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Course Material

**One Year Advanced Diploma in International
Humanitarian Law**

**1.2 Protection of Victims of War and Armed
Conflicts**

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3 The Temporal and Geographic Reach of International Humanitarian Law

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(p. 57) 3 The Temporal and Geographic Reach of International Humanitarian Law

1. Introduction

Understanding the geographical and temporal scope of international humanitarian law (IHL) is a fundamental component in the process of applying IHL norms to armed conflicts. Knowing where and when the provisions of IHL start—and cease—to apply is vital to ensuring that the rules are respected, and to identifying where other rules of international and domestic law are pertinent or more relevant. This chapter canvasses both the temporal and geographical scope of application of IHL, charting when and where the law applies and when and where it is deemed to cease applying. In doing so, it examines some of the more complex issues raised by the temporal and geographical aspects of IHL, such as the changing level of intensity of hostilities and the geographical location of participants in armed conflict.

2. The Temporal Scope of IHL

As a general rule, IHL applies from the commencement of hostilities, whether such hostilities are international or non-international in character. In international armed conflicts (IACs), situations of belligerent occupation also trigger the applicability of IHL, even if there are no active hostilities. However, there are different thresholds applicable in international and non-international armed conflicts (NIACs).

A. Start of Application of IHL

1. International armed conflicts

In IACs, IHL applies as soon as an armed conflict exists between states. Common Article 2 of the four Geneva Conventions of 1949 states that the Conventions apply to ‘all 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’. A formal declaration of war is no longer required. The Geneva Conventions dispensed with this requirement, previously outlined in article 1 of Hague Convention (III) of 1907 Relative to the Commencement of Hostilities, that ‘the contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form (p. 58) either of a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war’.¹

Given that IHL applies as soon as an armed conflict exists between states, it is necessary to define ‘armed conflict’. Chapter 2 ‘Classification of Armed Conflicts’ in this book explores this concept in more detail, but for the purposes of this chapter it is useful to note that the test for determining the existence of an IAC was outlined by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* Jurisdiction decision: ‘an armed conflict exists whenever there is a resort to armed force between States’.² Any time there is ‘any difference arising between two states and leading to the intervention of members of the armed forces’,³ an IAC will be deemed to exist. Additional Protocol I to the Geneva Conventions (API)⁴ adds so-called ‘wars of national liberation’ to the categories of IAC, as being those armed conflicts ‘in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination’.⁵

In situations of belligerent occupation, IHL is applicable to all situations of total or partial belligerent occupation, even if the occupation meets with no armed resistance.⁶ Territory will be considered occupied when it is placed under the authority of a hostile army.⁷ This determination involves a bipartite objective test: the establishment of authority by the occupying force over the territory, and the ability of the occupier to actually exercise authority over the territory.⁸ Once territory is considered occupied, IHL relating to belligerent occupation is applicable.⁹

2. Non-international armed conflicts

Determining when IHL starts to apply in situations of NIAC is slightly more difficult than for IACs. The first treaty provision regulating NIAC was Common Article 3, which did not explicitly state any temporal grounds for application—rather, it was only to apply in ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’. Therefore, it is necessary to determine when exactly an armed conflict (p. 59) of a non-international character is deemed to exist. The current accepted definition is outlined in the *Tadić* Jurisdiction decision, which states that a NIAC exists whenever there is ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’.¹⁰ There are thus two elements to this test: the intensity of the hostilities, and the level of organization of the groups involved.¹¹

Additional Protocol II (APII) sets the threshold higher for its applicability. For an APII NIAC to exist, the conflict must:

... 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.¹²

Therefore, in addition to the intensity and organization criteria outlined in *Tadić* and required for application of Common Article 3, APII will only apply where the organized armed group maintains some territorial control to the exclusion of the High Contracting Party (ie the state). Furthermore, APII only applies to armed conflicts taking place between the armed forces of a state and organized armed groups; it does not apply to armed conflicts taking place between organized armed groups that do not also involve a state.

Once a NIAC is deemed to have started, and depending on what kind of NIAC it is, IHL will be applicable. However, when exactly IHL will begin to apply in NIACs is often difficult to ascertain, as internal tensions and disturbances will likely precede the conflict. For instance, the Arab Spring of 2011 started as a series of widespread public protests in states such as Libya, Syria, Egypt, and Tunisia.¹³ In Syria, protests were met with military force in an attempt to suppress the demonstrations.¹⁴ In response, the Syrian protestors gradually became more organized, changing from protestors and rioters to more organized armed opposition groups; by July 2011, the Free Syrian Army (FSA) had proclaimed its formation.¹⁵ By May 2012, the FSA claimed at least 40,000 members and was able to launch systematic attacks against the military assault launched against them by the Syrian government.¹⁶

Determining when the violence in Syria became an armed conflict for the purposes of the application of IHL was difficult. An examination of the facts on the ground in November 2011 by a United Nations Independent International Commission of Inquiry found that, despite the deaths of nearly 4000 Syrian civilians and the widespread military operations taking place throughout Syria, they were unable to verify whether the FSA maintained a (p. 60) sufficient degree of organization, or whether the hostilities were of such an intensity, as to warrant the designation of NIAC and the application of IHL.¹⁷ The Commission’s second¹⁸ and third¹⁹ reports, in February and August 2012 respectively, noted the

increasing intensity and violence of the situation in Syria, and the increasingly organized opposition groups, but only in its third report was any mention made of the possible applicability of IHL, even though there was no express designation of the conflict as being non-international in character.²⁰ This came after the July 2012 report from the International Committee of the Red Cross (ICRC) where it stated that it believed that an armed conflict existed in Syria and that IHL was applicable throughout the state.²¹ When IHL begins to apply in NIACs can often be difficult to ascertain, and requires careful examination of the facts on the ground.

B. End of Application of IHL

1. General rule: cessation of active hostilities

As a general rule, in both IACs and NIACs, IHL will cease to apply when there is a 'general close of military operations'.²² This concept of a close of military operations is understood to mean when there has been the adoption of a 'general or definitive armistice, of a general capitulation by a belligerent, or at the point in time that witnesses any form of *debellatio* [total defeat]'.²³

While a seemingly straightforward statement, in practice determining when an armed conflict has ceased can be difficult. There have, of course, been situations where military operations have been terminated at a precise date and time, pursuant to a peace treaty or armistice treaty. For example, Germany signed documents indicating its unconditional surrender at the end of the Second World War; the instrument included a sentence stating that:

... the German High Command will at once issue orders to all German military, naval and air authorities and to all forces under German control to cease active operations at 2301 hours Central European time on 8 May and to remain in the positions occupied at that time. No ship, vessel, or aircraft is to be scuttled, or any damage done to their hull, machinery or equipment.²⁴

(p. 61) However, such clear-cut situations, where military operations are terminated at precise times, are infrequent. For example, despite definitive statements as to the 'end' of the conflict in places such as Iraq²⁵ and Afghanistan,²⁶ active hostilities in those locations continued for some time afterward.²⁷ In NIACs, the situation is even more complex. Should the *Tadić* criteria regarding the commencement of hostilities be applied to the cessation of hostilities? That is to say, if the NIAC, once started, falls below its initial triggering criteria of group organization and intensity of hostilities, is IHL also suspended? Such an approach could potentially see IHL applicable one day and non-applicable the next, depending on whether hostilities of a sufficient degree of intensity were taking place at the time.²⁸ This approach seems operationally unworkable and would require parties to the conflict to undertake daily—perhaps even hourly—assessments of active hostilities and group organizational structure, to examine whether IHL was applicable at the time. Indeed, the *Tadić* jurisprudence seems to reject this approach, stating that only when a 'peaceful settlement is achieved'²⁹ will IHL cease to apply. Therefore, lulls in the intensity of hostilities in certain regions will not suspend the operation of IHL. Once the conflict reaches the necessary levels of group organization and intensity of violence, IHL remains applicable, even if the intensity of hostilities falls below the initial threshold required to trigger its application.

However, if one takes the view that IHL, once triggered, applies until a peace settlement is negotiated, different problems arise. NIACs can often become protracted, low-intensity affairs. For instance, the four-decade-long NIAC in Colombia against FARC³⁰ and the ELN³¹ has been, at times, considered an APII conflict³² as well as a Common Article 3³³ conflict. Ongoing, low-level hostilities continued for much of that period, despite efforts to negotiate (p. 62) peace. (A lasting peace was only concluded in 2016.³⁴) To continue to apply APII, or

even Common Article 3, to situations that had for some time fallen well below the threshold for the application of those norms is fraught with problems, such as the potential displacement of international human rights law norms that apply in peacetime.³⁵

Armed conflicts can also be cyclical in intensity. For example, Afghanistan, due to its climate, has seasonal periods of hostilities, colloquially known as 'fighting seasons'.³⁶ Winter snows make the mountainous regions of the country impassable, but as the snows melt in spring, Taliban fighters are able to move more freely and engage in hostilities against the Afghan National Security Forces.³⁷ The winter season, followed by the poppy harvest, generally sees little in the way of active hostilities.³⁸ However, there is a clear intent, certainly on the part of the Taliban, that such a cessation of hostilities is merely temporary and that 'the Islamic Emirate of Afghanistan [the Taliban] has ambitions of continuing the sacred obligation of Jihad with the backing of its Muslim nation until the expulsion of every last infidel invader and establishment of an Islamic government'.³⁹ Indeed, terrorist activities more generally are by their nature sporadic and unpredictable. As such, reaching the requisite threshold of intensity, and determining when the campaign or attacks have permanently stopped, is particularly problematic. This is also because instances of terrorist organizations publicly declaring their intent to cease hostilities are infrequent.⁴⁰

As with determining the beginning of an armed conflict, determining its cessation requires an objective assessment of the facts. It is the actual conduct of the parties on the ground that will indicate whether a conflict has terminated, rather than subjective statements of intent to terminate hostilities.⁴¹

(p. 63) Finally, note should be made regarding temporary termination or suspension of hostilities. Temporary cease-fires are often negotiated by parties to the conflict to allow for further discussions preparatory to permanent cease-fire and for peace treaties to be concluded,⁴² or for reasons such as the removal of the wounded or sick (or shipwrecked) left on the battlefield or in other areas.⁴³ However, these agreements are temporary; as Dinstein notes, 'the pause in the fighting, brought about by a cease-fire, is no more than a convenient juncture for direct negotiations ... a cease-fire in and of itself is, consequently, no harbinger of peace'.⁴⁴ Indeed, the repeated cease-fires and breaches of cease-fires in the Israeli-Palestinian conflict are demonstrative of how cease-fires do not always lead to a complete termination of hostilities and lasting peace.⁴⁵

2. Sui generis rules: occupied territories and persons detained in relation to the conflict

In addition to the general rules on the cessation of hostilities, the law of armed conflict contains specific rules regarding its termination in situations of occupied territory and relating to the detention of persons, such as civilian internees and prisoners of war.

A. Occupied territories

Occupation, as a matter of fact, continues until the territory in question is no longer occupied; that is, when the occupying power no longer exercises effective control in the territory.⁴⁶ The cessation of the law of occupation is different according to different treaties. Article 6 of Geneva Convention IV (GCIV) provides that the Convention ceases to operate on the general close of military operations, except in occupied territory. In occupied territory, GCIV will continue to operate for one year following the general close of military operations,⁴⁷ with a number of its other provisions continuing to bind the occupying power for as long as it exercises the functions of government in the territory.⁴⁸ Furthermore, protected persons 'whose release, repatriation or reestablishment may take place after such dates shall meanwhile continue to benefit'⁴⁹ from the protections of GCIV.

However, the one-year limitation rule outlined in article 6 is not repeated in API, which instead states in article 3(b) that in occupied territory the provisions of the Geneva Conventions and API will only cease to operate on the termination of the occupation. Thus, under API, the operation of the entirety of GCIV is extended to the end of occupation.⁵⁰ The API approach operates on a factual control framework, similar to that of (p. 64) article 42 of the Hague Regulations. That is to say, if the law on occupation comes into effect when the territory is actually placed under the authority of the hostile power, then, logically, the law ceases to operate when the territory is no longer under the authority of the hostile power.⁵¹ The customary status of article 3 of API is 'unclear'.⁵² However, as Kolb and Hyde suggest, in effect the substance of article 3 prevails in the form of article 42 of the Hague Regulations and article 6(3) of the Geneva Conventions—namely that:

... the Hague Regulations apply as long as the occupation lasts, and the rules of the Geneva Convention IV continue to apply to the extent that they are expressive of customary international law. Virtually all substantive rules of occupation law are now considered to be reflected in customary international law. The limitation of Article 6(3) therefore seems now largely obsolete.⁵³

B. End of captivity and detention

For those persons who have been detained in relation to the conflict, IHL continues to apply up until the time of their release or repatriation. For prisoners of war (POWs), article 5(1) of Geneva Convention III (GCIII) provides that POWs are protected under the Convention from the time of their capture until their final release and repatriation.⁵⁴ Similar provisions in Geneva Convention I (GCI) and API cover any other protected persons 'who have fallen into the hands of the enemy'.⁵⁵ For protected persons who have been detained in relation to the hostilities in occupied territory, article 6(4) of GCIV provides that such persons continue to enjoy the benefits of the Convention until their 'release, repatriation or re-establishment'.⁵⁶ This continuing protection is necessary to ensure that no one in a position of vulnerability finds themselves bereft of international legal protections, even if there has been a permanent cessation in hostilities. There have been a number of examples of POWs or protected persons being detained by parties to the conflict long after the termination of hostilities. For example, following the Iran-Iraq War in the 1980s, thousands of detainees from both sides of the conflict experienced significant delays in their repatriation—indeed, the last group of detainees held by Iran was only released in 2003.⁵⁷ The provisions in IHL are a vital measure to ensure that such protected persons remain protected until they are no longer under the control of the adverse party.

(p. 65) 3. End of application of IHL due to denunciation

For the sake of completeness, it is worth noting that IHL's application may be terminated due to a state denouncing the Conventions. All four Geneva Conventions, and the Hague Regulations, contain provisions allowing for denunciation.⁵⁸ Denunciation has the effect of making the treaty no longer in force for the denouncing party. However, the Hague Regulations and the Geneva Conventions outline strict rules regarding denunciation, stating that denunciation will only take effect one year after the receipt of such denunciation by the depositary of the treaty.⁵⁹ Further, if a state currently engaged in an armed conflict denounces the Conventions, such denunciation will not take effect until 'peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated'.⁶⁰ Therefore, states may not denounce the Conventions as a means by which to avoid their treaty obligations. Furthermore, all applicable customary international law obligations will endure,⁶¹ indeed,

given that the vast bulk of the substantive provisions of the Conventions has attained customary status,⁶² there seems little to be achieved by denunciation.

3. Geographical Scope of IHL

The geographical or spatial scope of IHL depends on what kind of armed conflict is taking place—international or non-international.

A. International Armed Conflicts

1. The principle of unity of territory

In IACs, the principle of unity of territory prevails—IHL is applicable throughout the entire territory of the parties to the conflict, including their territorial waters⁶³ as well as the airspace above their territories.⁶⁴ Thus, IHL applies beyond the immediate areas of active hostilities to encompass all the territory under the control of belligerent parties. This ensures (p. 66) that certain situations—like occupied territory, internment camps, or POW detention facilities—remain covered by IHL, even if no active hostilities take place in the immediate vicinity. This was noted by the ICTY in *Tadić*:

Although the Geneva Conventions are silent as to the geographical scope of international 'armed conflict', the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to conflict, not just to the actual vicinity of the hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the prisoners of war and civilians, are not so limited.⁶⁵

Thus, areas where prisoners of war or other protected persons are detained are covered by IHL. In addition to territory under the jurisdictional control of the belligerent parties, IHL also applies in areas where there are 'actual hostilities or relationships between belligerents outside the territory of the belligerents'.⁶⁶ IHL will therefore apply on the high seas and in the exclusive economic zones (EEZ, defined as 200 nautical miles from the low-water-mark baseline of a coastal state⁶⁷), including the EEZs of neutral states.⁶⁸

2. Air and outer space and the high seas

As noted above, IHL applies to the airspace over the territorial lands and waters of the belligerent parties. There is no international treaty that delimits national airspace, but in practice national airspace is considered to be all airspace above the territorial lands and waters of a state that is capable of generating aerodynamic lift and thus sustaining powered flight. Airspace is perhaps best understood as what it is not—that is, national airspace (and thus sovereignty over such space) ends where outer space begins. The Fédération Aéronautique Internationale proposes the delimitation between airspace and outer space at the so-called Kármán Line—sixty-two miles (or 100 km) from sea level.⁶⁹ All territorial airspace would be considered as coming within the purview of IHL, as would any hostile acts that take place in international airspace (that is, airspace superadjacent to the high seas).⁷⁰

Existing international law treaties place limitations on certain kinds of hostile activities in outer space. Article IV of the 1967 Treaty on Outer Space⁷¹ obliges parties to the treaty (p. 67) not to place in orbit any objects carrying nuclear weapons or any other weapons of mass destruction, or to install such weapons on celestial bodies, or otherwise station them in outer space. Furthermore, parties to the treaty are under an obligation to use the moon and other celestial bodies 'exclusively for peaceful purposes'.⁷² Additional regulation, in the form of the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies,⁷³ reaffirms the principles of the 1967 treaty and prohibits the threat or use of force either on the moon (or other celestial bodies in the solar system other than

Earth) or from the moon (in relation to Earth or other human-made spacecraft).⁷⁴ However, none of the extant treaties prohibit the use of conventional weapons in outer space—only weapons of mass destruction, such as nuclear weapons, are prohibited. Outer space must therefore be considered as coming within the geography of armed conflict and within the purview of existing IHL rules.⁷⁵

Armed conflict may also occur on the high seas—that is, all waters that are not part of a coastal state's territorial sea, archipelagic waters, or internal waters. With regards to armed conflict on the high seas, note must first be made of article 88 of the 1982 United Nations Convention on the Law of the Sea, which states that 'the high seas shall be reserved for peaceful purposes'.⁷⁶ Thus, any acts of hostilities on the high seas would seem to violate article 88 of the Law of the Sea Convention. However, state practice⁷⁷ and the writings of experts⁷⁸ would suggest that an overly literal application of article 88 is unwarranted. Indeed, the most recent definitive statement of the existing law of naval warfare, the *San Remo Manual on the International Law Applicable to Armed Conflicts at Sea*, expressly rejects an interpretation of article 88 prohibiting naval warfare on the high seas.⁷⁹ The high seas and the seabed under the high seas are therefore legitimate theatres of war and governed by IHL.⁸⁰

3. Special areas—hospital zones and neutralized zones

IHL provides that certain areas within the territory of a party to the conflict (or in any other territory) may be rendered off-limits to military activity, through designation of the area as a demilitarized zone, a neutralized zone, a non-defended locality (or safe zone), or a hospital or safety zone. Thus IHL provisions and protections still apply, but these zones are not to be made the location of active hostilities.

Non-defended localities can be any town, village, dwelling, or building which is declared to be an undefended place.⁸¹ Non-defended localities are open to occupation by the adverse (p. 68) party,⁸² but are immune from attack provided that all combatants and mobile military equipment are evacuated from the locality;⁸³ that no hostile use is made of fixed military installations or establishments within the locality;⁸⁴ that no acts of hostility are committed by the authorities or population within the locality;⁸⁵ and that no activities in support of the hostilities take place within the locality.⁸⁶ The presence of the police force or of medical units of the adverse party, or of enemy sick and wounded, does not result in the loss of a locality's non-defended status.⁸⁷ Undefended localities may be established by unilateral act by any of the parties to the conflict; it is not necessary for all parties to the conflict to agree to them being established. While attacking undefended localities is contrary to IHL, respect for the rule has not always been absolute. A recent example was seen in the conflict in the former Yugoslavia, where the UN established a number of safe zones,⁸⁸ all of which were, by the end of the conflict, attacked and occupied. One of these safe areas—Srebrenica—was the site of the murder of over 8000 Bosnian Muslims.⁸⁹

Hospital and safety zones may also be established by parties to the conflict—though these zones require agreement by all parties. Article 23 of GCI and article 14 of GCIV provide that parties to the conflict may establish, both in their own territory and in occupied territory, hospital zones and localities to ensure protection for the wounded and sick, and for medical personnel and others who tend to the wounded and sick. While article 23 of GCI covers the wounded and sick in armies in the field, article 14 of GCIV goes further and provides protection for aged persons, children under fifteen, expectant mothers, and mothers of children under seven years of age. Such safety zones may also be established on the high seas; one such zone was established during the Falklands/Malvinas conflict in 1982. This so-called 'Red Cross Box' was approximately twenty nautical miles in diameter and enabled

hospital ships to maintain their position and assist in the transfer of British and Argentinian wounded.⁹⁰

Finally, neutralized or demilitarized zones may also be established by parties to a conflict. Unlike undefended localities, demilitarized or neutralized zones are not open to occupation by adverse parties. The scope of the provisions is slightly different in each case. In GCIV, article 15 refers to neutralized zones, which can be established, by agreement of the parties, with the intention to 'shelter from the effects of war ... wounded and sick combatants and non-combatants [and] ... civilian persons who take no part in hostilities, and who, while they reside in these zones, perform no work of a military character'.⁹¹ Demilitarized zones are outlined in article 60 of API and are intended to protect civilians living within such zones from attack by parties to the conflict. The provisions for establishing a demilitarized zone are similar to those for an undefended locality; however, demilitarized zones can (p. 69) only be created by agreement of the parties to the conflict. As the ICRC Commentary to the Protocols notes, the 'essential character of the zones created in Article 60 ... [is] that they have a humanitarian and not a political aim; they are specially intended to protect the population living there against attack'.⁹² Demilitarized zones in API are thus to be distinguished from demilitarized zones that have been established pursuant to an armistice treaty⁹³ (or indeed, any treaty⁹⁴), from zones or areas which have been designated as *permanently* neutral,⁹⁵ or from zones established as 'buffer' zones between belligerent parties.⁹⁶

4. The law of neutrality and IHL

On the outbreak of hostilities, the law of armed conflict applies to those states that are the belligerent parties in the conflict. All other states must determine whether to become involved in the hostilities, and thus become a co-belligerent state, or else refrain from becoming involved in the hostilities.⁹⁷ For those states that refrain from involvement in hostilities, the law on neutrality will apply. Specific rights and duties attach regarding neutrality, both for the state that chooses neutrality and for belligerent parties to the conflict. The law of neutrality provides that the neutral state has a right to remain separate from the hostilities, and not be adversely impacted by such hostilities. This is given practical effect in the extant laws on neutrality—the 1907 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land⁹⁸ and the 1907 Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War.⁹⁹ Article 1 of Hague Convention V provides that the territory of a neutral state is inviolable; it is prohibited to conduct any hostilities on the territory of a neutral state, including the transport of troops or munitions through neutral territory.¹⁰⁰ The rules on neutrality apply to neutral land, as well as territorial waters and airspace.¹⁰¹ However, to enjoy these benefits, neutral states must fulfil certain duties. A neutral state must abstain from participating in (p. 70) the conflict, either directly or indirectly, on behalf of any of the parties to the conflict. If it wishes to remain neutral, it may not provide any military assistance to parties to the conflict, whether through supply of personnel, material, or financial aid.¹⁰² The prohibition on aid applies only to acts of the neutral state which are 'of military relevance to the belligerents'.¹⁰³ Furthermore, states may make political statements criticizing one party or the other without violating the law of neutrality.

Neutral states are also under an obligation to ensure that their territory remains neutral. As well as abstaining from participating in the hostilities, the neutral state must ensure that its territory is not used in any way in violation of the principle of neutrality. This includes a duty to ensure that its territory is not used by parties to the conflict as a base from which military operations may be conducted. Furthermore, a neutral state may not allow passage by a belligerent through its land territory.¹⁰⁴

Finally, neutral states are obliged to 'defend' their neutrality, by repelling any violation of their neutrality by a belligerent party.¹⁰⁵ How such defence is carried out varies in state practice. Some states, such as Switzerland and Austria, take a position of 'armed neutrality'—operating on the idea that 'neutral states are indeed obliged to undertake military efforts in order to repel a violation of neutrality by the use of armed force'.¹⁰⁶ Other states, such as Costa Rica, take the approach of 'unarmed neutrality', having disbanded their armed forces.¹⁰⁷ There is no 'formal obligation'¹⁰⁸ on states to use armed force to defend their neutrality, but states are obliged to repel or suppress attempts to violate their neutrality. States are thus entitled to use proportionate measures, including armed force, to prevent or repress violations of their neutrality. Such 'defence' of neutrality remains governed by the law of neutrality; that is to say, states engaged in such actions must act *only* to restore their territorial integrity and neutrality. They must not take any additional steps which would render their defensive action an act of belligerency and result in their participation in the hostilities, at which point their acts would be governed by the law of armed (p. 71) conflict. If belligerent forces enter the territory of a neutral state, such forces must be disarmed and interned.¹⁰⁹

B. Non-International Armed Conflicts

1. Intrastate issues—does IHL apply only where there are active hostilities in NIAC?

In NIACs, the geographical scope of IHL depends on the type of NIAC taking place. For NIACs that are purely internal—that is, are conducted solely within the territorial boundaries of the affected state—one approach posits that IHL will apply to the entire territory of the affected state. This approach was outlined by the International Criminal Tribunal for Rwanda in the *Akayesu* decision:

There is no clear provision on applicability *ratione loci* either in Common Article 3 or Additional Protocol II. However, in this respect Additional Protocol II seems slightly clearer, in so far as it provides that the Protocol shall be applied 'to all persons affected by an armed conflict as defined in Article 1'. The commentary thereon specifies that this applicability is irrespective of the exact location of the affected person in the territory of the State engaged in the conflict. The question of applicability *ratione loci* in non-international armed conflicts, when only Common Article 3 is of relevance should be approached the same way, i.e. the article must be applied in the whole territory of the State engaged in the conflict. This approach was followed by the Appeals Chamber in its decision on jurisdiction in *Tadić*, wherein it was held that 'the rules contained in [common] Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations'.¹¹⁰

According to this interpretation of the law, IHL will apply in all areas of the state, including those areas that are not sites of active hostilities.¹¹¹

However, there is a case to be made for a more restricted approach, limiting the application of IHL. Indeed, that the law relating to NIACs should have strict territorial and geographical limitations was envisaged by those involved in the drafting of APII. At the 1972 Conference of Government Experts, it was considered 'inconceivable that, in the case of a disturbance in one specific part of the territory (in a town, for instance) the whole territory of the State should be subjected to the application of the Protocol'.¹¹² This is borne out in practice, where some conflicts have been highly geographically restricted; the conflict between the Aceh separatist movement and the Indonesian government on the island (p. 72) of Sumatra is one such example.¹¹³ For all of the rules of IHL to apply to the totality of Indonesian territory for the duration of such a conflict would seem to create problems for, at the very least, the application of international human rights law norms.

Certain international human rights law provisions may be derogated from in a time of public emergency which threatens the life of the nation; thus, too broad an application of IHL norms could potentially see human rights norms suspended for protracted periods of time, even in locations far removed from active hostilities, resulting in, for example, broad application of the law on permissible lethal targeting of persons.¹¹⁴

That being said, it is equally possible to apply IHL too narrowly. The *Akayesu* formula for the geography of NIAC, a formula drawn from the *Tadić* and *Kunarac* cases, applies 'the laws of war ... in the case of internal armed conflicts, [to] the whole territory *under the control* of a party to the conflict, whether or not actual combat takes place there'.¹¹⁵ The use of the phrase 'under the control' would seem to exclude from the operation of IHL parts of the territory that are *not* under the control of parties to the conflict. This would create the 'curious consequence'¹¹⁶ of having IHL cease to apply in areas where no one party held exclusive control of the territory.

The *Akayesu/Tadić/Kunarac* approach seems to suggest that IHL attaches to certain participants and acts only where territorial control is effected. It would thus seem to exclude from the operation of IHL those conflicts that take place in territory not under the territorial control of the participants to the conflict. This raises the question: does IHL have extra-territorial effect?

2. Extraterritorial applicability for trans-national actors in NIAC: does IHL 'follow' the participants everywhere they are found in the world?

The *Tadić* formula—that 'the rules contained in [common] Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations'¹¹⁷ and that IHL applies in the whole territory of the state engaged in the conflict—raises an obvious question: what happens when the conflict crosses the territorial boundary? What happens when a NIAC, either between non-state armed groups (NSAGs), or between a state and an NSAG—'spills over' into the territory of other states? Indeed, what happens when participants in a NIAC engage in hostilities at a distinct geographical remove from their adversaries? Does IHL follow the participants in these so-called 'transnational'¹¹⁸ NIACs wherever they are found in the world?

(p. 73) One line of thinking about the geography of NIAC suggests that IHL—specifically the rules on targeting and military necessity¹¹⁹—applies wherever the participants in the conflict are found.¹²⁰ Thus, the moment a direct participant crosses an international boundary, he or she 'brings the law with them' into that territory, and the state into which that participant crosses comes under the ambit of IHL. In certain situations, this approach is entirely logical. An armed non-state group may utilize a poorly guarded border region of a neighbouring state as a base from which to conduct hostilities. In such a situation, the NIAC does not suddenly stop because a border is crossed: 'the applicable law does not suddenly cease when it reaches a territorial frontier'.¹²¹ Indeed, as the ICRC has stated:

[The] spillover of a NIAC into adjacent territory cannot have the effect of absolving the parties of their IHL obligations simply because an international border has been crossed. The ensuing legal vacuum would deprive of protection both civilians possibly affected by the fighting, as well as persons who fall into enemy hands.¹²²

A broad application of IHL would thus be warranted, to ensure that anyone possibly impacted by the conflict finds due protection under the law.

However, a broad approach might be problematic, depending on how far away from the hostilities such participants are located. High-level leaders of organized armed groups often locate themselves far from active hostilities, sometimes even well beyond the state where the armed conflict is taking place.¹²³ The general consensus regarding such leaders is that they are lawful targets due to their involvement in the hostilities.¹²⁴ But how far is too far, for the purposes of the application of IHL? In 'geographically unfocused conflicts',¹²⁵ the

central command of an organized armed group may be located far away from active hostilities, perhaps even operating in a putatively neutral state. The quintessential example of this was Osama bin Laden. Bin Laden was head of the Al Qaeda armed group from 1988 to 2011.¹²⁶ During that time, Al Qaeda conducted hostilities in Afghanistan, Yemen, Iraq, Somalia, the Maghreb,¹²⁷ and Syria.¹²⁸ Following the attacks on the US in September 2001, (p. 74) Bin Laden was allegedly smuggled out of Afghanistan into Pakistan, from where he oversaw the group's activities.¹²⁹ Thus, Bin Laden was geographically removed from the site of active hostilities. Was his targeting by the US in May 2011 governed by IHL? Did Bin Laden 'carry' the conflict, and thus the law, with him wherever he was located?

Critics of this perspective, including the ICRC, have rejected taking an overly broad approach to the geographical application of IHL in NIACs, stating that to do so 'would have the effect of potentially expanding the application of rules on the conduct of hostilities to multiple states according to a person's movement around the world as long as he is directly participating in hostilities in relation to a specific NIAC'.¹³⁰ Such an approach would create a 'global battlefield',¹³¹ with the flow-on effect of having IHL apply to all states where conflict-related activities occur, even if such states host no active hostilities, and are not parties to the conflict.¹³²

A third approach, and one that seems to have some support in both treaty and case law, avoids the drawing of 'arbitrary boundaries'¹³³ and proposes a case-by-case approach to the geography of armed conflict and the applicable law—namely, is there a sufficient nexus between the relevant law and the conduct in question? The language of APII suggests such an approach, by providing for its applicability to 'all persons affected by an armed conflict',¹³⁴ an interpretation confirmed by the Commentary to the Protocols, which states that APII is triggered by criteria related to 'persons, and not to places'.¹³⁵ This approach is congruent with that espoused by the 1972 Conference of Government Experts, which affirmed that, for the purposes of APII, 'what is important is that persons affected by the armed conflict should be entitled to the protection of the Protocol, wherever they might be'.¹³⁶ This case-by-case approach was evidenced by the International Criminal Tribunal for Rwanda (ICTR) in the *Kayishema* trial judgment, where the Tribunal stated that 'violations of [Common Article 3 and APII] could be committed outside the theatre of combat ... every crime should be considered on a case-by-case basis taking into account the material evidence'.¹³⁷

This 'third approach' provides a different possibility of examining the geographical scope of armed conflict. Rather than hewing to a strict geographical limit on the applicability of the law, or espousing a broad, potentially vast, scope of applicability, this approach suggests that it is the 'persons, objects, and the like that are affected by the armed conflict and the conduct at issue rather than any geographic location [that] would provide a more appropriate solution to the question of the geographic scope of application of the law'.¹³⁸ This approach suggests implementation of IHL in a more nuanced manner: rather than the entirety of IHL applying to the entirety of a state as soon as a participant or combatant is physically (p. 75) present in that territory, the IHL relevant to NIACs instead applies to specific territory only in so far as either active hostilities are taking place or to the geographically limited areas where participants are found. Thus, in the case of the Bin Laden targeting, IHL rules would not have applied to the entirety of Pakistani territory, but rather only to that locale where Bin Laden himself was found.

4. Conclusion

Knowing when and where to apply the law of armed conflict is a vital first step for states and non-state actors engaged in armed conflict. Developments in the conduct of armed conflicts over recent years have made this process notably more complicated. However, case law and commentary from experts has contributed greatly to better understanding the

geographical and temporal scope of the law and will, no doubt, continue to fill in the gaps that exist in the law, especially in the area of NIAC.(p. 76)

Footnotes:

- 1** Hague Convention (III) Relative to the Opening of Hostilities (adopted 18 October 1907; entered into force 26 January 1910) 205 CTS 263 (Hague Convention III) article 1.
- 2** *Prosecutor v Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 70.
- 3** Jean Pictet (ed), *Commentary to the First Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field* (ICRC 1952) 32.
- 4** Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977; entered into force 7 December 1978) 1125 UNTS 3 (API). Also adopted at the time was the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977; entered into force 7 December 1978) 1125 UNTS 609 (APII). The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (adopted 8 December 2005, entered into force 14 January 2007) 2404 UNTS 261 (APIII) adds an additional protected emblem—that of the Red Crystal—to the existing Red Cross and Red Crescent emblems.
- 5** API article 1(4).
- 6** Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (GCI) article 2.
- 7** Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land (adopted 18 October 1907; entered into force 26 January 1910) 205 CTS 227 (Hague Convention IV) article 42.
- 8** See the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168 (*Armed Activities* case) 172–3.
- 9** See chapter 2 ‘Classification of Armed Conflicts’ for more detailed examination of how to determine the existence in fact of occupation.
- 10** *Tadić* Jurisdiction decision (above n 2) para 70.
- 11** See chapter 2 ‘Classification of Armed Conflicts’ for more detailed examination of how to determine the existence in fact of a non-international armed conflict.
- 12** APII article 1(1).
- 13** See Fouad Ajami, ‘The Arab Spring at One: A Year of Living Dangerously’ (*Foreign Affairs*, April 2012) www.foreignaffairs.com/articles/libya/2012-01-24/arab-spring-one.
- 14** ‘Middle East Unrest: Three Killed at Protest in Syria’ *BBC News* (London, 18 March 2011) www.bbc.com/news/world-middle-east-12791738.
- 15** The formation of the Free Syrian Army, one of the first organized opposition groups to emerge in the Syrian conflict, was announced via video release on YouTube on 29 July 2011: thesyrianinterpreter, ‘Defected Officers Declare the Formation of “Syrian Free Army”, 29-7-2011’ (29 July 2011) www.youtube.com/watch?v=Rk7Ze5jVCj4.

