CIA Questioners Ben Pershing”, <http://www.washingtonpost.com/wp-dyn/content/story/2009/04/16/ST2009041602877.html?sid=ST2009041602877>; Ben Pershing, “On Interrogation Policies, Republicans Winning the Message Fight”, in the Washington Post on 24 April 2009, http://voices.washingtonpost.com/44/2009/04/24/on_interrogation_policies_repu.html, Shailagh Murray in the Washington Post on 23 April 2009 “A Commission on Enhanced Interrogation? Obama Rebuffs Idea”, http://voices.washingtonpost.com/44/2009/04/23/a_commission_on_enhanced_inter.html?wprss=44;

⁴ For more information visit: <http://www.icty.org>

⁵ For more information visit: <http://www.icttr.org>

⁶ For more information visit: <http://www.sc-sl.org>

⁷ E.g. the Inter American Court for Human Rights (IACtHR) and the European Court for Human Rights (ECtHR), as well as the United Nations Human Rights Committee (UNHRC) and the United Nations Committee against Torture (UNCAT).

Originally, our analysis meant to study only games taking place nowadays, thus posing no problems of temporal application of IHL, e.i. determining which laws are or were applicable at a given moment in time. In the course of our research to find games for our study, we realized that some of the most popular and most recent games are set in a period during World War I or II or some years in the future. Thus, though the focus continued to be on games which take place in current real or fictional conflict scenarios or law enforcement operations, we decided to include games taking place in other contexts. As we will see in the conclusions, these games contained important violations. Our decision to include them was based on the fact that most of the average players of these games have no background on either IHL or IHRL. Thus, they will normally not be aware that some of the actions may have been allowed in a previous moment, but are now forbidden. What matters is that they will practice (virtually) and learn conducts that nowadays amount to serious violations of IHL, ICL or HRL. It is important to mention as well that despite the fact that the Geneva Conventions were only adopted in 1949, during World War II, there already existed regulations for the conduct of hostilities and the treatment of e.g. prisoners of war, as well as for the regulation of certain kinds of weapons.⁸ For the average player, the actions performed during a game will most likely have a direct impact on their perception of conflicts and law enforcement operations in general and of conducts allowed in such situations. It will also influence how they evaluate and perceive governments' and armed groups' behaviours in reality and the media coverage on these issues. Moreover, it was decided to include such games as this study would also like to disincentive the practice of placing games in historical or future contexts in order to escape scrutiny.

The games we have analyzed have been selected from different developers and publishers and aim at different age levels. We have also included games which can be played in diverse platforms such as Xbox, Xbox360, Microsoft Windows, Play Station 2 and 3, Mac, mobile phone devices, etc. Some of the games selected can be bought in video stores, some can be ordered through internet, others downloaded, etc. While many have been released just recently, others have been out on the market for some time, having turned almost into classical shooter games.

1.3. Methodology Used

Each game was carefully selected by Pro Juventute and TRIAL staff after conducting an extensive research on recent or popular shooter games (first-person or third-person) taking place in armed conflict scenarios. The complexity of the games called for hiring gamers to play the games and record the scenes. IHL specialists made a list of violations⁹ which the

⁸ In addition to the customary rules of IHL, the following treaties were applicable at the time of the Second World War: The Hague Conventions of 1899 and 1907; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (1906); Geneva Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare (1925); Geneva Convention relating to the treatment of prisoners of war (1929).

⁹ See Annex II.

gamers used as a guide when they played the games, thus knowing exactly what type of scenes to look for and record for further analysis. A few games were played by the gamers together with members of TRIAL and Pro Juventute in order to make sure the appropriate scenes were recorded and the exercise was correctly understood. Once the scenes were recorded, a team of three lawyers specialised in the fields of IHL, ICL and IHRL analyzed the scenes, situating them in their appropriate context according to the plot of the game e.i. classical international armed conflict (IAC), non-international armed conflict (NIAC), or law-enforcement operation with no indication of armed conflict situation. The violations found were then classified according to their gravity.¹⁰ The label “Good” was given to acts which amounted to violations of IHL or IHLR which were punished in the game. Violations which were committed by the *enemy*, that is, a character with which the player cannot identify himself/ herself were labelled “Mild.” Violations which were possible to commit but which were not part of the game or did not make any strategic sense within the game were classified as “Medium”, and violations which were required in order to advance or where the violation was an actual part of the game were labelled “Strong.” As the scenes were recorded, whenever problems of interpretation or appreciation of a violation arose, the other team members were consulted to discuss and analyse it.

1.4. Problems Encountered

Both the players and the analysers encountered a number of problems. The players sometimes had a hard time acquiring the games *inter alia*, because they were not yet available in Europe or they could not order them. This decreased the number of games we had chosen from an original thirty to twenty.

In addition, the analysers sometimes had difficulties understanding the plot of the game and the context of the scenes. The games are very complex and the players are often given various possibilities to achieve their goals, thus making it difficult to determine which means and methods are available to the player and which rules apply. In addition, because the games are controlled to a great extent by the player, a player of a particular game may see very different types of content than another, depending on the choices he or she makes. Thus, it is almost impossible to assure, despite engaging for many hours in game play, that all possible violations are found, or that in those games showing no violations, there exist indeed none.

In some of the games, different operations are portrayed in different contexts, some of which seemed to be armed conflicts, but some of which seemed to be simply law enforcement operations taking place outside an armed conflict.¹¹ Defining whether the given situation is

¹⁰ See Annex III.

¹¹ There are legal provisions in IHL which define what is meant by “armed conflict”. In IHL one generally distinguishes between international armed conflicts (IAC) and conflicts of a non-international character (NIAC). Article 2 common to the 1949 Geneva Conventions defines an international armed conflict as follows: “... cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” And: “The Convention shall also apply to all

taking place in the context of an armed conflict or not, is essential in order to determine what law is applicable.¹² However, this was not always a straight-forward task. What made it even more difficult was that some games are set in the context of a mix of reality and science fiction which makes applying the law a complicated undertaking. While in some cases, the armies or groups confronting each other are known to the player, most of the times these are fictional armies or it is not clear whether they were armies at all, thus raising doubts in the analysis of the situations. At times, the scenes contained no violations; however, they set up scenarios that could lead to violations such as the so called "ticking bomb" scenarios,¹³ which prepare the gamers to act with a sense of urgency, easily leading to unlawful behaviour, as it happens in real life. To prevent confusion or mistakes, we decided to leave out unclear scenes, allegedly containing violations, and rather to focus our analysis only on scenes containing clear situations.

Another problem we faced constantly in analyzing the games was the fact that some violations are related to issues in IHL that are controversial and/or for which there are currently no clear answers e.g. how to bind private military contractors to the rules of IHL. Furthermore, the situations depicted in the games are often ambiguous and for a proper legal analysis more details as to the preparation of an operation, the information available to the attackers, etc. would be required. This is a problem which reflects the actual difficulties in the implementation of IHL in today's conflicts: the International Committee of the Red Cross (ICRC) and other international organisations as well as human rights NGOs are confronted with similar problems in their daily work.

cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." The definition of a non-international armed conflict is more complex. In its first case, the *Tadić* case, the International Tribunal for Former Yugoslavia (ICTY) defined an internal armed conflict as "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." This definition was based on two key treaty provisions: Article 3 common to the 1949 Geneva Conventions and Article 1 of AP II. (See *Tadić* Case, No. IT-94-1-AR72, Judgment of 15 July 1995, paragraph 70.) For further information regarding the qualification of conflicts visit the website of the "Rule of Law in Armed Conflicts Project" initiated by the Geneva Academy of International Humanitarian Law and Human Rights "to support the application and implementation of international law in armed conflict." at <http://www.adh-geneva.ch/RULAC/index.php>

¹² See FN 1.

¹³ The "ticking bomb" scenario is a hypothetical thought experiment, often used by proponents of the use of torture in interrogation. It can be formulated as follows: "Suppose that a perpetrator of an imminent terrorist attack that will kill many people is in the hands of the authorities and is unwilling to disclose information needed to prevent the attack. Should he be tortured in an attempt to make him disclose the information?" This scenario is used to justify torture, "enhanced interrogation methods" or "harsh interrogation techniques" with the argument, that torture may be justified in cases where many lives could be saved if the tortured person gives information that could help to divert an imminent threat – for instance deactivating a "ticking bomb" placed in a densely populated area. For instance, the former head of the CIA, George Tenet, used the typical "ticking bomb" argument to justify the "harsh interrogation measures" used by his agency after 9/11. See "George Tenet: At the Center of The Storm - Former CIA Director Breaks His Silence", http://www.cbsnews.com/stories/2007/04/25/60minutes/main2728375_page3.shtml, CBS, April 29, 2007 by Daniel Schorn. For further information see: "Defusing the Ticking Bomb Scenario: Why we must say No to torture, always", The Association for the Prevention of Torture, 2007, available at: <http://www.ap.t.ch/content/view/109/lang,en/>

However, even though such violations may be subject to controversies, they should be avoided or at least identified as problematic in the game. Considering that IHL is a body of law which is constantly developing and adapting to new realities, current developments should not be ignored when designing new games.

2. Legal Analysis

2.1. Introduction in Legal Aspects Applicable to all Games

As stressed in the first section, the aim of this project is not to propose measures aiming at prohibiting video games portraying armed conflict situations or law enforcement operations. Just like in real life, where IHL does not ban recourse to force, but rather provides a set of international rules which limit the effect of armed conflicts and protect certain particularly vulnerable groups of people, we do not believe that representations of armed conflicts should be banned from entertainment media. Yet, we believe that games should also show the limits to war as they exist in reality.

However, IHL is a complex area of Public International Law and its application is not always straight forward or entirely clear, and this difficulty did not escape its analysis in the context of video games. In IHL, questions of interpretation arise both in terms of the law as well as in terms of the situation to which it is applied. The aim of this study however was not to dwell into the deep intricacies of IHL, analysing borderline cases which even in real wars may be controversial, but rather to focus on issues related to the conduct of hostilities and the treatment of persons that apply in conflicts whether international or non-international and which stem from the fundamental rules of IHL. That is, the study focused on the violation of the following rules:

- a) The obligation to treat humanely all persons, without any adverse distinction, who do not or are no longer taking active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.¹⁴ (Article 3 (1) common to the 1949 Geneva Conventions¹⁵)

¹⁴ This rule was already established in Article 23(c) of the Annex to the 1907 Hague Convention: Regulations concerning the Laws and Customs of War on Land, which states that: "In addition to the prohibitions provided by special Conventions, it is especially forbidden (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion". Article 41 of AP I defines as a person *hors de combat* someone who "shall not be made the object of attack". A person is *hors de combat* if: (a) he is in the power of an adverse Party; (b) he clearly expresses an intention to surrender; or (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape. Similarly, Rule 47 of the ICRC Customary International Law Study establishes that "Attacking persons who are recognized as *hors de combat* is prohibited" and uses a similar definition of *hors de combat* as the one used in Article 41 API. The Rome Statute of the International Criminal Court (ICC) also includes as a war crime the "Killing or wounding a combatant who, having laid down his arms or having no longer means of defence,

- b) The obligation to protect persons who do not or are no longer taking active part in hostilities against all acts of violence, particularly against murder of all kinds, mutilation, cruel treatment and torture, as well as outrages upon personal dignity, in particular humiliating and degrading treatment (Article 3 (1) (a) and (c) common to the 1949 Geneva Conventions)
- c) The prohibition of the taking of hostages (Article 3 (b) common to the 1949 Geneva Conventions)
- d) The prohibition of the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (Article 3 (d) common to the 1949 Geneva Conventions)
- e) The prohibition to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. (Article 35 of AP I)¹⁶
- f) The obligation to distinguish between the civilian population and combatants and between civilian objects and military objectives and the obligation to direct operations only against military objectives in order to ensure respect for and protection of the civilian population and civilian objects. (Article 48 AP I)¹⁷

has surrendered at discretion" for IAC in Article 8(2)(b)(vi) and the murder of all kinds of members of armed forces who have laid down their arms for NIAC in Article 8(2)(c)(1).

¹⁵ Article 3 Common to the 1949 Geneva Conventions is widely accepted as reflecting customary international law. It contains the minimal rules that have to be respected in armed conflicts. It has been interpreted as applying, as a "minimum yardstick", to all types of armed conflicts: IAC and NIAC (e.g., Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), 1986 I.C.J. 14, 25 International Legal Materials 1023, para. 218 (1986); Tadic Appeal Decision, para. 67). Article 3 common to the 1949 Geneva Conventions states that parties to a NIAC shall treat humanely "without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria" those persons "taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause." To comply with this rule, Article 3 prohibits in regard to those taking no active part in the hostilities: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

¹⁶ This rule is based on the principle that the Parties to the conflict are not free to use any methods or any means of warfare whatsoever. The 1907 Hague Regulations already state it in Article 22 in the following terms: "The right of belligerents to adopt means of injuring the enemy is not unlimited". See: ICRC Commentary to Article 35 API (ICRC, Geneva/Martinus Nijhoff Publishers, Dordrecht, 1987, XXXV).

¹⁷ The entire system established in The Hague in 1899 and 1907 and in Geneva from 1864 to 1977 is founded on this rule of customary law. It is thus applicable without being formulated word by word in any Convention, but

- g) The obligation to respect the principle of proportionality. (Article 57 AP I, Art 51 AP I and Article 3 annexed to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons)¹⁸

In cases where there were no indications that the games or scenes took place in the context of an armed conflict, IHL was not applied, and scenes were rather analysed from the perspective of IHRL. In these cases, the study focused on possible violations of fundamental rights such as

- a) The right to life (Art. 3 of the Universal Declaration of Human Rights (UDHR), Art.6 of the International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR), Art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR), among other human rights treaties)¹⁹

was included in API to reiterate the distinction required and the limits of attacks on military objectives. In fact, this principle was already implicitly recognized in the St. Petersburg Declaration of 1868 renouncing the use of certain projectiles, which reiterated that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy". See: ICRC Commentary to Article 48 API (ICRC, Geneva/Martinus Nijhoff Publishers, Dordrecht, 1987, XXXV).

¹⁸ In all these Articles, the wording is identical. Attacks 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" are prohibited. The principle contributes to determining where the limits of warfare are, as the entire law of armed conflict is the result of an equitable balance between the necessities of war and humanitarian requirements. It is important to note that an attack cannot be justified only on grounds of proportionality if it contravenes the other above-mentioned principles.

¹⁹ It is generally not considered to be a violation of the right to life if a person is deprived of his life in the execution of a sentence of a court, following his conviction of a crime for which this penalty is provided by law; if it results from the use of force which is no more than absolutely necessary in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained or; in action lawfully taken for the purpose of quelling a riot or insurrection. See for example Article 2 (1) and (2) ECHR, which states that "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection. See also the "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials", which aim at limiting the use of firearms by law enforcement officials. Paragraph 9, for instance, outlines that "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life." The European Court of Human Rights (ECtHR) in the case *Nachova et al v Bulgaria* put it as follows: "As the text of Article 2 § 2 itself shows, the use of lethal force by police officers may be justified in certain circumstances. However, any use of force must be no more than "absolutely necessary", that is to say be strictly proportionate in the circumstances. In view of the fundamental nature of the right to life, the circumstances in which deprivation of life may be justified must be strictly construed." (*Nachova and Others v. Bulgaria*, Appl. 43577/98 and 43579/98. Council of Europe: European Court of Human Rights, Judgement, 6 July 2005, para. 94).

- b) The prohibition of torture, cruel, inhuman or degrading treatment (Article 7 ICCPR, Article 3 ECHR, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (CAT) and the 1987 European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT))²⁰
- c) The prohibition of arbitrary arrest and detention (Article 9 ICCPR, Art. 5 ECHR, among other human rights treaties)²¹

The content of these and other violations will be further developed as they arise in the analysis of the games and references to their legal sources will be provided in footnotes.

As mentioned in the methodology, the first step in the analysis of the games was to determine the context in which the entire game or a specific scene or mission took place. The situations were classified as IAC²², NIAC²³ or, law enforcement operations.²⁴ The players and

²⁰ The prohibition of torture is considered a *jus cogens* norm, meaning it is absolute and non-derogable. See: Prosecutor v. Furundžija, International Criminal Tribunal for the Former Yugoslavia, 2002, 121 *International Law Reports* 213 (2002).

²¹ Article 9(1) ICCPR states that "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." The Working Group on Arbitrary Detention, established by resolution 1991/42 of the former Commission on Human Rights defines arbitrary detention as: detention which is contrary to the human rights provisions of the major international human rights instruments. And more specifically "1. Where there is no legal basis for the deprivation of liberty (for example when a person is kept in detention after the completion of their prison sentence or despite an amnesty law applicable to them); 2. When a person is deprived of their liberty because they have exercised the rights and freedoms guaranteed in the UDHR and the ICCPR. 3. When a person has been deprived of their liberty after a trial which did not comply with the standards for a fair trial set out in the UDHR and other relevant international instruments."

²² IAC are regulated by the Four Geneva Conventions of 12 August 1949 and by AP I. According to Article 2 common to the Four Geneva Conventions of 1949, IAC are those which oppose "High Contracting Parties", meaning States. An IAC occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation. Moreover, no formal declaration of war or recognition of the situation is required. The existence of an IAC depends on what actually happens on the ground. It is based on factual conditions and it makes no difference how long the conflict lasts, or the level of violence. IAC as defined by Article 2 also include "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance". Apart from regular, interstate armed conflicts, Article 1(4) of AP I extends the definition of IAC to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and racist regimes in the exercise of their right to self-determination..." also referred to as wars of national liberation.

²³ NIAC are regulated by Article 3 common to the 1949 Geneva Conventions and by the AP II. Article 3 is often referred to as a convention in itself for it provides a minimum set of rules to be respected by Parties in NIAC. Although it has been interpreted to cover international and non-international armed conflicts (see FN 14), it remains particularly relevant in NIAC, as these are less regulated than IAC. Its provisions apply to cases of "armed conflict not of an international character occurring in the territory of a High Contracting Party." Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. As the 1949 Geneva Conventions have universally been ratified now, the requirement that the armed conflict must occur "in the territory of one of the High Contracting Parties" has lost its importance in practice. In order to distinguish an armed conflict, in the meaning of common Article 3, from less serious forms of violence, such as internal disturbances and tensions, riots or acts of banditry, or

characters that appeared in a scene were also classified when possible, as combatants or civilians. Whenever the classification of the context in which a game took place could not be clearly determined, the scenes were analyzed both from the IHL and IHRL point of view. This is actually the way lawyers proceed when analyzing a real potential armed conflict situation.

Analysis of Chosen Games

2.1.2 24, *The Game*

a) General Information about Game

This game was developed by SCE Studio Cambridge and published by 2K Games, Sony Computer Entertainment. It was released between February and April 2006 for PlayStation 2. It is a third-person shooter game. Its ESRB²⁵ rating is “M” and its PEGI²⁶ rating is over 16 years old.

law enforcement operations, the situation must reach a certain threshold of confrontation. Two criteria are usually used in this regard: First, the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces. Second, non-governmental groups involved in the conflict must be considered as "parties to the conflict", meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations. AP II also applies to NIAC. However, its scope of application is more limited, applying only to conflicts which "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." See ICRC Commentary to Article 3 Common (ICRC, Geneva/Martinus Nijhoff Publishers, Dordrecht, 1987, XXXV).

²⁴ Law enforcement operations are police or military operations which are not necessarily carried out in the context of an armed conflict and which do not themselves amount to an armed conflict. They are regulated by national laws and regulations and IHRL, but not by IHL. They must, in particular, be distinguished from operations which reach a level of violence and organization that allow the situation to be defined as a NIAC within the meaning of Article 3 common to the Four Geneva Conventions of 1949, thus triggering the application of IHL. The core international human rights instruments applicable to law enforcement operations are the ICCPR; the CAT; the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; the Basic Principles for the Treatment of Prisoners adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by General Assembly resolution 43/173 of 9 December 1988; the Code of Conduct for Law Enforcement Officials adopted by General Assembly resolution 34/169 of 17 December 1979; the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. The core regional instruments are the African Charter on Human and Peoples' Rights adopted June 27, 1981, the Inter-American Convention on Human Rights of 22 November 1969; the Inter-American Convention to Prevent and Punish Torture of 9 December 1985; the ECHR and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987.

²⁵ The Entertainment Software Rating Board (ESRB) is a non-profit, self-regulatory body established in 1994 by the Entertainment Software Association (ESA), formerly known as the Interactive Digital Software Association

b) *Context*

The game takes place in the U.S.A. and is set up in the context of the fight against terrorism. The Counter-Terrorist Unit (CTU) of Los Angeles must deal with a series of challenges posed to them by alleged terrorists, such as the placement of a Ricin Bomb or an alleged plot to assassinate the fictional Vice-President of the United States. The player can be Jack Bauer, the head of field operations of the CTU, or other high ranking agents of the Los Angeles CTU such as field agent, Chase Edmunds. It is unclear whether the context is that of an international armed conflict, a non-international armed conflict, or a law enforcement operation, thus the analysis below takes into consideration both scenarios.

c) *Violations Encountered and Legal Analysis*

The chosen scenes set up what is known as the “ticking-bomb scenario” where, typically, law enforcement officials must obtain information from a captured terrorist before an important attack occurs in order to prevent it from taking place.²⁷

The violations found in this game were inhuman or degrading treatment or possibly torture. In a scene where Agent Jack Bauer of the CTU interrogates an alleged terrorist who presumably possesses information on the assassination plot against the fictional U.S. Vice-President, both severe physical pain and mental pain are intentionally inflicted on the suspect in order to obtain information from him. The role of the player is to “break down” the alleged terrorist through the interrogation. In order to do so, the player must influence the stress level of the alleged terrorist by using techniques labelled “aggressive,” “coax” or “calm.” The

(IDSA). ESRB assigns computer and video game content ratings, enforces industry-adopted advertising guidelines and helps ensure responsible online privacy practices for the interactive entertainment software industry. ESRB uses 7 different ratings which have two equal parts: rating symbols suggest age appropriateness for the game and content descriptors indicate elements in a game that may have triggered a particular rating and/or may be of interest or concern. They are: EC (Early Childhood); E (Everyone); E10+ (Everyone 10+); T (Teen); M (Mature (17+)); AO (Adults Only). Most of the games we analyzed were rated as Mature. Titles rated M (Mature) have content that may be suitable for persons ages 17 and older. Titles in this category may contain intense violence, blood and gore, sexual content and/or strong language. For more information visit: <http://www.esrb.org/index-js.jsp>

²⁶ The Pan-European Game Information (PEGI) age rating system was established to help European parents make informed decisions on buying computer games. It was launched in spring 2003 and replaced some national age rating systems with a single system now used throughout most of Europe. The system is supported by the major console manufacturers, including Sony, Microsoft and Nintendo, as well as by publishers and developers of interactive games throughout Europe. The age rating system was developed by the Interactive Software Federation of Europe (ISFE). PEGI has five age categories and seven content descriptors: 3+, 7+, 12+, 16+ and 18+. The age rating does not take into account the difficulty level or skills required to play a game. Most of the games we analyzed were rated as 16+ and 18+. 16+ rating is applied once the depiction of violence (or sexual activity) reaches a stage that looks the same as would be expected in real life. More extreme bad language, the concept of the use of tobacco and drugs and the depiction of criminal activities can be content of games that are rated 16+. 18+ classification is applied when the level of violence reaches a stage where it becomes depictions of gross violence and/or includes elements of specific types of violence. Gross violence is the most difficult to define since in a lot of cases it can be very subjective, but in general terms it can be classed as the depictions of violence that would make the viewer feel a sense of revulsion. For more information visit: <http://www.pegi.info/en/index/>