16 Suheil Damouny and Emily Benammar, 'Syria Opposition Parties: Explained' *ABC News* (Sydney, 10 June 2014) www.abc.net.au/news/2013-08-29/syria-opposition-parties/4913162#FSA.

17 UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' UN Doc A/HRC/S-17/2/Add.1 (23 November 2011) paras 97–99.

18 UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' UN Doc A/HRC/19/69 (22 February 2012).

19 UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' A/HRC/21/50 (15 August 2012).

20 UNHRC A/HRC/19/69 (above n 18) paras 105–109; *ibid* paras 26–29.

21 Martin Chulov Julian Borger, 'Bashar al-Assad could face prosecution as Red Cross rules Syria is in civil war' *The Guardian* (16 July 2012) <https://www.theguardian.com/world/2012/jul/15/syria-civil-war-red-cross?newsfeed=true>. By contrast see UNHRC A/HRC/S-17/2/Add.1 (above n 17) para 62, where the Commission of Inquiry states that while the acts of violence discussed in the report 'may be linked to non-international armed conflict and thus assessed under international humanitarian law', the Commission was not able to definitively 'make such an assessment'.

22 See Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV) article 6(2) and API article 3(b). See also APII article 2(2), which refers to the 'end of the conflict'.

23 Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart 2008) 102. See also Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2011) 34–51.

24 Act of Military Surrender, signed by of the Chief of Operations Staff of the Armed Forces High Command General Alfred Jodl on behalf of the German High Command (Rheims 7 May 1945) www.ourdocuments.gov/doc.php?flash=false&doc=78. There is, as of this writing, no extant formal peace treaty between Japan and Russia regarding the Second World War (Carol Williams, 'Russia, Japan Renew Quest for Elusive WWII Peace Treaty' *Los Angeles Times* (Los Angeles, 1 May 2013) <http://articles.latimes.com/2013/may/01/world/la-fg-wn-russia-japan-peace-treaty-20130430>; 'Tokyo Wants 'New Level' in Relations with Moscow—PM Abe' *RT Question More* (21 May 2015) <http://rt.com/business/260701-japan-russia-relations-development>). This, however, does not mean that IHL continues to apply between Japan and Russia.

25 Following the 2003 invasion and occupation of Iraq, ongoing hostilities against insurgents continued until the Iraq War was declared 'over' on 31 August 2010, when President Barack Obama declared an 'end of the combat mission' in Iraq. White House, 'Remarks by the President on Ending the War in Iraq' <https://obamawhitehouse.archives.gov/the-press-office/2011/10/21/remarks-president-ending-war-iraq>.

26 Mark Thompson, 'US Ends its War in Afghanistan' *Time* (28 December 2014) <http://time.com/3648055/united-states-afghanistan-war-end>.

27 In Iraq, US strikes in Iraq against Islamic State continued until the purported 'defeat' of ISIS in 2018; (see further 'Syria conflict: US officials withdraw troops after IS "defeat"' *BBC News* (London, 19 December 2018) <https://www.bbc.com/news/world-middle-east-46623617>; US troops remain in Afghanistan, with hostilities continuing, despite the

supposed end of the war (see further *The U.S. War in Afghanistan 1999–2019*, Council on Foreign Relations <https://www.cfr.org/timeline/us-war-afghanistan>).

28 Indeed, in the *Tadić* Jurisdiction decision (above n 2), this phenomena of regional lulls in fighting was noted (at para 70), when the Chamber, in assessing the existence of an armed conflict, stated that IHL had been triggered within the former Yugoslavia due to the intensity of hostilities and the organization of the groups involved, and continued to apply ‘even if substantial clashes were not occurring in the Prijedor region at the time’ that the alleged crimes for which Tadić was on trial occurred.

29 *Tadić* Jurisdiction decision (above n 2) para 69.

30 Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia).

31 Ejército de Liberación Nacional (the National Liberation Army).

32 See the Organization of American States (OAS), ‘Third Report on the Situation of Human Rights in Colombia’ (OEA/Ser.L/V/II.102, Doc 9 rev 1) (26 February 1999) 4; see also the Colombian Constitutional Court, Sentencia No C-574/92, and Ruling on the Constitutional Conformity of Protocol II, Sentencia No C-225/95, and the Supreme Court of Colombia case *Gian Carlo Gutierrez Suarez*, Radicado No 32.022, 59.

33 OAS (above n 32), where it is stated that:

Colombia, unlike other States that all too frequently choose to deny the existence of such hostilities within their territory for political or other reasons, has openly acknowledged the factual reality of its involvement in such a conflict and the applicability of Article 3 common to the four 1949 Geneva Conventions (Common Article 3), the 1977 Protocol Additional to the Geneva Conventions of August 12, 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), and other customary law rules and principles governing internal armed conflicts.

34 Government of Colombia and FARC-EP, Final Agreement for Ending Conflict and Building a Stable and Long-Lasting Peace (24 November 2016).

35 Indeed, the applicability of international human rights law in times of armed conflict generally remains contentious—especially in non-international armed conflicts, where recent case law in the UK has queried the legal basis under which persons may be detained in relation to non-international armed conflicts; see further Gabor Rona, ‘Guest Post: Rona on *Mohammed v Ministry of Defence* and Detention in NIAC’, *Opinio Juris* (22 May 2014) <http://opiniojuris.org/2014/05/22/guest-post-rona-mohammed-v-ministry-defence-detention-niac>.

36 See Neil Shea, ‘The Talking Season’ *Virginia Q Rev* (2010) www.vqronline.org/vqr-portfolio/talking-season; Joseph Goldstein, ‘Afghan Army is Tested by the Taliban as Fighting Season Begins’ *New York Times* (New York, 13 April 2015) www.nytimes.com/2015/04/14/world/asia/afghan-army-is-tested-by-the-taliban-as-fighting-season-begins.html?_r=0. See also Bill Roggio, ‘Taliban Announce this Year’s Spring Offensive’ *The Long War Journal* (9 May 2014) www.longwarjournal.org/archives/2014/05/taliban_announce_thi.php?utm_source=rss&utm_medium=rss&utm_campaign=taliban-announce-this-years-spring-offensive.

- 37** See Jonah Blank, 'Is There a Hidden Message in the Taliban's 2014 Fighting Season Plan?' *Foreign Policy* (29 May 2014) <http://foreignpolicy.com/2014/05/29/is-there-a-hidden-message-in-the-talibans-2014-fighting-season-plan>.
- 38** See Jay Price, 'Cyclical Nature of Afghan Fighting May Mask Deeper Trends, Experts Warn' *McClatchy DC* (Washington, 18 March 2013) <https://www.mcclatchydc.com/news/nation-world/world/article24746842.html>.
- 39** See Islamic Emirate of Afghanistan, 'Statement of Leadership Council of Islamic Emirate Regarding the Commencement of the Annual Spring Operation Named "Khaibar"' (8 May 2014), reprinted in Bill Roggio, 'Taliban announce this year's spring offensive' (above n 36).
- 40** See eg the declaration of the complete cessation of hostilities by the IRA on 31 August 1994. P O'Neill, 'IRA Announce Cessation of Military Operations—31 August 1994' *Sinn Féin* (29 August 2014) www.sinnfein.ie/contents/31310.
- 41** Jann Kleffner, 'Scope of Application of International Humanitarian Law', in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 61.
- 42** See further Dinstein *War, Aggression and Self-Defence* (above n 23) 57.
- 43** See eg GCI article 15. See also the armistice provisions in Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulation concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227 (Hague Regulations) articles 36–41.
- 44** Dinstein *War, Aggression and Self-Defence* (above n 23) 57.
- 45** For instance, there have been a number of cease-fires agreed between Israel and Palestinian groups, including in 2008, 2012, and 2014. None of these have led to lasting peace and a permanent cessation of hostilities.
- 46** The Hague Regulations of 1907 do not specify when they cease to operate; however, a teleological approach to the Regulations, and to article 42 in particular, would suggest that if the Regulations apply once territory is actually placed under the control of a hostile power, then the rules would cease to apply once the territory is no longer actually controlled by that hostile power. See further Kolb and Hyde (above n 23) 104.
- 47** GCIV article 6(3).
- 48** These provisions are *ibid* articles 1–12, 27, 29–34, 47, 49, 51, 52, 53, 59, 61–77, and 143.
- 49** *ibid* article 6(3).
- 50** Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 281; see also Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Koninklijke Brill 2009) 16–24.
- 51** Arai-Takahashi (above n 50) 17.
- 52** *ibid* 18.
- 53** Kolb and Hyde (above n 23) 104; see also Robert Kolb, 'Étude sur l'Occupation et sur l'article 47 de la IVème Convention de Genève du 12 Août 1949 Relative à la Protection des Personnes Civiles en Temps de Guerre: Le Degree d'Intangibilité des Droits en Territoire Occupé' (2002) 10 *AYIL* 267, 291, 295.
- 54** GCIII article 5(1).

55 GCI article 5; API article 3(b). GCI article 5 is worded in the same way at GCIII article 5; API article 3(b) states that the Protocol and Conventions apply 'for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.'

56 GCIV article 6(4).

57 'Iran Frees "Last Iraqi Prisoners"' *BBC News* (London, 5 May 2003) http://news.bbc.co.uk/2/hi/middle_east/3001751.stm. See also John Quigley, 'Iran and Iraq and the Obligations to Release and Repatriate Prisoners of War after the Close of Hostilities' (1989) 5 *Am U Int'l L Rev* 73.

58 Hague Convention IV article 8; GCI article 63; Geneva Convention (II) for the Amelioration of the condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (adopted 12 August 1949, entered into force 12 October 1949) 75 UNTS 85 (GCII) article 62; GCIII article 142; GCIV article 158.

59 Hague Convention IV article 8; GCI article 63; GCII article 62; GCIII article 142; GCIV article 158.

60 GCI article 63; GCII article 62; GCIII article 142; GCIV article 158.

61 This is explicitly stated in GCI article 63(4); GCII article 62(4); GCIII article 142(4); and GCIV article 158(4), which provide that any denunciation of the treaty:

shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and from the dictates of public conscience.

62 See eg the findings of the Eritrea-Ethiopia Claims Commission, 'Prisoners of War—Ethiopia's Claim 4' (1 July 2003) paras 30–31, where the Commission stated that 'given the nearly universal acceptance of the four Geneva Conventions of 1949 ... the Geneva Conventions of 1949 have largely become expressions of customary international law'. See also the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226 para 79.

63 Defined in customary international law and treaty law as twelve nautical miles from the low-water mark baseline of a coastal state (United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 14 November 1994) 1833 UNTS 3 (UNCLOS) article 3).

64 See section 3.A.2 'Air and outer space and the high seas' below for a more detailed explanation of the geographical scope of IHL in relation to airspace, the exclusive economic zones (EEZ) and high seas, and outer space.

65 *Tadić Jurisdiction decision* (above n 2), para 68.

66 Kolb and Hyde (above n 23).

67 See UNCLOS article 57.

68 Note, however, UNCLOS article 58(3), which provides that any activities carried out by States in the EEZ must 'have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law'. As such, any military

operations in the EEZ of a neutral state must be carried out in accordance with any existing rights and duties retained by the coastal state.

69 The *HPCR Manual on the International Law Applicable to Air and Missile Warfare* defines airspace as ‘the air up to the highest altitude at which an aircraft can fly and below the lowest possible perigee of an earth satellite in orbit’ (article 1(a)) (*HPCR Manual on International Law Applicable to Air and Missile Warfare* CUP 2013). The Fédération Aéronautique Internationale defines such a space at the so-called Kármán Line—see FAI, ‘100km Altitude Boundary for Astronautics’ <https://www.fai.org/page/icare-boundary>, accessed 14 January 2020.

70 See generally the Hague Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons (adopted 18 October 1907; 27 November 1909), the non-binding Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare (adopted 19 February 1923) (also known as the Hague Rules on Air Warfare), and *HPCR Manual on the International Law Applicable to Air and Missile Warfare* (ibid n 69).

71 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (adopted 27 January 1967; entered into force 10 October 1967) 610 UNTS 205.

72 ibid article IV.

73 (adopted 5 December 1979; entered into force 11 July 1984) 1363 UNTS 3.

74 ibid article 3(2).

75 See further Jackson Maogoto and Steven Freeland, ‘The Final Frontier: The Laws of Armed Conflict and Space Warfare’ (2007-2008) 23 *Conn J Int’l L* 169; and Michael Schmitt, ‘International Law and Military Operations in Space’ (2006) 10 *MPYUNL* 89.

76 UNCLOS article 88. Note also UNCLOS article 58(2), which applies the same principle to the EEZ.

77 See eg UK Ministry of Defence, *Manual on the Law of Armed Conflict* (OUP 2004) 350–1.

78 See Robin R Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edn, Manchester UP 1999) 208; Rudiger Wolfrum, ‘Military Activities on the High Seas: What are the Impacts of the UN Convention on the Law of the Sea?’, in Michael Schmitt and Leslie Green (eds), *The Law of Armed Conflict: Into the Next Millennium* (1998) 71 ILS 505; Dinstein *War, Aggression and Self-Defence* (above n 23) 23.

79 Louise Doswald-Beck (ed), *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (CUP 1995) 82.

80 Dinstein *War, Aggression and Self-Defence* (above n 23) 23.

81 Hague Regulations article 25; API article 59.

82 API article 59(2).

83 ibid article 59(2)(a).

84 ibid article 59(2)(b).

85 ibid article 59(2)(c).

86 ibid article 59(2)(d).

87 ibid article 59(3).

88 See UNSC Resolutions 819 (16 April 1993), 824 (6 May 1993), and 836 (4 June 1993).

89 See *Prosecutor vs Krstić* (Appeals Judgment) IT-98-33 (19 April 2004); and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43.

90 Sylvie Junod, 'Protection of the Victims of Armed Conflict: Falkland-Malvinas Islands (1982)', in ICRC, *International Humanitarian Law and Humanitarian Action* (2nd edn, ICRC 1985) 23-4, 26.

91 GCIV article 15(a)-(b).

92 Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff 1987) 709 (AP Commentary).

93 For instance, following the First World War, the Treaty of Versailles (signed 28 June 1919) (1919) 225 CTS 189 article 42 provided that 'Germany is forbidden to maintain or construct any fortifications either on the left bank of the Rhine or on the right bank to the west of a line drawn 50 kilometres to the East of the Rhine'.

94 For instance, The Antarctic Treaty (adopted 1 December 1959; entered into force 23 June 1961) 402 UNTS 71 article 1 provides that 'there shall be prohibited, inter alia, any measure of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any type of weapon' in Antarctica.

95 The Panama Canal is permanently neutral, pursuant to the Treaty concerning the Permanent Neutrality and Operation of the Panama Canal (adopted 7 September 1977; entered into force 1 October 1979) 1161 UNTS 177 article 1.

96 The demilitarized zone (DMZ) between the Democratic People's Republic of Korea and the Republic of Korea was the result of the Panmunjom Armistice Agreement (North Korea-People's Republic of China-UNC) (27 July 1953) 4 UST 234; it acts as a buffer between the two states, and while there are no military installations within the DMZ, both sides of the zone, within North and South Korea respectively, are heavily militarized. See further Don Oberdorfer and Robert Carlin, *The Two Koreas: A Contemporary History* (Basic Books 2014), specifically chs 1 and 3 on the post-war division of Korea and the ongoing tensions which have often played out in the DMZ.

97 Note that some states have declared their permanent neutrality, such as Switzerland, Austria, Sweden, Ireland, and Finland (as reported by NATO, 'Neutral European Countries: Austria, Switzerland, Sweden, Finland, Ireland' <http://nato.gov.si/eng/topic/national-security/neutral-status/neutral-countries>; see also Paul Seger, 'The Law of Neutrality', in Andrew Clapham and Paolo Gaeta (ed), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 259-60.

98 (adopted 18 October 1907; entered into force 26 January 1910) 205 CTS 299 (Hague Convention V).

99 (adopted 18 October 1907; entered into force 26 January 1910) 205 CTS 395 (Hague Convention XIII).

100 Hague Convention V article 2.

101 See Hague Convention XIII articles 1-2; see also Hague Rules of Aerial Warfare (above n 70) article 40, and the *HPCR Manual on the International Law Applicable to Air and Missile Warfare* 170-1.

102 This relates solely to the provision of financial aid for the purposes of the conflict. Neutrality and the duty of non-participation do not mean that states may not maintain commercial relationships with belligerent parties. Hague Convention V article 5 and Hague Convention XIII article 7 outlines this principle. As a general rule, neutral states are under an obligation to treat the belligerent parties equally, and not favour one or the other—ie by granting new commercial rights to one belligerent, or placing new economic restrictions on one belligerent state. As Kolb and Hyde (above n 23) note:

usual State practice is to continue commerce with the belligerents on the same basis as existed prior to the commencement of hostilities ... changes to the pre-existing trade relationships to the detriment of one belligerent, or, in some cases, extreme imbalances in the pre-existing trading relationship being maintained without giving the other belligerent the chance to take part in trade on an equal basis, are prohibited.

See also Seger (above n 97) 256–7.

103 Seger (above n 97) 257.

104 Hague Convention V article 2. It is noteworthy that while the Hague Convention V on neutrality on land clearly prohibits the movement of troops or supplies through neutral territory, the Hague Convention XIII article 10 on maritime neutrality only states that neutrality will not be lost by a state if a warship or other belligerent vessel transits its territorial waters or else is forced to remain within its territorial waters (for instance, due to inclement weather or for urgent repairs to the vessel) for up to a period of twenty-four hours. This right of innocent passage is found in articles 10, 12, 14, and 17 of Hague Convention XIII.

105 See Hague Convention V article 5 and Hague Convention XIII articles 2, 9, and 24.

106 Michael Bothe, 'The Law of Neutrality', in Fleck (ed) (above n 41) 560.

107 Seger (above n 97) 256.

108 Peter Hostettler and Olivia Danai, 'Neutrality in Land Warfare', *Max Planck Encyclop Public Int'l L* (September 2013) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e347?rskey=qQk2nI&result=1&prd=EPIL>.

109 Hague Convention V articles 11–15.

110 *Prosecutor v Akayesu* (Judgment) ICTR 96-4-T (2 September 1998) para 635.

111 See *Tadić* Appeal Judgment (above n 65) para 69. See also *Kunarac*, where the ICTY stated that 'there is no necessary correlation between the area where the actual fighting takes place and the geographic reach of the laws of war'. (*Prosecutor v Kunarac et al* (Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002) para 57). It was sufficient, from the Tribunal's perspective, that the acts are 'closely related' to the hostilities (*Kunarac* Judgment, *ibid*). The *Tadić* approach seems to have been followed by institutions such as the UN and the Inter-American Commission on Human Rights (in, respectively, UN Economic and Social Council, 'Report on the Situation of Human Rights in Somalia' UN Doc E/CN.4/1997/88 (3 March 1997) para 55; and the Inter-American Commission on Human Rights, 'Report on Terrorism and Human Rights' Doc No OEA/Ser.L/V/II.116 Doc 5 rev 1 corr (22 October 2002) para 60. See further Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 250–2.

112 Conference of Governments Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Report on the Work of the Conference*, Vol I, at 68 para 2.59.

113 See generally Kirsten Schulze, *The Free Aceh Movement (GAM): Anatomy of a Separatist Organization* (East-West Center Washington, 2004); and Human Rights Watch, *Indonesia: The War in Aceh* (August 2001) www.hrw.org/reports/2001/aceh. See also Sivakumaran (above n 111) 250.

114 See eg International Covenant on Civil and Political Rights (adopted 16 December 1966; entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 4, which allows for derogations from the Covenant in situations of states of emergency, such as armed conflict. However, the Human Rights Committee has made it clear that derogations from fundamental human rights principles must be ‘limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency’ (Human Rights Committee, *General Comment 29: States of Emergency (Article 4)* UN Doc CCPR/C/21/rev.1/Add.11 (31 August 2001) para 4.

115 *Kunarac* (above n 111) 57 (emphasis added).

116 Michael Schmitt, ‘Charting the Legal Geography of Non-International Armed Conflict’ (2013) 51 *Rev Dr Milit* 93, 102.

117 *Tadić* (Appeal Judgment) (above n 65) para 69.

118 For further discussion of the concept of ‘transnational armed conflict’, see Geoffrey Corn and Eric Jensen, ‘Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations’ (2009) 42(1) *Israel L Rev* 33–4; Geoffrey Corn, ‘Geography of Armed Conflict: Why it is a Mistake to Fish for the Red Herring’ (2013) 89 *Int’l L Stud* 77, 80–83.

119 See further chapter 7 ‘International Humanitarian Law and the Conduct of Hostilities’ in this book, in which Michael Schmitt details the substance of these principles.

120 The idea of participants raises the issue of direct participation in hostilities (DPH)—see further chapter 7.

121 Sivakumaran (above n 111) 251.

122 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (Report of the 31st Conference of the International Red Cross and Red Crescent) www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf. See also Dapo Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’, in Elizabeth Wilmshurst (ed), *International Law and the Classification of Armed Conflicts* (OUP 2012) 70–2 and Nils Melzer, *Targeted Killing in International Law* (OUP 2008) 259–60. This broad approach is evidenced in article 7 of the Statute of the International Tribunal for Rwanda (UNSC Resolution 955 UN Doc S/RES/955 (8 November 1994)), which states that its temporal jurisdiction shall extend to the territory of Rwanda including its land surface and airspace, as well as to the territory of neighbouring states in respect of serious violations of international humanitarian law committed by Rwandan citizens.

123 See below nn 127, 130 regarding Osama bin Laden.

124 Sivakumaran (above n 111) 251.

125 Schmitt ‘International Law’ (above n 75) 104.

126 See further Michael Scheuer, *Osama bin Laden* (OUP 2011), specifically ch 5.

127 The Maghreb encompasses Algeria, Chad, Mali, Mauritania, Morocco, Niger, and Tunisia.

128 Scheuer (above n 126) ch 6.

129 Tim Ross, 'WikiLeaks: Osama bin Laden "Protected" by Pakistani Security' *The Telegraph* (London, 2 May 2011) www.telegraph.co.uk/news/worldnews/asia/pakistan/8488236/WikiLeaks-Osama-bin-Laden-protected-by-Pakistani-security.html. See also Abdel Bari Atwan, *After Bin Laden: Al Qaeda, The Next Generation* (New York: New Press 2012) 24–6 regarding Bin Laden's residency in Pakistan following the 9/11 attacks.

130 ICRC Report of the 31st Conference of the International Red Cross and Red Crescent (above n 122) 22.

131 *ibid.*

132 Schmitt 'International Law' (above n 75) 107.

133 Sivakumaran (above n 111) 251.

134 APII article 2(1).

135 AP Commentary 1360.

136 ICRC, *Commentary on the Draft Additional Protocols to the Geneva Conventions of August 12, 1949* (ICRC 1973) 134.

137 *Prosecutor v Kayishema and Ruzindana* (Judgment) ICTR-95-1-T (21 May 1999) para 176.

138 Sivakumaran (above n 111) 252; see also Louise Arimatsu, 'Territory, Boundaries and the Law of Armed Conflict' (2009) 12 *YBIHL* 157, 189.

(p. 50) 3 Scope of Application of International Humanitarian Law

I. Material Scope

3.01

International humanitarian law regulates, and as a rule applies in times of, armed conflict.

1. International humanitarian law regulates, and as a rule¹ applies in times of, armed conflicts. Accordingly, it is also referred to as the law of armed conflict or *jus in bello*. The three interchangeable terms denote the only branch of public international law that is specifically designed to strike a balance during armed conflicts between preserving humanitarian values, on the one hand, and considerations of military necessity, on the other by protecting those who do not or no longer directly participate in hostilities and by limiting the right of parties to the conflict to use armed force only to the amount necessary to achieve the aim of the conflict, which is to weaken the military potential of the enemy. International humanitarian law is not concerned with the legality of the armed conflict (see also below Section 3.06). Instead, it reflects the reality of organized armed violence, unleashed by states and organized armed groups, and regulates what parties to an armed conflict may or may not do in the course of an armed conflict. Each and every rule of international humanitarian law reflects the aforementioned balance between humanitarian concerns and considerations of military necessity. As a branch of public international law, it is primarily states that determine how the balance between humanitarian concerns and considerations of military necessity is struck. That determination is articulated in the course of the lawmaking process. Thus, when negotiating international conventional humanitarian law, in the course of customary law formation through state practice and *opinio juris*, through the development of general principles of international humanitarian, and by virtue of other legally binding sources (such as unilateral declarations and binding resolutions of international organizations), states identify what they consider to be the acceptable balance between humanitarian concerns and considerations of military necessity. Naturally, such a state-centric lawmaking process does not take place in isolation, but is informed by non-state constituents, such as humanitarian and civil society organizations, not the least the International Committee of the Red Cross (ICRC) with its express mandate to promote and act as guardian of international humanitarian law.

2. While international humanitarian law is the only branch of public international law that *specifically* regulates situations of armed conflicts, it does not automatically supersede (p. 51) all other areas of public international law in the event of an armed conflict. The move from the formal notion of ‘war’ in the legal sense—predicated by a declaration of war—to the objective, fact-driven notion of ‘armed conflict’ has brought with it the gradual abandonment of the traditional rigid distinction in international law between the state of peace and the state of war.² Today, the outbreak of an armed conflict will not necessarily mean that all other rules of international law cease to apply. See below, Sections 3.47–3.51.

3. International humanitarian law distinguishes between two generic types of armed conflicts: armed conflicts of an international character, including belligerent occupations, and armed conflicts not of an international character (see below, Sections 3.02, 3.04, 3.08–3.09). The distinction between international and non-international armed conflicts rests upon the parties to the armed conflict. International armed conflicts occur between two or more states, whereas non-international armed conflicts occur between states and organized non-state armed groups or between such groups. International and non-international armed

conflicts are subject to distinct sets of rules of international humanitarian law: the law of international armed conflicts,³ including the law of belligerent occupation,⁴ and the law of non-international armed conflicts.⁵ Notwithstanding the need to distinguish between the two types of armed conflicts and the distinct legal regimes applicable to them, a situation may warrant an application of both regimes, namely when a situation amounts to both an international armed conflict and a non-international armed conflict. The armed conflicts in Syria between 2011 and 2020 and in Kosovo in 1999 are illustrative in that regard, as they involved parallel international armed conflicts between (a coalition of) States and the territorial State (Turkey v. Syria; NATO member states v. Serbia) and non-international armed conflicts between States and non-state organized armed groups as well as between such groups (Syria with support of Russia and Iran, the US led coalition v. various non-state organized armed groups; Serbia v. Kosovo Liberation Army).

3.02

An international armed conflict exists if one state uses armed force against another state. It is irrelevant whether the parties to the conflict consider themselves to be at war or in a state of armed conflict with each other.

1. In the words of the Geneva Conventions, the law of *international armed conflict* applies to 'all 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'.⁶ The *ICRC Commentary* further explains that the notion of an international armed conflict requires 'the hostile resort to armed force involving two or more States'.⁷ (p. 52) Similarly, the ICTY has held that an international armed conflict exists whenever there is 'resort to armed force between States'.⁸

These views adhere to the so-called 'first-shot' theory, according to which the law of international armed conflict applies from the first moment that force is used by one state against another state. It is irrelevant, according to that view, what form that force takes, what its intensity or duration is, and irrespective of whether force is used unilaterally by one State against another or whether both use force.⁹ An alternative view to the 'first-shot' theory holds that any armed conflict, including those that occur between two or more states, requires the parties to it to be 'engaged in fighting of some intensity'.¹⁰ According to the latter view, not any resort to armed force between states would suffice. 'Border clashes', for instance, would not amount to an international armed conflict,¹¹ nor would, presumably, the singular abduction and subsequent detention of a member of the armed forces of one state by (members of the armed forces of) another state. It is submitted, however, that this latter view requiring a certain level of intensity for the resort to armed force between states to amount to an international armed conflict bears the risk of creating an international legal vacuum or of depriving certain categories of persons of the protections that international humanitarian law provides. One fails to *see*, for instance, what international legal parameters would govern the conduct of hostilities during a border clash between two states. And a member of the armed forces of a state captured by another state would be deprived of the rights and privileges granted to prisoners of war under conventional and customary international humanitarian law.¹² While the better view thus is to adhere to the 'first-shot' theory and consider an international armed conflict to exist so as to trigger the applicability of international humanitarian law as soon as there is resort to armed force between states, it is ultimately the facts on the ground that determine the extent to which international humanitarian law becomes operable.

A minor incursion by the armed forces of one state into another state, for instance, will not bring into operation the whole plethora of rules of international humanitarian law. Rather, the factual circumstances of a military operation amounting to an international armed conflict will determine which of the rules are practically relevant and, as a consequence, the extent to which the law becomes operable. If, during such an operation, no member of

the opposing armed forces is captured the law pertaining to prisoners of war will not become operable. Pivotal in that regard is, however, that the reason for the inapplicability is purely *factual* rather than *legal*, namely that the facts are such that the preconditions for the operation of the law pertaining to prisoners of war are absent. As soon as a member of the opposing armed forces falls into the power of the enemy, he or she becomes a prisoner of war entitled to the full protection that international humanitarian law grants to that category of persons.

(p. 53) **2.** The existence of an international armed conflict is a question of fact and is independent of the subjective views of the parties to the armed conflict. As a matter of law, it is irrelevant whether the warring states consider themselves to be engaged in an armed conflict, even less so whether they formally acknowledge the existence of a state of armed conflict or war. The adoption of the Four Geneva Conventions of 1949 marked a significant shift away from formal preconditions for the applicability of international humanitarian law to a fact-based approach (see further Section 3.03).

3. The fact that an international armed conflict requires a 'state' on both sides of the resort to armed force warrants some clarification, both as regards the state as an actor and the state as the object against which the armed force is used. It will commonly be the case that a state resorts to armed force by using its regular armed forces. However, the law also clearly contemplates the possibility of using irregular armed forces, such as militias and other volunteer corps that do not form part of the armed forces, but belong to the state party to the international armed conflict.¹³ At the same time, the classification of a situation as an international armed conflict does not depend on whether force is used by military—as opposed to other (non-military) state agencies, such as border guards or coast guards.¹⁴ Furthermore, nothing precludes a classification of a resort to armed force as an international armed conflict if force is projected by other actors acting on behalf of the state, against another State,¹⁵ as in the case of an organized armed group acting under the control of a State (see below, Section 19.01, commentary, para. 4 a). As far as the State as the object of the armed force is concerned, the view has gained some traction that it suffices if such force is projected against one of the constitutive elements of a state, i.e. its territory, population or government.¹⁶ However, that view is not universally shared and some posit that resort to force of one state directed exclusively against a non-state organized armed group situated on another state's territory is not to be considered an international armed conflict if the former state does not target the territorial state's organs or 'national assets', understood to include its population, notwithstanding the lack of consent by the territorial state.¹⁷

4. According to Article 1(4) AP I, armed conflicts 'in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination' trigger the applicability of the law of international armed conflict. The contemporary relevance of this provision is uncertain. It has been argued that its field of application was intended to be quite restricted.¹⁸ Furthermore, the fact that 'wars against colonial domination' in the traditional sense are largely a thing of the past may be seen to further indicate a decline in contemporary relevance. The reference to alien occupation, in turn, adds little to Article 2 of the Geneva Conventions, (p. 54) except perhaps where the territory occupied was not part of the territory of a state at the time of the occupation, and the *ICRC Commentary* regards the reference to racist regimes as applying only to 'regimes founded on racist criteria'.¹⁹ Article 1, para. 4, AP I was undoubtedly not intended to apply to any conflict in which an ethnic group or the inhabitants of a territory attempted to secede from a parent state. At the same time, the concept of self-determination has evolved, although its exact contemporary contours are subject to considerable debate.²⁰ Whether that evolution involves also a wider application for Article 1, para. 4 remains to be seen. Where Article 1, para. 4, does apply, Article 96, para. 3, AP I provides that an authority representing the people engaged in such a conflict

may make a declaration addressed to the depositary of the Protocol (the Government of Switzerland), undertaking to apply the Conventions and the Protocol, in which case the Conventions and the Protocol shall become binding on both parties to the conflict. Article 7, para. 4, of the Weapons Convention 1981 contains a similar provision. Opinions differ as to whether Article 1, para. 4, AP I can be regarded as stating a rule of customary international law.²¹ The controversy which Article 1, para. 4, has aroused ever since it was first proposed suggests that states do not regard it as declaratory of customary international law, although there is some evidence that it has had an influence on practice.²²

3.03

The application of international humanitarian law is not dependent on a formal declaration of war. Formal declarations of war (Article 1 HC III) nowadays occur only very rarely.

1. In contradistinction to the period preceding the adoption of the Four Geneva Conventions of 1949, the applicability of the law of international armed conflict is not conditioned by a formal declaration of war. This is notwithstanding the possibility that international humanitarian law may also be rendered applicable through a formal declaration of war in the absence of any resort to armed force between the state declaring war, on the one hand, and the state against whom war is being declared, on the other hand.²³ Such a declaration would trigger those parts of the law of international humanitarian law that are not directly concerned with, or dependent on, the conduct of hostilities. Examples of these parts are the rules on the treatment of aliens in the territory of a party to the conflict²⁴ and those governing the treatment of internees.²⁵ Be that as it may, the possibility of a formal declaration of war without the occurrence of actual hostilities today seems remote, not the least because states today generally abstain from making formal declarations of war.

(p. 55) **3.04**

International humanitarian law also applies to all cases of total or partial military occupation, even if this occupation meets with no armed resistance (Article 2, para. 2 common to the Geneva Conventions).

1. As part of the law of international armed conflict, the law of *belligerent occupation* applies to situations in which territory is placed under the authority of a hostile army.²⁶ The occupation extends only to the territory where such authority has been established and can be exercised.²⁷ Three cumulative requirements have been deduced from these generic provisions. First, the local government has not consented to the presence of foreign forces. Second, the local government is unable to exert its powers. Third, the foreign forces exercise authority over the territory concerned in lieu of the local government.²⁸ Once the aforementioned conditions are fulfilled, the law of belligerent occupation applies, whether or not the occupation meets with resistance.²⁹

2. As in the case of determining whether an international armed conflict exists by virtue of the fact that there is 'resort to armed force between States', the determination of a given situation as amounting to belligerent occupation is exclusively governed by the facts on the ground. The evidence must be sufficient to demonstrate that the said unconsented-to authority was in fact established and exercised by the intervening state in the areas in question.³⁰ Relevant indicative factors in making that determination include the ability of the occupying power to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly; the surrender, defeat, or withdrawal of enemy forces; the presence of a sufficient force, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt; the establishment of a temporary administration over the territory; and the issuance and

enforcement of directions to the civilian population.³¹ It follows from the foregoing that battle areas may not be considered as occupied territory.³² International case law indicates that it is immaterial for the applicability of the law of belligerent occupation whether the territory that is placed under the authority of the hostile army is undisputedly the territory of another State or whether its international status is unclear.³³ Decisive is that the three aforementioned conditions are met in relation to territory to which the occupying power has no legal title.

3.05

The application of international humanitarian law pertaining to international armed conflicts is not affected by whether or not the parties to an armed conflict recognize one another as states (Article 13, para. 3, GC I; Article 13, para. 3, GC II; Article 4 A, para. 3, GC III; Article 43, para. 1, AP I).

1. The applicability of the rules of international humanitarian law regulating international armed conflicts is not dependent upon whether the parties to a conflict recognize one (p. 56) another as states. As a consequence of the fact-driven notion of an armed conflict—as opposed to a subjective approach to the existence of it—several rules expressly stipulate, for example, that the protection granted to the wounded, sick, and shipwrecked, as well as the protection of prisoners of war, equally extends to those ‘who profess allegiance to a Government or an authority not recognized by the Detaining Power’.³⁴ Similarly, AP I includes into the notion of ‘armed forces of a Party to a conflict’ those organized armed forces, groups, and units which are under a command responsible to a party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by an adverse party.³⁵ The underlying principle is also borne out by the practice of states that participated in international armed conflicts in which AP I was inapplicable. Thus, throughout the Arab–Israel conflict, the Arab states did not recognize Israel as a state,³⁶ yet both sides in that international armed conflict have accepted the applicability of international humanitarian law.

2. The question of whether the parties to an armed conflict are states is objective and not a matter to be determined by the subjective recognition policies of each party. Where, however, there is real doubt about whether one side in a conflict is a state, rather than a secessionist movement within the rival party, recognition by other states may have an important evidential effect.

3. The principle that the non-recognition of a government or authority as representing the state party is of no relevance for the applicability of the law of international armed conflict equally entails that an effective (*de facto*) government may represent the state even though it assumed that effectiveness in the course of a non-international armed conflict during which competing claims to be the government of a state were made. In other words, if a non-state organized armed group becomes the effective government and exercises control over (most of) the territory of the state concerned, a resort to armed force between the state that that government now represents against another state will amount to an international armed conflict.³⁷

3.06

The application of international humanitarian law does not depend on whether an armed conflict has been started in violation of a provision of international law regulating the use of force (*jus ad bellum*). International

humanitarian law applies equally to all the parties to an armed conflict irrespective of the legality or illegality of their resort to force.

1. The legality or otherwise of an armed conflict under the law regulating the recourse to the use of armed force is irrelevant for the applicability and interpretation of international humanitarian law. International humanitarian law applies equally to all parties to an armed conflict, irrespective of whether an armed conflict is waged in compliance or in violation of the general prohibition of the use of force embodied in the UN Charter³⁸ or any of the recognized exceptions to that prohibition, that is the right to use force in self-defence against an armed attack³⁹ and the right to use force with authorization of the Security Council acting under Chapter VII of the Charter.⁴⁰ Acts of members of (p. 57) the armed forces participating in an illegal use of armed force are subject to the same constraints under international humanitarian law as those of their opponents. Although international law is agnostic as regards the legality of the use of force *within*—as opposed to *between*—states, the separation between the cause for initiating a non-international armed conflict and the applicable rules of international humanitarian law applies *mutatis mutandis*.⁴¹

2. While conventional humanitarian law is, as a rule, only binding between those states which are parties to the respective treaties, it remains applicable between those parties in their mutual relations even if another party to the conflict has not become a party to the respective treaty.⁴² However, once the applicability of international humanitarian law has been determined, the obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity.⁴³

3.07

During an international armed conflict, the law of neutrality shall be applied to the relations between the belligerent parties and states not participating in the conflict (Article 2 HC III; see below, Chapter 18).

1. Prior to the shift from formal preconditions for the applicability of international humanitarian law to a fact-based approach, the law of neutrality was only triggered between neutral powers and belligerent states in case of a formal declaration of war made by the belligerent states. Some support persists in academic writings for the view that the law of neutrality applies only if there is a formal state of war.⁴⁴ There is also evidence that a number of states take the same view.⁴⁵

2. Yet, an alternative view has emerged over the years, which holds that the law of neutrality governs the relation between neutral and belligerent states in the event of an international armed conflict, also in the absence of a formal state of war.⁴⁶ This second approach more adequately reflects the current, fact-based approach to the applicability of international humanitarian law. This question is examined in more detail in Chapter 18.

3.08

A non-international armed conflict is a situation of protracted armed violence between governmental authorities and organized armed groups within a state or between such groups within a state.

(p. 58) **3.09**

In a non-international armed conflict, each party shall be bound by the applicable conventional and customary international humanitarian law. Regular armed forces should comply with the rules of international

humanitarian law in the conduct of military operations in all armed conflicts, however such conflicts are characterized (see below, Chapter 19).

1. Two basic requirements condition the existence of a non-international armed conflict: the armed violence must be of sufficient intensity and the parties must be sufficiently organized. The following are indicative factors in assessing whether the requirement of intensity is satisfied: the number, duration, and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.⁴⁷ As far as the requirement of organization is concerned, the following factors are relevant: the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits, and military training; its ability to plan, co-ordinate, and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accords.⁴⁸ The aforementioned factors for determining the intensity of the armed violence and the organization of the parties to it must not be understood as a conclusive checklist, however. Rather, they are guidelines in distinguishing non-international armed conflicts from situations in which violence occurs that does not rise beyond internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.⁴⁹ Such instances of lesser or less organized violence are not considered armed conflicts. While there is thus a need to distinguish non-international armed conflicts from internal disturbances and tensions on the lower end of the spectrum, non-international armed conflicts on the higher end of the spectrum may reach the threshold for the applicability of AP II. This is the case when the armed conflict 'take[s] 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'.⁵⁰ This latter requirement of territorial control distinguishes non-international armed conflicts under AP II from other non-international armed conflicts. Furthermore, AP II does not apply to non-international armed conflicts in which organized armed groups are pitted against each other, without the state being a party to the armed conflict.

2. As already alluded to (see above, Section 3.01, para. 3), the distinction between international and non-international armed conflicts rests on the question who the parties to (p. 59) the armed conflict are. The fact that an armed conflict is not limited to the territory of a single state does not mean, without more, that a non-international armed conflict changes its character and is to be considered international.⁵¹ In that sense, 'non-international' is not to be equated with 'internal'. This is not to suggest, however, that *prima facie* non-international armed conflicts may in certain cases be rendered international in character, for instance when the control exerted by a state over an organized armed group fighting another state is such that the conflict is to be considered as occurring between the two states. For further discussion, see Section 19.01.

3. The attacks on the US in September 2001 led the then US Administration to refer to a 'war against terrorism'. That concept is controversial.⁵² Other states, including those which are close allies of the US, have not generally employed the term 'war against terrorism'. Indeed, subsequent US administrations have taken a different position and instead refer to an armed conflict of the US with al-Qaeda and its associated forces.⁵³ Whether and to what extent that assertion is correct as a matter of international humanitarian law depends on

the fulfilment of the same criteria as those for any armed conflict—whether international or non-international in character—referred to above. In other words, it is possible that violent acts that are being described as ‘terrorist’ by the victim state can bring international humanitarian law into operation. This can happen, for instance, when those acts are attributable to a state and give rise to an international armed conflict between that state and the state that is the target of the violent acts. It can also occur if the violent acts are not attributable to a state, when they reach the required degree of intensity and the group that engages in such acts is sufficiently organized so that the situation amounts to a non-international armed conflict. Thus, the fighting between the US and allied forces on the one side and Afghan forces on the other in 2001–2002 was an international armed conflict irrespective of whether Afghanistan was responsible for the al-Qaeda attacks in New York and Washington on 11 September 2001 which prompted the military operations in Afghanistan.⁵⁴ Furthermore, the organized armed violence that ensued after the ousting of the Taliban government between the newly installed Afghan transitional government following the convening of the Loya Jirga in June 2002 and coalition forces, on the one hand, and various organized armed groups (remnants of the Taliban, al-Qaeda, etc.), on the other hand, amounted to a non-international armed conflict.

4. Although non-international armed conflicts are, in principle, subject to a different and more limited legal regime than that which applies in an international armed conflict, the evolution of conventional and customary international humanitarian law has brought about a tangible approximation between the law of international and non-international armed conflicts. A considerable body of treaty rules and customary international humanitarian law has evolved which applies in both types of armed conflicts.⁵⁵ However, (p. 60) important differences remain. One pivotal example of these differences is the absence of combatant status in non-international armed conflicts, which entails the right to participate directly in hostilities⁵⁶ and is the precondition for the status of prisoner of war.⁵⁷ Other examples are the law of occupation and the law of neutrality, both of which exclusively apply in international armed conflicts. Moreover, the applicability in non-international armed conflicts of a number of rules regulating methods and means of combat, that is tactics and weapons, is uncertain according to the ICRC Customary Law Study.⁵⁸ Some other findings of the ICRC Customary Law Study on methods and means of warfare in non-international armed conflicts have also given rise to a critical response from the US government and academics.⁵⁹

5. Despite these differences between the law regulating international armed conflicts and the law of non-international armed conflicts, it is possible that some or all of the law of international armed conflicts may become applicable, either through a mutual agreement between the parties to such an armed conflict, or by a unilateral declaration of one of the parties to that effect. Indeed, Common Article 3 encourages the parties to a non-international armed conflict to conclude special agreements to bring ‘all or part’ of the other provisions of the Geneva Conventions into force between them.

6. The final sentence of Section 3.09 adds an important policy rule, namely that regular armed forces should comply with all rules of international humanitarian law in the conduct of any armed conflict, irrespective of whether that conflict is characterized as non-international or international. Compliance with the full body of rules of international humanitarian law in non-international conflicts undoubtedly presents practical problems, but it serves not only humanitarian interests but also operational requirements. This policy has received support from a number of other sources (*see below*, Section 19.16).⁶⁰

7. An application of international humanitarian law beyond the legally required minimum needs to be distinguished from an application of it in situations that may involve a certain degree of (armed) violence without amounting to an armed conflict, such as internal disturbances or violent demonstrations. In such situations, a ‘choice’ to apply international humanitarian law is not available to the extent that the situation is governed by more

stringent rules of international law. For instance, international humanitarian law allows certain actions, such as the rendering *hors de combat* of combatants, fighters, and civilians directly participating in hostilities, and the destruction or damage of military objectives, while the wounding and killing of persons and the destruction or damage of property is subject to more rigid rules during peacetime, most importantly under human (p. 61) rights law. States and international organizations do not have the choice to replace the legal obligations under the more stringent legal framework applicable during peacetime for the more permissive rules of international humanitarian law. In short, parties to an armed conflict have the possibility to go beyond the minimum legally required under international humanitarian law, but those conducting military operations are not allowed to undercut their obligations under applicable international law by applying the permissive aspects of international humanitarian law in the absence of an armed conflict.

II. Personal Scope

3.10

International humanitarian law binds parties to an armed conflict and individuals.

1. International humanitarian law first and foremost binds parties to an armed conflict. These parties may be states, international organizations or organized armed groups.
2. States are bound by those treaties of international humanitarian law to which they have consented, as well as the rules of customary international humanitarian law to which they have not persistently objected. Likewise, states are equally bound by those principles of international humanitarian law that amount to general principles of law in the sense of Article 38(1)(c) ICJ Statute. Furthermore, applicable binding resolutions of intergovernmental organizations may be the source for obligations of states under international humanitarian law, regardless of whether or not the rule in question applies to the respective state by virtue of its being embodied in a treaty binding upon that state, in the corpus of customary international humanitarian law or in the body of general principles of law in the sense of Article 38(1)(c).⁶¹
3. While international humanitarian law treaties do not provide for the possibility of international organizations to become parties, such organizations are bound by customary international humanitarian law by virtue of their international legal personality,⁶² when they are a party to an armed conflict.⁶³ The binding force of international humanitarian (p. 62) law on UN forces under that condition is also confirmed by a number of other instruments.⁶⁴ The determination whether or not, and for what time, international organizations are to be considered 'a party to an armed conflict' may involve complex issues of fact and law. One such complexity is whether it is the international organization, troop contributing states or both that are to be considered the party to the armed conflict.⁶⁵ However, as a rule, the conditions for the applicability of international humanitarian law are to be approached in the same way for armed conflicts in which international organizations participate as in relation to any other armed conflict.⁶⁶ Although international humanitarian law thus may apply to international organizations, two qualifications must be made. The first is that the application of the law of neutrality may be affected in a conflict in which the UN is involved, whether directly through forces under its command or indirectly because it has authorized military action. All states are, today, members of the UN and, as such, are under a legal obligation to carry out Security Council decisions relating to the maintenance of international peace and security.⁶⁷ In addition, Article 2, para. 5 of the UN Charter provides that: 'All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.' This obligation will prevail over the laws of neutrality by virtue of Article 103 of the UN

Charter. A member state may not, therefore, rely upon the law of neutrality in order to evade the obligation to carry out binding Security Council resolutions. In addition, any state, whether or not a member of the UN, may assist a UN force or a force acting under the authorization of the Security Council even if such assistance would normally be a violation of the law of neutrality.⁶⁸ The second qualification is that the application of international humanitarian law may be affected by binding decisions of the Security Council. This is particularly likely to be the case with respect to the law of belligerent occupation (*see below*, Chapter 9). That law places a high priority on the maintenance of the status quo in occupied territory pending a definitive settlement but the Council may well adopt decisions requiring structural change within the occupied territory (as it did in Iraq in 2003–2004).⁶⁹ *See further* Chapter 20.

4. It is generally accepted that international humanitarian law, and in particular the law of non-international armed conflicts, binds organized armed groups. This is not only evident from the wording of Common Article 3, which is addressed to ‘each Party to the (p. 63) conflict’, and some other instruments applicable in non-international armed conflicts,⁷⁰ but also confirmed by various resolutions and decisions of international bodies⁷¹ as well as the ICRC. Beyond this general acceptance, however, the conceptual basis for the binding force of international humanitarian law on organized armed groups is far from settled.⁷² For further discussion, *see below*, Section 19.01, para. 5.

5. The binding force of international humanitarian law on individuals has been recognized for a long time. Ever since individuals have been punished for transgressions of the law, it is clear that individuals bear duties under international humanitarian law.⁷³ Such duties do not only extend to the individual combatant but to members of organized armed groups as much as to civilians.⁷⁴ International humanitarian law imposes such duties upon individuals directly on the international plane, that is without requiring the interposition of a rule of domestic law for establishing individual criminal responsibility.

3.11

International humanitarian law protects persons who do not or no longer directly participate in hostilities.

1. In international armed conflicts, international humanitarian law formally recognizes and defines distinct categories of persons who do not or no longer directly participate in hostilities as ‘protected persons’. These are the wounded, sick and shipwrecked,⁷⁵ prisoners of war,⁷⁶ and civilians.⁷⁷ While no formal categories of ‘protected persons’ exist in non-international armed conflict, the applicable international humanitarian law nevertheless grants material protection to those who do not or no longer actively participate in hostilities.

2. Among the aforementioned persons that enjoy general protection, international humanitarian law grants special protection to certain groups of persons, namely women,⁷⁸ children,⁷⁹ refugees and displaced persons,⁸⁰ missing persons,⁸¹ medical and religious (p. 64) personnel,⁸² humanitarian relief personnel,⁸³ journalists,⁸⁴ and personnel involved in a peacekeeping mission who are entitled to the protection given to civilians under international humanitarian law.⁸⁵

3. While international humanitarian law provides a great number of—at times very detailed—rules that stipulate the treatment that parties to an armed conflict are obliged to grant to persons who do not or no longer directly participate in hostilities, the underlying principle—sometimes referred to as the principle of protection⁸⁶ - is that they must be respected and protected in all circumstances, and must be treated humanely, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria.⁸⁷ The obligation to respect them means that parties to an armed conflict must refrain from harming them, from exposing them to suffering and from killing them. The

active notion of the obligation to protect such persons means that parties to an armed conflict are obliged to ward off dangers and to prevent harm. The obligation to afford humane treatment entails that parties to an armed conflict ensure to persons who do not or no longer directly participate in hostilities an existence worthy of human beings. The treatment must be afforded without discrimination on any ground. On the prohibition of reprisals against persons who do not or no longer directly participate in hostilities, *see* Section 7.45.

3.12

Although members of the armed forces of a party to an armed conflict and civilians directly participating in hostilities may be subject to direct attack, they enjoy the protection of international humanitarian law against certain methods and means of warfare.

1. Combatants in international armed conflicts, fighters in non-international armed conflicts, and civilians directly participating in hostilities are legitimate targets, that is they may be subjected to direct attack. They nevertheless enjoy a certain degree of protection through some rules on methods and means of warfare, first and foremost the prohibition of means and methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering.

III. Geographical Scope

3.13

In international armed conflicts, military operations may only be carried out in:

- **the territories of the parties to the conflict as defined by the national boundaries;**
- **the high seas (including the airspace above and the sea floor); and**
- **exclusive economic zones.**

(p. 65) 1. In international armed conflicts, military operations may not be carried out beyond what is at times referred to as ‘the area of war’.⁸⁸ That area includes all the territory of the parties to the conflict,⁸⁹ and the high seas, and exclusive economic zones (EEZs), including the EEZs of neutral states⁹⁰ (although military operations in the EEZ of a neutral state must show due regard for the rights and interests of that state).⁹¹

International humanitarian law applicable in international armed conflicts as a whole thus has an extensive geographical scope. However, the geographical scope of individual rules may very well be more limited. Thus, the nature of the rules pertaining to the protection of prisoners of war and civilians have been mentioned as examples of rules that apply to the entire territory of the parties to the conflict, not just to the vicinity of actual hostilities, whereas other provisions have been held to be so clearly bound up with the hostilities that their geographical scope is limited to the territory in which hostilities occur.⁹²

2. The territory (including internal and territorial waters) of neutral states and the airspace above them may not be made part of the area of war, unless the neutral state has allowed one of the belligerents to conduct military operations on its territory, in which case the rival belligerent has a right to take measures in that territory to terminate those operations.⁹³

3. Besides the aforementioned geographical confines emanating from international humanitarian law and the law of neutrality, the *jus ad bellum* may impose further restrictions. See below Section 3.19.

3.14

The national territory includes:

- **land territory;**
- **rivers and landlocked lakes;**
- **national maritime waters and territorial waters; and**
- **the airspace above these territories.**

3.15

The dividing line between the airspace of the national territory of a state and outer space shall be drawn where, due to existing physical conditions, the density of the air is small enough to permit the employment of satellites. According to the present state of the art, the minimum flight altitude of satellites ranges between 80 and 110 km above ground level.

3.16

The 1967 Outer Space Treaty prohibits placing nuclear weapons or any other weapons of mass destruction in outer space and provides that the moon and other celestial bodies be used exclusively for peaceful purposes. Military operations in outer space that occur in connection to an armed conflict are governed by international humanitarian law (see also Section 2.04 above and Sections 5.32 and 18.56 below).

1. The 1967 Treaty on principles governing the activities of states in the exploration and use of outer space, including the moon and other celestial bodies (The Outer Space Treaty) stipulates certain rules that are of significance for military activities in outer (p. 66) space. Most significantly, these rules include the prohibition to place in orbit around the earth any objects carrying weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space and an obligation to use the moon and other celestial bodies exclusively for peaceful purposes (Article IV). The restrictions on military operations that the prohibition and obligation entail do not, however, preclude the applicability of international humanitarian law to military operations in outer space that occur in the context of an armed conflict, regardless of whether such operations are conducted in compliance or in violation of the obligations that are incumbent upon states parties to the 1967 Outer Space Treaty.

3.17

Subject to the agreement of the parties to the armed conflict, it is prohibited to extend military operations to demilitarized zones (Article 60 AP I), in particular hospital and safety zones (Article 23 GC I; Article 14 GC IV) and neutralized zones (Article 15 GC IV). Non-defended localities (Article 25 HagueReg; Article 59 AP I) may not be attacked (see Section 7.16 below).

1. Zones within the territory of the parties to a conflict may be excluded from the area in which military operations may be conducted by agreement between the parties. Thus Article 23 GC I and Article 14 GC IV provide for the establishment of hospital zones for the treatment of the wounded and sick. Article 15 GC IV provides for the establishment of safety zones intended to shelter the wounded, sick, and civilians 'who take no part in hostilities'. Such zones are to be established by agreement between the parties and a Draft Agreement is attached to the Geneva Conventions as a precedent. The parties can also, if they so wish, establish zones on the high seas in which no hostile operations are to take place. The provision in Article 60 AP I for the creation, again by agreement between the parties, of demilitarized zones builds upon the concept of the safety zones in the Fourth Convention. It should be noted that the establishment of all these zones requires agreement between the parties; a unilateral announcement by one party to the conflict is not sufficient. See further, Sections 7.19–7.21, 12.24–12.27.

2. Undefended localities are those which can be occupied at will by a belligerent. They are therefore confined to 'places in or near a zone where armed forces are in contact' (Article 59 AP I) and do not extend to places far behind a state's 'lines' since such a place, although it may have no forces anywhere near it, is not open for occupation. Undefended localities may be established without agreement between the parties. Undefended localities declared by a state remain part of the area of war but the adverse party may not bombard or otherwise attack them, although it may send forces to occupy them.

3.18

Military operations shall not be carried out in the national territories of neutral or other states not parties to the conflict and in neutralized areas in which, according to contractual agreements, no military operations shall take place, even if the state to whose area of jurisdiction they belong is a party to the conflict.

1. The duty of the belligerents not to conduct military operations in the territory of neutral states and states not parties to the conflict applies to all such states and not just to those states, such as Switzerland, with a permanent regime of neutrality. In addition, a number of treaties provide for the neutralization of areas of territory, even if those areas form part of the territory of a belligerent.⁹⁴

(p. 67) 2. The Spitsbergen Treaty, 1920,⁹⁵ by which eleven states recognized the 'full and absolute sovereignty of Norway over the Archipelago of Spitsbergen', required Norway not to construct any naval base or fortification on the archipelago, 'which may never be used for warlike purposes'. Spitsbergen was, however, used for military operations during World War II. When Norway placed Spitsbergen under NATO command after World War II, the USSR protested. Norway replied that no bases or fortifications were to be built upon the archipelago.⁹⁶

3. The Åland Islands were made a 'neutral zone' by a multilateral agreement of 1921,⁹⁷ following the recommendation of the Council of the League of Nations. This status was reaffirmed in Article 5 of the Peace Treaty with Finland, 1947.

4. Article 1 of the Antarctic Treaty 1959⁹⁸ reserves the Antarctic for peaceful purposes and forbids the establishment of military bases and fortifications within Antarctica.⁹⁹

5. The Suez Canal is subject to a detailed regime regarding its use and protection in time of war, contained in the Constantinople Convention 1888.¹⁰⁰ However, the measures taken to close the Canal to German shipping during World Wars I and II and to Israeli shipping during the Egypt-Israel War called into question aspects of this regime.

6. The Hay-Pauncefote Treaty 1901¹⁰¹ between the UK and the US prohibits acts of hostility within the Panama Canal Zone.¹⁰² The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal Zone 1977¹⁰³ between the US and Panama, and the annexed Protocol on neutrality, open to accession by all states, provides for the permanent neutrality of the Panama Canal.¹⁰⁴

3.19

The zones in which military operations actually take place are referred to as the area of operations.

Military operations will not normally be conducted throughout the area of war. The area in which operations are actually taking place at any given time is known as the 'area of operations' or 'theatre of war',¹⁰⁵ although these are not legal terms of art. The extent to which a belligerent today is justified in expanding the area of operations will depend upon whether it is necessary for him to do so in order to exercise his right of self-defence. While a state cannot be expected always to defend itself solely on ground of the aggressor's choosing, any expansion of the area of operations may not go beyond what constitutes a necessary and proportionate measure of self-defence. In particular, it cannot be assumed—as in the past—that a state engaged in armed conflict is free to attack its adversary anywhere in the area of war.¹⁰⁶

(p. 68) **3.20**

The law of belligerent occupation applies in territory that has actually come under the authority of hostile armed forces.

See Section 9.02.

3.21

In non-international armed conflicts the applicability of international humanitarian law extends to the area of operations and the territory under control of a party to the armed conflict (see below, Section 19.01).

1. The territorial applicability of the law of non-international armed conflict extends to the entire territory of the state concerned.¹⁰⁷ The geographical scope of international humanitarian law applicable in this type of armed conflict is thus not limited to areas of actual combat or their vicinity. While some rules, for instance those governing the conduct of hostilities, are practically relevant first and foremost in those areas where such hostilities actually occur, the rules of the law of non-international armed conflict apply throughout the territory irrespective of whether or not combat takes place.¹⁰⁸

2. Complex questions relating to the geographical scope of international humanitarian law are raised by non-international armed conflicts that are not limited to the territory of one single state; non-international armed conflicts that are not internal in nature, in other words. See Section 19.01.

IV. Temporal Scope

3.22

International humanitarian law begins to apply from the beginning of the international armed conflict, the situation of belligerent occupation, or the non-international armed conflict.

1. Subject to the limited exceptions of those rules that apply also in peacetime,¹⁰⁹ international humanitarian law begins to apply as soon as an armed conflict has come into existence. As soon as the factual requirements for that existence are met, the situation begins to be governed by international humanitarian law.
 2. To the extent that one subscribes to the first-shot theory,¹¹⁰ that means that the law of international armed conflict begins to apply with the resort to armed force between states.
 3. In a similar vein, the law of belligerent occupation begins to apply as soon as the factual conditions for the existence of a belligerent occupation are fulfilled. The precise determination when that is the case raises a number of complicated and contested questions. Thus, there is no unanimous agreement on the questions at what point in time the invasion by one state of the territory of another state turns into a situation of belligerent occupation; whether an intermediate period between the invasion phase and a situation of belligerent occupation may exist; whether occupation implies some degree of stability in the area subject to the foreign forces' intervention; and to what extent the law of belligerent occupation can be applied gradually.¹¹¹
- (p. 69) 4. The law of non-international armed conflicts begins to apply as soon as the armed violence is sufficiently intense and the armed group(s) sufficiently organized so as to meet the legally required threshold. This is notwithstanding the fact that non-international armed conflicts are often preceded by a period of internal disturbances and tensions that is not governed by international humanitarian law. It will then be necessary to determine at what point in time such disturbances and tensions reach the threshold of intensity, and the parties to it the required degree of organization, for the situation to be governed also by international humanitarian law rather than exclusively by human rights law and national law.

3.23

In international armed conflicts, international humanitarian law ceases to apply on the general close of military operations. The law of belligerent occupation ceases to apply at the termination of the occupation. In non-international armed conflict, international humanitarian law ceases to apply at the end of the armed conflict. However, persons deprived of their liberty or whose liberty has been restricted for reasons related to the armed conflict continue to benefit from the protections of international humanitarian law until the end of such deprivation or restriction of liberty (Article 6, paras. 2, 3 and 4, GC IV; Article 3, lit. b, AP I; Art. 5 GC I; Art. 5, para. 1, GC III; Art. 6, para. 4, GC IV; Article 3, lit. b, AP I; Article 2, para. 2, AP II).

1. As much as the beginning of the applicability of international humanitarian law, the end of that applicability is essentially a matter of fact. The subjective views of the parties to the armed conflict or of the occupying power are immaterial if contradicted by the facts. It is also neither necessary nor determinative that a peace agreement has been reached by the parties to an armed conflict. Such an agreement may be indicative of the intentions of the parties to an armed conflict to end hostilities and move from a time of armed conflict to peace. However, if and when these intentions are not followed by actual conduct, it is that actual conduct which is determinative.
2. As far as international armed conflicts are concerned, the law ceases to apply 'on the general close of military operations',¹¹² provided that one can deduce from the facts on the ground that the termination of the international armed conflict is 'sufficiently general, definitive and effective'.¹¹³ A mere pause in hostilities is insufficient; rather, they must have ended with a degree of stability and permanence and be accompanied by the end of other military movements from which one can reasonably conclude that the resumption of

hostilities is unlikely.¹¹⁴ This is different in situations of belligerent occupation. Article 6(3) GC IV stipulates that in such a case, the Convention ceases to apply 'one year after the general close of military operations' except for certain rules which apply for the duration of the occupation and 'to the extent that [an Occupying Power] exercises the functions of government in [occupied] territory'. AP I differs to some extent from GC IV in as much as it extends the applicability of the entire law of belligerent occupation until the 'termination of the occupation'.¹¹⁵ Regardless of whether or not there is a general close of military operations or a termination of the occupation, persons for whom the final release, repatriation, or re-establishment is pending continue to benefit from the relevant rules of international humanitarian law.¹¹⁶ In the case of a non-international (p. 70) armed conflict, international humanitarian law ceases to apply with the end of the armed conflict. That determination will occasionally be straightforward, for instance when one of the parties to the non-international armed conflict is comprehensively defeated. Yet, more often than not, it requires a prediction of whether armed confrontations have fallen below the threshold of intensity and / or the non-state armed group's degree of organization has fallen below the required threshold, with such a degree of stability and permanence that it can reasonably be concluded that the armed conflict has come to an end.¹¹⁷ The law of non-international armed conflict provides a similar exception to its temporal scope as the law of international armed conflict in as much as it stipulates that those deprived of their liberty or whose liberty is restricted for reasons related to that conflict continue to benefit from a limited number of protections, regardless of whether they are so deprived or restricted during or after the conflict.¹¹⁸

3.24

In international armed conflicts, hostilities may be terminated temporarily or permanently. Even a definite cessation of hostilities does not alter the fact that there is a state of war. A state of war will be ended only by a conclusion of peace unless it has already been expressly terminated. The following Sections on activities relating to the termination of hostilities and on the conclusion of peace are based on treaty law and custom applicable in international armed conflicts. They partly affect activities to terminate hostilities and conclude peace agreements also in non-international armed conflicts (see also below, Section 19.21).

1. The termination of the applicability of international humanitarian law discussed in the previous section needs to be distinguished from the termination of hostilities. The latter term is not identical with the notion of 'armed conflict' as a factual determinant of the beginning and end of the temporal scope of applicability of international humanitarian law. The term 'hostilities' in turn, refers to the resort by the parties to the conflict to means and methods of injuring the enemy.¹¹⁹ In other words, 'hostilities' are a narrower concept than, and form only one part of, an 'armed conflict'. Hostilities can be terminated temporarily or permanently by means of an armistice or ceasefire (see below, Sections 3.31 et seq.).

2. Where a state of war has come into being through a formal declaration of war, the fact that hostilities have been terminated is not in itself sufficient to terminate the state of war. Historically, it has generally been accepted that as a corollary to the formal requirement of a declaration of war to bring about the state of war, it is also only through the formal instrument of a peace treaty which terminates the state of war.¹²⁰ Today, some other clear indication on the part of the belligerents that they intend to terminate the state of war can fulfil the same function as a peace treaty (on the role of armistices in that respect, see below, Section 3.45). Although active hostilities during World War II ceased in Europe in May 1945, it was not until 31 December 1946 that the US formally announced that hostilities had terminated.¹²¹ Even then, the state of war was regarded as continuing, pending the adoption of a peace treaty between Germany and her former adversaries. In

the end, (p. 71) no peace treaty was concluded.¹²² The state of war was, however, formally declared terminated by France (9 July 1951), the UK (9 July 1951), the US (24 October 1951), and the USSR (25 January 1955). Similar declarations were made by Germany's other former adversaries.¹²³ Until those declarations were made, national courts continued to hold that the state of war obtained for most purposes.¹²⁴

1. Parlementaires and Protecting Powers

3.25

A cessation of hostilities is regularly preceded by negotiations with the adversary. The parties to the conflict frequently use parlementaires for this purpose.

Parlementaires¹²⁵ are used not only for negotiations about a cessation or temporary suspension of hostilities but also for negotiations on such matters as the recovery of wounded persons or exchange of prisoners, and for communicating messages to an adversary's forces. Today, negotiations for a general cessation of hostilities are more likely to be conducted at the political level,¹²⁶ frequently through an intermediary such as the UN. The use of parlementaires as the means of communication between opposing forces nevertheless remains important, especially when forces are deployed in remote areas, as in the Falklands conflict. The parlementaire must be authorized by the commander of the forces which sent him. Traditionally, this authorization should be in writing and signed by the commander concerned, although there is no express provision in the Hague Regulations to that effect.

3.26

Parlementaires are persons authorized by one party to the conflict to enter into negotiations with the adversary. Parlementaires and persons accompanying them, for example drivers and interpreters, have a right to inviolability (Article 32 HagueReg). They make themselves known by a white flag.

1. The parlementaire is usually, but not necessarily, an officer. He may be of any nationality. Defectors or persons taken prisoner by the adversary cannot have the status neither of parlementaires nor of persons accompanying parlementaires, and hence have no right of inviolability. They can be detained if the tactical situation so requires.

2. A parlementaire has a duty to make himself and the purpose of his mission known to the adversary; his own protection may depend upon this. For that reason, the law has traditionally required that a parlementaire display a white flag (Article 32 HagueReg). A white flag is, however, no more than a signal that an armed force wishes to open negotiations. By hoisting a white flag a force is asking its adversary whether it is willing to receive a communication. It does not necessarily indicate an intention to surrender, although it has come to indicate such an intention when raised by an individual soldier or a small group of soldiers during an exchange of fire. Although it is unlawful for a force displaying a white flag to carry on firing, great caution is necessary, for the flag may have been hoisted by some members of a unit without the knowledge or consent of the commander.¹²⁷ During the Battle for Goose Green in the Falklands conflict, some Argentine (p. 72) soldiers displayed a white flag without authorization from their commander and unknown to the rest of the Argentine forces engaged in the battle. A British party who went into the open to investigate were fired on and killed by other Argentine soldiers who were apparently unaware of the white flag raised by their colleagues.