²⁷ See FN 13.

game shows a chart with the stress level of the terrorist and the goal is to force and maintain their stress level so it falls within the "Cooperation Zone". Once the suspect has the "ideal stress wavelength", the player can use the coaxing questioning to make him talk. At this moment, the "Break" option appears. In this so called "mini-game," Agent Bauer severely injures the suspect by shooting him in the abdomen and banging his head on a table. The detainee, clearly injured and in serious pain, asks his interrogator to call an ambulance in repeated occasions because he is bleeding. The interrogator refuses to do so and explains to the detainee that he will not bring in a doctor until he talks. The interrogator continues questioning the detainee. After some time, seemingly influenced by the pain inflicted upon him, the need for a doctor due to the firearm injury, and a final threat by Agent Jack Bauer who pulls out his gun and puts it against the suspect's head telling him it is "his last opportunity to talk," the detainee reveals the code required to reach the snipers that are to shoot the Vice-President.²⁸ The conduct of the interrogator is prohibited under international law as it amounts to torture or inhuman and degrading treatment, defined both under IHL and IHRL instruments, as the act is an intentional act performed by a public official and causing severe physical or mental pain with the object of obtaining information.²⁹ This was categorized as a "strong" violation.

Another violation found under IHRL is a violation of the right to life as Agent Chase Edmunds shoots an alleged member of a terrorist cell who has surrendered. The use of lethal force by law enforcement officials should be a mechanism of last resort and can only be used

²⁸ You can see recorded versions of this interrogation scene by anonymous players on YouTube: <http://www.youtube.com/watch?v=Wz9jrmaFjmc>

²⁹ Art. 3(1) common to the 1949 Geneva Conventions prohibits cruel treatment and torture, as well as humiliating and degrading treatment. Article 17 of the Third Geneva Convention of 1949 also establishes that "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." Article 31 of the Fourth Geneva Convention of 1949 states that "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties" and Article 32 prohibits High Contracting Parties "from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents". See also Rule 90 of the ICRC Study of Customary International Law which establishes that "Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited." The Rome Statute of the ICC includes torture or inhuman treatment as a war crime in Article 8(2)(a)(ii) and 8(2)(c)(i) for IAC and NIAC respectively. Under IHRL, the ICCPR, among other instruments, prohibits torture in its Article 7. In addition, Article 1 of the CAT defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." The Inter-American Convention to Prevent and Punish Torture of 9 December 1985 and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987 contain similar definitions.

under very specific circumstances, which are clearly defined under international law.³⁰ In the context of IHL, while it is lawful to kill other combatants, it is not lawful to kill those who are *hors de combat*, such as those who have laid down their arms.³¹ The act in this scene was also classified as a “strong” violation.

This game also includes a scene where IHL is violated by the enemy, that is, a “mild” violation according to our classification. In such scene one of the alleged terrorists whom Jack Bauer is trying to capture takes a hostage. If we assume this to happen within an armed conflict, this behaviour is prohibited under IHL.³² Under IHRL it is prohibited by the International Convention against the Taking of Hostages, signed at New York on 18 December 1979, if it contains an international element.³³ It would also constitute a violation of the prohibition of arbitrary arrest and detention and the right to liberty. The player, in the role of Agent Jack Bauer, then shoots the hostage and kills her while she is already injured. Under IHRL, this act amounts to a violation of the right to life³⁴ and under IHL it violates the prohibition of attacking civilians.³⁵

2.1.3 *Army of Two*

a) *General Information about Game*

This game was developed by Electronic Arts, Montreal, and published by Electronic Arts. It was released on March 2008 for PS3 and Xbox 360. It is a third-person shooter game. Its ESRB rating is “M” and its PEGI rating is over 18 years old.

³⁰ See FN 19.

³¹ See FN 14.

³² Art. 3 Common to the Four Geneva Conventions of 1949, Art. 34 Fourth Geneva Convention of 1949, Art. 75(2)(c) AP I and Article 4(2)(c) AP II prohibit the taking of hostages. The taking of hostages is also a war crime under the Statute of the ICC as stated in Article 8(2)(a)(viii) for IAC and 8(2)(c)(iii) for NIAC.

³³ Article 1(1) of the Convention states that “Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the “hostage”) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (“hostage-taking”) within the meaning of this Convention.” However, Article 13 clarifies that “This Convention shall not apply where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State.”

³⁴ See FN 19.

³⁵ Making civilians an object of an attack is prohibited under Article 3 common to the 1949 Geneva Conventions. Furthermore, Article 32 of the fourth Geneva Convention prohibits measures which cause the physical suffering or extermination of protected persons. Article 51 of AP I, paragraph 2 states that “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”. Article 52(1) complements article 51 by stating that “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” thus clearly leaving out the civilian population. Under the Statute of the ICC, “Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;” is a war crime as defined in Article 8(2)(b)(i) for IAC and also for NIAC as established under Article 8(2)(e)(i).

b) *Context*

This game mainly takes place in Somalia but some operations also take place in Afghanistan, Iraq, Ukraine, China and the U.S. At least some of them seem to take place in the context of an armed conflict. The player is part of the U.S. Ranger Regiment. However, he is then hired to carry out an assassination by a private military contractor and the player begins working as employee of this private military company together with another ex-U.S. Ranger, creating thus, the “Army of Two”. Their job in the recorded scene is to fight against a warlord in Somalia and his troops.

c) *Violations Encountered and Legal Analysis*

The legal framework for members of security companies is loose, even in the real world. There are numerous attempts by states, in particular Switzerland³⁶ and international organisations such as the United Nations and the ICRC³⁷ as well as NGOs such as the Small Arms Survey³⁸ to better regulate the activities of private military and security companies. On 17 September 2008, 17 States - Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom, Ukraine, and the United States of America - finalised the so-called “Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict”.³⁹ The document reaffirms the obligation on states to ensure that private military and security companies operating in armed conflicts comply with IHL and IHRL. In general, staff of private military/security companies are bound by IHL. Their status is that of “Civilians”, unless they are part of the armed forces of a state or have combat functions for an organized armed group belonging to a party to the conflict.

Under IHL, there is a specific provision on “mercenaries” which clarifies that they shall not have the right to be a combatant or prisoner of war. However, the definition of “mercenary” in Article 47 API is rather narrow and does not apply to all members of private security or military companies.⁴⁰ It is similar to the definitions that can be found in the UN and African

³⁶ See: <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse.html> (last visited on 25/03/09).

³⁷ The International Committee of the Red Cross (ICRC) and the Swiss Federal Department of Foreign Affairs (FDFA) have launched an initiative to clarify existing legal obligations of the actors and to develop non-binding good practices for PMSCs. See: <http://www.privatesecurityregulation.net> (last visited on 25/03/09).

³⁸ See: http://www.smallarmssurvey.org/files/portal/issueareas/security/security_pdf/2001_Makki_et_al.pdf.

³⁹ The text of the document can be consulted in: http://www.un.org/ga/search/view_doc.asp?symbol=A/63/467 (last visited on 25/03/09).

⁴⁰ According to Article 47 of AP I, a mercenary is any person who is specially recruited locally or abroad in order to fight in an armed conflict, who takes in fact, a direct part in the hostilities, who is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party and who is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict nor a member of the armed forces of a Party to the conflict and has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Conventions against Mercenarism⁴¹ which prohibit mercenary activities and oblige states that have ratified these instruments to prosecute and punish mercenaries.

The context of the game does not seem to indicate that the members of the “Army of Two” are part of official armed forces of a state. All the contrary, they have left the U.S. Army. Neither does the context seem to point out that they are members of an organized armed group. Assuming that the U.S. is not a party to the conflict, they fit rather accurately what in IHL is defined as mercenaries. As mentioned above, mercenaries are considered to be civilians and as such, they have no right to participate in the hostilities. However, in the game, the members of “Army of Two” *are* participating in hostilities, so they lose protection awarded to civilians under IHL and may be tried for their mere participation in hostilities by the authorities of the states involved. This is not the case for regular soldiers of the enemy party – when captured they become prisoners of war and can only be tried for offences for which soldiers of the own army could be punished as well, not for the mere participation in the conflict. Most importantly, civilians, and this includes mercenaries, who take up their arms must also respect the rules of IHL and they face individual criminal responsibilities for serious violations of IHL they commit. This is regardless of whether they were hired by a state, an international organization (for instance in a peace enforcement operation) or a private military or security company. However, to be a mercenary or to be a civilian directly participating in the hostilities as such does not constitute a violations of IHL, as long as they do not commit such violations. .

2.1.4 Battlefield Bad Company

a) General Information about Game

This game was developed by Electronic Arts, Digital Illusions CE and published by Electronic Arts. It was released on June 2008 for Xbox 360 and PS3. It is a first-person shooter game. Its ESRB rating is “T” and its PEGI rating is over 16 years old.

b) Context

Battlefield Bad Company is a game depicting the actions of a four-man squad known as “Bad Company” in a fictional war taking place allegedly in the near future between Russia and the

⁴¹ Art 1 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989 takes up this definition of Art. 47 AP I (see FN 40) and adds in paragraph 2: “A mercenary is also a person who, in any other situation, “(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at : (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or (ii) Undermining the territorial integrity of a State; (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation; (c) Is neither a national nor a resident of the State against which such an act is directed; (d) Has not been sent by a State on official duty; and (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.” Article 2 of the Convention also establishes that “any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention.” A fairly similar definition can be found in the Convention of the OAU for the Elimination of Mercenarism in Africa of 1977.

United States, thus classifying as a classic international armed conflict between two states. “Bad Company” is composed of insubordinate members of the 222nd U.S. Army Battalion and thus are often sent before the Special Forces into the battlefield. According to the official description of the game, “Bad Company” must fight in different types of scenarios and “utterly destroy anything that gets in their way. Total destruction is the name of the game... enemies will soon learn that there is nowhere to hide.”⁴²

c) *Violations Encountered and Legal Analysis*

It is no surprise that with such descriptions, most of the violations found in this game have to do with destruction of property. Under IHL, combatants have the obligation to distinguish between civilians, respectively civilian objects and combatants, respectively military objectives.⁴³ In this game, no such distinction is made. Many battles take place in civilian areas and there is no limit to what the players can destroy in order to find and combat the enemy. We have classified the violations in these scenes as “strong”. While IHL recognizes that collateral damage, including civilians and civilian property, is sometimes inevitable and thus not generally prohibited as such, it requires unexceptional compliance⁴⁴ with the principle of distinction⁴⁵ and proportionality⁴⁶, meaning no direct attacks may be launched against civilians or civilian property,⁴⁷ no indiscriminate attacks⁴⁸ may be launched and the

⁴² <http://badcompany.ea.com/news/entryid/37761/> (last visited on 25/03/09).

⁴³ See FN 17.

⁴⁴ Failure to comply with the principle of distinction and proportionality are war crimes as defined in the Rome Statute, Article 8(2)(b) subparagraphs (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; and (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; for IAC and 8(2)(e) for NIAC (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities. Article 8(2)(a)(iv) qualifies as a war crime for IAC the act of "Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly". Similarly, Article 8(b)(iv) defines as a war crime for IAC the act of "(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;"

⁴⁵ See FN 17.