3. Traditionally, a parlementaire may approach the enemy alone, carrying the white flag himself. It is, however, more usual for him to be accompanied. According to Article 32 HagueReg, he may be accompanied by a trumpeter, bugler, or drummer, a flag-bearer, and an interpreter. In modern warfare, however, the parlementaire is more likely to be accompanied by a driver, wireless or loudhailer operator, and an interpreter.¹²⁸ The interpreter need not be a member of the armed forces to which the parlementaire belongs.

3.27

When entering the territory of the adversary, parlementaires and the persons accompanying them shall not be taken prisoner or detained. The principle of inviolability shall apply until they have returned safely to friendly territory. The adverse party is not required to cease firing in the entire sector in which a parlementaire arrives.

1. The parlementaire and those accompanying him or her are accorded inviolability. This means that they may not be fired upon or otherwise attacked, nor may they be detained. Except by prior agreement, however, the approach of a parlementaire does not require opposing forces to cease firing throughout a whole sector of the battlefield. Nevertheless, the entitlement of parlementaires and those accompanying them to be accorded inviolability is not absolute. First, they may be temporarily detained if they have (accidentally) acquired information the disclosure of which to the adversary would jeopardize the success of a current or impending operation of the friendly armed forces.¹²⁹ In this case, the parlementaire may be detained until the operation has been completed. In the meantime, he shall be treated with the respect appropriate to his position and at least like a prisoner of war. For a second exception, see the following section.

2. Distinct from the question of inviolability and loss of it is the question whether the commander to whom a parlementaire is sent is in all cases obliged to receive him or her. According to Article 33, para. 1 of the Hague Regulations of 1907, that question is to be answered in the negative. The commander may refuse to receive a parlementaire, for instance because reception would bear the risk of revealing operationally or tactically sensitive information. However, it is not considered lawful for a commander to announce in advance that parlementaires will not be received.¹³⁰

3. In contrast, it is permissible to take all necessary steps (e.g. blindfolding) to prevent the parlementaire from taking advantage of his mission to obtain information.¹³¹ Likewise, the commander who receives a parlementaire is entitled to direct the time and route by which he and his party should approach and the point at which they should enter the area controlled by his forces. Once the parlementaire is in territory controlled by the opposing forces, those forces are entitled to direct his movements in whatever way is necessary, commensurate with the safety of the parlementaire, to protect their security.

(p. 73) 3.28

Parlementaires lose their right of inviolability if it is proved in an incontestable manner that they have taken advantage of their privileged position for provoking or committing an act of treason (Article 34 HagueReg).

A parlementaire is entitled to observe and report on anything he sees which the adversary has not hidden. It is an abuse of the parlementaire's position, however, for the parlementaire or those accompanying him or her to commit acts contrary to international law and to the detriment of the adversary during their mission. Such acts include the taking of photographs, making sketch maps of defensive positions, engaging in secret intelligence gathering, committing acts of sabotage, organizing acts of espionage in the territory of the adverse party, inducing soldiers of the adverse party to collaborate in collecting

intelligence, instigating soldiers of the adverse party to refuse to do their duty; or encouraging them to desert. Should the parlementaire or those accompanying him or her do so, they may be detained temporarily (Article 33, para. 3, HagueReg) and, if it is proved 'in a clear and incontestable manner' that any of them have abused their position to provoke or commit an act of treason, the person concerned forfeits his or her inviolability and may be tried. Any measures taken against a parlementaire or members of his party should be communicated to the enemy at once.¹³²

3.29

Misusing the flag of truce constitutes perfidy and is thus a violation of international law (Article 23 lit. f, HagueReg; Article 37, para. 1 lit. a, Article 38, para. 1, AP I).

Misuse of the flag of truce has long been a war crime under customary international law. Under Articles 37 and 38 of AP I, such acts are treated as perfidy. The flag of truce is misused, for instance, if soldiers approach an enemy position under the protection of the flag of truce in order to attack.

3.30

Apart from dispatching parlementaires, the parties to a conflict may also communicate with each other through the intermediary of Protecting Powers. Protecting Powers are neutral or other states not parties to the conflict which safeguard the rights and interests of a party to the conflict and those of its nationals vis-à-vis an adverse party to the conflict (Article 2 lit. c, AP I). Particularly, the International Committee of the Red Cross may act as a 'substitute' (Article 5, para. 4, AP I) if the parties to the conflict cannot agree upon the designation of a Protecting Power.

For discussion of the now little-used institution of the Protecting Power, see Sections 21.20–21.21. The ICRC is now used more frequently as an intermediary.

2. Ceasefire and Armistice

3.31

An armistice agreement is characterized by the intention to provide an opportunity for making preparations for the termination of an armed conflict. Its aim is to terminate hostilities permanently. That is what distinguishes an armistice from a ceasefire. An armistice may be local (Article 37 HagueReg). As a matter of principle, however, an armistice agreement shall be designed to suspend military operations between the parties to the conflict and to pave the way for peace negotiations.

1. The distinction between a general armistice and a ceasefire has traditionally been that the armistice was considered a step on the road to a permanent end to hostilities and the conclusion of a treaty of peace. Thus the armistice of Rethondes in 1918 was a prerequisite for the commencement of negotiations which led in 1919 to the Treaty of Versailles and the termination of World War I. Since World War II, however, there have (p. 74) been a number of cases in which hostilities were brought to a close by the conclusion of an armistice agreement and no peace treaty was subsequently agreed. The hostilities in Korea were brought to an end by the conclusion of the Panmunjom Armistice Agreement in 1953, and

the first Arab-Israeli hostilities ceased with the conclusion of the 1949 armistice agreements between Israel, Egypt, Jordan, Lebanon, and Syria.

2. Historically, it has always been considered that the conclusion of a ceasefire or an armistice did not terminate the state of war.¹³³ It has been questioned whether this principle is still part of the law, especially where, as in the case of the 1949 armistice agreements between Israel and four Arab states, an armistice is concluded under UN auspices.¹³⁴ The correct view is probably that stated by Judge Baxter, namely that such an instrument *can* terminate the state of war, if the parties intend that it should have that effect,¹³⁵ for just as the creation of a state of war is brought about by a clear expression of the intentions of a country, that state of war can also be terminated by an indication of the intention to do so.

3. On the question of whether an armistice agreement or ceasefire can terminate an armed conflict, which has not amounted to war in the legal sense, *see* below, Section 3.45.

3.32

A ceasefire is defined as a temporary interruption of military operations which is limited to a specific area and will normally be agreed upon between the local commanders. It shall generally serve humanitarian purposes, in particular searching for and collecting the wounded and the shipwrecked, rendering first aid to these persons, and removing civilians (Article 15 GC I; Article 18 GC II; Article 17 GC IV). The regulations governing armistices (Articles 36-41 HagueReg) shall be applied *mutatis mutandis*.

Now that so few conflicts are treated, either by the parties or by other nations, as giving rise to a formal state of war, the dividing line between ceasefires, armistices, and other forms of suspension of hostilities has become increasingly blurred.¹³⁶ In many cases, a ceasefire is of indefinite duration. That was the case with the ceasefire concluded in the Iran-Iraq War in 1988, although that was concluded under UN auspices and followed the adoption of a binding resolution of the Security Council.¹³⁷

3.33

If the parties to the conflict have not defined the duration of an armistice, it shall, as a matter of principle, be considered a valid assumption that the armistice is designed to be the transition to a definite cessation of hostilities. The ban on the use of force embodied in the UN Charter shall also be observed during this period of transition. In contrast to the provisions of the Hague Regulations Concerning the Laws and Customs of War on Land (Article 36 HagueReg), the parties to a conflict may not, at any time, resume operations after the conclusion of an armistice except in the exercise of the right to self-defence in accordance with the UN Charter.

1. The changes in the law regarding resort to force brought about by the adoption of the UN Charter have had a particular effect on the right of the parties to resume hostilities (p. 75) after the conclusion of an armistice. Whereas the law once admitted there was a general right to resume hostilities (Article 36 HagueReg), today it would be a violation of Article 2(4) for a state to resume hostilities unless the behaviour of the other party to the armistice amounted to an armed attack or an imminent threat of an armed attack. Similarly, although under the traditional law the conclusion of an armistice did not prejudice the right of a party to exercise belligerent rights against shipping, such action would now be lawful only if it constituted a necessary and proportionate measure of self-defence.

2. That the law relating to the resumption of hostilities and the exercise of belligerent rights has changed in this way since the Hague Regulations were adopted was made clear by the Security Council in 1951, when it ruled that Egypt's continued exercise of belligerent rights against shipping was incompatible with the Egypt-Israel Armistice Agreement 1949. The Council ruled that: '... since the armistice regime, which has been in existence for nearly two and a half years, is of a permanent character, neither party can reasonably assert that it is actively a belligerent or requires to exercise the right of visit, search and seizure for any legitimate purpose of self-defence ...'.¹³⁸

3. It stands to reason that there is no difference between a general, indefinite ceasefire and an armistice in this respect. Whether a resumption of hostilities is justified after a general, indefinite ceasefire must be assessed by reference to the same criteria in the Charter in each case.¹³⁹

3.34

Any serious violation of a ceasefire or an armistice may give the other party the right of denouncing it and, provided that the conditions for an exercise of the right to self-defence in accordance with the UN Charter are fulfilled, to recommence hostilities. A denunciation of the armistice will be necessary only if the military situation so permits (Article 40 HagueReg; Articles 2, no. 4, and 51 UN Charter).

3.35

A violation of the terms of the armistice by individuals acting on their own initiative does not entitle the injured party to denounce the agreement but only to demand the punishment of the offenders and reparation for the losses sustained (Article 41 HagueReg).

A serious violation of an armistice or ceasefire will give rise to a right to resume hostilities. Again, however this right exists as an aspect of the right of self-defence, rather than as a right to punish the state responsible for the violation. Hostilities may be resumed if, and to the extent that, to do so is a necessary and proportionate measure of self-defence. Violations of armistice and ceasefire conditions committed by individuals acting without the authorization of their state will not normally give rise to such a right, although the true facts may be very difficult to ascertain in a particular case. Partly for that reason, many ceasefires are now monitored by UN peacekeeping forces to deter violations and to provide an authoritative machinery for determining the truth where violations have been alleged.

3.36

The terms of the armistice treaty shall be strictly observed by the parties to a conflict. It is not permissible to carry out any military operations giving an advantage over the adversary. To what extent this shall also apply to other actions taken during the armistice depends on the terms of the agreements made.

(p. 76) Where an armistice regime becomes permanent, in the sense that all hostilities cease but normal relations are not resumed between the parties, the extent to which a party to the armistice agreement is prevented from moving its forces within the territory which it holds will depend upon the specific terms of the armistice, rather than upon any general rule. In the absence of any provision to the contrary, activities such as entrenching, ammunition resupply, and prepositioning of reinforcements shall be permissible. During an

armistice it is, however, forbidden to move forward forces who are close to the enemy, or to employ reconnaissance patrols.¹⁴⁰

3.37

The area of application of a limited armistice shall be defined as precisely as possible.

If, for instance, wounded persons are to be recovered it must be clear if and up to what line bombardments further to the rear remain permissible. Sometimes it will also be necessary to co-ordinate the utilization of the airspace and the passage of ships.

3.38

An armistice must be notified in an unmistakable form and in good time. Hostilities are to be suspended immediately after the notification, or on the date fixed (Article 38 HagueReg).

3.39

The terms of an armistice shall not deviate from the provisions of the Geneva Conventions to the detriment of protected persons (Article 6 common to GC I-III; Article 7 GC IV).

International humanitarian law exists primarily to protect individuals rather than to establish rights for states.¹⁴¹ The states party to a conflict may not, therefore, waive by agreement between them any of the rights conferred upon individuals by international humanitarian law. However, they may of course agree to accord greater protection than is required by international humanitarian law.

3. Capitulation

3.40

A capitulation is the unilateral or mutually agreed termination of hostilities. It must take into account the rules of military honour (Article 35, para. 1, HagueReg).

3.41

It may be a total capitulation applying to all armed forces of a state, or a partial capitulation limited to specific units.

3.42

Every commander may declare or accept a capitulation only for his particular area of command. The capitulation and its acceptance are binding upon the states involved in the conflict. Every state may, however, call a capitulating commander to account if he has violated his duties, for example acted against orders.

3.43

A capitulation must be faithfully observed by the parties to the conflict (Article 35, para. 2, HagueReg). Persons who infringe the terms of the capitulation may be called to account by the adversary.

While the capitulation of the forces in a particular part of the area of operations will not affect the existence of the state of armed conflict elsewhere, when the surrender effectively applies to all the forces of one party in the area of operations and when there is every indication that the state on which those forces depend will not resume operations elsewhere, then the surrender may mean that active hostilities between the parties have ceased, with consequences for such matters as the duty to repatriate prisoners of war.¹⁴² The surrender of Argentine forces in the Falkland Islands in June 1982 led to the end of (p. 77) active hostilities and the repatriation of prisoners of war within a very short period once the British forces had taken the surrender of outlying Argentine garrisons not covered by the principal instrument of surrender and once it became clear that Argentina had no intention of carrying on hostilities from the mainland.¹⁴³

4. Conclusion of Peace

3.44

While a ceasefire, an armistice, or a capitulation only lead to a suspension or temporary cessation of hostilities, a conclusion of peace results in the termination of the state of war or armed conflict.

The conclusion of a ceasefire, armistice, or capitulation will not necessarily terminate a state of war or armed conflict. *See*, however, the commentary to Sections 3.24 and 3.45 for the suggestion that any of these acts may have the effect of terminating a state of armed conflict and possibly a state of war if the parties so intend.

3.45

A frequently used instrument to conclude peace is a peace treaty.

1. Parties to an armed conflict frequently use peace treaties to conclude peace. One can broadly distinguish between two types of peace treaties. First, *peace treaties strictu sensu* are agreements concluded between belligerent states in written form and governed by international law that bring to an end the formal or material state of war and to restore amicable relations between them. These peace treaties may only be concluded by heads of states or explicitly authorized representatives of the government of a state. Secondly, agreements that are concluded between a non-state party to an armed conflict, on the one hand, and either one or more states or one or more non-state parties, on the other hand, with a view to bring to an end a non-international armed conflict are commonly referred to as *peace agreements*.¹⁴⁴

2. Peace treaties regularly address the following broad categories of issues:

- the consequences of the conflict, including matters such as prisoners of war and other conflict-related detainees and displaced persons;
- measures that are taken to avoid a relapse into armed conflict, such as the peaceful settlement of territorial disputes, disarmament, demobilization, rehabilitation and reintegration of members of the armed forces of organized armed groups, restructuring and training of governmental armed forces, democratization and power-sharing, and human rights issues, and the granting of amnesty;

- the procedural and institutional dimensions of the implementation of, and monitoring over the compliance with, the terms of the peace treaty, such as the setting up of, and the procedures applicable to, Joint Commissions, bodies entrusted with investigating the causes of the conflict and boundary commissions in the case of territorial disputes, and the role of third parties, such as intergovernmental and regional organizations and third states in implementation and monitoring, and, in case of peace agreements, the establishment of transitional bodies, including transitional governments and transitional justice mechanisms, such as Truth and Reconciliation Commissions.¹⁴⁵

(p. 78) The aforementioned issues only partially overlap with those that featured in classical peace treaties.¹⁴⁶

3.46

Armed conflicts may also be terminated by a ceasefire without any peace treaty, or other modes that reflect the mutual consent of the parties to an armed conflict to terminate the armed conflict.

Armed conflicts are oftentimes terminated by less formalized modes than by peace treaties. These modes include implied mutual consent that can be inferred from the mere termination of hostilities; the complete defeat of one of the belligerents (*debellatio*) and unilateral declarations.¹⁴⁷ It has also been suggested that certain instruments which are traditionally regarded to merely suspend hostilities but which do not terminate the state of war or the armed conflict, such as armistices, have nowadays at times effectively assumed roles comparable to those of peace treaties.¹⁴⁸ It must be stressed, however, that these modes to terminate an armed conflict—whether formalized or not—do not automatically bring to an end the applicability of international humanitarian law. That question is dependent on the purely factual equation of the existence of an international armed conflict, belligerent occupation, or a non-international armed conflict. In other words, a unilateral declaration to the effect that one of the parties to an armed conflict considers the armed conflict to have ended has no bearing on the question whether the situation after such a declaration is governed by international humanitarian law. If the situation continues to be one of resort to armed force between states, of belligerent occupation of protracted armed violence between governmental forces and organized armed groups or between such groups, international humanitarian law continues to apply (*see above* Section 3.22).

V. Relevance of Other Fields of International Law

3.47

International humanitarian law must be applied in context with other principles and provisions of international law.

The most obvious manifestation of this principle is that the rules of general international law relating to such matters as treaty interpretation and application¹⁴⁹ and state responsibility¹⁵⁰ are as applicable in times of armed conflict as they are in times of peace. International humanitarian law is not a self-contained body of law but part and parcel of international law as a whole. The 2005 decision of the ICJ in *DRC v Uganda*¹⁵¹ is a good example of international humanitarian law being applied within the framework of international law as a whole. Moreover, the outbreak of armed conflict no longer suspends the operation of that part of international law known as the law of peace, so that it remains

applicable between the belligerents and neutrals and, subject to the effect of international humanitarian law, between the belligerents themselves.

(p. 79) 1. Peacetime Rules

3.48

International humanitarian law does not *ipso facto* terminate or suspend the operation of peacetime rules.

Whereas it was at one time widely assumed that the creation of a state of war between states automatically terminated, or at least suspended, all treaty relations between them (except, of course, for treaties which were specifically intended to apply during wartime),¹⁵² today neither an international armed conflict, nor even a formal state of war, has such an effect. Rather, the effects of an outbreak of war or international armed conflict on treaty relations between the parties will depend upon whether it may be inferred from the treaties concerned that it was intended that they should cease to be effective in such circumstances.¹⁵³

As a general rule, the law of peace continues to apply between each belligerent state and the non-belligerent or neutral countries, subject only to the effects of the law of neutrality. The law of neutrality qualifies the law of peace by conferring certain additional rights and obligations upon both belligerents and neutrals. Nevertheless, in many modern conflicts, there has been a reluctance to apply the law of neutrality and belligerents have frequently dealt with states not party to the conflict solely on the basis of the law of peace. As explained above, the law of peace will also continue to apply between the belligerents themselves. It is, however, subject to two qualifications. First, some rules of the law of peace contain within themselves limitations which become applicable in time of armed conflict or permit parties to derogate in time of armed conflict. Second, the law of armed conflict operates as a *lex specialis* which—in certain circumstances at least—will override conflicting obligations under the law of peace. This issue is discussed further below in connection with the operation of human rights law in time of armed conflict.

2. Human Rights

3.49

Human rights continue to apply in armed conflicts and post-conflict military operations.

See below, Chapter 14.

3. International Criminal Law

3.50

Important principles and rules of international humanitarian law have been reaffirmed in the progressive development of international criminal law which applies in peacetime and in times of armed conflict.

See below, Sections 21.10–21.16.

(p. 80) VI. Relevance of International Humanitarian Law in Peacetime and Post-Conflict Military Operations

3.51

Certain principles and rules of international humanitarian law are also relevant in peacetime and post-conflict military operations.

See above, Section 3.08, and below, Chapter 20.

Footnotes:

¹ As an exception to the rule that international humanitarian law applies in times of armed conflicts, some rules, such as those relating to dissemination, are applicable in peacetime as well. For these exceptions, see e.g. Arts 23, 44, 47 GC I; Art. 127 GC III; Art. 144 GC IV; Arts 6, para. 1, and 83, para. 1 AP I; Art. 7 AP III.

² On the state of war doctrine, see I. Brownlie, *International Law and the Use of Force by States* (OUP, 1963), 26-8. See also the following contributions in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (OUP, 2015): R. Lesaffer, 'Too Much History: From War as Sanction to the Sanctioning of War', 35-55, at 41-2, and M. Mancini, 'The Effects of a State of War or Armed Conflict' 988-1013.

³ Chiefly comprising the 1907 Hague Regulations on Land Warfare, the four 1949 Geneva Conventions (except Common Article 3), the 1977 Additional Protocol I, a significant number of treaties pertaining to more specific issues, and customary international law.

⁴ In the main comprising Arts 42-56 HagueReg 1907, Arts 47-78 GC IV, and customary international law.

⁵ The most important treaty rules are Common Art. 3 and AP II. Furthermore, rules of customary international humanitarian law apply.

⁶ Common Article 2 of the Geneva Conventions of 1949.

⁷ ICRC, *Commentary on the First Geneva Convention, Convention (I) for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field* (CUP, 2016), 80 at para. 219.

⁸ ICTY, *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, Appeals Chamber (2 October 1995), 70.

⁹ ICRC, *Commentary GC I*, 81 at para. 223, and 85 at para. 236.

¹⁰ ILA Committee on the Use of Force, Final Report on the Meaning of Armed Conflict in International Law (2010), 2.

¹¹ Ibid. 28, and supportive state practice at 16-17.

¹² For the pertinent case of a US pilot shot down and captured by Syrian forces over Lebanon in the 1980s, when the US maintained that this incident amounted to an armed conflict and that the pilot was thus entitled to be treated as a prisoner of war under GC III, see (1988) 82 *Proceedings of the American Society of International Law* 602-3 and 609-11.

¹³ Cf. Art. 4(A)(2) GC III.

¹⁴ ICRC, *Commentary GC I*, 82 para. 226. For the specifics of certain types of naval operations, see *ibid.*, para. 227.

¹⁵ Cf. in this vein ICC, *The Prosecutor v Bemba*, Decision on the Confirmation of Charges (2009), para. 223.

¹⁶ ICRC, *Commentary GC I*, p 81-2 para. 224; D. Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E. Wilmschurst (ed.), *International Law and the Classification of Conflicts* (OUP, 2012), 32-79, at 70.

- ¹⁷ T. D. Gill, 'Classifying the Conflict in Syria' (2016) 92 *International Law Studies* 367–8.
- ¹⁸ H. A. Wilson, *International Law and the Use of Force by National Liberation Movements* (Clarendon, 1988), 168. See also the declarations made by the UK on ratifying the Protocol, A. Roberts and R. Guelff (eds), *Documents on the Laws of War*, 3rd edn (OUP, 2000), 510–12.
- ¹⁹ ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, 1987), para. 112.
- ²⁰ Cf. ICJ, *Kosovo Advisory Opinion* (ICJ Reports, 2010), para. 82.
- ²¹ Compare G. Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols' (1979-IV) 165 *RdC* 353, 371–2 and Cassese, 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law' (1984) 3 *UCLA Pacific Basin Law Journal* 55, 68–71, with Aldrich, 'Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I' (1986) 26 *Virginia Journal of International Law* 703; Draper, 'Wars of National Liberation and War Criminality', in Howard (ed.), *Restraints on War* (OUP, 1979); C. Greenwood, 'Customary Law Status of the 1977 Geneva Protocols', in A. Delissen and G. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead. Essays in Honour of Frits Kalshoven* (Nijhoff, 1991), 93–114, at 111–12.
- ²² See C. Murray, 'The 1977 Protocols and the Conflict in Southern Africa' (1984) 33 *ICLQ* 462.
- ²³ For historical examples, see Y. Dinstein, *War, Aggression and Self-Defence*, 6th edn (CUP, 2017), 12.
- ²⁴ Cf. Arts 35–46 GC IV.
- ²⁵ Cf. Arts 79–135 GC IV.
- ²⁶ Cf. Art. 42 HagueReg (1907). As to the customary status of Art. 42, see ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 167, paras 78 and 172, para. 89; ICJ, *DR Congo v Uganda*, Judgment, ICJ Reports 2005, para. 172.
- ²⁷ Ibid.
- ²⁸ ICRC *Commentary GC I*, p. 109 paras 303–4.
- ²⁹ Cf. Common Art. 2, para. 2 to the Geneva Conventions.
- ³⁰ ICJ, *DR Congo v Uganda*, Judgment of 19 December 2005, para. 173.
- ³¹ Cf. ICTY *Prosecutor v Naletilić and Martinović*, Trial Chamber Judgment (31 March 2003), para. 217.
- ³² Ibid.
- ³³ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004), para. 95; Eritrea-Ethiopia Claims Commission, Central Front, Ethiopia's Claim, Partial Award (2004), para. 29.
- ³⁴ Art. 13, para. 3, GC I; Art. 13, para. 3, GC II; Art. 4 A, para. 3, GC III.
- ³⁵ Art. 43 AP I.
- ³⁶ Egypt, however, recognized Israel in 1979 when the two states concluded a peace treaty, as did Jordan in 1994. See Section 3.43.
- ³⁷ ICRC *Commentary GC I*, p. 85 paras 234–5.

- ³⁸ Cf. Art. 2(4) UN Charter.
- ³⁹ Cf. Art. 51 UN Charter.
- ⁴⁰ Cf. Art. 42 UN Charter.
- ⁴¹ M. Sassòli, 'Ius ad Bellum and Ius in Bello—The Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?', in M. Schmitt and J. Pejic, *International Law and Armed Conflict: Exploring the Faultlines—Essays in Honour of Yoram Dinstein* (Brill, 2007), 241–64, at 254–7.
- ⁴² Cf. Common Art. 2 (3) GCs.
- ⁴³ Rule 140 *CIHL*. See below, commentary para. 4(b) to Section 19.01.
- ⁴⁴ R. Tucker, *The Law of War and Neutrality at Sea* (US Government Printing Office, 1957), 199–200. See also D. Schindler, 'State of War, Belligerency, Armed Conflict', in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica, 1979), 3, 5; E. Castren, *The Present Law of War and Neutrality* (Helsinki: Suomalaisen Kirjallisuuden Seuran Kirjapainon Oy, 1954), 34–5; H. Lauterpacht (ed.), *Oppenheim's International Law*, Vol. II, 7th edn (David McKay, 1952), 655.
- ⁴⁵ C. Greenwood, 'The Concept of War in Modern International Law' (1987) 36 *ICLQ* 283, 297–301; statements by India quoted in S. P. Sharma, *The Indo-Pakistan Maritime Conflict 1965* (Bombay: Academic Books, 1970), 87 and by Canada XXI *CYIL* (1983), 326.
- ⁴⁶ See, e.g., *US Naval Manual* (2007) at para. 7(i); *US Operational Law Handbook* (2012), 41; *US DoD Law of War Manual* (2016), 15.2.1; *UK Manual* (2004), 19 at 1.42; *Australian Manual* (2006) at 11.1–11.3; *France Manuel* (2012), 66; M. Bothe, 'Neutrality in Naval Warfare: What is Left of Traditional International Law?', in A. Delissen and G. Tanja (eds), *Humanitarian Law of Armed Conflict—Challenges Ahead: Essays in Honour of Frits Kalshoven* (Nijhoff, 1991), 387–405.
- ⁴⁷ ICTY, *The Prosecutor v Ramush Haradinaj, Idriz Balaj and Lahi Brahimagj*, Case No. IT-04-84-T, Judgment (3 April 2008), para. 49.
- ⁴⁸ Ibid. para. 60.
- ⁴⁹ Cf. Art. 1(2) AP II, Art. 8(2)(d) and (f) ICC Statute.
- ⁵⁰ Cf. Art. 1(1) AP II.
- ⁵¹ U.S. Supreme Court, *Hamdan v Rumsfeld*, 548 US 557 (2006), 628–31.
- ⁵² See C. Greenwood, *Essays on War in International Law* (Cameron May, 2006), 409.
- ⁵³ See, e.g., H. H. Koh, Legal Adviser, US Department of State, Address to the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (25 March 2010), <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm>.
- ⁵⁴ See commentary to Section 2.01 on the quite different question of whether the events of 11 September 2001 constituted an armed attack for the purposes of the law of self-defence.
- ⁵⁵ As for treaty law, see Sections 19.07–19.11. For customary international humanitarian law, see *CIHL*, concluding that of the 161 Rules that were found, 159 apply in international armed conflicts and 148 apply in non-international armed conflicts.
- ⁵⁶ Cf. Art. 43(2) AP I.
- ⁵⁷ Cf. Art. 44(1) AP I.

58 See the findings of this Study in respect of the prohibition of the improper use of the flags or military emblems, insignia, or uniforms of the adversary, applicable in international armed conflicts, but only ‘arguably’ so in non-international armed conflicts. Cf. *CIHL* Rules 62 and 63.

59 See, e.g., John B. Bellinger III and William J. Haynes II, ‘A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law’ (2007) 866 *IRRC* 443–71 at 460, 465; D. Turns, ‘Weapons in the ICRC Study on Customary International Humanitarian Law’ (2006) 11 *JCSL* 201–37. For a response to the US criticisms, see J. M. Henckaerts, ‘Customary International Humanitarian Law: a response to US comments’ (2007) 866 *IRRC* 473–88.

60 International Institute for Humanitarian Law, ‘Declaration on the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts’ (1990) *IRRC* 404–8; see also the discussion in the *US Naval Manual* (2007) 5–3 and Department of Defense (DoD) Directive 5100.77 of 10 July 1979, restated in DoD Directive 2311.01E of 9 May 2006, DoD Law of War Program, Section 4.1.

61 Although the Security Council has not acted, through the exercise of its Chapter VII powers, as legislator in the field of international humanitarian law thus far, that possibility cannot be excluded. See G. Nolte, ‘The Different Functions of the Security Council with Respect to Humanitarian Law’, in V. Lowe, A. Roberts, J. Welsh, and D. Zaum (eds), *The United Nations Security Council and War—The Evolution of Thought and Practice since 1945* (OUP, 2008), 532.

62 For the UN, see ICJ, *Reparations*, Advisory Opinion, *ICJ Reports* 1949, 179. Whether all international organizations possess international legal personality is largely a definitional question. However, in the following, use will be made of the definition of an international organization as expounded in the Draft Articles on Responsibility of International Organizations. Draft Article 2 defines an international organization as ‘an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality’. Cf. ILC Report on the work of its 59th Session (7 May to 5 June and 9 July to 10 August 2007), GAOR 62nd Session, Supplement No. 10 (A/62/10), p. 185. For the commentary to this article, see Official Records of the General Assembly, 58th Session, Supplement No. 10 (A/58/10), pp. 38–45.

63 See among many others, C. Greenwood, ‘International Humanitarian Law and United Nations Military Operations’ (1998) 1 *YIHL* 3–34 at 16; D. Shrager, ‘The United Nations as an Actor Bound by International Humanitarian Law’ (1998) 5 *International Peacekeeping* 64–81 at 65. For parallel arguments vis-à-vis the EU, see M. Zwanenburg, ‘Toward a More Mature ESDP: Responsibility for Violations of International Humanitarian Law by EU Crisis Management Operations’, in S. Blockmans (ed.), *The European Union and Crisis Management* (Asser Press, 2008), 395–415 at 400–1. See also ECJ, *Racke* (Case C-162/96) [1998], para. 45; ECJ, *Poulsen and Diva Navigation* Case C-286/90 [1992] ECR I-6019, para. 9, confirming that the EC is required to comply with the rules of (customary) international law in the exercise of its powers.

64 See, e.g., Articles 2(2) and 20 of the 1994 Convention on the Safety of United Nations and Associated Personnel [‘Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.’ ‘Nothing in this Convention shall affect: (a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards’]; UN Secretary General, Secretary-General’s Bulletin: Observance

by United Nations Forces of International Humanitarian Law (6 August 1999), ST/SGB/1999/13; UN DPKO Department of Field Support, 'United Nations Peacekeeping Operations—Principles and Guidelines' [Capstone Doctrine] (15 January 2008).

⁶⁵ For discussion, see ICRC, *Commentary GC I*, 90–1, paras 248–52.

⁶⁶ *Ibid.*, 247.

⁶⁷ Article 25 UN Charter.

⁶⁸ See the 1975 Wiesbaden resolution of the *Institut de droit international, Annuaire de l'Institut*, 56 Vol. II (1975), 541, D. Schindler and J. Toman (eds), *The Laws of Armed Conflict*, 4th edn (Nijhoff, 2004), 907 and Dinstein, above (n. 23), 154–5.

⁶⁹ See, e.g., SC Res. 1483 (2003), 1511 (2003), and 1546 (2004).

⁷⁰ Cf. e.g. Articles 7 and 8 of the 1999 Second Hague Protocol, both equally addressed to 'each Party' or 'Parties to the conflict'; Articles 8(2)(e)(vii) ['conscripting or enlisting children . . . into armed forces or groups . . .'] and (2)(e)(xi) ['subjecting persons who are in the power of another party to the conflict to physical mutilation . . .'] ICC Statute.

⁷¹ See for recent examples. e.g. SC Res. 1868 (2009), Preamble (Afghanistan); 1863 (2009) para. 15 (Somalia); 1856 (2008) para. 23 (DR Congo); all calling upon, or demanding that all parties to the respective armed conflicts comply with international humanitarian law; UN Commission on Human Rights . . . See also Special Court for Sierra Leone, *Prosecutor v Kallon and Kamara*, Appeals Chamber Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (13 March 2004) para. 45.

⁷² J. Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93 *IRRC* 443–61.

⁷³ For an early example, see e.g. U.S. Supreme Court, the *Henfield's* case (1793), 11 F. Cas. 1099, reproduced in J. Paust, M. C. Bassiouni, M. Scharf et al. (eds), *International Criminal Law, Cases and Materials*, 2nd edn (Carolina Academic Press, Durham, 2000), 232–8.

⁷⁴ For the criminal responsibility of civilians for war crimes, see among many others, Trial of *Krupp and Eleven Others*, US Military Tribunal, Nuremberg (17 November 1947–30 June 1948). *Law Reports of Trials of War Criminals*, Vol. X, p. 150. For a useful summary of other case-law, including criminal trials of civilians for war crimes, see R. Provost, *International Human Rights Law and Humanitarian Law* (CUP, 2002), 75–102. For a recent restatement, see ICTR, *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, Appeals Chamber (1 June 2001), paras 443–4.

⁷⁵ Cf. Arts 13 of GC I and II respectively, and Art. 8(a) and (b) AP I.

⁷⁶ Cf. Art. 4 GC III and Arts 43 and 44(1) AP I.

⁷⁷ Cf. Art. 4 GC IV and Art. 50 AP I.

⁷⁸ GC I, Art. 12(4); GC II, Art. 12(4); GC IV, Art. 27; AP I, Art. 76; GC III, Arts 25, 97; GC IV, Arts 76, 85, 124; AP I, Art. 75(5); AP II, Art. 5(2)(a); GC III, Art. 14; GC IV, Art. 97; GC III, Art. 29; GC IV, Art. 85(4); GC III, Art. 88; AP I, Art. 76(2), (3); AP II, Art. 6.

⁷⁹ See, e.g., GC IV Arts 23–4, 38, 50, 76, 89; AP I, Arts 70(1), 77; AP II Art. 4(3); Convention on the Rights of the Child, Article 38.

⁸⁰ See, e.g., GC IV, Arts 44, 45, 49, 70; AP I, Arts 73, 85; AP II, Art. 17.

⁸¹ See, e.g., AP I, Arts 32–4.

⁸² See, e.g., GC I, Arts 24–6; GC II, Art. 36; GC IV, Art. 20; AP I, Art. 15; AP II, Art. 9.

⁸³ See, e.g., AP I, Art. 71(2); AP II, Art. 18(2).

- ⁸⁴ See, e.g., AP I, Art. 79.
- ⁸⁵ Cf. Rule 33 *CIHL*.
- ⁸⁶ Cf. F. Kalshoven and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 4th edn, <https://www.icrc.org/en/publication/0793-constraints-waging-war-introduction-international-humanitarian-law>.
- ⁸⁷ Arts 12 GC I and II; 16 GC III; 27 GC IV; 75 AP I; 2 and 4 AP II.
- ⁸⁸ H. Lauterpacht (ed.), *Oppenheim's International Law*, Vol. II, 236–44; C. Greenwood in the second edition of this Handbook, 59.
- ⁸⁹ Unless somehow excluded, e.g. by neutralization; see Sections 3.17–3.18.
- ⁹⁰ See Chapter 17.
- ⁹¹ Article 58, Law of the Sea Convention 1982.
- ⁹² ICTY, *Tadić*, Interlocutory Appeal, para. 68.
- ⁹³ See Chapter 18.
- ⁹⁴ H. Lauterpacht, *Oppenheim's International Law*, Vol. II, 244–7; Afsah, 'Neutralization', *MPEPIL*.
- ⁹⁵ LNTS 2, 7; Ulfstein, 'Spitsbergen/Svalbard', *MPEPIL*.
- ⁹⁶ Afsah, above (n. 94).
- ⁹⁷ LNTS 9, 212; Hark, Åland Islands, *MPEPIL*.
- ⁹⁸ UNTS 402, 71; Vöneky/Addison-Agyei, 'Antarctica', *MPEPIL*.
- ⁹⁹ Jennings and Watts, *Oppenheim's International Law*, Vol. I, 693.
- ¹⁰⁰ *Ibid.*, 592; Arcari, 'Suez Canal', *MPEPIL*.
- ¹⁰¹ 190 CTS 215.
- ¹⁰² Jennings and Watts, *Oppenheim's International Law*, Vol. I, 595; Arcari, 'Panama Canal', *MPEPIL*.
- ¹⁰³ (1977) 16 *ILM* 1021–98; Jennings and Watts, *Oppenheim's International Law*, Vol. I, 597–8.
- ¹⁰⁴ A number of other cases in which territory is said to have been neutralized are discussed in H. Lauterpacht, *Oppenheim's International Law*, Vol. II, 244–7 and Afsah, above (n. 94).
- ¹⁰⁵ H. Lauterpacht, *Oppenheim's International Law*, Vol. II, 237.
- ¹⁰⁶ This question is discussed further by C. Greenwood, 'Self-Defence and the Conduct of International Armed Conflict', in Y. Dinstein and M. Tabory (eds), *International Law at a Time of Perplexity* (Nijhoff, 1989), 273, 276–8.
- ¹⁰⁷ ICTR, *Akayesu*, paras 635–6.
- ¹⁰⁸ ICTY *Tadić*, Interloc. App., para. 69.
- ¹⁰⁹ See above n. 1.
- ¹¹⁰ See above Section 3.02, commentary, para. 1.
- ¹¹¹ For a summary of the opinions of experts, see ICRC, *Occupation and other Forms of Administration of Foreign Territory* (2012), <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf>.

- 112** Cf. Arts 6(2) GC IV and 3(b) AP I.
- 113** ICTY, *Gotovina* Trial Judgment (2011) para. 1694.
- 114** ICRC, *Commentary to Geneva Convention I*, 101 at 277–8.
- 115** Cf. Art. 3(b) AP I. For discussion, see ICRC, *Occupation and other Forms of Administration of Foreign Territory*, 26–33.
- 116** Cf. Arts 5 GC I, 5(1) GC III, Art. 6(4) GC IV, Art. 3(b) AP I.
- 117** Cf ICRC, *Commentary to Geneva Convention I*, 176–7, at paras 490–6.
- 118** Cf. Art. 2(2) AP II.
- 119** ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), 43.
- 120** Kleffner, ‘Peace Treaties’, *MPEPIL*.
- 121** M. Whiteman, *Digest of International Law*, Vol. X (Washington, 1968), 89.
- 122** See, however, the Treaty on the Final Settlement with respect to Germany, (1990) 29 *ILM* 1186.
- 123** Whiteman, Vol. X, 89–95; J. L. Kunz, ‘The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision’ (1951) 45 *AJIL* 37–61; ‘Ending the War with Germany’ (1952) 46 *AJIL* 114.
- 124** See the cases discussed at Whiteman, Vol. X, 93–4.
- 125** *UK Manual* (2004), para. 10.4; M. Greenspan, *The Modern Law of Land Warfare* (University of California Press, 1959), 380–5.
- 126** *UK Manual* (2004), para. 10.3.1.
- 127** *Ibid.*, para. 10.5.2.
- 128** *Ibid.*, para. 10.7.
- 129** *Ibid.*, para. 10.9.
- 130** H. Lauterpacht (ed.), *Oppenheim’s International Law*, Vol. II, 539; Greenspan, above (n. 127), 382.
- 131** Article 33, para. 2, HagueReg.
- 132** *UK Manual* (2004), para. 10.10.
- 133** H. S. Levie, ‘The Nature and Scope of the Armistice Agreement’ (1956) 50 *AJIL* 880.
- 134** See, e.g., the statement by the representative of Israel, SCOR 549th Meeting, 26 July 1951, paras 40–1; S. Rosenne, *Israel’s Armistice Agreements with the Arab States* (Tel-Aviv: Blumstein, 1951), 45.
- 135** R. Baxter, ‘Armistices and other Forms of Suspension of Hostilities’ (1976) 149 *RdC* 353.
- 136** Azarov/Blum, ‘Suspension of Hostilities’, *MPEPIL*.
- 137** SC Res. 598 (1987); see M. Weller, ‘The Use of Force in Collective Security’, in I. Dekker and H. Post (eds), *The Gulf War of 1980–1988* (Nijhoff, 1992), 77–90.
- 138** SC Res. 95 (1951).
- 139** S. Bailey, ‘Cease-fires, Truces and Armistices in the Practice of the UN Security Council’ (1977) 71 *AJIL* 461.

- 140** Greenwood, in the second edition of this Handbook, at 69.
- 141** See commentary to Section 2.02.
- 142** Article 118 GC III.
- 143** For the text of the instrument of surrender, see (1982) 53 *BYIL* 526–7 and the statements at 537–8.
- 144** Kleffner, above (n. 122).
- 145** For references, see Kleffner *ibid.*
- 146** On these, see R. Lesaffer (ed.), *Peace Treaties and International Law in European History—From the Late Middle Ages to World War One* (CUP, 2004), 36, 404; S. Neff, *War and the Law of Nations—A General History* (CUP, 2005), 117–18. See also Greenwood in the second edition of this Handbook at 71.
- 147** For international armed conflicts, cf. Dinstein, above (n. 23), 47–50.
- 148** *Ibid.*, 42.
- 149** See the provisions of the Vienna Convention on the Law of Treaties, 1969, which are generally taken as declaratory of customary international law and thus applicable to all treaties.
- 150** See the ILC Articles on State Responsibility 2001, J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002).
- 151** ICJ, *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)*, *ICJ Reports* 2005.
- 152** ILC, *Draft Articles on Effects of Armed Conflicts on Treaties and commentaries thereto*, *Official Records of the General Assembly, 66th Session, Supplement No. 10 (A/66/10)* (2011); see also A. McNair, *The Effect of War upon Treaties* (CUP, 1943).
- 153** 61 *Annuaire de l'Institut* (1985) Vol. II, 278. See also ILC, *Draft Articles on the effect of armed conflicts on treaties and commentaries thereto*, paras 100 and 101.

(p. 234) 6 Triggering the International Law of Armed Conflict

The next four chapters deal with the application of the law of armed conflict to the actual conduct of war. This is often known as the *jus in bello*. This international law applies to all parties to the conflict, whether they consider themselves to be fighting a just war or not. This law applies whether or not the conflict is accepted as having given rise to a State of War. The threshold for triggering the modern international law of armed conflict is not set out in the treaties. In the past this law of war obviously applied when states were in a State of War, and the rules came to be applied in the American Civil War. But today the situation is complicated, not only because the treaties provide little guidance, but also because states may wish to deny that the law of armed conflict applies to their operations, or that armed groups have taken control of territory. Moreover, where an armed conflict qualifies as an armed conflict between states, captured armed forces will be entitled to prisoner of war status and to be released at the end of the conflict. In all situations where the international law of armed conflict applies, certain violations will constitute war crimes (although the list of war crimes for international armed conflicts is longer than for non-international ones). So the legal consequences of triggering the threshold for the application of this international law can be significant. One needs to determine: first, what kind of conflict we are dealing with; and, second, what the appropriate threshold of violence is that would trigger the law of armed conflict for such an armed conflict.¹

I think for present purposes seven different situations can be helpfully separated out:

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1. Declared War.
2. Armed conflicts between states.
3. Belligerent occupation.
4. Recognized Belligerencies.
5. National Liberation Movements under Additional Protocol I.
6. Non-international armed conflicts.
7. Conflicts involving forces under UN command and control where the United Nations is as a party to the conflict.

6.1 Declared Wars

Today neither a Declaration of War, nor war in the material sense is a necessary condition for the application of the laws of war (also known as the law of armed conflict (LOAC), or international humanitarian law (IHL)).² Even where older treaties on the laws and customs of war on land state that the treaty is 'only binding on the Contracting Powers, in case of war between two or more of them',³ today the rules in such treaties are applied to all armed conflicts between states, and the equivalent customary international law does not require that the armed conflict counts as a War.⁴

(p. 236) As we have seen, states and international organizations have been keen, for different reasons, to avoid describing various conflicts as Wars. But this was not really to avoid the protective law that we are now interested in. States wanted to be able to continue to trade and import and export arms without fear of breaching rules regarding to Neutral Status. Organizations such as the League of Nations did not want to qualify a conflict as

War, only to then seem to everyone be impotent to stop it under their new arrangements designed to impose sanctions on those who resort to War.⁵

It would be misleading to suggest that Japan, in denying the existence of War with China in 1937, was simply seeking to avoid the obligations found in the law of war treaties that protected prisoners of war and those under occupation. In fact, by the beginning of 1942 Japan had agreed to apply the relevant Prisoner of War Convention (which it had not ratified) with regard to American, British, Canadian and New Zealand prisoners of war, even extending it to civilian internees in order to gain reciprocal advantages for the protection of captured or interned Japanese.⁶ In any event, the Tokyo Tribunal applied the laws of war to the killing and mistreatment of prisoners of war and civilians.⁷ The situation with regard to the denial of War is more complex than any apparent wish to avoid constraints on how the enemy should be treated.

The issues emerge in the proceedings in Tokyo at the International Military Tribunal for the Far East. Two defendants told the Tribunal that 'it was officially decided in 1938 to continue to call the war in China an "Incident" and to continue for that reason to refuse to apply the rules of war to the conflict'.⁸ Judge Pal, from the Tokyo International Military Tribunal, who considered that the hostility between China and Japan in 1937 'cannot be denied the name of "war"',⁹ sets out his speculations on why states chose to deny the existence of War:

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Japan did not give the hostility the name 'war' perhaps because she thereby expected to elude the constraints of the Kellogg-Briand Pact, perhaps she thought that simply by omitting to issue a declaration it would be possible for her to avoid the opprobrium of waging war, and to avoid the duties imposed by international law for the conduct of war.

Japan says that she was anxious to localize the matter. Of course, it must be said that by not declaring the hostility to be war, Japan deprived herself of certain valuable rights of belligerency also, like rights of blockade, etc.

China also did not want to give the name of 'war' to this hostility before Japan became involved in war with the United States of America by her attack on Pearl Harbour.

China did not give it the name 'war' perhaps because she needed the assistance of the so-called neutral countries who were anxious to avoid being openly at war.

America also did not give it that name: perhaps because she desired to escape the disabilities of her neutrality legislation whereby the shipments of arms and munitions of war to belligerents were automatically forbidden. America certainly could have openly acknowledged a state of war.¹⁰

Since the Second World War, states have hesitated when it comes to declaring War or accepting that they are in a State of War. Again, this is not usually connected to any attempt to avoid the rules for the protection of victims of war. Rather this relates now to the reluctance to trigger the effects in national law that we discussed in the previous chapter. With regard to the Malvinas/Falklands conflict in 1982, the UK Government chose not to declare War to avoid the consequences for British citizens under the Trading with the Enemy Act and the general international opprobrium that would accompany any contemporary Declaration of War.¹¹

A Declaration of War by one state against another will nevertheless still trigger the application of the law of armed conflict, even in the absence of hostilities. This is explicitly stated in the 1949 Geneva Conventions for the protection of war victims, and the 1954 Hague Convention on the Protection of Cultural Property in Armed Conflict.¹² It is also explicitly stated that (p. 238) these treaties apply even if the State of War is not

recognized.¹³ Multiple other treaties, including those prohibiting certain weapons, incorporate this trigger of Declared War by referencing the key provision of the Geneva Conventions.¹⁴ The relevant common paragraph in all four of the 1949 Geneva Conventions reads:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all 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.¹⁵

The last uncontroversial Declaration of War with legal effect is sometimes said to be the one made by the Soviet Union on Japan on 8 August 1945.¹⁶ However, references are often made to the insistence by Egypt that it considered it was at War with Israel when it came to certain matters related to the Suez Canal,¹⁷ and the claim by Pakistan in 1965 that it was at War with India. But these instances have not led all outside decision-makers to consider that real Declarations of War had been issued with any legal effects beyond what would apply in any armed conflict.¹⁸ Schindler's study concluded that 'State (p. 239) practice since 1945 shows that, in a state of war, third parties do not act in a different way than in an armed conflict.'¹⁹ As we saw in the Preface, there have been significant references to 'Declarations of war' by Al-Qaeda and the so called 'Islamic state'. Any such declarations by armed groups are of no effect in terms of bringing into force the humanitarian law treaties under consideration in this chapter. For a declaration of war to trigger the 1949 Geneva Conventions, it would have to be a formal unilateral Declaration of War issued by the appropriate authority of a state declaring War on another state.

There is no particular form that the Declaration of War need take, but political statements will not today be assumed to be the equivalent of a Declaration of War. In the Eritrea/Ethiopia Arbitration, the Commission rejected Eritrea's argument that a Resolution of the Ethiopian Council of Ministers and Parliament condemning the Eritrean invasion of the day before (12 May 1998) could be taken as a Declaration of War. Even though the Resolution made clear that Ethiopia would act in self-defence, the Commission stated that the essence of a Declaration of War 'is an explicit affirmation of a state of war between belligerents'.²⁰ Some would consider that a declaration of a Blockade could still count as an act of War, or trigger a State of War.²¹ Leaders and politicians are often quoted as calling a situation war, complaining of 'acts of war', or even referring to being in 'a state of war',²² but from a legal perspective such statements have rarely been found to have any legal effect.

The validity of a purported Declaration of War was considered in some detail in the 1976 Arbitral Award by Pierre Lalive in an arbitration in Geneva between an Indian cement company and the National Bank of Pakistan. The Bank argued that there was a 'State of War' between India and Pakistan due to the 'hostile acts of India in the form of an invasion'. And that, in addition, there had been a 'Declaration of War by the President of Pakistan' in a radio (p. 240) broadcast. Lalive found that the broadcast did not constitute a Declaration of War:

In the official copy of this broadcast ... are to be found, inter alia - with a criticism of Indian 'aggression' and attack, which was made 'without a formal declaration of war' - the words 'We are at war' and a statement to the effect that Pakistan is invoking its right of self-defence under the UN Charter.

Whether or not the facts or claims referred to in the broadcast are sufficient evidence that a 'state of war' came into existence, a distinct question remains: can the President's statement be considered as a 'declaration of war' ...? The answer, in my opinion, must be in the negative. In the words of a leading authority much relied

upon by both parties (Oppenheim-Lauterpacht, *International Law*, Vol II, 7th ed, § 94, p 293), a declaration of war is:

‘a communication by one State to another that the condition of peace between them has come to an end and a condition of war has taken place’.

It is obvious that the President’s speech of September 6, 1965, addressed to his ‘dear countrymen’ in no way was, or purported to be, a ‘communication’ to India. The official text produced by the President, moreover, contains, neither in its title nor elsewhere, the terms ‘declaration of war’.²³

Although in the present context we are examining the possibility of a declared War triggering the 1949 Geneva Conventions and other treaties covering the law of armed conflict, Lalive’s separate examination of whether there could nevertheless have been a ‘State of War’ in the post-UN Charter world is also worth examining. His reticence to finding a State of War explains in part the high threshold needed to assume a Declaration of War, or indeed to assume the existence of a War in the legal-technical sense:

The *obligations* of both India and Pakistan under the Charter – a text which purports to prohibit or at least regulate the use of force – are bound to have *some* effect and *some* relevance upon the question whether a ‘state of war’ came into existence on September 6, 1965. This minimum effect may be described as follows: *in case of doubt* as to the answer to be given to that question, the answer should be negative rather than affirmative, for the (p. 241) existence of a state of war can certainly *not be presumed* between members of the UNO. On the contrary, it must be presumed, *in dubio*, that each Member State, if and when it is using force, intends to use it in a manner consistent with its obligations under the Charter (especially under article 2(4)).²⁴

Lalive then turns to the legal argument and the words used by the President of Pakistan at the end of same radio broadcast examined above:

‘We are invoking the United Nations Charter to exercise our inherent rights of individual and collective self-defence recognised in Chapter VII of the Charter.’ It is clear that this right of self-defence can be exercised not only when an armed attack initiates a ‘war’ but also in cases of armed conflicts short of war. The fact that Pakistan referred to Article 51 of the UN Charter and, eventually, on September 21, 1965, complied with the Security Council Resolution on a cease-fire indicates that it did intend to fulfil its obligations and exercise its right of Member of the UNO. One is therefore tempted to draw the conclusion that, if any ‘presumption’ may be based on the use of force by the attacked State, it is a presumption rather against than in favour of the will to wage ‘war’, a presumption that self-defence will be limited and the use of force kept within the general limits of the Charter, pending action by the Security Council.²⁵

A court may well follow Lalive’s lead and presume that in most cases there is no War in the international legal sense, ambiguous declarations of war (or even claims about a state of war) being seen as extremely unlikely to be of legal effect in the contemporary world. In the present context, therefore, we should conclude that it is more likely that the law of armed conflict would be triggered by an actual conflict between states than by reference to a supposed declared War.

(p. 242) 6.2 Armed Conflicts between States

The Geneva Conventions state, as we have seen, that they apply to 'any other armed conflict which may arise between two or more of the High Contracting Parties'. These Parties now include all UN member states, as well as the State of Palestine, the Holy See and the Cook Islands. We can conclude that these treaties are of universal application and would apply to any armed conflict between two or more such Parties. Other treaties with a more limited range of states parties will apply to armed conflicts between those states parties. So, for example, armed conflicts under Additional Protocol I include inter-state conflicts covered by the 1949 Geneva Conventions where both states are parties to this Protocol. In practice, some states may choose to apply this more protective regime to a conflict even where they are not bound to do so.²⁶ The customary international law of international armed conflict will also apply to any armed conflict between two or more states.²⁷

The next question, then, is what constitutes an armed conflict in this context? We can afford to be brief: the short answer is that the threshold is low. Where there is an intention by one state to engage with force against another state, the humanitarian protections in the law of armed conflict will be triggered. So the first wounded or captured person will be covered by the relevant protective regime. On the other hand, it seems clear that mistakenly 'invading' a territory due to a GPS mix up, or drunken wanderings over the border, would not trigger an armed conflict.²⁸ I have sought to set out criteria elsewhere for understanding this threshold:

(p. 243)

For such low-level hostilities between states to trigger the application of the Geneva Conventions, one might take into account factors such as whether the use of force was undertaken by the military and targeted at the other state's military, or is harmful to the state or to those under its jurisdiction, the extent of the damage or casualties, the location of the incident (an attack on the territory of the state carrying particular significance), the level of control exercised over any non-state groups involved in the hostilities, and the significance of any target. This does not represent a scientific formula, but we can see that, for example, a deliberate and attributed attack on a single warship, even with no casualties, could trigger the application of the law of [international armed conflict], while a cross-border skirmish involving some over-excited customs officers may not. While the subjective approach of the two states concerned is not determinative, in many situations the admission that the incursion or damage was a mistake may resolve dubious cases.²⁹

The problems in this area tend to turn less on whether the minimal threshold has been reached, and more on whether the actions of non-state armed groups operating in one state should be considered as under the control of another state so that the situation can be considered as part of an international armed conflict.³⁰ This is a controversial area, complicated by the fact that there may be overlapping conflicts, one between the two states and another between a state and an armed group.³¹ Confusion arises because there (p. 244) are, as we saw in Chapter 4, parallel rules determine the permissible reactions by one state to another state's support to an armed group. These depend on the type of support that is proffered.

Let me recall the separate rules:

1. The sending of armed groups into another state can be considered an act of aggression and an armed attack, generating the right to self-defence against the sending state.
2. Where the state is merely supporting an armed group fighting another state, this may be considered a use of force, but not an act of aggression; this would not be considered an armed attack, and there would be no right for the victim state to engage in the use of force against the other state in self-defence. The rationale is that one should not let states too easily claim the right to use force in self-defence.
3. Where the state engages in an armed conflict with such an armed group, the law of armed conflict for a non-international armed conflict should apply.³²
4. Where a state is in effective control of, or instructing or directing, the operations of an armed group, and in the course of those operations the group or its fighters commit violations of international law, then those acts are attributable back to the state that bears international responsibility for such violations of international law.³³

(p. 245) The modern and complex question concerns the situation where a state attacks an armed group in the territory of another state without that state's permission. One view holds that this can constitute an international armed conflict,³⁴ while this 'does not exclude the existence of a parallel non-international armed conflict between the intervening State and the armed group'.³⁵ Lubell stresses, however, that Article 2 of the Geneva Conventions applies to an armed conflict that 'arises between two or more' states. So he concludes that 'it is submitted that the notion of "between" still carries weight, as it can be understood as pointing to the combination of the objective and subjective aspects of belligerent intent and *animus belligerendi*'.³⁶ He, and others, such as Gill, would separate out cases where there was obviously an international armed conflict, 'due to the nature of the activities and the amount of harm caused',³⁷ from other uses of force directed against a non-state actor where there is no intent to engage the host state in an armed conflict. For Dinstein, 'The legal position is transformed only if States become entangled in combat with each other.'³⁸

In sum, when an armed conflict arises between states, the amount of force necessary to trigger the international humanitarian law of armed conflict is low; one does not need to conceive of the inter-state violence as something that looks like war. This has a very meaningful rationale: from the outset the first wounded and captured benefit from the full legal protection offered by the Geneva Conventions. When it comes to the separate conflicts with armed groups, as we shall see, the threshold of violence for the application of the law of armed conflict may be higher. Separating out these conflicts is challenging not only for lawyers – the political dimension will play a real role.

Political leaders may prefer not to refer to an 'international armed conflict', let alone a 'war'. Lawyers working within ministries of defence nevertheless will usually be keen to accept that humanitarian law applies, not least for the protection it will offer their own side in the event of capture. Goodman, who worked as Special Counsel in the US Department of Defense, offers these pertinent insights:

(p. 246)

The Administration might be reluctant to admit these events amount to an armed conflict with Syria, because such an admission could lead to an uncontrolled escalation of hostilities. If the President walked out onto the Rose Garden tomorrow

and announced that the United States was in an armed conflict with Syria, just imagine the results.

...

To say we are in an armed conflict, however, is not to say we are at war. The definition of an 'armed conflict', which preoccupies humanitarian lawyers who want to know if the Geneva Conventions apply, is not the same as the political state of affairs involved in 'war'. Remember even the detention of a single soldier would presumably be enough to trigger the protections of the POW [Prisoner of War] Convention, yet that is nowhere near a sufficient amount of force to be considered a war between two states. Indeed, as odd as it might sound to a policymaker, a detained soldier may properly be classified as a 'prisoner of war' even when there isn't a war.³⁹

6.3 Belligerent Occupation

Armed resistance by government forces to an occupation by another state should be considered an international armed conflict. According to the Geneva Conventions, even where there is no armed resistance to an occupation, as long as the host state has not consented to the presence, the Geneva Conventions apply.⁴⁰ An occupation need not involve an invasion. Foreign forces that started out in another state with the consent of the host state could refuse to leave and then go on to establish an occupying force, triggering the application of the relevant international law of armed conflict. Occupation is defined by Article 42 of the 1907 Hague Regulations, which reads:

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

(p. 247) In recent times, consideration has been given to a state of occupation's continuing even where the occupying power remains outside the occupied territory yet remains in effective control.⁴¹ The Prosecutor of the International Criminal Court considered in 2014 there 'is a reasonable basis upon which to conclude that Israel continues to be an occupying power in Gaza despite the 2005 disengagement'.⁴² Among other things, she noted:

Israel's exercise of control over border crossings, the territorial sea adjacent to the Gaza Strip, and the airspace of Gaza; its periodic military incursions within Gaza; its enforcement of no-go areas within Gaza near the border where Israeli settlements used to be; and its regulation of the local monetary market based on the Israeli currency and control of taxes and customs duties.⁴³

6.4 Recognized Belligerency

Aside from the regimes established by the multilateral treaties, the laws of international armed conflict have been applied by states to conflicts that were fought against groups that were not considered nation states at that time. In the 19th century, when international law contained no specific rules for civil wars, the idea of recognizing as Belligerents the non-state party in a civil war meant that the international laws of war would apply to both parties. There were conditions for recognition, essentially that there was: (i) a 'civil war' with 'a state of general hostilities'; (ii) territory controlled by the non-state party to the conflict and with 'a measure of orderly administration' and (iii) observance of the 'rules of warfare' under a 'responsible authority'.⁴⁴

Sivakumaran has detailed the various claims by entities, such as Franco's Nationalists, to a 'right' to be recognized as Belligerents with Belligerent Rights,⁴⁵ and yet it seems that recognition has been rarely granted by the state (p. 248) fighting an insurgency. It is hard to see that there really is a right to be recognized as a Belligerent. It was more common for a state not associated with the conflict to act on their interests and recognize a belligerent entity in order to convert a civil war into an international War with rights and obligations for non-participating states which could thereby enjoy Neutral Status. Such a recognition, while it risked being seen as an unfriendly act, did not change the application of the law of armed conflict between the insurgents and the state they were fighting. So the laws of war regarding neutrality, search and seizure of contraband, even Prize Law, would apply between the insurgents and the recognizing state and its nationals, but not between the parties to the civil war.⁴⁶ In this area national courts are unlikely to have much room for discretion. For the English courts, a certificate relating to Belligerency (as for War, or Neutrality) would be issued by the Executive, and that would be binding on the court.⁴⁷

Where things became famously dramatic was the Belligerency that was implied by President Lincoln's Blockade of Confederate ports in the American Civil War, which in turn allowed Great Britain to ensure its own rights related to its Neutral Status: ensuring goods carried on its neutral ships would be immune from seizure. As Witt explains, in his very engaging book *Lincoln's Code*, it seems clear that President Lincoln did not intend to recognize the Belligerency of the Southern States and apply the international laws of War to them; he only wanted to turn his closure of Southern ports into a 'Blockade', as that term was understood under international law. This was in order to mollify Great Britain and others who feared for the safety of their nationals under the criminal law covering port closures, and for their trade, as well as their access to the cotton and other goods exported from the Southern States.⁴⁸

In Witt's telling, Lincoln assumed that the United States could apply the laws of War between itself and states such as Great Britain, and at the same (p. 249) time treat the rebellious Southerners as criminals, rather than as soldiers of war entitled to be prisoners of war under the laws of war. This 'mixed theory' allowed for the situation to be both rebellion and War.⁴⁹ The US Supreme Court, when faced with challenges from the owners of ships seized for running the Blockade, found that the President had the executive power to treat this as a War, even though there was no fight with a foreign nation:

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader or States organized in rebellion, it is nonetheless a war although the declaration of it be 'unilateral.'⁵⁰

However, it was apparent there was an inconsistency between treating the rebels as criminals and seeing the British as entitled to rights flowing from their Neutral Status in War. And in the end the Confederate Forces were treated to the privileges that would have been accorded to forces from a foreign state at War with the United States. The British Declaration of Neutrality of 1861 is taken as a recognition of the Confederate States as Belligerents under international law. But that British Declaration did not constitute a recognition of international statehood for the Confederate States – such a recognition would have been considered by the United States as grounds for War with Great Britain.⁵¹

After the American Civil War, the US Army continued its wars with American Indians, including the Plains Indians. For decades the execution of Native Americans had been commonplace, and seen as outside the formal structures of the laws of war (their nations not being seen as sovereign states). The plight of US soldiers captured by the Confederate forces in the Civil War, and the emerging notions that there were limits prescribed by law of war manuals such as the Lieber Code, forced a rethink on how captured prisoners should

be dealt with. Witt recounts how, in 1862, Dakota warriors associated with the Sioux Nation were tried, convicted and sentenced to death by Military Commissions for murder, rape and robbery. But President Lincoln (p. 250) separated out those who had merely fought against his soldiers and they were interned.⁵² Similarly, Witt highlights that the Apache leader, Geronimo, captured in 1886, was eventually sent, together with his fellow fighters and the women and children, to a camp in Florida, where they remained as prisoners of war for 25 years.

The invocation of the laws of war with regard to the battles between the Native Americans and the US armed forces is part of the background against which the laws of war are sometimes seen in the United States. Solis recounts how the notion of war was central to the trial of Senika-Wakan-Ota, aka 'Plenty Horses'. What follows is a précis of his gripping account.

Fearing a massacre similar to the one meted out at Wounded Knee, the Brulé Sioux took up position in order to fight the US soldiers. Lieutenant Casey went to meet the Sioux, and after briefly talking with Plenty Horses, he turned to leave, at which point Plenty Horses shot him. Plenty Horses was later arrested and tried for murder. The Prosecutor called on the US Army to testify that there had been no State of War with the Sioux.

Interestingly, General Miles reportedly advised the Prosecutor 'My boy it was a war.'⁵³ Addressing the jury, the Judge said that 'it clearly appears that on the day when Lieutenant Casey met his death there existed in and about the Pine Ridge Agency a condition of actual warfare between the Army of the United States ... and the Indian troops'. Casey was unquestionably a combatant and could be killed by the enemy. The Judge reminded the jury that if Casey had killed Plenty Horses while reconnoitering his camp, he would surely not have been tried with murder, and that if the attack on Wounded Knee was not a wartime event then all the US soldiers involved should be tried for murder. He directed the jury to conclude the killing had to be an act of war. They did – and Plenty Horses was acquitted.

The episode serves as an important reminder for the contemporary context: if one is to rely on Belligerent Rights derived from War-time, then one should accept that these Belligerent Rights will apply to one's enemies. The traditional approach is neatly expressed by Castrén in his seminal 1966 book on *Civil War*: 'If a lawful Government has not recognized insurgents as belligerents, it cannot itself exercise belligerent rights'.⁵⁴

(p. 251) Today it is unlikely that a state would seek to recognize as Belligerents any non-state group fighting against it and thereby entitle the rebels to the privileges of a combatant when those rebels kill the state's own soldiers. To recognize an armed group under the formal regime of Belligerency, in effect, gives the Belligerent non-state actor most of the rights and obligations associated with the armed forces of a state in an inter-state armed conflict.⁵⁵ Such recognition would mean that those taking up arms against the state could not be prosecuted for the fact of fighting but would have to be interned as prisoners of war until the end of hostilities, after which they would have to be released. In an inter-state armed conflict such prisoners are for the most part repatriated to the other state. If a Belligerency were to be recognized, all those prisoners of war would have to be 'released onto the streets', potentially dangerous and able to regroup in the future and fight once more against the state. Similarly, it seems unlikely today that another state would declare its Neutral Status, and thus indirectly recognize certain Belligerent rights for the rebel group in the interaction with the Neutral state that chose to recognize the group.⁵⁶ What has emerged more recently has been the recognition in Latin America of armed groups fighting for freedom under dictatorships. As Gurmendi has documented, the Andean Pact recognised the belligerency of the Sandinistas in 1979. The issue was not neutral rights. In Gurmendi's words, 'The recognition itself was rather part of a toolbox designed to

directly interfere in the Nicaraguan conflict and bring about the end of the Somoza dictatorship, in the name of human rights.’⁵⁷

Whether or not there is any recognition of belligerency, the Geneva Conventions nevertheless specifically encourage the parties to a non-international armed conflict to adopt special agreements to bring into force all or part of the Conventions,⁵⁸ and indeed states and armed groups can and do make declarations and enter into agreements that create obligations beyond what the treaties bind them to do.⁵⁹

(p. 252) 6.5 Wars of National Liberation under Additional Protocol I

There is another way in which an armed conflict between a non-state armed group and a state can become seen in law as an international armed conflict, triggering the application of the relevant international rights and obligations for both sides. When the Additional Protocols to the Geneva Conventions were negotiated and concluded in 1977, newly decolonized states, together with socialist states, succeeded in finding a way for Wars of National Liberation to be considered international armed conflicts. Such conflicts would involve the full application of the four Geneva Conventions of 1949 and the extensive provisions of Protocol I.

The key provision from 1977 applies Additional Protocol I and the Four Geneva Conventions to

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.⁶⁰

The states that were particularly targeted by this provision at that time, South Africa and Israel, rejected the notion that liberation movements could gain the rights applicable in international armed conflict against racist regimes or alien occupiers. After the transition in South Africa from apartheid (p. 253) to multiracial democracy, South Africa joined the Protocol. States with colonial possessions, such as the United Kingdom and France, entered declarations when joining the treaty. These declarations essentially sought to restrict the application of the provision to armed groups that these states would in the future consider are legitimate self-determination movements.⁶¹

For a long time, this controversial provision was considered to be more symbolic than anything else. But in 2015, the Polisario Front sent a unilateral declaration to the depositary (the Swiss Federal Council), stating that it undertook to apply the four Geneva Conventions and the Protocol in its conflict in Western Sahara with Morocco (a party to the Protocol). Switzerland notified the parties to the Geneva Conventions that the declaration had the effect of immediate application of the Geneva Conventions and the Protocol to both parties to the conflict.⁶² Morocco has objected that Morocco is the only representative of the population of the Sahara, that there is no armed conflict and that Morocco has not been said in any of the UN documents to be a *colonisateur*, or a *puissance occupante*, let alone a *régime raciste*.⁶³ The internal Swiss memorandum nevertheless explained that that it was sufficient that Morocco was in occupation and that the self-determination issue had been addressed in various General Assembly resolutions.⁶⁴ These treaties governing international armed conflict therefore apply to any armed conflict between Polisario and Morocco.