⁴⁶ See FN 18.

⁴⁷ Art. 51 AP I prohibits making the civilian population or individual civilians the object of attack. Paragraph 2 states that “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”. Article 52(1) complements article 51 by stating that “Civilian objects shall not be the object of attack or of reprisals...”. Under the Rome Statute of the ICC, "Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;" is a war crime as defined in Article 8(2)(b)(i) for IAC and also for NIAC as established under Article 8(2)(e)(i).

⁴⁸ Art. 51 AP I prohibits indiscriminate attacks, which are defined as follows: “4. (...) (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

expected loss of civilian life, injury to civilians or damage done to civilian objects may not be excessive in relation to the concrete and direct military advantage anticipated.⁴⁹ In the scenes, there seems to be no assessment of proportionality in the attacks realized in civilian areas and we do not know, whether precautionary measures were taken to minimize civilian casualties and damage to civilian objects. However, in a real life situation, one is often confronted with similar circumstances: regular armed forces and irregular armed groups are very unlikely to give any information about the planning of the preparation of military operations to international organisations or human rights bodies. Without such information, it is difficult to establish that a military operation was not proportional, in particular whether the attacker took all the precautionary measures necessary to avoid, and in any event to minimize incidental loss or civilian life, injury to civilians and damage to civilian objects.”⁵⁰

In addition to the extensive destruction, some of the scenes portray the members of “Bad Company” taking gold and “treasures” found in the civilian houses they have just destroyed. Upon obtaining them, the players get points. These actions amount to pillage, which is strictly prohibited under IHL and thus have also been labelled as “strong”.⁵¹ This illegal action is confirmed in one of the scenes where you can hear a member saying that “Pillaging is an old war tradition.” Pillage is considered as a war crime both in international and non-international armed conflicts.⁵²

2.1.5 Brothers in Arms – Hell’s Highway

a) General Information about Game

This game was developed by Gearbox Software and published by Ubisoft. It was released in September 2008 for Xbox 360 and PS3 and in October 2008 for Windows. It is a first person tactical shooter game. Its ESRB rating is “M” and its PEGI rating is over 18 years old.

b) Context

This game takes place at the end of the Second World War, during “Operation Market Garden” in which the Allies in the real, historic events, through an airborne invasion led by the United States planned to capture a corridor through Holland to cut the German lines and

objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

⁴⁹ See FN 18.

⁵⁰ Art. 57 AP I obliges states to take precautionary measures “to avoid, and in any event to minimize incidental loss or civilian life, injury to civilians and damage to civilian objects.”

⁵¹ Art. 33 Fourth Geneva Convention of 1949 establishes that “Pillage is prohibited.” See also: Art 4(2)(g) APII; Art. 28 Hague Convention (IV) respecting the Laws and Customs of War on Land, 1907; Art. 47, Hague Convention (IV) respecting the Laws and Customs of War on Land, 1907.

⁵² The Rome Statute of the ICC defines pillaging as a war crime for NIAC as established in Article 8(2)(e)(v) “Pillaging a town or place, even when taken by assault.” A similar provision exists for IAC under Article 8(2)(b)(xvi).

end the war.⁵³ However, Hitler's units were in the area and counterattacked, turning this operation into the last Nazi German victory. The player is the U.S. Sgt. Baker who is leading the operation.⁵⁴ This is a classic international armed conflict scenario, however situated in a period before the existence of the 1949 Geneva Conventions and its additional Protocols.⁵⁵

c) *Violations Encountered and Legal Analysis*

In the scene "Capture the Bridge, Recon the Town", a civilian woman is taken hostage or captured by a soldier and moments later, she appears hung by the neck with a rope.⁵⁶ It is unclear what the woman was doing before being captured, but even if she was taking direct part in hostilities, she may not be killed. She may be tried for the mere fact of having directly participated in hostilities, but if captured she must still be treated humanely.⁵⁷ In addition, summary executions, understood as executions which are carried out "without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable by civilized peoples" using the terms of Article 3 (1)(d) common to the 1949 Geneva Conventions, constitute a war crime under the Rome Statute of the ICC.⁵⁸

In another scene, the German II SS Panzer Corps, seem to have taken refuge in a Church and are firing from the church tower downwards. As the acts in this scene are not committed by the player but by the enemy army, they have been classified as "mild" violations. As mentioned earlier, at the time when the events shown in the game took place, the 1949 Geneva Conventions, Additional Protocols and Hague Convention on the Protection of Cultural Property were not in force yet. However, other regulations, e.g. in the Hague Conventions of 1907 for the protection of cultural property, did exist, prohibiting the attack of such buildings as long as they are not used for military purposes.⁵⁹ Under IHL, it is

⁵³ Operation Market Garden (September 17–25, 1944) was an Allied military operation, fought in the Netherlands and Germany in World War II. It was the largest airborne operation of all time. See: Anthony Farrar-Hockley, *Airborne carpet: Operation Market Garden*, London, Macdonald, 1970. (Purnell's history of the Second World War. Battle book; no 9) or Charles W. McArthur, *Operations analysis in the U.S. Army Eighth Air Force in World War II*, Providence, Rhode Island: American Mathematical Society [etc.], 1990. (History of mathematics; vol. 4, pp. 226 ff.) During Operation Market Garden, thirty thousand British and American airborne troops were to be flown behind enemy lines to capture the eight bridges spanning the network of canals and rivers on the Dutch/German border. The airborne commander, General 'Boy' Browning, had just seven days to prepare for the operation. Before the strategic detail could be confirmed, he received alarming information regarding German troops in the area. It was suggested that there were two SS Panzer divisions around Arnhem, with many tanks and vehicles. General Browning decided to go ahead with the operation but the Allies were defeated. See also: http://www.thehistorychannel.co.uk/site/features/operation_market_garden.php

⁵⁴ <http://brothersinarmsgame.us.ubi.com/> (last visited on 25/03/09).

⁵⁵ The Geneva Conventions were adopted in the Diplomatic Conference of Geneva on August 12, 1949 and entered into force on October 21, 1950.

⁵⁶ We were assuming it is the player (or at least the army to whom the player belongs to) who takes the hostage, but it is unclear in the game.

⁵⁷ See FN 15.

⁵⁸ Art. 8 para. 2(c)(iv) of the Rome Statute of the International Criminal Court prohibits summary executions both in IAC and NIAC.

⁵⁹ In the Annex to the 1907 Hague Conventions, Article 27 underlines that "in sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or

presumed that objects normally dedicated to civilian purposes, such as places of worship, are not being used to make an effective contribution to military action,⁶⁰ and thus may not be attacked.⁶¹ However, when such objects are being used to support the military effort, they *may* become military objectives⁶² and in that case, they may be targeted. However, just like it is prohibited to *attack* civilian objects which are being used for civilian purposes, it is also prohibited to *use them in support of the military effort*.⁶³ The violation in this scene is precisely that the church, which is a civilian object, is being used in support of the military effort.

2.1.6 *Call of Duty 4 (Modern Warfare)*

a) *General Information about Game*

This game was developed by Infinity Ward and published by Activision. It was released in November 2007 for Xbox 360, PS3 and Windows in September 2008 for Mac. It is a first-person shooter game. Its ESRB rating is “M” and its PEGI rating is over 16 years old.

charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes (...). Article 5 of the IX 1907 Hague Convention establishes that "In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes. It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white." Article 56 of the Annex to the 1907 Hague Conventions, which applies in the case of occupation, provides that: "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science is forbidden, and should be made the subject of legal proceedings." After the Second World War, the following Articles regulating similar situations were applicable Article 53 of AP I which states that "Without prejudice to the provisions of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and of other relevant international instruments, it is prohibited: (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, (b) to use such objects in support of the military effort; (c) to make such objects the object of reprisals." Article 16 of AP II also states that "Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort." See also Article 54 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954. Violations of these provisions constitute war crimes in IAC and NIAC under articles 8 (2) (b) (ix) and 8 (2)(e) (iv) respectively of the Rome Statute of the ICC.

⁶⁰ Article 52 (3) of AP I states that "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."

⁶¹ See FN 59.

⁶² Article 52 (2) of AP I establishes that "...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."

⁶³ Article 52 (2) of AP I prohibits the "...use of such objects [civilian objects] in support of the military effort". Article 53 (b) of AP I also prohibits the use of historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples "in support of the military effort".

b) *Context*

The story takes place in a fictional near-future, where a radical leader has staged a coup d'état in the Middle East, and an "Ultranationalist" movement has instigated a civil war in Russia. The events of the conflicts are seen from the perspectives of an American Marine and a British SAS⁶⁴ commando, and are set in multiple locations, including the Middle East, Azerbaijan, Russia, and in Prypiat, in the Ukraine. It is unclear what the classification of the conflict is, but it seems to qualify as an armed conflict, whether international or non-international.

c) *Violations encountered and legal analysis*

In one of the scenes, the player is a helicopter gunman whose task it is to provide support for the ground units below who are fighting the enemy. In order to identify the enemy on the battleground, which is a village, the shooters in the helicopter wear thermal vision equipment. Because of the use of thermal vision equipment but most of all, due to the distance at which the helicopter is flying, it is difficult to distinguish the enemy forces from the own troops, which appear in the game as blinking figures. This makes it extremely hard to comply with the principle of distinction between civilians/civilian goods and military objectives, which is fundamental under IHL.⁶⁵ In a real life situation it would therefore be questionable whether such an operation in a village could be carried out in compliance with IHL, since the attack is indiscriminate as it employs a method or means of combat the effects of which cannot be limited to specific military objectives, or at the very least, are most likely “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.”⁶⁶

It is commendable however that this scene incorporates the prohibition of attacking one particular civilian objects, namely the church.⁶⁷ In the game, the failure to comply with the instruction not to hit the Church (which is given by the voice of an invisible commander in the background) results in failure of the mission. We consider this feature of the game a positive step in the direction we wish for other games: the player realizes that there are limits in warfare and that overstepping these limits results in a type of punishment.

⁶⁴ The Special Air Service (SAS) is the British Army's most renowned special force unit. See: <http://www.eliteukforces.info/special-air-service/> (last visited on 25/03/09).

⁶⁵ See FN 17.

⁶⁶ See FN 18.

⁶⁷ Places of worship such as a Church have been awarded special protection under IHL, see FN 59.

Nevertheless, other civilian objects in the town such as houses, water towers and the graveyard, which also benefit from protection against attacks,⁶⁸ may be completely destroyed without any punishment or warnings.

Additionally, in another scene, fighting also takes place in a village, and the player is a gunman on a helicopter. The town features numerous mosques and statues and these can be attacked and destroyed without failing the mission. Mosques are places of worship and civilian objects and must thus be spared from attacks under IHL.⁶⁹ Another problem in this scene is that the player can attack civilian buildings with no limits in order to get rid of all the enemies present in the town who are on roof tops, open areas of the town, squares featuring statues, etc. Under IHL, the fact that combatants/ fighters are present in a town does not make the entire town a military objective.⁷⁰ In addition, although IHL recognizes that some collateral damage may at times be inevitable, this should always be proportionate to the concrete military advantage obtained from the attack. The above mentioned rules of proportionality and precaution apply.

In the introduction to another scene, the player, who now becomes Al-Asad, a military commander of an unnamed Arab country who is allegedly responsible for toppling and assassinating the President of that country and then taking control of the country himself, is being taken prisoner in the back of a car. As he is being driven through the streets of a town in an unnamed country, obviously located somewhere in the Middle East, one can see several soldiers rounding up civilians, beating them and even killing them, as they are allegedly enemies. Under IHL, civilians may not be attacked and only lose this protection if and so long as they participate directly in the hostilities.⁷¹ However in this scene, there is no indication that they were directly participating in hostilities and thus the beatings and killings would amount to a violation of the pillar of IHL which is to protect those who do not or no longer participate in hostilities. Although the exact meaning of "direct participation in hostilities" has not been clearly defined and there are still efforts headed by the ICRC and the

⁶⁸ Article 54 (2) API, states that "it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive." Houses and graveyards, on the other hand are, by their nature and purpose, assumed to be civilian objects and thus fall under the general protection of IHL for all civilian objects - as long as they are not used for military purposes, see FN 60.