6.6 Non-International Armed Conflicts

The Geneva Conventions refer to these conflicts in the negative, in the sense that they are 'not of an international character'.⁶⁵ There was little judicial determination of the threshold of violence that was needed to trigger the application of this international humanitarian law until it became necessary for the purposes of the international prosecution of war crimes. The (p. 254) international tribunals with jurisdiction over war crimes committed in non-international armed conflicts have developed criteria to determine whether there is an armed conflict to which the laws of war apply. We are discussing here an armed conflict between a state and an armed group, or between two armed groups. Defendants have sought in their criminal trials to show that the conditions for armed conflict and the attendant laws of war were not met. This is crucial for the defence at trial, because without an armed conflict that triggers the laws of war, there can be no prosecution for war crimes. In turn the international criminal tribunals have explained in some detail where the threshold is for the application of the law of war in an armed conflict where one or more of the parties is an armed group.

Two key criteria have emerged that take us over the threshold: the intensity of the violence, and the level of organization of the non-state armed group. Such requirements for the application of the customary international law of non-international armed conflict, and presumably for the application of Common Article 3 of the 1949 Geneva Conventions,⁶⁶ were spelt out in some detail by the International Criminal Tribunal for the former Yugoslavia. The first relates to intensity:

Trial Chambers have relied on indicative factors relevant for assessing the 'intensity' criterion, none of which are, in themselves, essential to establish that the criterion is satisfied. These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.⁶⁷

The second criterion requires that the armed non-state actor has to fulfil certain organizational requirements:

As for armed groups, Trial Chambers have relied on several indicative factors, none of which are, in themselves, essential to establish whether the (p. 255) 'organisation' criterion is fulfilled. Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.⁶⁸

Whether or not the political purposes of the group are relevant remains controversial,⁶⁹ yet judicial statements have suggested that the motives of the parties are irrelevant.⁷⁰

These thresholds were developed for the purposes of determining when individuals could be prosecuted for war crimes committed in a non-international armed conflict. They have come to be used as a general guideline as to when the protections in Common Article 3 of the

Geneva Conventions apply, as well as for the customary international law applicable to both sides in a non-international armed conflict.

This leaves the question of when the treaty law contained in Additional Protocol II should apply. It is generally accepted that there needs to be control over territory and perhaps a higher degree of organization. The Protocol applies to non-international armed conflicts between the armed forces of a state party to the Protocol 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'.⁷¹

(p. 256) Several commentators suggest that, in addition to the requirement that the organized armed group control territory, there should be a greater intensity of violence before the Additional Protocol applies.⁷² But today one could ask whether the Protocol really requires a greater level of intensity of violence than that required to trigger Common Article 3. So far the International Criminal Court seems to have avoided creating two separate thresholds. The UK Military Manual seems only to demand that, to move from Common Article 3 to Additional Protocol II, the dissidents should 'achieve a degree of success and exercise the necessary control over a part of the territory'.⁷³ Dinstein nevertheless highlights the requirement under the treaty for 'sustained and concerted military operations'.⁷⁴ The *Manual on the Law of Non-International Armed Conflict* similarly suggests a 'higher' threshold for the Applicability of Additional Protocol II (AP II).⁷⁵

There may be good arguments for insisting on a hierarchy of thresholds related to the level of military action, so that humanitarian protection for people in the hands of the other party is triggered at the lowest level of violence, and yet serious fighting is needed to trigger other provisions of the law of war related to targeting. It makes sense for us to consider a rather low threshold for those who have fallen into the hands of the enemy under Common Article 3, and a higher one for rules concerning the conduct of hostilities and some of the extra obligations we find in Additional Protocol II.⁷⁶

(p. 257) Also at a more political and journalistic level, there is still a sense that some conflicts move from rebellion, through insurgency into something called 'civil war'. In the past, this term was seen to have specific legal implications (and historically writers such as Vattel suggested that civil war denoted lawful resistance - while rebellion was unjust).⁷⁷ Today no humanitarian law expert suggests that labelling something a civil war triggers extra rights and obligations. Nevertheless, media entities such as Reuters, the BBC and the *New York Times* spend considerable time writing about whether the conflicts in Iraq or Syria constitute a civil war. Similarly, government authorities may choose, for political reasons, to deny that there is a civil war (rather than some sort of insurgency, conflict or series of terrorist attacks).⁷⁸ Acceptance that there is a 'civil war' is seemingly to admit that the government has lost control, and perhaps subliminally conjures up older notions that the parties have become, in Vattel's words, 'two independent parties, who consider each other as enemies, and acknowledge no common judge'.⁷⁹ Perhaps there is also still an understanding of civil war that suggests that each side may have just as much legitimacy as the other, and outside powers should refrain from any intervention and abstain from assistance to the government or the side claiming to be the government. In short, this second higher threshold for non-international armed conflict may matter, especially if it is consciously, or unconsciously, assimilated to civil war and all that that term conjures up.⁸⁰

(p. 258) 6.7 Conflicts Involving UN Mandated Peacekeeping Operations

A complex set of questions concern the extent to which the United Nations, or any other intergovernmental organization, can be considered a party to a conflict, and so bound by the laws of war. As none of these entities can become parties to humanitarian law treaties such as the Geneva Conventions, they become bound by the relevant international law of armed conflict to the extent that this law applies to them as a matter of customary international law. In addition they may be bound by the fundamental rules and principles of humanitarian law as a result of their own internal regulations,⁸¹ or through agreements entered into with host states.

The Convention on the Safety of United Nations and Associated Personnel foresees that the United Nations might become a party to an international armed conflict, at which point this Safety of UN Personnel Convention would no longer apply (the context would also have to be specifically a UN enforcement operation authorized by the Security Council under Chapter VII).⁸² It seems clear that a conflict between the United Nations and the armed forces (p. 259) of a state would be an international armed conflict, such that the relevant protective rules from the Geneva Conventions should apply.

While the low threshold we discussed above applies to inter-state conflicts, doubts have been expressed as to whether this low threshold is workable where peacekeepers engage in the use of force with a state in the course of a mandate to protect civilians or provide humanitarian assistance. If an international armed conflict is triggered, say, by a small skirmish between the UN forces and government troops, then triggering the laws of war would imply the whole UN force would lose its protection from attack as the Safety Convention would no longer apply. Attacks on the UN mandated peacekeeping operations would no longer qualify as international crimes.⁸³

As Greenwood points out, the drafters of that UN Safety Convention did not intend for UN forces to lose their protection in Bosnia and Herzegovina as a result of the use of force in self-defence.⁸⁴ We may have to accept that the threshold and criteria for triggering an international armed conflict may be different when a UN operation engages with the armed forces of a state in the course of such mandated operations. Greenwood predicted that 'A degree of violence which, in the past, would certainly have been regarded as sufficient to constitute an international armed conflict will come to be regarded as something of a lesser nature if it involves UN forces.'⁸⁵

Caution over rushing to apply the law of armed conflict to UN forces is also premised on the fact that, in many cases, the UN forces will have multiple tasks, including humanitarian assistance, demining, protection of civilians, etc, and may be spread across a wide territory. The normal assumptions that the laws of war apply across a whole territory and allow for targeting of all members of the armed forces from the enemy party should not, in my view, be transposed to this situation.⁸⁶ As Bianca Maganza highlights, UN (p. 260) military vehicles, planes, helicopters bases, etc are used every day by humanitarian workers.⁸⁷ The idea that the United Nations could be considered at war could lead to catastrophic confusion over what could be targeted under the laws of war.

In the context of the applicability of the protective regime of the UN Safety Convention, the expert *Leuven Manual* clarifies:

Acting in lawful self-defence does not constitute a hostile act or automatically result in becoming party to an armed conflict under IHL. Lawful self-defence includes protection of mission personnel and/or civilians from imminent physical danger and

extends to proportionate action to counter attempts to disarm or otherwise incapacitate mission personnel or seize vital installations or equipment.⁸⁸

The issue is further complicated by the fact that even UN forces nominally under the command and control of the United Nations will often still be, in fact, under the control of the sending state. This will be even more the case in a situation such as a NATO operation. States will in many cases retain international responsibility for the actions of their forces, even if the relevant international organization may also be responsible under what is known as 'dual attribution'.

The legal reasoning on this last point has been developed by a judgment of the Supreme Court of the Netherlands in a case brought by a specific victim from Srebrenica, concerning the conduct of the Dutch Battalion in the UN operation.⁸⁹ At one point it had been argued in this context, and elsewhere, that the behaviour of UN peacekeepers was exclusively attributable to the United Nations. The judgment, however, is clear that in such operations the sending state retains some effective control over its forces, and the sending state can be responsible for any unlawful acts. The key point is that the sending state will always retain 'disciplinary powers and criminal jurisdiction ("the organic command")'.⁹⁰ The United Nations has no criminal jurisdiction over such personnel, and so the control the sending state retains (p. 261) can lead to state responsibility, alongside any responsibility attributable to the United Nations or any other international organization.⁹¹

Therefore, in some cases, the participating state may well enter into an armed conflict with the host state in addition to any armed conflict between the United Nations and the state.⁹² The humanitarian law treaties would apply to the state alongside the equivalent customary international law that might also bind the United Nations or other international organization. The humanitarian protections outlined in the following chapters would apply. What we would not have is a War, with the attendant ideas of enemy aliens, enemy property and so on. The language used in this context matters, as elucidated by the distinguished law of war scholar, LC Green:

It should be noted that by using the term 'enforcement measures' or even 'armed conflict' rather than 'war' for incidents in which military action is taken in the name of the United Nations, there need be no debate whether the United Nations, not being a state, is able to engage in war and enjoy the rights of a belligerent.⁹³

Opinion is divided on whether an armed conflict between the United Nations and a non-state armed group might be considered an international armed conflict where the United Nations is acting for neither side in any internal armed conflict. It is suggested here that it is not the international character of the United Nations that determines the classification of the conflict, but rather the non-state character of the opposing forces that means that the conflict is of a non-international character. Neither the United Nations nor the rebel group will have the international law rights associated with international armed conflict. Both sides are bound by the humanitarian law of armed conflict applicable to non-international armed conflict.⁹⁴

Footnotes:

¹ These questions have generated a huge amount of doctrine and analysis: Wilmschurst (ed), *International Law and the Classification of Conflicts* (2012) 117–45; Zamir, *Classification of Conflicts in International Humanitarian Law: the Legal Impact of Foreign Intervention in Civil Wars* (2017); Lubell, 'Fragmented Wars: Multi-Territorial Military Operations against Armed Groups', 93 *International Law Studies* (2017) 215–50; Kleffner, 'The Legal Fog of an Illusion: Three Reflections on "Organization" and "Intensity" as Criteria for the Temporal

Scope of the Law of Non-International Armed Conflict', 95 *International Law Studies* (2019) 161–78.

² The choice of which phrase to use may reflect the personal appreciation of the purpose of this branch of international law. For example, Dinstein, *Non-International Armed Conflicts in International Law* (2014) at 3 explains that in his books, he prefers references to the law of armed conflict, as it has 'dispassionate connotations' and 'avoids a false impression (implicit in the "humanitarian limb" of IHL) that the rules governing non-international armed conflict hostilities are *de rigueur*, humanitarian in nature. It is an irrefutable fact that, even though humanitarianism is always a consideration, many of these rules are engendered primarily by military necessity.' He has also explained that 'The use of the adjective "humanitarian" occasionally misleads the uninitiated to confuse IHL with human rights law.' Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edn (2016) at 20. Solis suggests that 'civilians' refer to the law of armed conflict as international humanitarian law: *The Law of Armed Conflict: International Humanitarian Law in War* (2010) at xxix. Military manuals tend to present all these expressions as synonymous: see, eg, US Department of Defense, *Department of Defense Law of War Manual* (2016) at para 1.3.1.2 UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) at para 1.2.

³ Eg Laws and Customs of War on Land (Hague II, 1899) Art 2.

⁴ See UK *Manual* (n 2) at 28–29; US *Manual* (n 2) at 79–82; Kalshoven and Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 4th edn (2011) 30–32; Dinstein, *International Armed Conflict* (n 2) 20–22. We suggested, however, in Ch 2 that in order to trigger the obligations of Neutral Status under treaties such as Hague (1907) V and XIII, it may be that the non-participating state would have to consider the armed conflict a War and declare that it has Neutral Status. When it comes to the 1907 Hague Conventions VI and XI concerning capture of merchant ships, it may be that they would only be applied in time of a formal State of War or an inter-state conflict of certain intensity and duration; see Ch 8 below for a full discussion of the appropriateness of continuing the idea of capture of merchant ships in Naval economic warfare as a question of Belligerent Rights.

⁵ See Ch 3 above.

⁶ Pritchard and Zaide (eds), *The Tokyo War Crimes Trial* (1981) vol 22 at 49,711–31.

⁷ The Defence argued, therefore, that the Chinese troops who resisted the Japanese Army were not lawful combatants and could be treated as bandits. The Judgment refers to the inauguration of a 'ruthless campaign for the extermination of these "bandits" '. Pritchard and Zaidi at 49,600–01. In addition, when fighting broke out in Mukden in 1932, over 2,700 civilians accused of harbouring bandits were machine-gunned or bayoneted to death. The 'Rape of Nanking' from 1937 was said by the Tribunal to involve the killing of 12,000 non-combatants in the first few days of occupation, and the rape of 20,000 women during the first month. Overall, the Judgment refers to an estimate of 200,000 civilians and prisoners of war murdered during the first six weeks of occupation.

⁸ Ibid at 49,602.

⁹ Ibid at 1,015.

¹⁰ Ibid at 1023–24.

¹¹ Fazal, *Wars of Law: Unintended Consequences in the Regulation of Armed Conflict* (2018) at 103–7; see also the statement by Speaker Foley with regard to the 1991 conflict with Iraq in section 5.1.1 above.

¹² See GCs (1949) Common Art 2, and Hague (1954) Art 18.

¹³ The Hague Convention is explicit that it applies even if the state of war is not recognized by 'one or more of' the states parties. The Geneva Conventions state that they apply 'even if the state of war is not recognized by one of them', but this has been interpreted as covering the situation where all states parties to the conflict deny that there is a war. Clapham, 'The Concept of International Armed Conflict', in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 3-26 at 5; ICRC, *Commentary on the First Geneva Convention*, 2nd edn (2016) (hereinafter *Commentary GC I* (2016)) at 213.

¹⁴ See Additional Protocol (AP) I of 1977, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980).

¹⁵ Art 2 first para.

¹⁶ Turns, 'The Law of Armed Conflict (International Humanitarian Law)' in Evans (ed), *International Law*, 5th edn (2018) 840-76 at 844, who suggests that 'the association of such declarations with the appearance of an unlawful use of force under the Charter, or an act of aggression, has led to the procedure becoming defunct'.

¹⁷ Khadduri, 'Closure of the Suez Canal to Israeli Shipping', *Law and Contemporary Problems* (1968) 147-57; Avram, *The Evolution of the Suez Canal Status from 1869 up to 1956: A Historico-Juridical Study* (1958). See also Rosenne, 'Directions for A Middle East Settlement - Some Underlying Legal Problems', 33 *Law and Contemporary Problems* (1968) 44-67 at 52, writing from an avowedly Israeli perspective, who stated 'As a matter of principle we believe that the very existence of a state of war is utterly incompatible with membership in the United Nations and the obligations imposed by the Charter.' See further Baxter, *Humanizing the Laws of War: Selected Writings of Richard Baxter* (2013) at 198ff, for a discussion of the rights of Egypt in this context and the relevance of a state of war or peace.

¹⁸ Schindler, 'State of War, Belligerency, Armed Conflict', in Cassese (ed), *The New Humanitarian Law of Armed Conflict* (1979) 3-20 at 9-11.

¹⁹ Ibid at 15.

²⁰ 26 RIAA, 19 December 2005, Partial Award, *Jus Ad Bellum - Ethiopia's Claims 1-8* at para 17.

²¹ See section 8.2.1 below. See also ICRC, *Commentary GC I* (2016) (n 13) at para 223, suggesting that a declaration of air or naval blockade would be sufficient to create an armed conflict to which humanitarian law would apply. It is also worth noting that the French *Manuel de droit des conflits armés* (2012) states (at 27), without particular explanation, 'Le blocus est un acte de guerre'. Compare Heintschel von Heinegg, 'Naval Blockade', 75 *International Law Studies* (2000) 203-30 at 204; and similarly see 'Blockade', *MPEPIL* (2015) at para 5.

²² For a suggestion that the North Korean leader had apparently declared war in 2013, see Casey-Maslen and Haines, *Hague Law Interpreted: The Conduct of Hostilities under the Law of Armed Conflict* (2018) at 27.

²³ *Dalmia Cement Ltd v National Bank of Pakistan*, 18 December 1976, 67 ILR 611 at 615-16 (paras 8 and 9).

²⁴ Ibid at 619 (para 27) (original emphasis). The question under national law would most likely be decided by a binding certificate on the courts, issued by the Executive; Lalive discusses this and concludes that the English Common Law on this point would have been applicable in India and Pakistan, but held as an international arbitrator he was not bound to

follow any certification. See also McNair and Watts, *The Legal Effects of War*, 4th edn (1966) at 457-58.

²⁵ *Dalmia Cement* (n 23) at 622-23 (para 41).

²⁶ So a state might choose to apply AP I in a conflict where the other party had not ratified the Protocol or made a declaration. It would seem that Australia applied AP I in determining what would constitute a lawful target in its conflict with Iraq in 2003 (Iraq was not a party to the treaty at that time); see Henderson (Flight Commander), *The Contemporary Law of Targeting* (2009) Ch 1; interestingly, the Swedish International Humanitarian Law Committee suggested that 'Above all, a state that has ratified the protocol should not too readily and categorically choose a line of non-application in relation to an adversary that has not ratified. The principle of reciprocity is intended to give reasonable protection against obvious military disadvantages (a "safety net"), not to be an unconditional mechanism for setting aside the provisions of the protocol.' Report reproduced in part in Sassòli, Bouvier and Quintin, *How Does Law Protect in War?* 3rd edn (2011) vol II, document 76, electronic version only, available at <https://www.icrc.org/en/download/file/19456/icrc-0739-part-ii-vol-i.pdf>. See also AP I Art 96(2), which allows for the application of the Protocol as a matter of law where a state that is not a party accepts and applies its provisions.

²⁷ See further Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol 1: *Rules* (2005).

²⁸ See eg Rogers, *Law on the Battlefield*, 3rd edn (2012) at 3, where he states 'an accidental border incursion by a military aircraft caused by navigational error would not amount to armed conflict'; ICRC, *Commentary GC I* (2016) (n 13) at para 241. And see more generally, for the factors that constitute an international armed conflict, paras 210-244.

²⁹ Clapham, 'The Concept of International Armed Conflict' (n 13) at 16.

³⁰ For the purposes of international criminal law, the international criminal tribunals have developed a test, sometimes known as the 'overall control test', that suggests that once a state is in overall control of a non-state armed group engaged in an armed conflict in another state, this can trigger the application of the law of international armed conflict so that a wide set of war crimes come into play. This has not yet been adopted by the International Court of Justice for the test as to whether or not a state supporting an armed group can be accused of an armed attack (see Ch 4 above), nor as the test for attribution (see International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, para 404 and see rule 4 below). For references to such internationalized conflicts in the context of international war crimes trials, see *Prosecutor v Bemba* ICC-01/05-01/08, 21 March 2016, at para 130. The Prosecutor facing the need to choose charges under international or non-international armed conflict for the purposes of a war crimes prosecution would seem to be more likely to consider the nature of the entities that are fighting than the doctrinal possibilities offered by the idea of conceiving such an 'internationalized' armed conflict. See the ICC Prosecutor in Prosecution's Closing Remarks, ICC-01/04-01/06, 1 June 2011, *Situation in the DRC, Prosecutor v Lubanga*, who states in such a context that the conflict is internationalized 'as long as sovereign nation States are opposed to each other' (at para 32) and '[t]he character of the conflict is to be determined by reference to the parties involved rather than the territory on which the conflict takes place' (at para 34).

³¹ Some authors consider that at one point the conflicts merge into one single international armed conflict (see, eg, ICRC, *Commentary GC I* (2016) (n 13) at paras 265-273). See also the detailed discussions in Sassòli, *International Humanitarian Law* (2019) (hereinafter *IHL*) at paras 6.13-6.21; Mačák, *Internationalized Armed Conflicts in International Law* (2018) Ch 3; Carron, 'When is a Conflict International? Time for New Control Test in IHL',

98 *IRRC* (2016) 1019–41; and see further Gill, ‘Classifying the Conflict in Syria’, 92 *International Law Studies* (2016) 353–80; Ferraro, ‘The ICRC’s Legal Position on the Notion of Armed Conflict Involving Foreign Intervening and on Determining the IHL Applicable to this Type of Conflict’, 97 *IRRC* (2015) 1227–52; Milanovic and Hadzi-Vidanovic, ‘A Taxonomy of Armed Conflict’, in Henderson and White (eds), *Research Handbook on International Conflict and Security Law* (2013) 256–313.

³² For further suggestions on how individuals should be treated in these complex proxy conflicts, see Clapham ‘The Concept of International Armed Conflict’ (n 13) at 17ff. There may also be an international armed conflict between two states, and for that conflict the laws of international armed conflict would apply. If the armed group is operating from occupied territory, the conflict between the occupier and the armed group will only be international if the armed group is fighting ‘on behalf of the territorial government or in the exercise of a right to self-determination’. Prosecutor’s Closing Remarks ICC ICC-01/04-01/06, 1 June 2011, *Situation in the DRC, Prosecutor v Lubanga* at para 50. See section 6.5 below.

³³ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*, ICJ judgment of 27 June 1986, at paras 109 and 115; Art 8 of the ILC Articles on State Responsibility (2001); and *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007, at para 400.

³⁴ ICRC, *Commentary GC I* (2016) (n 13) at paras 237 and 262.

³⁵ *Ibid* at para 261.

³⁶ Lubell, ‘Fragmented Wars: Multi-Territorial Military Operations against Armed Groups’, 93 *International Law Studies* (2017) 215–50 at 236.

³⁷ *Ibid* at 233; and Gill, ‘Classifying the Conflict in Syria’, 92 *International Law Studies* (2016) 353–80 at 373, who lists a number of factors he considers are more persuasive than the issue of consent.

³⁸ Dinstein, *International Armed Conflict*, (n 2) at 36.

³⁹ ‘Is the United States Already in an “International Armed Conflict” with Syria?’, 11 October 2016, available at <https://www.justsecurity.org/33477/united-states-international-armed-conflict-syria/>; and see the response by Gabor, ‘Letter to the Editor: Not So Fast on Calling it an “Armed Conflict” Between the US and Syria’, 13 October 2016, available at <https://www.justsecurity.org/33546/letter-editor-fast-calling-armed-conflict-syria/>.

⁴⁰ See Common Art 2 para 2 to the 1949 Geneva Conventions; Sassòli, *IHL* (n 31) at 6.22 et seq stresses that the Hague Regulations (1907) on occupied territory would also apply.

⁴¹ For a detailed look at the criteria for occupation in this context, see ICRC, *Commentary GC I* (2016) (n 13) at paras 285–341.

⁴² ‘Report on Situation on Registered Vessels of Comoros, Greece, and Cambodia’, 6 November 2014, paras 25–29 at 29.

⁴³ *Ibid* at para 27.

⁴⁴ See Lauterpacht (ed), *Oppenheim’s International Law: a Treatise (Disputes, War and Neutrality)*, 7th edn (1952) vol II at 249, discussed by Sivakumaran, *The Law of Non-International Armed Conflict* (2012) at 9–20.

⁴⁵ My use of capitals (upper case) is to show that the term ‘Belligerent’ is not just descriptive but refers to the type of entity that has Belligerent Rights and obligations that flow from that state recognition. The recognition turns a belligerent armed group into a Belligerent. An unrecognized armed group cannot claim the Belligerent Rights that a state enjoys. The same logic applies to the capitalization of ‘War’ and ‘Blockade’. It is the status

that these institutions have under international law that gives rise to rights and obligations. A *de facto* war or blockade would not have the same legal effects.

⁴⁶ ‘When the insurgents are sufficiently well organized, conduct hostilities according to the laws of war, and have a determinate territory under their control, they may be recognized as belligerents whether or not the parent state has actually or impliedly recognized that status, as by establishing a maritime blockade against ports under their control. With the recognition of belligerency, the third state assumes the obligations of neutrality, just as in a war between two states.’ Jessup, *A Modern Law of Nations* (1948) at 53.

⁴⁷ Mann, *Foreign Affairs in English Courts* (1986) 4, 47–48.

⁴⁸ Witt, *Lincoln’s Code: The Laws of War in American History* (2012) at 141–51.

⁴⁹ Ibid at 151; Witt references Sumner speaking in the Senate, calling it a ‘double’ case: ‘you may call it Rebellion or War, as you please, or you may call it both’.

⁵⁰ *Prize Cases*, 67 US (1862) 635 at 668.

⁵¹ Arielli, Sadler and Frei, ‘The Foreign Enlistment Act, International Law, and British Politics, 1819–2014’, 38 *The International History Review* (2015) 636–56.

⁵² Witt, *Lincoln’s Code* (n 48) at 330–36.

⁵³ Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010) at 32.

⁵⁴ Castrén, *Civil War* (1966) at 99; for Castrén’s distinctions between civil war, insurrection, riot, and rebellion, see *ibid* 26–33.

⁵⁵ For discussion of other rights related to, *inter alia*, treaties, occupation and reparations, see *ibid* at 152–67.

⁵⁶ For instances of 19th-century recognitions of Belligerency by belligerent states and neutral states, see Sivakumaran (n 44) at 17–20.

⁵⁷ ‘The Last Recognition of Belligerency (and Some Thoughts on Why You May Not Have Heard of It)’, 10 December 2019, at www.opiniojuris.org.

⁵⁸ See Vierucci, ‘Applicability of the Conventions by Means of Ad Hoc Agreements’, in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 509–21; see also the Hague Convention for the Protection of Cultural Property (1954) Art 19(2).

⁵⁹ See the collection of statements at <http://theirwords.org/pages/geneva-call>; and Bellal and Heffes, ‘“Yes I Do”: Binding Armed Non-State Actors to IHL and Human Rights Norms Through Their Consent’, 12 *Human Rights and International Law Discourse* (2018) 120–36.

⁶⁰ Art 1(4). A similar provision applies under the Convention on Certain Conventional Weapons (1980), and the United States, Israel, Turkey, the United Kingdom and France have made reservations to that treaty to limit the possibility of being bound to apply all the provisions of the four Geneva Conventions and this treaty to an armed conflict with a group claiming to be acting as part of a self-determination struggle. A question mark remains over whether the law of international armed conflict could be triggered for a War of National Liberation under customary international law or otherwise. For early discussion, see Abi-Saab, ‘Wars of National Liberation in the Geneva Conventions and Protocols’, 165 *RCADI* IV (1979) 353–445; Abi-Saab, ‘Wars of National Liberation and the Development of Humanitarian Law’, in Akkerman et al (eds), *Declarations on Principles* (1977) 143–79; and Bothe, Partsch and Solf, *Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd edn (2013) at 45–51. Cf Prosecutor’s Closing Remarks (n 32) at para 32 fn 30, where the Prosecutor considers this rule does not exist as a matter of customary international law. Mačák, *Internationalized Armed Conflicts* (n 31) at 7–75 has

suggested that the wording of Protocol I implies that its provisions apply to the relevant state even before the declaration by the group concerned creates obligations for the group.

⁶¹ Available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470.

⁶² For some of the practical implications, see Fortin, 'Unilateral Declaration by Polisario under API accepted by Swiss Federal Council', available at <https://armedgroups-internationalallaw.org/2015/09/02/unilateral-declaration-by-polisario-under-api-accepted-by-swiss-federal-council/>.

⁶³ The letter of 30 June 2015 is available at https://www.dfae.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/geneve/150709-GENEVE-avec-ann_e.pdf.

⁶⁴ See Mačák, 'Wars of national liberation: the story of one unusual rule II', 30 July 2018, available at <https://blog.oup.com/2018/07/wars-national-liberation-unusual-rule-part-2/>.

⁶⁵ Common Art 3 of the 1949 Geneva Conventions.

⁶⁶ See Moir, 'The Concept of Non-International Armed Conflict', in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 391–414 at 404–14.

⁶⁷ *Prosecutor v Haradinaj*, Case No IT-04-84-84-T, 3 April 2008, para 49; see also Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', 91 *International Review of the Red Cross* (2009) 69–94.

⁶⁸ *Haradinaj* (n 67) at para 60. And see further ICTY *Prosecutor v Boskoski*, Case No IT-04-82, 10 July 2009, para 175.

⁶⁹ See Vité, 'Typology of Armed Conflicts' (n 67) at 78; Sassòli, *IHL* (n 31) at para 6.38.

⁷⁰ See the cases and other references discussed by the ICRC *Commentary GC I* (2016) (n 13) at paras 447–51.

⁷¹ AP II Art 1. Complex questions arise when states parties to AP II operate abroad: see Geiß, 'Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?', 93 *IRRC* (2011) 11–46 at 16; similarly Pejic, 'The Protective Scope of Common Article 3: More than Meets the Eye', 93 *IRRC* (2011) 189–225 at 201. *Contra* Bellal, Giacca and Casey-Maslen, 'International Law and Armed Non-State Actors in Afghanistan', 93 *International Journal of the Red Cross* (2011) 47–79 esp at 60–61; see also Hampson, 'Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law', 87 *International Law Studies* (2011) 187–213 esp fn 79 at 213: 'When the conflict is of the requisite intensity for Additional Protocol II to be applicable, but it is not applicable because the conflict occurs in the territory of a State not a party to the conflict, it should be treated as an Additional Protocol II conflict for these purposes. It is beyond the scope of this article to consider whether Article 1.1 of Additional Protocol II should be amended to replace "its armed forces" by "the armed forces of a High Contracting Party."'

⁷² Sandoz, Swinarski and Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) at 1343ff; Hampson, 'Direct Participation in Hostilities' (n 71) 187–213 at 195–97 and 203; Dinstein, *Non-International Armed Conflicts* (n 2) 39–50; Abi-Saab, 'Les protocoles additionnels 25 ans après', in Flauss (ed), *Les nouvelles frontières du droit international humanitaire* (2003) 17–39 at 24–25; Clapham, 'Defining Armed Conflicts under the Additional Protocols: Is There a Need for Further Clarification?' in Pocar (ed), *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives* (2018) 33–42.

⁷³ UK *Manual* (n 2) at para 3.9.

⁷⁴ Dinstein, *Non-International Armed Conflicts* (n 2) at 46–47.

⁷⁵ Schmitt, Garraway and Dinstein, *The Manual on the Law of Non-Armed Conflict* (2006) at 3, available at <https://www.scribd.com/document/108685710/Manual-on-the-Law-of-Non-International-Armed-Conflict-Prof-Michael-N-Schmitt>.

⁷⁶ See in particular the point made by Hampson that some Hague-style rules in AP II can be read as *permitting* action to be taken, while the lower threshold for Common Article 3 only *protects* the victims of armed conflict. So suggesting that there is only one threshold with customary rules that apply to all non-international armed conflicts ‘may imply a shift from a law and order paradigm to an armed conflict paradigm at an inappropriately low level of disruption. Since Geneva-law rules are focused on the protection of victims and bear a significant similarity to the approach of [human rights law], their applicability at the Common Article 3 threshold does not appear to be too problematic. It is specifically customary rules of Hague law that give rise to this difficulty. More particularly, it is [law of armed conflict] rules that *permit* action to be taken, rather than [law of armed conflict] rules that prohibit attacks against certain types of targets or the use of certain weapons, that cause the problem.’ Hampson, ‘Direct Participation in Hostilities’ (n 71) at 197. For a nuanced look at which rules involve varying degrees of permission, see Quintin, *The Nature of International Humanitarian Law: A Permissive or Restrictive Regime?* (2020). For those who consider that international humanitarian law in this context ‘not only prohibits and prescribes conduct but also authorizes conduct (such as killing or depriving an enemy fighter of liberty)’, there may be good policy arguments for fixing the threshold for the application of this law higher as, for such authors, human rights law would no longer be applicable when the Protocol (or even the customary international law equivalent) applies, and human rights law would have been more protective; see Sassòli, *IHL* (n 31) at paras 6.39, and 10.02–10.19. Compare Clapham, ‘The Limits of Human Rights in Times of Armed Conflict and Other Situations of Armed Violence’, in Fassbender and Traibach (eds), *The Limits of Human Rights* (2019) 305–17; and see further Shany, ‘The End of the War/Peace Limit on the Application of International Human Rights Law: A Response to Andrew Clapham’, *ibid* at 319–27.

⁷⁷ Vattel, *The Law of Nations* (1797), eds Kapossy and Whatmore (2008) at 645 para 293.

⁷⁸ See, eg, Lozano and Machado, ‘The Objective Qualification of Non-International Armed Conflicts: A Colombian Case Study’, 4 *Amsterdam Law Forum* (2012) 58–77.

⁷⁹ *The Law of Nations* (supra) at para 293.

⁸⁰ See Armitage, *Civil Wars: A History* (2017) at 220–222. The latest *Department of Defense Manual on the Laws of War* (n 2) suggests that civil wars can lead to recognition of belligerency, which could in turn lead to the application of the laws of international armed conflict: at para 17.1.1.1, ‘*NIAC and Civil War*’. ‘Civil war is a classic example of a non-international armed conflict. For example, a non-international armed conflict could involve the open rebellion of segments of a nation’s armed forces (sometimes called dissident armed forces) against the incumbent regime, each claiming to be the legitimate government. . . . In some cases of civil war, the insurgent party has been recognized as a belligerent, and, at least in some respects, the law of international armed conflict would be applied by the States choosing to recognize the insurgent party as a belligerent.’ The footnote in the original reads: ‘See, e.g., LIEBER CODE art. 150 (“Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government.”).’ See also Luban, ‘Military Necessity and the Cultures of Military Law’, 26 *Leiden Journal of International Law* (2013) 315–49 at 324; Sassòli, ‘The Convergence of the International Humanitarian Law of Non-International and International Armed Conflicts – The Dark Side of a Good Idea’, in Biaggini, Diggelmann and

Kaufmann (eds), *Polis und Kosmopolis -Festschrift für Daniel Thürer* (2015) 679-89; De Wett, *Military Assistance on Request and the Use of Force* (2020) at 19, who uses the expression 'civil war' in her study as synonymous with a conflict defined by AP II.