⁶⁹ See FN 59 and 60.

⁷⁰ Article 51 (5) (a) AP I clarifies that "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;" is considered indiscriminate. See also FN 48. In addition, Article 50(3) of API establishes that "The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."

⁷¹ See FN 47 and in NIAC, Article 13 of APII which also deals with the protection of the civilian population and establishes in paragraph 3 that "Civilians shall enjoy the protection afforded by this part, *unless and for such time as they take a direct part in hostilities.*"

TMC Asser Institute to clarify this notion,⁷² it is not recommendable to include such scenes killing what apparently look like civilians in video games as it sends the wrong message to the players.

In another scene, the British Special Air Forces are sent to find and capture Al-Asad. Upon doing so, the SAS tie Al-Asad up in a chair for questioning. Captain Price is in charge of questioning him and while doing so, he also beats Al-Asad brutally. He stops shortly to receive a phone call and immediately after his conversation, stops the questioning and beatings and kills Al-Asad by shooting him in the head. The context of the scene seems to be that the SAS wanted to extract some information from Al-Asad, apparently to hinder some kind of terrorist attack.

In this typical “ticking bomb” scenario, the beating of Al-Asad amounts to torture or at least inhuman treatment, which are prohibited in any context, under any circumstances, whether in peace time or during armed conflict situations.⁷³ Killing him amounts to an extra-judicial, summary or arbitrary execution as it falls outside the context of any legal framework.⁷⁴

2.1.7 *Call of Duty 5 (World at War)*

a) General Information about Game

This game was developed by Treyarch and published by Activision. It was released in November 2008 for PC, Xbox 360, PS2 and PS3, Wii and NDS. It is a first- person shooter game. Its ESRB rating is “M” and its PEGI rating is over 18 years old.

⁷² See for example <http://www.icrc.org/Web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205> (last visited 19 April 2009).

⁷³ See FN 20.

⁷⁴ An extrajudicial execution, summary or arbitrary executions are prohibited under IHRL, under the framework of the Right to Life, see FN 19. Under IHL, the 1949 Geneva Conventions provide an important framework of accountability in relation to extrajudicial, summary or arbitrary executions during armed conflict, see Article 3 common to the 1949 Geneva Conventions, see FN 15. Article 75 (4) of API establishes "No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure (...). Similarly, AP II establishes in Article 6(2) "No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality." According to Art. 8(2)(c)(iv) of the Rome Statute of the ICC, the "passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable" is prohibited. Thus, extrajudicial, summary or arbitrary executions may under certain circumstances amount to genocide, crimes against humanity or war crimes, as defined in international law, including in the Rome Statute of the ICC. See also the Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions available at <http://www2.ohchr.org/english/issues/executions/standards.htm> (last visited April 14, 2009), as well as the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the Economic and Social Council in its resolution 1989/65 of 24 May 1989 available at <http://www2.ohchr.org/English/law/executions.htm> (last visited April 14, 2009).

b) *Context*

This game takes place during the Second World War, thus classifying it as taking place in an international armed conflict. There are two scenarios portrayed, one is a battle between the U.S. Marine Corps and the Japanese Army in the Pacific, and the other one is following the Soviet Red Army advancing on Berlin. According to the official description of the game: "Call of Duty: World at War brings an uncensored edge to combat, as soldiers face the most harrowing and climatic European and Pacific battles in which an enemy, who knows no surrender and no retreat, will fight to the last breath, unleashing an arsenal of lethal surprising tactics."⁷⁵

c) *Violations Encountered and Legal Analysis*

This game portrays the use of flamethrowers by American soldiers against Japanese soldiers. The flamethrower is used by the player in open spaces such as villages and fields, but also directly against enemy soldiers even when they are just a meter away. Thus, the enemy soldiers are burned alive with the flamethrower. The use of these weapons clearly violates the prohibition of causing superfluous injury and unnecessary suffering which was already an obligation established in the Hague Regulations of 1907 and thus already prohibited during the Second World War.⁷⁶ Today, employing "weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering" is considered as a war crime.⁷⁷

Another violation found in the game is the possibility to shoot injured soldiers. This was also already prohibited by the Hague Regulations of 1907 which states in Article 23 that it is especially forbidden "To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion".⁷⁸

The first scene of the game begins with a violation we have labelled as "mild" because it is not committed by the player, a U.S. Marine Corp, but by the enemy, that is the Japanese Army. In this scene, the player is Private Miller a U.S. Marine Corp who has been captured together with another U.S. Marine by the Japanese while scouting Makin Island. Both U.S. Marines are tied up and interrogated by members of the Japanese armed forces. It is not clear what the interrogation is about, but it is clear by the dialogue, that they want information. The

⁷⁵ <http://pc.ign.com/articles/929/929002p1.html> (last visited on 25/03/09).

⁷⁶ Art. 23(e) Hague Convention (IV) with Respect to the Laws and Customs of War on Land, 1907.

⁷⁷ Art. 8 para. 2(b) (xx) classifies as war crime "Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;". However, the last part of sentence shows how controversial the issue is amongst states.

⁷⁸ Art. 23(c), Hague Convention (IV) with Respect to the Laws and Customs of War on Land, 1907. See also FN 14.

American Marines refuse to answer, saying that they will “not become traitors.” The Japanese continue whipping the Marines. Then one of the members of the Japanese army burns the face of the American Marine and gives the order to kill them both. The Japanese soldier receiving the order kills the U.S. Marine by slashing his throat and as he is proceeding to kill Private Miller, the American Marines save him and the game continues. Upon rescuing Private Miller, the U.S. Marine Corps say they will make the Japanese pay for what they did. These acts, although not performed by the player but rather by his virtual counterparts, the Japanese soldiers, clearly amount to torture and murder (extrajudicial killing, summary execution) as defined in IHRL and IHL instruments.⁷⁹

2.1.8 Close Combat: First to Fight

a) General Information about Game

This game was developed by Destineer and published by 2K Games and MacSoft for Macintosh. It was released in April 2005 and can be played on Windows, Xbox 360, Macintosh. It is a first- person shooter game. Its ESRB rating is “T” and its PEGI rating is over 16 years old.

b) Context

The plot of the game is fixed on a fictional conflict involving Lebanon, Syria and the United States. The player is a U.S. Marine who leads a unit of three other marines while being deployed to Lebanon to fight of militant forces who are trying to take control of the country. The game seems to take place in the context of an international armed conflict.

c) Violations Encountered and Legal Analysis

No violations were found when playing this game. On the contrary, this game contains some kind of punishment of violations of IHL: Attacking civilians has a negative impact on the moral of your team and civilian buildings may not be attacked.

2.1.9 Conflict Desert Storm

a) General Information about Game

This game was developed by Pivotal Games and published by SCi. It was released between September 2002 and April 2003 for Windows, Xbox, PS2 and GameCube and on August

⁷⁹ On extrajudicial execution, summary or arbitrary executions, see FN 74. On the prohibition of torture, see FN 29. Concerning the treatment of prisoners of war see Art. 13, Third Geneva Convention and Art. 4 Hague Convention (IV) with Respect to the Laws and Customs of War on Land, 1907.

2005 for Mobile platforms. It is a tactical third-person shooter game. Its ESRB rating is “T” and its PEGI rating is over 16 years old.

b) Context

This game takes place during the 1991 Gulf War. The player can choose to be the leader of a four-man squad troop from the U.S. Delta Force⁸⁰ or of the elite British SAS⁸¹. The objective is to eliminate the Chemical Warfare, Supergun and Scud Missile threat posed by the enemy, and to remove the Republican Guard from their fortified positions inside Kuwait City. The assignments take the player from Al Khafji, where he needs to defend the town and slow the advance of the Iraqi invasion, to the deep desert on vital scud-hunting missions and right into Baghdad itself, on highly secretive rescue and assassination operations. This conflict can be classified as an international armed conflict to which IHL is applicable. It can be classified this way due to the invasion of Kuwait by Iraq. The United States and British forces support the Kuwaitis by invading Iraq. This international armed conflict is between the Iraq and Kuwait forces and between the U.S., British and other allied forces and Iraq.

c) Violations Encountered and Legal Analysis

In one of the scenes, the player shoots his own partner, that is, one of the members of the four-man squad of the special armed forces led by the player. The shot partner "re-emerges" and the game continues. Attacking the members of your own armed forces is not a violation as such under IHL. However, in most countries this will be punished under domestic law. The player does not receive any warning for committing these types of acts, nor does the mission end. It would be useful if the player who commits these kinds of acts would receive a warning in the game.

2.1.10 Far Cry 2

a) General Information about Game

This game was developed by Ubisoft Montreal and published by Ubisoft. It was released on October 2008 for Windows, Xbox 360, PS3. It is a first-person shooter game. Its ESRB rating is “M” and its PEGI rating is over 16 years old.

⁸⁰ The U.S. Army's 1st Special Forces Operational Detachment-Delta (1stSFOD-D) is the U.S. Army's special-operations unit organized for the conduct of missions requiring a rapid response with surgical application of a variety of skills. Delta plans and conducts a broad range of special operations across the operational continuum. Delta is organized for the conduct of missions requiring rapid response with surgical applications of a wide variety of unique skills, while maintaining the lowest possible profile of U.S. involvement. <http://www.globalsecurity.org/military/agency/army/sfod-d.htm> (last visited on 25/03/09).

⁸¹ The Special Air Service (SAS) is the British Army's most renowned special forces unit. From the moment several black-clad figures appeared on the balconies of the Iranian Embassy in London in 1980, the Special Air Service became 'celebrities' both at home and overseas. See: <http://www.eliteukforces.info/special-air-service/> (last visited on 25/03/09).

b) *Context*

This game seems to take place in the context of a non-international armed conflict situated somewhere in Africa. The parties to the conflict are two irregular armed groups. The player is a mercenary hired to capture an arm dealer, called “the Jackal”. In order to fulfil the mission, the player must bring up the two factions against each other, identify and exploit their weaknesses and neutralize their superior numbers.⁸² This conflict is regulated by Article 3 Common to the 1949 Geneva Conventions since it is not an international armed conflict between two states but rather a non-international armed conflict between irregular armed groups.⁸³ If the state where the conflict takes place has ratified or acceded Additional Protocol II to the 1949 Geneva Conventions, these norms would also apply,⁸⁴ in addition to IHL which applies at all times.

c) *Violations Encountered and Legal Analysis*

The scenes portray extensive shooting in civilian areas and the shooting of civilian objects,⁸⁵ including shooting at a church.⁸⁶ All these acts go unpunished in the game. Even if we assume the attacks are not directed against these objects, the excessive destruction of civilian objects amounts to a violation of the principle of proportionality. IHL allows for some collateral damage to civilians and civilian objects in carrying out hostilities, however, any expected damage must be proportional to the direct and concrete military advantage anticipated.⁸⁷

Furthermore, in this game, the player is also allowed to shoot a person who is surrendering. This amounts to a violation of the prohibition of attacking those who have laid down their arms.⁸⁸

2.1.11 World in Conflict

a) *General Information about Game*

This game was developed by Massive Entertainment and published by Ubisoft. It was released in September 2007 for Microsoft Windows. It is a first-person tactical shooter game. Its ESRB rating is “T” and its PEGI rating is over 18 years old.

⁸² <http://farcry.us.ubi.com/index.php?page=story>, <http://www.gamespot.com/pc/action/farcry2/review.html> (last visited on 25/03/09).

⁸³ See FN 23.

⁸⁴ This is likely, since most African states ratified Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

⁸⁵ See FN 48.

⁸⁶ Churches are granted special protection in IHL, as they are places of worship and thus part of the cultural heritage, see FN 59.

⁸⁷ See FN 18.

⁸⁸ See FN 14.

b) *Context*

The game portrays a fictitious scenario where the Soviet Union did not collapse but rather made a decisive advance into Europe. In this game the NATO forces combat the Red Army and in a second front, the Red Army launches an attack against the United States. The player is a U.S. Army officer. The game seems to take place in a scenario of an international armed conflict during the Cold War period.

c) *Violations Encountered and Legal Analysis*

In the scene on a farm, the complete destruction of a village through what is often referred to as “carpet bombing” is portrayed. This amounts to an indiscriminate attack for even the presence of some soldiers in a civilian area does not render the entire area a military target.⁸⁹ Also, soldiers should not treat multiple military targets (i.e. the soldiers who could be hiding in the village), as a single military objective, raiding the entire village.⁹⁰

In *Mission Seven: Deep Strike* the player attacks a church and completely destroys it. Upon doing so however the partner of the soldier who led the operation tells him: "That was not good partner. Now I will have to explain your behaviour to our allies. Hopefully they will understand." This feature of the game is to be considered as positive, since the attack on a church is a conduct prohibited under IHL. It was even prohibited before the entry into force of the 1949 Geneva Conventions.⁹¹ The message given in this scene however is that perhaps the conduct can be explained to the allies and there will be no problem and prosecution will probably not follow. Without denying the possibility that some explanation could exist for the behaviour, it would be good if the game would incorporate sanctions for committing these types of conduct which amount to war crimes.

The scene *in the hospital* portrays the bombing of a hospital. This is a civilian object which may not be attacked and which is awarded special protection under IHL.⁹²

In the scene *cluster bombs*, cluster munitions are thrown from an airplane onto a village – although it is not clear whether by enemy forces. Even though there were no specific provisions at the time of the Cold War which prohibited the use of cluster munitions, customary IHL in force at the time prohibited attacks that did not comply with the principles of proportionality, distinction or which are indiscriminate.⁹³ The use of cluster munitions was recently prohibited by the Convention on Cluster Munitions of May 2008 (open for signature since 3 December 2008). It prohibits the use, production, stockpiling and transfer of cluster munitions. But even without the Convention, in most cases, the use of cluster munitions leads

⁸⁹ See FN 70.

⁹⁰ See FN 70.

⁹¹ See FN 59.

⁹² See e.g. Article 18 Fourth Geneva Convention of 1949.

⁹³ See FN 17 (principle of distinction), FN 18 (principle of proportionality) and FN 48 and 70 (prohibition of indiscriminate attacks).

to a violation of IHL. First, because cluster bombs are not precision-guided and so called “area weapons,” they are very likely to hit outside the military target. When this happens in a populated area, it often causes high numbers of civilian casualties, possibly violating the principle of proportionality and the principle of distinction. In addition, the submunitions often fail to explode when they hit the ground. This poses a serious danger to civilians, as unexploded submunitions often explode at a later stage, when handled or disturbed, for example by playing children or farmers working in the fields. Again, this does not allow for the distinction between civilians and civilian objects and military objectives, a fundamental principle of IHL.

2.1.12 Frontlines: Fuel of War

a) General Information about Game

This game was developed by Kaos Studio and published by THQ. It was released between February and March 2008 for Microsoft Windows and Xbox 360. It is a first-person tactical shooter game. Its ESRB rating is “T” and its PEGI rating is over 16 years old.

b) Context

In a desperate, near future setting (2016 onwards) where controlling the planet's depleting fossil resources determines the ultimate fate of civilization, a global war for oil is being waged between two superpowers, the Western Coalition (US/EU) and the Red Star Alliance (Russia/China). Players are elite soldiers in an army division of either party to the conflict. They are deployed in different countries in Central Asia and can choose among over 60 different vehicles and weapons based off of real military designs of the near future. They have a lot of freedom of choice in obtaining their military objectives. The plot suggests that the game takes place in the context of an international armed conflict.

c) Violations Encountered and Legal Analysis

In one scene the player can choose to drop cluster bombs on a military target. If no civilians are around, this conduct would still be prohibited by the Convention on Cluster Munitions at least for the states parties.⁹⁴ However, still taking only into consideration the general principles of IHL, it is important to point out that even if used against a military target, cluster bombs often fail to explode on contact which means it may later injure or kill civilians. In this respect, cluster munitions fail to comply in most cases with the principles of distinction and proportionality.

⁹⁴ Given that this game takes place in the near future (the year 2016), the Convention on Cluster Munitions will most likely already have entered into force. For its entry into force, the Convention requires ratification by 30 states. Up to this day, 11 States have ratified.

2.1.13 *Ghost Recon Advanced Warfighter 2*

a) General Information about Game

This game was developed by Red Storm Entertainment for the platforms Xbox 360 and PS3, by High Voltage Software for the PlayStation Portable platform and by GRIN for the PC platform. It is published by Ubisoft. It was released for Xbox between March and July 2007, for PC in July 2007 for PS3 in August 2007 and for Play Station portable between May and August 2007. It is a tactical shooter game. Its ESRB rating is “T” and its PEGI rating is over 16 years old.

b) Context

The game takes place in the year 2014, south of the United States border in Mexico. The plot deals with the conflict between a Mexican “rebel” group, the Mexican loyalists and the United States Army featuring the “Ghost Recon” team, composed by some of the most feared operators of the U.S. Army Special Forces. This conflict can be classified as a NIAC as it is not between two or more High Contracting Parties to the Geneva Conventions, but between the U.S. armed forces and a Mexican armed group. However, because the fighting takes place in the Mexican territory, it could also be classified as an IAC due to the presence of US armed forces on Mexican soil, unless the Mexican government agreed to their presence. In this case, the conflict would still be a NIAC.

c) Violations Encountered and Legal Analysis

In one of the scenes, the commander of a regular army gives an order to one of his subordinates to shoot enemy combatants in the head. This is not an obvious violation, as killing combatants is allowed under IHL and there are not provisions as how to kill, except that superfluous suffering should be avoided.⁹⁵ However, a headshot constituting an extrajudicial execution is a war crime. Still, the recorded scene is not so clear. The act would only constitute an extra judicial execution if the enemy combatant was captured and accused of having committed a crime but was then shot without trial. This is stated e.g. in Common article 3 of the 1949 Geneva Conventions prohibits in paragraph (1)(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.⁹⁶

According to Art. 8(2)(c)(iv) of the Rome Statute of the International Criminal Court, the "passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are

⁹⁵ Article 35 AP I.

⁹⁶ See FN 15.

generally recognized as indispensable" is prohibited. That means if a "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause" are killed by a headshot, this would constitute a war crime.

2.1.14 *Hour of Victory*

a) General Information about Game

This game was developed by N-Fusion Interactive and published by Midway Games. It was released for Xbox and Microsoft Windows in June 2007. It is a first-person shooter game. Its ESRB rating is "T" and its PEGI rating is over 16 years old.

b) Context

This game takes place during the Second World War. It bases its story in North Africa and Europe. The objective is to stop the German army from creating a nuclear weapon. The players are part of a British Commando, a covert operative and an Army Ranger. The game takes place in the context of an international armed conflict.

c) Violations Encountered and Legal Analysis

In the scene *Kampagne Schloss Felsenberg*, tanks passing through a civilian area and destroying many civilian objects with gunfire are portrayed. This amounts to a violation of the principle of distinction and eventually also proportionality with regards to civilian objects.⁹⁷ Nevertheless, there seem to be no civilians present in the area.

Another violation, committed however by the enemy, and thus a "mild" one in our classification, takes place in the scene *Befreiung von Al Shator*. Widespread shooting in civilian areas is portrayed, especially by means of planes flying over villages and dropping bombs. The role of the player is to attempt to shoot on the planes from ground positions. Dropping bombs on densely populated areas, from high altitudes, is likely to be in violation of the principle of distinction, the prohibition of attacking civilian objects and the principle of proportionality.⁹⁸

2.1.15 *Medal of Honour Airborne*

a) General Information about Game

This game was developed by Electronic Arts and published by Electronic Arts. It was released for Xbox and Microsoft Windows in September 2007 and for PS3 in November 2007. It is a first-person shooter game. Its ESRB rating is "T" and its PEGI rating is over 16 years old.

⁹⁷ See FN 17 and 18.

⁹⁸ See FN 17 and 18.

b) *Context*

This game takes place during the Second World War in the European theatre of war. The player takes the role of Private Boyd Travers, a paratrooper in the 82nd Airborne Division and later in the 17th Airborne Division of the United States Army. Private Travers must fight in different scenarios such as Italy, northern France, the Netherlands, and Germany. The game takes place in the context of a classic international armed conflict scenario.

After the tutorial mission, the player is sent to Sicily in 1943, with a drop into a small walled village called Adanti as part of Operation Husky, the costly Allied invasion of Sicily.

c) *Violations Encountered and Legal Analysis*

In scene 1 – *Kampagne Husky*, parashooters are descending to a village. As soon as they are on the ground, they begin firing at a church which lies next to where they land. No enemy fire seems to be coming from the church. As mentioned above, a church as a civilian object and is awarded special protection from attacks under IHL.⁹⁹ If used for military purposes, it could, of course, turn into a military objective, however, from the scene, it could not be depicted that the church fits any of the elements required for a civilian object to become a military objective. Thus the attack of this civilian building amounts to a violation of IHL.¹⁰⁰

2.1.16 *Metal Gear Soldier 4*

a) *General Information about Game*

This game was developed by Kojima Productions and published by Konami. It was released for PS3 in June 2008. It is a single-player stealth action game. Its ESRB rating is “M” and its PEGI rating is over 18 years old.

b) *Context*

Game takes place in 2014, with almost no military restrictions. The war is mainly waged by private military organizations. The boss of one of the biggest private military firms is "Liquid Ocelot". The player is "Snake" and is fighting against "Liquid Ocelot", who wants to obtain control over the world. The plot suggests that there is an armed conflict, but it is not clear whether it is international or internal. The operations are performed by private military companies (PMC).

⁹⁹ See FN 59.

¹⁰⁰ See FN 59.

c) *Violations Encountered and Legal Analysis*

One of the scenes portrays the killing of an injured soldier from whom no danger was emanating, thus violating the prohibition of attacking combatants who have laid down their arms.¹⁰¹

In other scenes, the goal seems to be to kill all enemies, even those who are wounded or who have surrendered. According to a “walkthrough” of the game “enemies that have been subdued can be awoken if found by another PMC soldier. With this in mind, you should get into a habit of finishing knocked out enemies off. A very effective way to do this is take out your Stun Knife, single crouch beside the enemy, hold L1, and press R1 to kill any subdued enemy in one hit.” This also amounts to a violation of the obligation to spare those who do not or no longer take part in hostilities.¹⁰²

In another scene, players passing a market square can shoot civilians without warning and without punishment, which amounts to a war crime.¹⁰³ As mentioned above, if fighting takes place in areas where civilians are present, special care and precautionary measures must be taken to spare civilians and if the attack is still expected to cause excessive injury or damage in relation to the anticipated military advantage, fighting should not take place. If no distinction can be made between civilians and combatants or civilian objects and military objectives, the attack would amount to an indiscriminate attack and would thus be in violation of IHL.