⁸¹ See the UN Secretary-General's Bulletin, *Observance by United Nations Forces of International Humanitarian Law*, UN Doc ST/SGB/1999/13, 6 August 1999; Shraga, 'The Secretary-General's Bulletin on the Observance by United Nations Forces on International Humanitarian law: A Decade Later', 39 *Israel Yearbook of Human Rights* (2009) 357-77.

⁸² Art 2(2): 'This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.' For the background, see Bloom, 'Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel', 89 *AJIL* (1995) 621-31.

⁸³ See further, for the perspective from the international criminal tribunals, Pacholska, '(Il)legality of Killing Peacekeepers: The Crime of Attacking Peacekeepers in the Jurisprudence of International Criminal Tribunals', 13 *JICJ* (2015) 43-72. The crime in the ICC Statute for both international and non-international armed conflicts is defined as 'Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict': Art 8(2)(b)(iii) and (e)(iii).

⁸⁴ 'Protection of Peacekeepers: The Legal Regime' 7 *Duke Journal of Comparative and International Law* (1996) 185-207 at 202.

⁸⁵ Ibid. See also for a detailed discussion Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 95 *IRRC* (2013) 561-612.

⁸⁶ Grenfell, 'Perspective on the Applicability and Application of International Humanitarian Law: The UN Context', 95 *IRRC* (2013) 645-52.

⁸⁷ Maganza, 'From Peacekeepers to Parties to the Conflict: An IHL's Appraisal of the Role of UN Peace Operations in NIACs', 25 *JCSL* (2020) 209-36 at 232.

⁸⁸ Gill, Fleck, Boothby and Vanheusden (eds), *Leuven Manual on the International Law Applicable to Peace Operations* (2017) at 324.

⁸⁹ *Netherlands v Hasan Nuhanović*, Supreme Court of The Netherlands, Case No 12/03324, 6 September 2013.

⁹⁰ Ibid at para 3.10.2.

⁹¹ See especially the discussion at ibid paras 3.9.2-3.12.3.

⁹² The legal framework will be dependent on the particular facts, see Sassòli, *IHL* (n 31) at paras 6.63-6.66; see also Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica', 9 *JICJ* (2011) 1143-57.

⁹³ *The Contemporary Law of Armed Conflict*, 3rd edn (2008) at 381; for a critical discussion of the extent to which Belligerent Rights can continue, at all see Ch 8.

⁹⁴ For the United Nation's own binding directives covering these obligations, see UN Doc ST/SGB/1999/13, 6 August 1999, ss 5-9; for the Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse, see ST/SGB/2003/13, 9 October 2003.

(p. 77) 4 Domains of Warfare

1. Introduction

‘Domains’ of warfare are generally understood as the operational environments in which armed conflict occurs, and to which international humanitarian law (IHL) therefore applies. Until recent decades, domains of armed conflict have been largely predicated on geospatial conceptions, denoting the physical places where armed conflict has customarily occurred: land, sea, and air. General IHL applies across all these areas—including the fundamental principles of humanity, military necessity, and proportionality; restrictions or prohibitions of certain means and methods of warfare; and basic rules requiring humane treatment of persons and respect for civilians and civilian property. Over time however, the particular exigencies of land, sea, and air warfare have led to the development of some specific IHL rules and principles tailored to each of those environments. Discussing domains of armed conflict therefore offers a window into the historical development of IHL. It shows how the emergence of new operational environments and new means and methods of armed conflict catalyses efforts at legal regulation, which can lead to the development of new domains or sub-sets of IHL. In this way, IHL has become more specialized over time, organized into sub-fields of interpretation and application.

This chapter first examines the land, air, and sea domains, and then considers how the idea of a domain might apply to armed conflict in outer space, and armed conflict involving cyber operations and other emerging capabilities. The aim is to give a general overview of the development of IHL in relation to these different operational contexts, and to analyse the concept itself of a ‘domain of armed conflict’ and show how it shapes the way we think about and apply IHL. The chapter argues that the concept remains useful when analysing how IHL applies to armed conflict occurring in specific physical environments. However, it is perhaps less useful in the contexts of armed conflict occurring in multiple domains simultaneously, and armed conflict carried out through some new technologies and capabilities. Such contexts show the limitations of the concept and suggest that the increasingly complex nature of armed conflict may require the future development of more sophisticated ways of thinking about armed conflict and IHL.

(p. 78) 2. The Evolving Concept of ‘Domain’: From Physical Battlefield to Figurative Field of IHL Application

The traditional concept of a battlefield is the physical location of armed conflict. Accordingly, IHL is underpinned by several fundamental geospatial concepts, essentially prescribing what parties to armed conflict can and cannot do in certain places. Two such concepts are the ‘area of war’ and the ‘area of operations’. The ‘area of war’ is the area within which the military operations of the parties to an armed conflict may be carried out.¹ This is an extensive area, comprising all the territories of the parties, the high seas (including the airspace above and the sea floor), and exclusive economic zones.² Certain areas may be excluded from the area of war, for example neutralized zones (such as Antarctica), demilitarized zones, or the territory of neutral states. Within the area of war are the places where military operations actually take place at any given time, known as the ‘theatre of war’ or the ‘area of operations’.³ Domains of armed conflict are traditionally understood as the specific environments in which military operations may be conducted. The three main physical domains are land, sea, and air, where particular means and

methods of armed conflict are conducted by states' armies, navies, and air forces respectively.

As indicated earlier, much of IHL is not domain-specific and applies generally, including most weapons-related treaties and treaties regarding cultural property. However, general IHL is supplemented by some domain-specific IHL rules and principles. This regulatory development began with armed conflict on land, was followed by sea and air, and now debates are occurring about possible extension into other operational environments such as outer space and cyberspace. The diversification of domains of IHL therefore reflects technological developments, as humans have evolved different environments in which to fight and new capabilities. This is not, of course, a clear linear progression; there are ongoing efforts to refine various aspects of IHL regarding land, sea, and air warfare.

In general, however, the history of IHL is one of increasing detail and specificity in legal regulation, as warfighting capabilities have become more sophisticated and specialized. Over time, domains of *armed conflict* have given rise to domains of *IHL*: the particular bodies of law, practice, and interpretation that have developed to guide behaviour in certain operational environments. Land, sea, and air warfare now represent bodies of specialized IHL and professional communities of expertise and practice. The latter comprise both those who engage directly in armed conflict, and those who advise on and/or interpret the relevant rules and principles—principally state defence forces, government ministries, relevant international organizations, the International Committee of the Red Cross, and legal academics.

While some might use the terms 'domains of armed conflict' and 'domains of IHL' interchangeably, it is important to recognize that these are different concepts. As will be discussed further in sections 6–8 of this chapter, not all domains of armed conflict necessarily correlate to specific fields of IHL. That is, while all domains of armed conflict may be understood as domains of IHL in the broad sense that general IHL applies to all activities (p. 79) undertaken in the course of armed conflict, they are not all domains of IHL in the more narrow sense of being the subject of sub-sets of specialized IHL rules and principles.

Within military forces, the domain is a fundamental concept for organizing particular expertise, resources, and operations. For international lawyers, the 'domain' similarly serves as an organizational concept, which helps to structure our thinking about the application of IHL to a given context. That is, a basic first step in analysing the application of IHL is to ask where the armed conflict is occurring, which helps us to identify the applicable specialized sources of law and commentary. The way many lawyers structure their legal analysis therefore reflects traditional spatial conceptualizations of the battlefield.

In recent decades, the idea of discrete geographic domains has been challenged by two interrelated features of contemporary warfare. The first feature is that armed conflict increasingly involves integrated operations carried out simultaneously across multiple domains. The second feature is the increasing technological sophistication of armed conflict, with new capabilities changing the ways and spaces in which armed conflict is being fought. In turn, this is opening up new spaces for consideration by lawyers about how to apply and interpret IHL. This is demonstrated by the recognition by some states of outer space, cyberspace, and the electromagnetic spectrum as domains of armed conflict, and debates about whether other emerging capabilities may lead to the future recognition of additional domains. With some of these technologies, it is not possible to pinpoint a specific place where armed conflict occurs. In these contexts, understanding 'domains' is less about the physical theatre or locus *where* parties fight, than about *how* they fight and using what means and methods. In this way the concept of a domain as an environment is evolving into a broader concept, encompassing methods and means of warfare. For example, the Australian Army has recently defined domains as 'the physical or conceptual areas in which

human activity and interaction occurs, including the four environmental domains of maritime (including subsurface), land, air and space, and the three non-environmental domains of cyberspace, the electromagnetic spectrum, and information'.⁴

The next sections will examine briefly the three main physical domains of armed conflict: land, sea, and air. Each section will flag key IHL treaties and other relevant instruments. It should be noted that both international and non-international armed conflict may occur in all of the domains discussed in the chapter. The classification of conflicts will not be discussed here, other than to note that most domain-specific IHL has developed initially in the context of international armed conflict.

3. Land

Land is the oldest domain of warfare, where humans first began fighting each other. As most contemporary armed conflicts are conducted at least partially on land, questions about land warfare remain as topical as ever.⁵ Treaty law regarding the means and methods of land warfare stretches back well over a century. Early instruments include the *Lieber Code* (p. 80) 1863⁶ and the Hague Convention (II) with Respect to the Law and Customs of War on Land 1899, and its annexed Regulations,⁷ which are considered declaratory of customary rules regarding armed conflict in general.⁸ This Convention was replaced and amended as Hague Convention IV at the 1907 Hague Conference.⁹ Other important treaties regarding armed conflict on land are the Hague Convention III (Opening of Hostilities) 1907;¹⁰ Hague Convention V (Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land) 1907;¹¹ Hague Convention IX (Respecting Bombardment by Naval Forces in Time of War) 1907;¹² and the First, Third, and Fourth Geneva Conventions 1949,¹³ as well as Additional Protocols I and II of 1977.¹⁴ IHL regarding land warfare has largely been applied and adapted to other domains, including maritime and air warfare.¹⁵

4. Sea

The maritime domain is a three-dimensional space, as military operations may be conducted on, under, or over the sea.¹⁶ More specifically, hostile actions by naval forces may be conducted in, on, or over the land territory of the parties to armed conflict; their internal and archipelagic waters; territorial seas; neutral contiguous zones; fishery zones; continental shelf areas and exclusive economic zones; the high seas; and the airspace above those areas. The general principles of IHL are applicable in naval warfare as they are in land and air warfare. However, a significant body of treaty law and other instruments has developed to cater for the specificities of armed conflict in the maritime context, in particular the fact that the emphasis is on ships taking part in hostilities rather than individuals,¹⁷ and also the involvement of neutral interests to a much greater extent than with land operations.¹⁸ (p. 81) Certain means and methods of armed conflict are unique to the maritime domain, such as blockade, visit and search, and naval mine warfare.¹⁹ In maritime warfare only warships may take part in hostilities and exercise belligerent measures, not merchant vessels.²⁰

How IHL applies often depends on the particular maritime area in which the relevant activity occurs. For example, armed conflict in a belligerent's sovereign waters (internal waters and territorial sea) is largely analogous to fighting on a belligerent's land territory, and includes fighting in the adversary's national airspace.²¹ This contrasts to armed conflict occurring in the maritime zones beyond states' territorial seas, and the airspace above them—commonly referred to respectively as 'international waters' and 'international airspace'.

Although naval battles have been fought for several thousand years, legal regulation occurred later than for armed conflict on land. Following some early instruments adopted in the late nineteenth century,²² most of the international instruments governing naval armed conflict were developed in 1907 through eight Hague Conventions (Hague Conventions VI–XII).²³ They concern the conduct of hostilities (the laying of underwater mines, bombardment by naval forces, and protection of the sick, wounded, and shipwrecked);²⁴ and the protection of certain ships (the status of merchant ships and their conversion into warships,²⁵ the right of capture,²⁶ and the rights and duties of neutral powers).²⁷ Technological progress led to further codification efforts, including the Declaration of London concerning the Laws of Naval War 1909;²⁸ the 1913 Oxford Manual of the Laws of Naval War;²⁹ agreements in 1922 regarding the use of submarines and noxious gases;³⁰ and further instruments (p. 82) in the 1930s on the limitation and reduction of naval armaments, and on submarines.³¹ The Second World War saw numerous torpedo attacks on neutral vessels, merchant ships, and hospital ships, as well as indiscriminate laying of underwater mines. This led to the development in 1945 of the Geneva Convention II, providing a regime for the protection of the wounded, sick, and shipwrecked in armed conflict at sea.³² However, since 1945 there have been no new treaties specifically concerning naval warfare, with attempts to promote further codification being generally unsuccessful.³³ This means that interpreting and updating the law has been entrusted to state practice, which is reflected largely in states' naval manuals.³⁴

The main contemporary reference document for the law of naval warfare is the *San Remo Manual on International Applicable Armed Conflicts at Sea*.³⁵ Developed between 1987 and 1994 by a Committee of Experts under the auspices of the International Institute of Humanitarian Law and the International Committee of the Red Cross (ICRC), it restated and significantly clarified the rules applicable to naval warfare, taking into account developments over the previous century. Although non-binding, it is often used as the basis of national military manuals.³⁶ While some consider it expressive of customary law,³⁷ others argue that not all its details necessarily reflect custom.³⁸

In comparison with armed conflicts on land, armed conflicts at sea (or in other waters) have been uncommon over the past decades.³⁹ While the basic principles of the Hague Conventions and other early treaties are still generally recognized as customary in character,⁴⁰ the age of the instruments understandably means that aspects are significantly outdated, and need to be adapted to contemporary naval warfare,⁴¹ as well as to take into account the major changes in the law of the sea.⁴² An ongoing challenge is therefore how to interpret existing law to apply to the modern realities of the maritime domain. Particular topical issues include how to apply existing law to non-international maritime conflict; the blurring of paradigms from constabulary operations into armed conflict; and how to characterize unmanned and autonomous surface and sub-surface combat vehicles.⁴³

(p. 83) 5. Air

Airpower plays a critical role in twenty-first-century armed conflict, and yet it remains the operational domain least regulated by IHL treaty law.⁴⁴ To date, unlike for land and maritime warfare, states have not adopted any treaty exclusively devoted to air warfare—understood as hostilities conducted during armed conflict by or against aircraft.⁴⁵ The limited existing treaty law concerning air and missile warfare mainly deals with medical aircraft.⁴⁶ However, much of the vacuum has been filled by customary international law, combined with some provisions in general IHL treaties that constrain air operations and non-binding instruments.⁴⁷ IHL applicable to air and missile warfare draws on both the land and naval domains, either directly or indirectly, for relevant legal rules and principles.⁴⁸ Air attacks against targets on land are governed by the rules of war on land. When aircraft fly over open sea or engage in combat with naval forces, the law of naval warfare applies.⁴⁹ Though the *San Remo Manual* does not deal with aviation, it looks at aerial activity in

conjunction with naval operations—for example, it contains special rules on the interception, visit, and search of civil aircraft.⁵⁰

Airspace is divided into national airspace and international airspace (airspace over the exclusive economic zones of other states, and the high seas). Under customary international law each state has exclusive sovereignty over the airspace above its land and territorial sea.⁵¹ The vertical extent of airspace, and the beginning of outer space, is unsettled in international law.⁵² It has been argued that anything in orbit or beyond is in outer space,⁵³ which reflects the view that airspace means ‘the air up to the highest altitude at which an aircraft can fly and below the lowest possible perigee of an earth satellite in orbit’.⁵⁴ In international armed conflict air operations may be conducted over the territory of belligerent states, and also in international air space.⁵⁵ There is no settled definition of the term ‘aircraft’ in international law,⁵⁶ though one suggested definition is craft ‘deriving their support in the atmosphere from the reactions of the air’, with military aircraft understood as all aircraft (whether manned or unmanned, armed or unarmed) that are operated by the armed forces or a state and bear its military markings.⁵⁷ Only military aircraft are entitled to engage in hostilities, unlike other state aircraft or civilian aircraft.⁵⁸

(p. 84) Following the beginnings of air warfare through use of balloons in the late eighteenth century,⁵⁹ the first attempt to develop principles concerning air warfare was at the 1899 Hague Peace Conference, where declarations were adopted banning the launching of projectiles and explosives by balloons or by similar methods, and the use of certain kinds of projectiles.⁶⁰ The Balloons Declaration was replaced in 1907 by a further Declaration to the same effect,⁶¹ although few states ratified either Declaration. At the time of the 1899 and 1907 Hague Conferences air technology was insufficiently advanced to allow precise targeting of military objectives, but by the First World War air operations played a critical role, with aircraft widely used for observation, bombing, and dog fighting.⁶² It became apparent that some rules were necessary to regulate conflict in this theatre of activity, which led to the 1923 development of the ‘Hague Rules of Air Warfare’.⁶³ Although not in treaty form, much of the Hague Rules are understood as reflecting customary law.⁶⁴ Two particularly important provisions—early versions of the principle of distinction (between military aircraft and other aircraft) and IHL’s first definition of ‘military objectives’—became custom and were later codified in API in 1977.⁶⁵

The Second World War involved extensive bombing offensives which resulted in the destruction of many civilian areas, and during this period there was no written law binding specifically governing air warfare.⁶⁶ While much of the law of air warfare has developed through analogies drawn from the laws of armed conflict on land and at sea, since the Second World War ‘it has become quite clear ... that such analogies are often inadequate, inasmuch as conditions of air warfare differ radically from those prevailing on land and at sea’, such as ‘[t]he high speed, the vast space, and the state-of-the-art sophistication of air warfare’.⁶⁷

However, overall there seems to have been a reluctance to address the broad issues of air warfare through treaty law, with only a few specific aspects selected for regulation through binding rules.⁶⁸ The four Geneva Conventions of 1949 mention aircraft primarily regarding their medical functions rather than their use in the conduct of hostilities,⁶⁹ and certain other instruments not specific to armed conflict also contain rules restricting air operations.⁷⁰ API contains several provisions regarding medical aircraft,⁷¹ and rules concerning (p. 85) air-to-ground attacks, but does not address air-to-sea, sea-to-air, ground-to-air, or air-to-air combat except as they have incidental effects on civilians or civilian objects on the ground.⁷² Despite this incompleteness, API’s general norms regarding issues like proportionality and precautions in attack are regarded by most states as reflective of custom applicable in all air operations.⁷³ API is therefore understood as prohibiting attacks

on the civilian population and civilian property, regardless of whether the attack is on land, from the air or from the sea.⁷⁴

In an effort to restate and update the law applicable to air warfare, between 2002 and 2010 a group of military and humanitarian experts developed the *Harvard Manual on International Law Applicable to Air and Missile Warfare*,⁷⁵ which now represents ‘the most authoritative and comprehensive treatment of air warfare to date’. Although non-binding, it is regarded by many as reflecting customary rules, and as a subsidiary means to determine international law applicable to air and missile warfare.⁷⁶ Its 175 Rules and detailed accompanying commentary focus on where air operations may be conducted; who and what may be attacked; how air operations must be conducted; and what weapons may be used.⁷⁷ It has been noted, however, that in many cases the *Manual* only includes ‘the least common denominator, in particular in the crucial area of protection of the civilian population on land against air attacks’.⁷⁸

Topical issues in recent years include how to apply IHL in relation to unmanned aerial vehicles (UAVs) or ‘remotely piloted aerial systems’ (RPAS).⁷⁹ While UAV/RPAS are governed by the fundamental rules of IHL just as non-remotely piloted aircraft or any other weapon system,⁸⁰ some interpretative challenges remain, such as how UAVs should be marked; how to apply the concept of ‘command’ to the operation of a UAV, and how the concept of ‘crew’ applies to those who are remotely operating or programming a UAV.⁸¹ Several aspects of the existing law of air warfare need further updating. Given that air capabilities are continuing to evolve rapidly and to be relied on heavily by states, it has been argued that ‘[t]here is a constant and obvious need to adapt the law of armed conflict to the changing and challenging contingencies of air warfare’.⁸²

(p. 86) 6. Outer Space

Outer space⁸³ is another physical environment in which armed conflict may potentially occur, and is considered by some as a ‘fourth domain’ of armed conflict.⁸⁴ There is significant interest in developing more detailed guidance on the application of IHL to it.⁸⁵ Although long recognized that IHL applies to military operations in outer space, there is little state practice, both because of the legal requirement to use space only for peaceful purposes, and because not all states are capable of conducting military operations in space.⁸⁶ It was not until the 1960s that armed conflict in space began to be possible, following space research and missions in the 1950s, and the US and Soviet launch of satellites and manned space missions during the Cold War.⁸⁷ In 1959 the UN Committee on the Peaceful Uses of Outer Space was established⁸⁸ and was instrumental in the creation of five space-related treaties⁸⁹ and five non-binding instruments and sets of principles.⁹⁰ However, these treaties have few states parties and provide little detailed guidance for modern military uses of space. Inter alia, they provide that the moon and other bodies in outer space must only be used for peaceful purposes,⁹¹ and prohibit the establishment of military bases, installations and fortifications, testing of weapons, and conduct of military manoeuvres.⁹² Thus far, much of the military use of outer space has been considered in the context of disarmament and arms control issues rather than IHL.⁹³

Over the ensuing decades, space capabilities have increased significantly, such that now many states rely heavily on space and satellites for communications; transportation; global positioning systems; reconnaissance; surveillance; and early warning and navigation (p. 87) systems⁹⁴—all capabilities with potential dual uses for civilian and military purposes. As a consequence, the possibility of armed conflict extending to outer space is considered by some to be growing,⁹⁵ with space now being described as ‘a critical security and conflict domain’.⁹⁶ It can be understood both as a ‘supporting domain’ of armed conflict, in that

space capabilities play an important role in supporting military operations in land, sea, and air warfare,⁹⁷ and also as a potential domain itself.

With these growing space capabilities is an increasing interest in legal regulation.⁹⁸ There is currently no intergovernmental instrument specifically examining the application of IHL to armed conflict in outer space. However, two independent expert-led projects are underway to develop manuals to clarify existing international laws applicable to military space operations, including IHL. One initiative, which began in 2016, is being led by the McGill University Centre for Research in Air and Space Law and aims to develop a 'Manual on International Law Applicable to Military Activities in Outer Space'.⁹⁹ Another, launched in 2018, aims to develop the 'Woomera Manual on the International Law of Military Space Operations'.¹⁰⁰ Both projects comprise experts from academia, the private sector, government, and military service, contributing in their personal capacities. These processes seek to avoid some of the challenges associated with space-related discussions in intergovernmental fora. For example, a lack of consensus has prevented progress on international law issues through the UN Committee on the Peaceful Uses of Outer Space and the UN Conference on Disarmament.¹⁰¹ Current UN-facilitated intergovernmental initiatives therefore focus more on broader issues, for example the UN General Assembly Group of Government Experts on the Prevention of an Arms Race in Outer Space, and the UN Group of Governmental Experts on Transparency and Confidence-Building Measures in Outer Space Activities.¹⁰²

7. New and Emerging Technologies

As discussed earlier, the development of new technologies has been a force driving the recognition of new domains of armed conflict. Technological innovation led to expansion of armed conflict from land into the naval and air environments, spurring efforts at legal (p. 88) regulation that led eventually to the development of new domains of IHL. Throughout history there is 'a clear tendency initially for the law to follow the technology, with new platforms as well as weapons prompting attempts to regulate'.¹⁰³ Technological change is therefore not a new challenge for IHL; however, the speed of change is now much faster, which exacerbates the problem of law lagging behind technology.¹⁰⁴ Below is a discussion of three areas of new technologies and capabilities that some states and commentators have identified as constituting new or future domains of armed conflict: activities conducted through cyber space; the electromagnetic spectrum; and computer-human body interfaces.

A. Information Technology/Cyberspace

For many states, critical areas of defence capability have become increasingly reliant on information technology and cyber operations—such as command-and-control, navigations, communications, intelligence, surveillance and reconnaissance, and weapons employment.¹⁰⁵ Cyberspace has therefore been described by some as the 'fifth domain' or 'dimension' of armed conflict.¹⁰⁶ For example, the US Department of Defence recognized cyberspace as an operational domain in 2011.¹⁰⁷ It has been described as 'a global domain within the information environment' which 'is dependent on the physical domains of air, land, maritime, and space'.¹⁰⁸ The US regards it both as a 'critical enabler for other warfighting domains and a new domain itself'.¹⁰⁹ Other countries are following suit by acquiring cyber capabilities and developing their force structures to leverage these capabilities.¹¹⁰ In 2016 NATO Allied Ministers formally recognized cyberspace as an 'operational domain' along with land, air, and sea operations, noting that '[m]ost crises and conflicts today have a cyber dimension'.¹¹¹ By 2015 more than 100 states had reportedly established dedicated cyber-warfare units within their armed forces or intelligence agencies.¹¹²

Most states and commentators would appear to recognize cyber capabilities as new means of supporting the conduct of armed conflict through kinetic operations. In this sense cyber capabilities can be understood as representing a 'domain' of armed conflict, although their non-geospatially bounded nature makes use of a term like 'domain' figurative rather (p. 89) than actual. Despite the common use of the term cyber-'space', cyber operations cannot easily be conceptualized spatially.¹¹³ Cyber capabilities denote a complex range of technologies, together understood loosely as a medium or dimension through which certain kinds of activities may be conducted, with real-world effects in the domains of land, sea, air, and space.¹¹⁴ IHL is applied by states to 'cyber operations that occur in the context of armed conflict or which have effect comparable to armed conflict'.¹¹⁵ The ICRC has described 'cyber warfare' as encompassing 'operations against a computer or a computer system through a data stream, when used as means and methods of warfare in the context of an armed conflict, as defined under IHL'.¹¹⁶

As an emergent capability in armed conflict it poses several challenges for our existing constructs—including debate about whether actions such as cyber-attacks fall within the definition of 'armed' conflict, or a military 'attack'; and whether data is an 'object' whose targeting is regulated by IHL.¹¹⁷ Some commentators have therefore argued that it is an error to think of cyberspace as a warfighting domain analogous to the traditional domains, and have critiqued the narrative that seems to suggest that 'cyberspace has become the new high ground of warfare, the one domain to rule them all and in the ether bind them'.¹¹⁸

While it is clear that the fundamental rules and principles of IHL apply to computer network attacks conducted in the course of armed conflict, as with other means and methods of warfare,¹¹⁹ the issue is specifically *how* they should apply and be interpreted. This has been the topic of considerable debate since the late 1990s¹²⁰—together with the question of whether cyber operations should be considered a new and distinct domain of IHL. This is a context in which commentary and analysis of academics and non-state experts is far ahead of the law, as well as state practice. There is currently no treaty law explicitly addressing the use of military computer network operations in armed conflict. The most in-depth attempt so far to clarify the international legal framework was the 2013 *Tallinn Manual on the International Law Applicable to Cyber Warfare*,¹²¹ a statement of rules by an international group of experts facilitated and led by the NATO Cooperative Cyber Defence Center of Excellence. This was followed in 2017 by *Tallinn Manual 2.0*, an updated and expanded edition.¹²²

(p. 90) In intergovernmental fora such as the UN Group of Governmental Experts on cyber security, discussion of the applicability of IHL to cyberspace operations has proved very sensitive and difficult. Between 2004 and 2017 it made modest progress in discussing norms, rules, and principles for responsible state behaviour in cyberspace, but it concluded its deliberations in the final session without arriving at a consensus outcome report.¹²³ It is widely considered to have failed in its objective, due to fundamental disagreements among members, including on the applicability of IHL.¹²⁴

State practice on this issue is either contradictory or classified, and thus undetectable. Although there are some emerging sprouts of *opinio juris* to be found in some states' national cyber-security strategies and other sources, overall states have been reluctant to express *opinio juris* in this rapidly evolving area.¹²⁵ The ICRC has acknowledged this is a difficult area, observing that '[c]yber warfare adds a new level of complexity to armed conflict that may pose novel questions for IHL'.¹²⁶ While many states appear to consider cyber operations as constituting a potential domain of armed conflict, it remains debatable whether it can be considered a distinct sub-field of IHL.

B. Electromagnetic Spectrum

The electromagnetic spectrum (EMS) appears to be considered by several states as a separate domain of armed conflict. The EMS encompasses infrared, radar, TV, and radio waves. There is increasing discussion about the possible uses of EMS in armed conflict, such as sensor technology, electronic jammers, and radars.¹²⁷ For example, military radar and military communications networks require increasing access to the radio frequency spectrum.¹²⁸ The phrase 'electronic warfare' is being used by several states to denote 'manipulation of the electromagnetic spectrum for military advantage'.¹²⁹ It is closely related to the concept of 'cyber warfare' (both being forms of electronic communication), but their relationship is the subject of debate.¹³⁰ Australia has recognized the EMS as one of 'three (p. 91) non-environmental domains', alongside 'cyberspace' and 'information'.¹³¹ In 2016, the US Defense Advanced Research Projects Agency (DARPA) has described the EMS as 'the sixth domain of modern warfare',¹³² explaining that:

The effectiveness of combat operations in the land, sea, air, space, and cyber domains depends on our ability to control and exploit the spectrum, because it is critical to our capabilities in navigation. While the spectrum is at the heart of current and future warfare, it remains highly contested and congested, and future info-centric warfare will require more access than ever before.¹³³

In 2018 a US Navy policy appeared to recognize the EMS as a warfighting domain 'on par with sea, land, air, space and cyber',¹³⁴ while in 2019 a US Defense Primer on Electronic Warfare characterized it somewhat differently, noting that '[a]s electronic warfare affects all military domains—land, air, sea, space, and cyberspace—each of the military services has its own EW capabilities and programs'.¹³⁵ Like the use of cyber technologies, the EMS is not a discrete geographic area and it potentially traverses several existing physical domains. A question for future consideration may be whether to regard the EMS solely as a means or method of armed conflict, or as a domain of armed conflict. It remains to be seen whether over time specific IHL rules and principles might be developed in this area.

C. The Human Mind?

Another emerging area of capability to mention briefly concerns the human mind, and brain-computer interface (BCI) technologies, which connect the brain to certain kinds of devices. This has led some commentators to forecast the human mind as being 'the next domain of warfare'.¹³⁶ This body of debate discusses matters such as the potential for brain-controlled drones, metal exoskeletons, and other BCIs aimed at enhancing the power, efficiency, and lethality of soldiers.¹³⁷ It has been observed that military research arms like the (p. 92) US DARPA are 'investing in understanding complex neural processes and enhanced threat detection through BCI' and that 'it seems the marriage between neuroscience and military systems will fundamentally alter the future of conflict'.¹³⁸ Again, the interrelationships with existing domains has been emphasized:

Like every other domain of warfare, the mind as the sixth domain is neither isolated nor removed from other domains; coordinated attacks across all domains will continue to be the norm. It's just that military and defense thinkers now need to account for the subtleties of the human mind ... and our increasing reliance upon the brain-computer interface.¹³⁹

Debates about BCIs and IHL are at any early stage, but this brief example illustrates how commentators describe emerging capabilities through the language of 'domains' of warfare.

D. New Domains or Just New Means/Methods of Armed Conflict?

In addition to the above examples, there are a whole host of other technologies in armed conflict that are the subject of current debate about how IHL should be applied to them, including artificial intelligence and autonomous weapons. Should these kinds of developments be approached as emerging 'domains' of armed conflict or instead thought of as capabilities and/or weapons?

This depends on how broadly one understands the concept of 'domains of armed conflict'. If one interprets it broadly, as new operating environments and capabilities through which armed conflict is conducted, then these new technologies might be regarded as emerging domains of armed conflict. However, whether the extension of armed conflict into new domains has led already to new domains of IHL, or will do so in the future, is a separate question. The application of IHL to new technologies in armed conflict is the subject of significant debate¹⁴⁰ and is recognized by the ICRC as one of the key contemporary challenges for IHL.¹⁴¹ The ICRC is engaged in clarifying the significance of basic IHL concepts, and suggests that although the fundamental rules of IHL apply to new technologies used in armed conflict, '[m]ore tailor-made rules to protect civilians from conflict's future frontlines may be needed'.¹⁴²

Many would argue that land, sea, and air are currently the only three recognized domains of IHL (in the sense of an established sub-set of specialized rules, principles, practice, and analytical commentary) and that, as yet, there are no new sub-sets of IHL applicable to newer technologies. Others would contend that these new capabilities *are* giving rise to (p. 93) new domains of IHL. They might support this by arguing either that they are new domains of IHL—in the broad sense of being capabilities subject to general IHL—and/or that they already constitute particular sub-sets of IHL due to the growing body of non-binding guidance instruments that interpret and apply existing IHL by analogy.

The former argument is not contentious; all military activities undertaken by a party in the course of armed conflict are subject to IHL. Although there may be no specific, tailored treaty obligations regarding the conduct of armed conflict through a new technology, the fundamental principles of IHL apply to all military operations, regardless of the specific medium employed. This is reflected in the Martens Clause¹⁴³ and the weapons review process of Article 36 of API, requiring states to conduct legal reviews of a new weapon, means, or method of warfare, to determine whether its employment would be prohibited under international law.¹⁴⁴ As the International Court of Justice has affirmed, IHL 'applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future'.¹⁴⁵ One just has to apply IHL by analogy to adapt it to new contexts and situations.¹⁴⁶

The second argument is more contentious, as it raises deeper questions about what constitutes the development of IHL—specifically, whether IHL can be said to be 'developed' through non-legal instruments, and through processes of interpretation and application, rather than only through binding treaty law or customary law. That is, is development through non-binding instruments and commentary sufficient to give rise to a new sub-field of IHL? Some might argue this to be the case, particularly in the current multilateral environment, where state-led development of IHL through binding law is proving so difficult, and where there is an increase in interpretative activity by non-state bodies or groups of experts.¹⁴⁷ Many others, from a more positivist perspective, would argue that such instruments and activities do not give rise to binding legal obligations on states, and are therefore not new IHL—while recognizing of course, that over time some sources may come to be regarded as subsidiary sources for interpreting international law.¹⁴⁸

This kind of debate shows that the concept of an IHL ‘domain’ is being used by commentators in different ways. Some use it to denote a physical environment where armed conflict occurs; others use it more broadly to mean a new field of operational activity to which IHL needs to be applied; while yet others use it to refer to a developed sub-set of specialized IHL rules, principles, interpretation, and practice. There is therefore some conflation between the concepts of operational environments and new methods and means of armed conflict, and also between the concepts of ‘domains of armed conflict’ and ‘domains of IHL’.