2.1.17 *Soldier of Fortune*

a) *General Information about Game*

This game was developed by Cauldron HQ and published by Activision Value. It was released in November 2007 and February 2008 for Microsoft Windows, Xbox 360 and PS3. It is a first-person shooter game. Its ESRB rating is “M” and it has been banned in several countries due to its extreme violence and gruesome dismemberment scenes.

b) *Context*

The player is a mercenary (thus the name “Soldier of Fortune”). Together with a partner he is hired by an unknown government agency to retrieve a Chinese government official who allegedly possesses sensitive information and escort him safely. However, his partner betrays him and a series of international incidents stem from this. The player thus has to go to places in the Middle East as well as Burma or Russia to track down the enemies and restore the global order. It is not clear who the character is working for and it is not clear whether the fighting takes place in the context of an armed conflict or not.

¹⁰¹ See FN 14.

¹⁰² See FN 14.

¹⁰³ See FN 47.

c) *Violations Encountered and Legal Analysis*

However, what is clear is that the characters in the game match the criteria of mercenaries as defined by the United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989.¹⁰⁴ The Convention establishes that the recruitment, use, financing and training of mercenaries violate principles of international law¹⁰⁵ and should be considered as offences of grave concern to all States and that any person committing any of these offences should be either prosecuted or extradited.

In other scenes, the player can chose to destroy civilian property such as buildings and cars unpunished. This is a violation of the obligation of distinguishing between civilian objects and military objectives and directing the attacks only towards military objectives.¹⁰⁶

2.1.18 Tom Clancy Rainbow 6 Vegas

a) *General Information about Game*

This game was developed by Ubisoft Montreal and published by Ubisoft. It was released for PS3 and Xbox 360 in March 2008 and for Microsoft Windows on April 2008. It is first-person tactical shooter game. Its ESRB rating is "M" and its PEGI rating is over 16 years old.

b) *Context*

This game revolves around the actions of the Rainbow-Six Team, to counter a series of terrorist attacks. According to the novel by Tom Clancy, on which this game is based, Rainbow is an international counterterrorism operation hosted by NATO and funded by money of the U.S. Department of Interior. The base of operations for Rainbow is located in Hereford in the United Kingdom (home to Special Air Services). Most of the characters in Rainbow are American or British, however, the NATO countries of France, Germany, Canada, Italy and Spain, plus Israel have at least one representative each. Clancy describes the structure of Rainbow as having one Director, who oversees the entire operation, and one Deputy Director, who is second in command. The Director is from the U.S. and the Deputy Director is British. The Rainbow Six team is deployed during terrorist crises when they are called upon for help from another country. The name Rainbow Six depicts the collaboration between the counter-terrorist unit "Rainbow" and the British intelligence unit "MI-6".¹⁰⁷

In the game Rainbow Six Vegas 2, the Rainbow Six multinational task force, which comprises counterterrorism experts from around the globe, is deployed to Las Vegas where, allegedly, the terrorist mastermind Alvarez Cabrero is hatching a scheme to destroy the city.

¹⁰⁴ See FN 41.

¹⁰⁵ Such as such as those of sovereign equality, political independence, territorial integrity of States and self-determination of peoples. See: Preamble of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989.

¹⁰⁶ See FN 17 and FN 48.

¹⁰⁷ http://en.wikipedia.org/wiki/Tom_Clancy%27s_Rainbow_Six

The objective of the player and its team is to stop Cabrero from destroying Las Vegas and to put an end to the terrorist threat. In the game, the members of the Rainbow Six team include both members and non-members of NATO. From the scenes and context it is difficult to know whether the situations amount to armed conflicts (whether international or non-international) or not. It is not clear whether the terrorist acts take place within the situation of armed conflict, and it is unclear whether the terrorist acts can be attributed to a specific State or to an organized armed group. The situations will be analyzed in the context of an armed conflict, that is, applying both IHL and IHRL and without the existence of an armed conflict, that is, applying only IHRL.

c) *Violations Encountered and Legal Analysis*

One of scenes taking place in the power station portrays a scenario where civilians have been taken as hostages. The player begins shooting at the hostage takers and the civilians manage to escape. As the civilians are escaping, the player fires and kills them. The mission immediately ends with a message stating that there were too many civilian victims and that the player will be removed from command. The taking of hostages is prohibited by IHL.¹⁰⁸ Directing attack at civilians is also a violation of IHL.¹⁰⁹ Under IHRL, States have the obligation to respect the right to life and the arbitrary deprivation of life is a violation of this right. The use of lethal force by law enforcement officials is only allowed as a tool for self-defense, the defense of others, or to prevent serious crimes involving risk to life. A deprivation of life is not arbitrary when it is used for these lawful purposes. However, it must also be the least harmful means *vis-à-vis* the purpose and proportionate.¹¹⁰

As is apparent from the failed mission, what the player should have done is to shoot the soldiers holding the civilians hostages and release the hostages without killing them. The fact that the player fails the mission when he does not comply with this is a positive element in the game, as the player is punished for a conduct that violates both IHL and IHRL.

Another scene portrays soldiers executing civilians. The characters are far away, thus it is difficult to see the action very clearly. Seemingly however, the civilians are tied up. The soldiers shoot them in the back. As explained above, attacking civilians is a violation of IHL¹¹¹ and both IHL and IHRL prohibit summary executions.¹¹² If these acts are performed by law enforcement officials, outside the context of an armed conflict, they would thus constitute a violation of the right to life.¹¹³ Even though it is seemingly not the player who is committing the violation, it would be recommendable to avoid putting these kinds of scenes in video games as they could mislead players in terms of what is allowed to be done.

¹⁰⁸ See FN 32.

¹⁰⁹ See FN 47.

¹¹⁰ See FN 19.

¹¹¹ See FN 47.

¹¹² See FN 74.

¹¹³ See FN 19.

Another scene portrays a person, seemingly a civilian, who is sitting down on the ground apparently unarmed, perhaps injured. A soldier (the player) is pointing his gun at him and the person raises his hands apparently as a sign of surrender. He moves slowly and starts getting up, he holds his leg as though he were injured; he starts walking towards the soldier and all of a sudden takes out his gun and tries shooting at the soldier. The player realizes this and shoots the person before he gets a chance to shoot back. Under IHL, civilians are protected against attacks and the effects of hostilities, but they do not have the right to participate in hostilities. A civilian loses his protected status as soon as he begins participating directly in hostilities. In this case, the person was clearly participating in the hostilities and thus, shooting him does not amount to a violation of IHL. In fact, if captured, the person can be punished for his participation in the hostilities. Additionally, the behaviour of this person would amount to an act of perfidy,¹¹⁴ which does, however, not constitute a war crime.¹¹⁵

Under IHRL, law enforcement officials may only use lethal force as a last resource and in certain scenarios: for self-defense, to defend others, and to prevent serious crimes involving risk to life.¹¹⁶ In this case, the person had the clear intention to shoot at the soldier and thus the soldier's reaction was in self-defense (or to defend the other soldier). This does not amount to a violation of human rights law.

2.1.19 Tom Clancy Splinter Cell Double Agent

a) General Information about Game

This game was developed by Ubisoft Shanghai, Ubisoft Montreal, Ubisoft Ancecy & Ubisoft Milan and published by Ubisoft. It was released for PS2, PS3, GameCube, Xbox, Xbox 360, Microsoft Windows, Wii and Mobile phone on October 2006. It is single-player stealth game. Its ESRB rating is “M” and its PEGI rating is over 18 years old.

b) Description of the Scenes Chosen

The player takes the role of Sam Fisher a “Third Echelon’s primary Splinter Cell operative.”¹¹⁷ Third Echelon is a subagency of the NSA (National Security Agency)¹¹⁸, “an elite team of strategists, hackers, and field operatives who collect intelligence to anticipate and respond to crises of information warfare.”¹¹⁹ “The NSA launches a top-secret initiative,

¹¹⁴ Art 37 AP I prohibits acts of perfidy. Acts of perfidy are defined as acts “inviting 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, shall constitute perfidy. The following acts are examples of perfidy: (a) the feigning of an intent to negotiate under a flag of truce or of a surrender; (b) the feigning of an incapacitation by wounds or sickness; (c) the feigning of civilian, non-combatant status; and (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.”

¹¹⁵ Acts of perfidy are not included in the list of war crimes of Art. 8 Rome Statute of the ICC.

¹¹⁶ See FN 19.

¹¹⁷ See Ubisoft official website: <http://splintercell.uk.ubi.com/introduction.php> (last visited on 25/03/09).

¹¹⁸ <http://www.nsa.gov/> (last visited on 25/03/09).

¹¹⁹ See Ubisoft official website: <http://splintercell.uk.ubi.com/introduction.php> (last visited on 25/03/09).

Third Echelon, a return to classical methods of espionage powered by the latest technology for the aggressive collection of stored data. No longer filtering the world through satellites and antennas, Third Echelon agents physically infiltrate dangerous and sensitive enemy locations to collect the required intelligence by whatever means necessary.” The Ubisoft website states what is the idea of the actions in the game when listing the “Third Echelon agents’ prime directives”. One of them reads as follows: “To keep all operations invisible to the public eye.”, and another: “To work outside the boundaries of international treaties, but know that the U.S. will neither acknowledge nor support their operations.”¹²⁰

Sam Fisher has to infiltrate into a criminal-armed group, called “JBA – James Brown Army” in order to get information and carry out other operations for his employer, the NSA. In order to continue his missions he has to gain trust from JBA – may however lose trust from the NSA – e.g. if he kills civilians. The set up of the game suggests that the player acts within a counter terrorist operation, although parts of the game are located in a conflict zone (Democratic Republic of Congo). Since the classification is not clear, both, IHL and IHRL will be applied.

c) *Violations Encountered and Legal Analysis*

In “II. Mission 2 - USA Kansas Ellsworth Federal Penitentiary”, the player, as Sam Fisher, enters the prison to free an important contact person, Jamie Washington. In the chosen scene the player attacks one of the prison wardens, threatens him to get a code and has then the choice whether to kill the warden or let him go. This scene is interesting, since it leaves the player the choice whether he/she wants to kill the warden or not. If the player opts to kill the man, he/she is punished with a lost of trust. However, even if the guard is not killed, a prison guard is considered as civilian under IHL and as a person with the same rights as any other person under IHRL. Treating him inhumanely is prohibited under both IHL and IHRL.¹²¹

Next to individual criminal responsibility, the U.S. is responsible for violations of International Law committed by Sam Fisher, as latter would be considered to be an agent of the US government, because even if he acts illegally, he is apparently instructed by the NSA and takes orders from a NSA colonel, even if the government pretends not to know (“the US will neither acknowledge nor support their operations”). International human rights bodies have repeatedly drawn states attention to their responsibility for acts of paramilitary groups acting outside the legal framework, if the state did not do anything against such acts or even consented with it.¹²²

¹²⁰ See Ubisoft official website: <http://splintercell.uk.ubi.com/introduction.php> (last visited on 25/03/09).

¹²¹ Such treatment is considered inhuman treatment. Mock executions can even be considered as amounting to torture. See FN 15 and FN 29.

¹²² A State incurs responsibility for any breach of an international obligation, such as the prohibition of torture under international human rights and international humanitarian law, which can be attributed to it (see Draft Articles on State Responsibility). This will be the case where the act has been committed by the organs of the government, such as the armed forces. Persons or entities not performing public functions may equally be

In the next mission “III. Mission 3 - USA New York City JBA Headquarters” Sam Fisher is in a similar dilemma when he has to choose in the last scene of this mission whether to kill a pilot, Cole Yeager, captured by JBA. He can either choose to kill the pilot or not. If he kills him he gains more trust of JBA, which facilitates the continuation of the game, but he loses some trust of the NSA. If he does not kill the pilot, a member of JBA kills him immediately. According to the person who played the game for the purpose of this project, it makes the continuation of the game easier if the pilot is killed. The message sent in this scene is that it does not really matter whether you kill him or whether he will be killed by another person. Both, in IHL and IHRL the killing of a captured person is a violation, notwithstanding the status of the person (civilian, captured combatant, prisoner of war).¹²³

In the next mission, “Mission 4 - Sea of Okhotsk 200 km off the Siberian Coast”, it is again not clear in what context the events take place. Sam Fisher has the order from both JBA and the NSA to “take out the crew” of a ship. In a situation of an armed conflict such action might be justified, if the ship, the Rublev, can be considered as a military objective, according to IHL, whose destruction would offer a direct military advantage and would not cause excessive injury or loss of civilian lives. However, in the scene, it is not always clear, whether the crew is civilian or whether they are combatants. In law enforcement contexts outside an armed conflict, killing the crew of a ship without any warning, would be considered as arbitrary killings and as such as a violation of any human rights treaty.¹²⁴

In “Mission 5 - China/Shanghai”, the player goes on with such violations of IHRL: in a hotel a person is torn over a railing and thrown down into an abyss. The order from both JBA and the NSA is just: infiltrate the hotel without launching an alarm. This purpose apparently justifies the killing of a person.

In “Mission 7 - Mexico Cozumel”, Sam Fisher has again the choice whether to kill or not a steward of the cruise. If he kills the man, he loses some trust of the NSA as “punishment”. In the next mission, “Mission 8 - USA New York City JBA Headquarters”, Sam Fisher can then decide whether he wants this cruise, the Cozumel, presumably with all the people on board,

imputable. If the State acknowledges and adopts the conduct of private persons as its own, it may be held responsible for violations. Similarly, it is responsible for violations by others who have acted under the direction, instigation or control of state organs, i.e. agents of the State.” Beyond such direct links, international jurisprudence is not clear on the nature and degree of State ‘control’ that triggers responsibility for the conduct of armed groups. Following the decision of the International Court of Justice (ICJ) in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), however, it appears that the ICJ will look to see if the State had “effective control” of the armed group (following the test set out in the Military and Paramilitary Case). State responsibility also arises out of “due diligence”. International human rights law recognizes that, in addition to the negative obligations imposed upon States to refrain from violating the human rights of those within its jurisdiction, States also have a positive obligation to exercise “due diligence” in securing the enjoyment of human rights against violations by non-state actors. States are required to “prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. When they fail to do so, they may be held responsible for their omission.

¹²³ See FN 15 and 19.

¹²⁴ See FN 19.

to be blown up or not. There are more such decisions in “Mission 9 - Democratic Republic of Congo, Kinshasa” and in “Mission 10 - USA New York City JBA Headquarters”, Sam can decide to either kill or not a CIA agent in Kinshasa, and later his own boss who is captured in the JBA headquarters. The only “sanction” is a slight change in the outcome of the game; the decision to kill thus basically depends on a purely strategic assumption, rather than on the awareness that in reality, such actions are restricted and regulated by international law.

2.1.20 True Crime Streets of L.A.

a) General Information about Game

This game was developed by Luxoflux and published by Activision. It was released for Microsoft Windows, PS2, Xbox, Mac, GameCube, and Mobile phone on November 2003. It is third-person shooter game. Its ESRB rating is “M” and its PEGI rating is over 16 years old.

b) Context

The player assumes the role of Nick (Kang) Wilson, a young, half-Chinese-American detective and the living bane of every police chief, because of his highly unorthodox and destructive means of catching criminals. When the game begins, Kang returns to Los Angeles after being suspended for going after a suspect and disobeying a direct order from his superiors.

There is no indication that the game takes place in a conflict situation. Therefore no IHL applies. However, IHRL, applicable also to law enforcement and police operations, applies.

c) Violations Encountered and Legal Analysis

In the first stealth mission of the game, the basic idea is not to be seen for too long by anyone. The player thus hides behind various objects, waiting for his victims to turn their back to him, then run up and hit. If the targeted person sees the player, the latter must shoot him with a tranquilizer dart. The example given in the game is actually quite exemplary: the player gets punished if he kills persons during the operation and get plus points if he “only” injures them - that means the game is somehow incorporating the principle of proportionality.¹²⁵

Another scene portrays “harsh interview methods” exercised by a police agent during his normal duties. In IHRL, torture, inhuman or degrading treatment is forbidden,¹²⁶ so such “harsh methods” would constitute a violation. Next to individual criminal responsibility, the state would be responsible for the police agent’s acts, even if he had acted against instructions, if the state does not provide sufficient supervision and measures to prevent and punish such violations.

¹²⁵ See FN 19.

¹²⁶ See FN 29.

Conclusions

The most frequent violations encountered in the games were violations of the principles of distinction and proportionality. They include extensive destruction of civilian property and/or injury or deaths of civilians, not justified by military necessity, as well as intentionally directing attacks against civilians or civilian objects. Many of the attacks against civilian objects were directed at religious buildings such as churches and mosques. In only one of the games, attacking a church ended in mission over, but the same did not happen when attacking other buildings dedicated to religion, namely mosques. In another game, the destruction of a church only merited a reprimand and an expression hoping that such act could be "understood" by their allies.

Another common violation was cruel, inhuman or degrading treatment or torture. Most of the times, these violations occurred in the context of an interrogation and in many cases, they ended in an extrajudicial execution. For games taking place outside the context of an armed conflict, arbitrary deprivations of life was the most common violation, generally involving alleged terrorists. In only one of the games, the "excessive" killing of civilians was punished by removing the player from command, while in another game, in certain missions, the player was punished with a lost of trust if he killed a certain character in the game. In another game, the player was punished if he killed persons during certain operations and got bonus points if he "only" injured them. This shows us that there are different ways to punish the player, and that this can add an element of strategic thinking to the game, while at the same time incorporating basic rules of IHRL. Nevertheless, the punishment of crimes of this nature should apply to the entire game and not be limited to certain scenes. In the context of armed conflict situations, extrajudicial executions were equally present in the games analysed.

Direct attacks against civilians were also frequent violations, the victims mostly being hostages or civilians present in a village who were not mere casualties but rather directly targeted. In only one of the games was this conduct punished.

Certain games failed to comply with the principle of distinction, mostly by using area weapons such as cluster munitions or by conducting airborne operations which did not allow distinguishing combatants from civilians on the ground.

Three of the games we analyzed included cases of civilians participating unlawfully in hostilities, whether as mercenaries or as members of private military or security companies.

Shooting injured soldiers was also seen in a few games, as well as the use of illegal weapons and causing unnecessary suffering and superfluous injury through the use of the same.

3. Recommendations

Firstly, we would recommend to game developers to avoid creating scenarios that easily lead to violations of IHL, such as the so called ticking-bomb scenario. In real life, as in video or computer games, such situations create a sense of urgency which, lacking precise guidelines for the conduct of an operation (which is the case in most video and computer games), could lead players to think that any mean to obtain the objective is possible and allowed. Following this logic, it would be very useful if developers would incorporate more specific rules on how to conduct an operation in their games, in terms of the weapons allowed, the behaviour allowed, the military targets sought, the degree of collateral damage permitted, etc. The message of the scenes should never be that everything is allowed, or that it is up to the player to decide what is right and what is wrong. In real life, this is not the way it works. In real life, there are rules and there are sanctions for violations of these rules. It is not up to the soldier or to the law enforcement agent to decide what is right and what is wrong. The events in Abu Ghraib have shown, what such "private justice", even if carried out by well trained and high ranking officers, may lead to.¹²⁷

As mentioned in the introduction, we had originally only chosen games taking place nowadays in the very near future, to which the 1949 Geneva Conventions apply. However, some of the games situated earlier in time contained important violations: we decided to include them, based on the fact that even before the adoption of the 1949 Geneva Conventions, there existed IHL treaties regulating the behaviour displayed, and also because the average player will normally not be thinking about whether some of the actions which may have been allowed in a previous moment, could now be forbidden. The player will therefore practice and learn conducts that nowadays amount to serious violations of IHL, ICL or HRL. In this sense, our second recommendation to developers of games that take place in historical contexts is that they place them in a far enough away past (e.g. Gladiators in ancient Rome) that allows the player to clearly distinguish the situation from one to which the current rules of IHL and IHRL would apply. Otherwise, the games should comply with the principles of IHL and IHRL.

Regarding the games which include characters which are members of Private Military and Security Companies, we would like to simply point out that the issue of how to bind them to IHL is a subject of current controversy and which reflects the actual difficulties in the implementation of IHL in today's conflicts. In this respect, we would like to discourage these characters from being allowed to commit acts which would violate IHL unpunished. It is important to raise awareness that states or whoever hires private/military security companies remain responsible for ensuring that the relevant IHL standards are met. Considering that IHL is a body of law which is constantly developing and adapting to new realities, current developments should not be ignored when designing new games.

¹²⁷ Physicians for Human Rights, Broken Laws, Broken Lives, Medical Evidence of Torture by US Personnel and Its Impact, June 2008, http://brokenlives.info/?page_id=69 (last accessed 26 March 2009).

In general, we believe and we have seen, in the course of playing different games, that punishing illegal conduct in video and computer games can be done and is, in fact, already done in some of the most popular games. However most of the times this is done partially, that is, limited to specific scenes or to only a few violations, allowing the commission of many others. The incorporation of rules of IHL and IHRL in a consistent manner in video and computer games is not only possible, but would surely render the games more interesting and would create players with a more accurate perspective of what is lawful and what is not in real armed conflict situations or law enforcement operations.

Annex I

List of important abbreviations and names

IHL	International Humanitarian Law
ICL	International Criminal Law
IHRL	International Human Rights Law
IAC	International Armed Conflict
NIAC	Non International Armed Conflict
ICC	International Criminal Court
Rome Statute	Rome Statute of the International Criminal Court
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
SCSL	Special Court for Sierra Leone
IACtHR	Inter American Court for Human Rights
UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ECtHR	European Court for Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984
CPT	European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment of 26 November 1987
ICRC	International Committee of the Red Cross
GC I	Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Entry into force, 21 October 1950.
GC II	Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949.
GC III	Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
GC IV	Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.
1949 Geneva Conventions	Conventions I, II, III and IV of 12 August 1949.
API	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
1977 Additional Protocols	Protocol I and II to the Geneva Conventions of 12 August 1949
1907 Hague Convention	Convention (IV) respecting the Laws and Customs of War on Land. The Hague, 18 October 1907.
Annex to the 1907 Hague Convention	Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.
PMC	Private Military Company

Annex II

Classification of the Games

24, the Game	Unclear, allegedly a fight against terrorism. Could be in the context of an IAC or NIAC.
Army of Two	Armed conflict (IAC or NIAC) indications of mercenary activities.
Battlefield Bad Company	IAC
Brothers in Arms, Hell's Highway	IAC, Second World War
Call of Duty 4 (Modern Warfare)	Armed conflict (IAC or NIAC), near future.
Call of Duty 5 (World at War)	IAC, Second World War
Close Combat, First to Fight	IAC
Company of Heroes	N/A
Conflict Desert Storm	IAC
Far Cry 2	NIAC
World in Conflict	IAC
Frontlines: Fuel of War	IAC, near future
Ghost Recon Advanced Warfighter 2	NIAC-IAC
Hour of Victory	IAC
Medal of Honour Airborne	IAC
Metal Gear Soldier 4	Armed conflict (IAC or NIAC), elements of science fiction and operations performed by PMC
Soldier of Fortune	Unclear, indications of mercenary activities
Tom Clancy Rainbow 6 Vegas	Unclear
Tom Clancy Splinter Cell Double Agent	Unclear
True Crime Streets of L.A.	No indication of armed conflict