(p. 94) 8. Armed Conflict Traversing Multiple Domains

With the trend towards increasing detail and specificity of legal regulation, it is important that each domain (or potential future domain) of IHL is not considered in isolation as a self-contained sub-set, but that they are understood and applied together in a comprehensive, integrated manner.¹⁴⁹ In practice, armed conflict is often conducted across several different operational environments simultaneously. This can occur in different ways. For example, as noted earlier in section 7 ‘New and Emerging Technologies’, military operations on land, at sea, or in the air often use cyber and/or space-based interconnected technologies, which can sometimes make it difficult to isolate precisely where a particular action is occurring. Also, an action may start in one domain and move into, or produce effects in, one or more other domains.

The complexities here are demonstrated by the significant debate about the application of IHL to technologies that produce a remote effect, for example the use of unmanned aerial or underwater vehicles to track and analyse potential targets or to provide platforms for weapons that are activated remotely.¹⁵⁰ Such capabilities challenge the concept of the domain of armed conflict as a discrete physical space, and affect how we understand the area of operations—because the effect may occur in the area of operations while the operator and targeting decisions may be far outside that area.¹⁵¹ An additional layer of complexity arises due to the fact that military operations are often of a joint nature, undertaken in coalitions with other states¹⁵² who may have different IHL obligations or interpret their obligations differently.

For all these reasons the concept of a battlefield as a discrete, identifiable physical space is now changing,¹⁵³ with the importance of integrated approaches to armed conflict evidenced in growing discussions of ‘multi-domain battle’¹⁵⁴ (MDB) or ‘multi-domain operations’.¹⁵⁵ In essence, the concept concerns the need for a party to armed conflict to synchronize and coordinate its actions across multiple domains, involving both kinetic and non-kinetic operations. It has been explained as having emerged from ‘a re-examination of ... previous military concepts and doctrine’ caused by ‘the rapid growth of capabilities tied to the newly minted space and cyber domains’.¹⁵⁶ It has been argued that the concept ‘is being developed (p. 95) to address the interconnected, *Omni domain* battlespace of the 21st Century’,¹⁵⁷ and that it ‘promises more fluid, adaptive, and effective operations simultaneously across five domains (land, sea, air, space, and cyber)’.¹⁵⁸

One illustration is the 2019 US Air Force launch of ‘a next-generation airborne surveillance and command and control technology intended to successfully synchronize air, ground, drone and satellite assets onto a single seamless network’.¹⁵⁹ Known as ‘Advanced Battle Management and Surveillance’, it is planned to reach full maturity in the 2040s and is described by Air Force officials as more of a ‘system’ than a platform-specific application,¹⁶⁰ intending ‘to change the way we execute battlefield management command and control in the multi-domain environment’.¹⁶¹ More broadly, the US has argued inter alia, that:

Multi-domain battle is a concept designed to overcome our adversary's integrated defensive capabilities, avoid domain isolation and fracturing, and preserve freedom of action ... The rate and speed of current and future world events will not allow us the time to synchronize federated solutions. In order to present the enemy with multiple dilemmas, we must converge and integrate multi-domain solutions and approaches before the battle starts ... we must maintain a common operating picture.¹⁶²

The MDB concept is the subject of ongoing debate. While it has received some critiques for not being new,¹⁶³ others question more fundamentally the heavy military reliance on the concept of domains, arguing for example that the word 'domain' itself 'contains some built-in assumptions regarding how we view warfare that can limit our thinking'.¹⁶⁴ That is, it 'undermines the ability to think holistically', which could 'actually pose an intractable conceptual threat to an integrated joint force'.¹⁶⁵ It appears therefore that the concept needs further testing before its practical utility can be established.¹⁶⁶ For example, how might MDB approaches affect the future drafting of rules of engagement, the delivery of IHL advice, and legal decision-making processes? And more generally, what might be the impact of MDB approaches on the way international lawyers approach IHL?

(p. 96) A. Moving beyond Specific Domains: Challenges for Legal Analysis

The above points about multi-domain armed conflict and the complex relationships between different domains present challenges for international law interpretation and application, and for the organization and delivery of IHL advice within governments. How may states cultivate deep expertise across all the growing sub-fields of IHL, but also ensure that lawyers 'develop a common operating picture' of how all the sub-fields work together? How is potential 'domain isolation' in IHL to be avoided, and how can we ensure that experts in IHL regarding land, sea, and naval warfare, as well as in space and new technologies, are acting in coordination? If the fast pace of armed conflict requires quick decisions that do not always allow time to 'synchronize federated solutions', it is important to ensure that IHL expertise is made an integral part of the planning, risk assessment, and decision-making involved for MDB approaches. In practice, this underscores the importance of lawyers, with IHL expertise being embedded in joint operations commands; and/or of IHL lawyers advising decision-makers across different parts of a defence force, different military services, and different parts of government to operate in close coordination and ensure their advice is consistent.

MDB appears for now to be more of a planning concept than a concept providing guidance on how to adopt an integrated, holistic approach to IHL application and interpretation. Does existing IHL, together with general international law, already provide an adequate body of rules and principles for evaluating and advising on armed conflict occurring in multiple domains? The reality of contemporary warfare is of operations frequently conducted simultaneously in multiple domains; therefore, applying IHL already requires lawyers to be conversant in multiple sets of rules and principles and to understand how they interact. Applying IHL always relies on the lawyer's interpretive and legal reasoning tools—and these are all that are available in the absence of binding law applicable specifically to new environments or means or methods of armed conflict. An emerging question though may be whether the existing legal reasoning tools continue to be fit for purpose for navigating these challenges in IHL.

The division of IHL into specialized sub-sets reflects the broader trend of fragmentation in international law, with the growing number of fields of particular expertise and practice, and the need for interpretative approaches that help navigate the relationships between them.¹⁶⁷ The issue of norm and regime interaction is therefore not new in international law¹⁶⁸ and certainly not new to IHL—as illustrated by the ongoing, extensive debates about

the relationships between IHL and other bodies of international law that also apply in armed conflict (including international human rights law and international criminal law).¹⁶⁹

(p. 97) General international law already provides several legal tools for managing challenges of coordination and interpretation (including the *lex specialis* principle, among others). Although one might argue that there are no gaps in IHL application because of the lawyers' tools of applying existing law by analogy, it could also be argued that the existing organization of sources of IHL according to specific 'domains' of armed conflict is not sufficiently sophisticated to cater for the increasing complexity of contemporary warfare. Looking to specific domains of armed conflict and domains of IHL may certainly be useful as a first step for an international lawyer to help identify which rules and principles may be most appropriate to apply to a particular situation. However, answering the basic question, 'Is a particular action or set of actions permissible or not permissible within existing IHL?' might not always be answerable simply by recourse to existing domain-specific sources of law or non-binding instruments. Instead, it may potentially require more sophisticated analysis and reasoning. A siloed, source-focused approach may need to be supplemented in the future by more holistic, integrated approaches, perhaps drawing more on systems analysis.

These issues of regime interaction and regulatory fragmentation are faced by multiple areas of law. Several other areas of international law may be further ahead than IHL in developing deeper reflections on these issues, for example in international environmental law, resource management, and climate change, which call for more holistic, integrated approaches to avoid legal silos, and which are sometimes underpinned by systems theory.¹⁷⁰ One illustration is the 'ecosystem' approach, seen as a new paradigm for integrated environmental and biodiversity management.¹⁷¹ As our conceptualization of the battlefield changes, our legal analytical processes may also need to evolve—perhaps drawing on insights and lessons from these other areas of international law. It may also require recognition that sometimes, legal reasoning will be insufficient to answer particular questions, and that resolution may need to take the form of practical policy decisions.¹⁷²

9. Conclusion

Much of the military and academic discourse about contemporary armed conflict demonstrates a continued heavy reliance on the concept of a domain. It serves as a fundamental organizing idea, reflecting the way we conceptualize the battlefield and categorize actions taking place during armed conflict. For much of history, the concept has reflected a fairly simple delineation of different physical battlefield environments, mirrored in the traditional division of states' armed forces into the army, navy, and air force. The domain concept has also exerted a powerful influence in shaping the way we think about, organize, and apply IHL. While much of IHL, including its fundamental principles, applies generally across all armed conflict, it has been supplemented over time by the development of specialized rules (p. 98) and principles tailored to particular domains. Over the past decades however, major evolutions in warfighting capabilities have caused the emergence of significant challenges to the traditional understanding of the domain and changes in the way the term is used.

The concepts of domains of armed conflict and of specialized sub-sets of IHL still continue to serve us well to the extent that it is possible to isolate certain actions in armed conflict as occurring in a particular physical environment, and to identify what sources of IHL may be applicable to those actions. However, these concepts are less useful in relation to activities occurring in non-physical environments, and to activities occurring across multiple environments, when there are potentially several sub-sets of rules applying simultaneously. Contemporary armed conflict therefore calls for a broader, looser approach to the idea of a domain. When 'domain' is understood less as a physical environment for armed conflict and

more broadly as a set of activities that are subject to the application of IHL, then the concept can continue to have some utility in describing new and emerging capabilities.

This chapter has shown that new domains of armed conflict can, over time, sometimes lead to the development of new sub-sets of IHL. However, in the current multilateral environment, many states appear reluctant to develop treaty law to address IHL issues. This means that in the near-to-medium future it is unlikely there will be new treaties with detailed IHL provisions regarding armed conflict in outer space or new warfighting capabilities and technologies—or even amendments to update existing IHL regarding land, sea, and air warfare. Development through customary international law is also likely to be challenging.

It is therefore more likely that many new capabilities would be addressed through non-binding, less-than-treaty status instruments, interpretation, and analysis. This raises fundamental questions about whether such processes can truly be said to constitute ‘development’ of IHL, or just ‘clarification’ and ‘interpretation’, and what the differences are between these concepts (including debates about the relationships between *lex lata* and *de lege ferenda*). In the absence of detailed binding law, one can only apply existing IHL by analogy, informed by the growing number of non-binding sources of interpretation. In this context, the skills of international lawyers in interpreting and applying IHL will have heightened importance—which invites greater attentiveness to the legal reasoning tools, the terminology, and the concepts we deploy as part of those interpretative processes. As this chapter has discussed, the domain concept may no longer be so well adapted or fit for purpose to assess some aspects of contemporary warfare. This suggests there may be value in exploring the potential for more sophisticated analytical approaches for evaluating armed conflict and its compliance with IHL.

Footnotes:

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1 Hersch Lauterpacht (ed), *Oppenheim’s International Law, Vol II: Disputes, War and Neutrality* (7th edn, David McKay 1952) (*Oppenheim*) 236–44.

2 Christopher Greenwood, ‘Scope of Application of Humanitarian Law’, in Dieter Fleck, *The Handbook of International Humanitarian Law* (2nd edn, OUP 2008) 45, 59 para 216.

3 *ibid* 53 para 220; *Oppenheim* (above n 1) 237.

4 Australian Army, *Land Warfare Doctrine 3-0, Operations* (2018) 13 www.army.gov.au/sites/default/files/lwd_3-0_operations_full.pdf.

5 Yves Sandoz, ‘Land Warfare’ in Andrew Clapham and Paolo Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 91, 91.

6 *Instructions for Government of Armies in the United States in the Field*, General Orders No 100 (24 April 1863). Another early instrument was the Institute of International Law’s *Oxford Manual on the Laws of War on Land* (1880), and both were influential in the negotiations at the 1899 and 1907 Hague peace conferences.

7 (signed 29 July 1899, entered into force 4 September 1900).

- 8** Leslie Green, 'Conduct of Hostilities: Maritime' in Leslie Green, *The Contemporary Law of Armed Conflict* (3rd edn, Manchester UP 2008) 188, 188.
- 9** Dietrich Schindler and Jiří Toman, *The Laws of Armed Conflicts* (4th edn, Martinus Nijhoff 2004) 55.
- 10** (signed 18 October 1907, entered into force 26 January 1910), USTS 538.
- 11** (signed 18 October 1907, entered into force 26 January 1910), USTS 540.
- 12** (signed 18 October 1907, entered into force 26 January 1910), USTS 542.
- 13** Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GCI); Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GCIII); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV).
- 14** Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 609 (APII).
- 15** Leslie Green, 'Conduct of Hostilities: Land', in Green, *The Contemporary Law of Armed Conflict* (above n 8) 147, 147 (internal footnotes omitted).
- 16** *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (adopted 1994, reproduced 1995) No 309 IRRC 583 (*San Remo Manual*); Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (CUP 1995) para 10ff.
- 17** Natalino Ronzitti, 'Naval Warfare', in Frauke Lachenmann and Rudiger Wolfrum, *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law, Thematic Series, Vol II* (OUP 2017) 757, 758.
- 18** *San Remo Manual* (above n 16).
- 19** Ronzitti 'Naval Warfare' (above n 17) 761-2.
- 20** 'Warship' is defined in the Convention on the High Seas (done 29 April 1958, entered into force 30 September 1962), 450 UNTS 11 article 8(2) and the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 3 (UNCLOS) article 29; see also W Heintschel von Heinegg, 'Warships', in Lachenmann and Wolfrum (above n 17) 1358.
- 21** David Letts and Rob McLaughlin, 'Law of Naval Warfare', in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 264, 266.
- 22** Paris Declaration Respecting Maritime Law (signed and entered into force 16 April 1856, 115 CTS 1); Hague Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864 (adopted 29 July 1899, entered into force 4 September 1900).
- 23** See further Schindler and Toman (above n 9) 1059-93; W Heintschel von Heinegg, 'Maritime Warfare', in Clapham and Gaeta (above n 5) 145; Marco Sassòli, Antoine Bouvier,

and Anne Quintin, *How Does Law Protect in War? Vol 1* (ICRC 2011), ch 10 Letts and McLaughlin (above n 21) 269–73.

24 Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 331; Convention (IX) concerning Bombardment by Naval Forces in Time of War (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 345; Convention (X) concerning the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (adopted 18 October 1907, entered into force 26 January 1910) 15 LNTS 340.

25 Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 305; Convention (VII) Relating to the Conversion of Merchant Ships into War-Ships (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 319.

26 Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 367; and Convention (XII) Relative to the Creation of an International Prize Court (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 381.

27 Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 395.

28 Signed 26 February 1909 [1908–09] 208 CTS 341; Schindler and Toman (above n 9) 1111.

29 ‘The Oxford Manual of Naval Warfare’ (9 August 1913) [1913] 26 AnnIDI 610; in D. Schindler and J. Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff 1988), 858–75.

30 Treaty for the Limitation of Naval Armament (6 February 1922), 25 LNTS 202; Treaty Relating to the Use of Submarines and Noxious Gases in Warfare (6 February 1922, not in force), 16 AJIL Supp 57.

31 Treaty for the Limitation and Reduction of Naval Armaments (Part IV) (22 April 1930), 112 LNTS 88; Procès-Verbal Relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930 (signed and entered into force 6 November 1936), 173 LNTS 353; Green, *The Contemporary Law of Armed Conflict* (above n 8) 45, citing Schindler and Toman (above n 9) 1139–49.

32 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 85 (GCII).

33 Letts and McLaughlin (above n 21) 274. API contains provisions concerning naval attacks on land targets (arts 50–60), but otherwise just states that the provisions concerning protection against the effects of hostilities similarly apply to naval operations which may affect civilians: API article 49(3).

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35 *San Remo Manual* (above n 16); Sassòli et al (above n 23) 302.

36 eg the UK, German, and US military manuals: Sassòli et al (above n 23) 302, n 289.

37 Green, *The Contemporary Law of Armed Conflict* (above n 8) 45.

38 Vaughan Lowe and Antonios Tzanakopoulos, ‘Ships, Visit and Search’, in Lachenmann and Wolfrum (above n 17) 1153, 1158.

- 39** Bruno Demeyere, Jean-Marie Henckaerts, Heleen Hiemstra, and Ellen Nohle, 'The Updated ICRC Commentary on the Second Geneva Convention: Demystifying the Law of Armed Conflict at Sea' (2016) 98 *IRRC* 401, 417.
- 40** Heintschel von Heinegg 'Maritime Warfare' (above n 23) 146.
- 41** *ibid* 146, 180-1.
- 42** eg through the Convention on the High Seas 1958 (above n 20) and UNCLOS; see Ronzitti 'Naval Warfare' (above n 17) 758.
- 43** Letts and McLaughlin (above n 21) 265.
- 44** Michael Schmitt, 'Air Warfare', in Clapham and Gaeta (above n 5) 118, 119, 144. See also Javier Guisández Gómez, 'The Law of Air Warfare' (1998) 323 *IRRC* 347; *UK Manual* (above n 34) ch 12 ('Air Operations').
- 45** Yoram Dinstein, 'Air Warfare', in Lachenmann and Wolfrum (above n 17) 13, 14.
- 46** Ian Henderson and Patrick Keane, 'Air and Missile Warfare', in Liivoja and McCormack (above n 21) 282; GCI ch VI; API articles 24-31.
- 47** Schmitt 'Air Warfare' (above n 44) 119, 144.
- 48** Henderson and Keane (above n 46) 282-98.
- 49** Sassòli et al (above n 23) 314.
- 50** *San Remo Manual* (above n 16) rules 125-158; Harvard University Program on Humanitarian Policy and Conflict Research, *Manual on International Law applicable to Air and Missile Warfare* (2009) www.ihlresearch.org/amw; Yoram Dinstein, Bruno Demeyere, and Claude Bruderlein (eds), *Harvard Manual on International Law Applicable to Air and Missile Warfare* (CUP 2010) (*Harvard Manual*) rules 37, 38, 40, 41, 55, 57, 70, and 134-46.
- 51** Convention on International Civil Aviation (7 December 1944), 15 UNTS 295 articles 1-2; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* [1986] ICJ Rep 14 para 251.
- 52** Henderson and Keane (above n 46) 288; Gbenga Oduntan, 'The Never Ending Dispute: Legal Theories on the Spatial Demarcation Boundary Plane between Airspace and Outer Space' (2003) 1 *Hertfordshire LJ* 64.
- 53** eg *UK Manual* (above n 34) para 12.13.
- 54** *Harvard Manual* (above n 50) rule 1(a).
- 55** Schmitt 'Air Warfare' (above n 44) 125; *UK Manual* (above n 34) para 12.14.
- 56** *UK Manual* (above n 34) para 12.4.
- 57** Dinstein (above n 45) 14.
- 58** *ibid* 15.
- 59** Schmitt 'Air Warfare' (above n 44) 120.
- 60** Declaration (IV, 1) to Prohibit for the Term of Five Years the Launching of Projectiles and Explosives from Balloons, and Other New Methods of a Similar Nature (20 July 1899); Green, *The Contemporary Law of Armed Conflict* (above n 8) 40, citing Schindler and Toman (above n 9) 95.
- 61** Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons (18 October 1907).
- 62** Schmitt 'Air Warfare' (above n 44) 121.

63 Commission of Jurists, The Hague, Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare (drafted December 1922–February 1923), Parliamentary Papers, Cmd 2201, (Hague Rules of Air Warfare) Miscellaneous No 14 (1924); Schmitt ‘Air Warfare’ (above n 44) 121–2.

64 Sassòli et al (above n 23) 314; Schmitt ‘Air Warfare’ (above n 44) 122–3; *Prosecutor v Galić*, IT-98-29-A, ICTY Appeals Chamber (30 November 2006) n 275; *UK Manual* (above n 34) para 1.26.3. Their customary status is debated by some: see Green, *The Contemporary Law of Armed Conflict* (above n 8) 46–7.

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66 *UK Manual* (above n 34) para 1.28.1.

67 Dinstein (above n 45) 13.

68 *ibid* 14.

69 GCI articles 13, 36, 37; GCII articles 12, 13, 15, 39, 40; GCIII articles 4, 75; GCIV articles 22, 111.

70 eg the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (adopted 10 April 1981, entered into force 2 December 1983), 1342 UNTS 137; Convention on Cluster Munitions (adopted 3 December 2008, entered into force 1 August 2010), 2688 UNTS 39; Schmitt ‘Air Warfare’ (above n 44) 123.

71 API articles 8(f)–(g) and (i) 24–31.

72 Schmitt ‘Air Warfare’ (above n 44) 124, citing API article 49(3); Michael Bothe, Karl Josef Partsch, and Waldemar A Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff 1982) 290.

73 Schmitt ‘Air Warfare’ (above n 44) 125.

74 Sassòli et al (above n 23) 315.

75 (above n 50).

76 Schmitt ‘Air Warfare’ (above n 44) 125; Henderson and Keane (above n 46) 283.

77 Harvard University Program on Humanitarian Policy and Conflict Research, *Commentary on the Manual on International Law Applicable to Air and Missile Warfare* (2010) www.ihlresearch.org/amw/manual; Schmitt ‘Air Warfare’ (above n 44) 125.

78 Sassòli et al (above n 23) 314.

79 The *Harvard Manual* divides the definition of RPAS into ‘Unmanned Aerial Vehicles’ (unmanned aircraft of any size which does not carry a weapon and which cannot control a weapon’ (rule 1(dd)) (commonly referred to as a ‘drone’) and ‘Unmanned Combat Aerial Vehicle’ which ‘carries and launches a weapon, or which can use on-board technology to direct such a weapon to a target’ (rule 1(ee)).

80 See eg New Zealand Defence Force, *Manual of Armed Forces Law: Vol 4, Law of Armed Conflict*, DM 69 (2nd edn, New Zealand Defence Force 1982) (*NZDF Manual*) para 10.7.2–10.7.3.

81 Henderson and Keane (above n 46) 285–6; *Harvard Manual* (above n 50) rule 1(x) para 6; see Markus Wagner, ‘Unmanned Aerial Vehicles’, in Lachenmann and Wolfrum (above n 17) 1280–6.

82 Dinstein (above n 45) 24.

83 As noted earlier in section 5 'Air', there is no treaty law definition of 'outer space', but it is understood to mean the space beyond the upper atmosphere: eg *NZDF Manual* (above n 80) para 8.11.8.

84 eg the US refers to space as a 'warfighting domain' in its 2018 National Defense Strategy: US, 'Summary of the 2018 National Defense Strategy of the USA' (2018) 6 <https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>. See also Sean Hall, 'Cyberspace at the Operational Level: Warfighting in all Five Domains' (2016) 5 <https://apps.dtic.mil/dtic/tr/fulltext/u2/1045557.pdf>.

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88 UN Office for Outer Space Affairs, 'Committee on the Peaceful Uses of Outer Space' www.unoosa.org/oosa/en/ourwork/copuos/index.html.

89 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (opened for signature 27 January 1967, entered into force 10 October 1967), 610 UNTS 205 (Outer Space Treaty) article V; Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (opened for signature 22 April 1968, entered into force 3 December 1968); Convention on International Liability for Damage Caused by Space Objects (opened for signature 29 March 1972, entered into force on 1 September 1972); Convention on Registration of Objects Launched into Outer Space (opened for signature on 14 January 1975, entered into force on 15 September 1976); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (opened for signature 18 December 1979, entered into force 11 July 1984), 1363 UNTS 21 (Moon Treaty) articles 3-4.

90 eg Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, UNGA Resolution 1962 (XVIII) (13 December 1963); Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries, UNGA Resolution 51/122 (13 December 1996). The other three sets of principles concern broadcasting, remote sensing, and nuclear power sources.

91 Outer Space Treaty articles 3 and 4; Moon Treaty articles 3(1)-(2).

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(p. 29) 2 Classification of Armed Conflicts

1. Introduction

International humanitarian law (IHL) governs the conduct of participants in an armed conflict. Thus, to determine whether this body of law applies to situations of violence, it is necessary to assess first of all whether the situation amounts to an 'armed conflict'. However, IHL does not recognize a unitary concept of armed conflict but two types of it: international (IACs) and non-international (NIACs).

This chapter examines the history of the distinction between these two categories, the consequences of it, and whether it still has validity. It then discusses legal concepts relevant to the two categories, including the differences between a NIAC and other violence, extraterritorial hostilities by one state against a non-state armed group (NSAG), and conflicts in which multinational forces are engaged.

2. History of the Distinction between IAC and NIAC

The distinction between IACs and NIACs arises out of the history of the regulation of wars and armed conflicts by international law. In the period following the peace of Westphalia in 1648 until the end of the Second World War (WWII), the international laws of war applied only to inter-state wars.¹ This was a consequence of the fact that international law was concerned only with relations between states² and eschewed regulation of matters considered to be within 'domestic jurisdiction'. Internal armed conflicts, or civil wars, were not considered to be 'real war[s] in the strict sense of the term in International Law'.³ The laws of war could only apply to civil wars where there was recognition, either by the state involved or a third state, of the belligerency of the insurgent party.⁴ Thus, the application of international law to what was *prima facie* an internal situation was not automatic but the result of recognition of the insurgent party's state-like qualities. At that time, the international laws of war did not distinguish between international and other wars. There was only one body of law which applied either *in toto* to international conflicts between states (or conflicts treated as such) or not at all.⁵

(p. 30) The extension of international regulation to internal armed conflicts changed decisively after WWII. This period was marked by the gradual expansion of international rights and obligations to individuals, as exemplified by the post-war prosecutions for international crimes and the development of international human rights law. It is therefore not surprising that around the same time consideration was given to extending the laws of war to internal armed conflicts. These developments were foreshadowed by the practice of some states and the League of Nations during the Spanish Civil War (1936-39). Although there was no recognition of belligerency during that conflict, there was an emerging view that international law applied to the conduct of hostilities during a civil war.⁶

The four Geneva Conventions 1949 not only decisively established that IHL would apply to certain conflicts involving non-state entities, but they also bifurcated IHL into the law of IAC and that of NIAC. Article 2 common to all four Conventions specifies that the Conventions apply 'to all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties'. The International Committee of the Red Cross (ICRC) had proposed to extend the Conventions in their entirety to internal conflicts.⁷ However, this was rejected by most states. Instead, only a single provision (article 3 common to the four Geneva Conventions, or 'Common Article 3') was made applicable to 'armed conflict not of an international character occurring in the territory of

one of the High Contracting Parties'. Thus, a division was established between the law applicable to IACs and NIACs.

This division was reinforced with the adoption of the Protocols Additional to the Geneva Conventions (API and II) in 1977.⁸ While API deals with 'the Protection of Victims of International Armed Conflicts,' APII 'relat[es] to the Protection of Victims of Non-International Armed Conflicts'. Likewise, the Rome Statute of the International Criminal Court of 1998 distinguishes between war crimes (that is, serious violations of the laws and customs of war) committed in IACs⁹ and NIACs.¹⁰

3. Consequences of the Distinction between IAC and NIAC

It is essential to distinguish between IACs and NIACs as differences exist in the content of the law applicable to each type of conflict. Under treaty law, the differences are vast. The entirety of the Geneva Conventions 1949, the Hague Conventions which preceded them, and API 1977 apply to IACs. These contain hundreds of articles which establish a detailed body of rules relating to the conduct of hostilities ('Hague Law'), as well as those concerning the protection of persons who do not, or who no longer, take part in hostilities ('Geneva Law').

By contrast, the treaty rules applicable to NIACs are rather limited. They are largely to be found in Common Article 3 of the Geneva Conventions 1949, the provisions of APII 1977, and article 8(2)(c) and (e) of the ICC Statute. Common Article 3 provides basic protection (p. 31) to those who do not or no longer take part in hostilities and does not regulate the conduct of hostilities. APII, which has fewer than twenty substantive provisions, and those parts of the ICC Statute dealing with NIACs, extend the rules protecting victims of conflict and introduce modest rules on the conduct of hostilities,¹¹ but fall far short of approximating the IHL rules applicable in IACs.¹²

Notwithstanding this difference in the applicable treaty rules, the distinction between IACs and NIACs is being eroded such that there is now greater, though incomplete, unity in the law applicable to these two forms of conflict.¹³ First, some treaties governing the conduct of hostilities apply to all conflicts without distinction. Examples include the Biological Weapons Convention 1972, Chemical Weapons Convention 1993, Convention Prohibiting Anti-Personnel Land Mines 1997, Second Protocol to the Hague Convention for the Protection of Cultural Property 1954, and the Amendment of 2001 extending the Convention on Conventional Weapons 1980 and its Protocols to NIACs.

Second, and more importantly, customary international law now provides for a broader set of rules governing NIACs and fills many of the gaps in treaty law. This was the position taken by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in the *Tadić* case, which held that the rules of IHL applicable in IAC concerning the protection of civilians, of persons *hors de combat* and of civilian objects, as well as the prohibitions relating to means and certain methods of warfare also apply in NIACs.¹⁴ The ICTY justified its position on the basis of state practice and that 'elementary considerations of humanity and common sense' would 'make it preposterous' that weapons prohibited in IACs could be used by states 'to put down rebellion by their own nationals on their own territory'.¹⁵

Further, the ICRC, in its 2005 comprehensive study of customary IHL ('the ICRC Study'),¹⁶ found evidence that nearly all customary IHL rules applied to both IACs and NIACs. It noted, in particular, that the gaps in APII 'have largely been filled through State practice', leading to 'the creation of rules parallel to those in [API], but applicable as customary law to [NIACs]'.¹⁷ Although this suggestion contradicted earlier assumptions,¹⁸ and questions have been raised as to the ICRC Study's methodology for identifying custom,¹⁹ it is now generally accepted (including by states) that customary IHL has expanded in NIACs beyond

the rules in Common Article 3 and APII. That expansion is reflected in the war crimes provisions of the ICC Statute.²⁰

(p. 32) Although the distinction between the law in IACs and NIAC is blurring, it remains important. This is particularly so in two key areas where the law still differs: the status of fighters and the detention of combatants and civilians.²¹

4. Why Does the Distinction Exist and Should it be Abolished?

The main reason for the persistence of the distinction is the view by some states that equating NIAC and IAC would undermine state sovereignty, particularly national unity and security.²² There are concerns that uniform rules would not only encourage secessionist movements, by giving them a status under international law, but also restrain the hand of the state when seeking to put down rebellions.²³ For example, if the IAC principle of combatant immunity—which prevents prosecutions of combatants merely for taking part in the conflict—were applied in NIACs, states would be unable to criminalize acts which are traditionally regarded as treasonous.²⁴ This is why article 3 of APII states that nothing in APII restricts the responsibility of the state ‘by all legitimate means, to maintain or re-establish law and order’.²⁵ States have also feared that abolishing the distinction would give international status to non-state groups and encourage international intervention in internal conflicts.²⁶ Hence, paragraph 4 of Common Article 3 states that ‘[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict’.

In light of the saving clauses in Common Article 3 and article 3 of APII, the above concerns are hardly justifiable. Also, the idea that foreign intervention follows from the classification of a conflict is to some extent erroneous. First, the UN Security Council (UNSC) now regularly intervenes in non-international conflicts.²⁷ Second, international law does not permit unilateral ‘humanitarian intervention’²⁸ or any kind of forceful intervention by a state in another state based on the nature of a conflict. It is, however, true that the more rules of IHL apply to NIACs, the greater the opportunity for other states to use countermeasures in response to alleged breaches.²⁹

(p. 33) While states may have legitimate concerns about extending the IAC rules relating to the status of fighters to NIACs, this should not prevent the extension of other norms to NIACs.³⁰ However, since IHL applies equally to all sides in a conflict, transposing some IAC rules to NIACs might be problematic where those rules assume or require state authority.

5. The Scope of Application of IHL: IACs

A. Inter-State Conflict

Article 2 common to the Geneva Conventions 1949 states that the Conventions ‘shall apply to all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognised by one of them’. It follows that an IAC is essentially an inter-state conflict.³¹ However, the key question for the application of IHL is ‘When does an armed conflict exist between two States such that this body of law applies?’

The question may be difficult to answer where one party claims to be a state and the other rejects this, as during the dissolution of the former Socialist Federal Republic of Yugoslavia. A NIAC may turn into an IAC when an internal rebel group successfully becomes a state. Nevertheless, except in the case of entities possessing the right of external self-determination, such as colonial or other non-self-governing peoples,³² secession without the consent of the parent state is rarely recognized as successful in international law.³³ Conversely, in cases of state dissolution or where the parent state consents to secession but

continues to fight (perhaps indirectly by providing support for groups within the new state), the conflict may be 'internationalized'.³⁴

1. War

Prior to the Geneva Conventions, the international laws of war applied to 'war'. The concept had a technical meaning and referred to the opposite of peace in the relations between states.³⁵ According to the Hague Convention (III) relative to the Opening of Hostilities 1907, a formal declaration of war was a pre-condition for the laws of war to apply.³⁶ Today, IHL will apply once an armed conflict factually exists between states, even if neither party formally considers itself at war.³⁷ However, the Geneva Conventions will still apply to cases of declared war, even if no hostilities take place. Although there are no modern cases of (p. 34) formal declarations of war,³⁸ there are statements by states to the effect that they are at war with another state.³⁹ Whether these are to be regarded as bringing into effect IHL is essentially a question of intention. For there to be a war in the technical sense, there needs to be an *animus belligerendi*. Yet '[t]here is probably a presumption that nations do not intend to create a state of war'⁴⁰ and '[s]o serious a matter as the existence of a state of war is not lightly to be implied'.⁴¹

2. Armed conflict

Both IHL and the rules prohibiting recourse to force in international relations have moved away from the formal concept of war and towards much more factual criteria. In the UN Charter, it is the 'use of force' that is prohibited. Likewise, the application of IHL depends on the existence of an 'armed conflict'. Although the Geneva Conventions lack a definition of 'armed conflict', the ICTY Appeals Chamber in *Tadić* found that:

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peace settlement is achieved. Until that moment, international humanitarian law continues to apply to the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.⁴²

A. Threshold for IACs

By asserting that an IAC exists *whenever* there is resort to armed force by states, the *Tadić* decision suggests a very low threshold for an IAC.⁴³ As Vité notes, 'it is ... not necessary for the conflict to extend over time or for it to create a certain number of victims'.⁴⁴ Almost any use of armed force by one state against another is sufficient,⁴⁵ except perhaps where it is unintended (eg arising out of error).⁴⁶ This view has been endorsed in the ICRC's Commentaries to the Geneva Conventions.⁴⁷

The alternative view requires a minimum intensity for an IAC to exist⁴⁸ and thereby seeks consistency with the definition of NIAC, which has an intensity requirement.⁴⁹ However, (p. 35) this analogy is misplaced, as it would result in a regulatory gap for inter-state military operations below that level, including the opening phase of hostilities. Unlike in NIACs, domestic law is not fully applicable to such inter-state military operations.

B. Geographical and temporal scope of IACs

The geographical and temporal scope of application of IHL in both IACs and NIACs are explored more fully in chapter 3 'The Temporal and Geographic Reach of International and Humanitarian Law' in this book and is addressed more briefly here. Where an armed conflict exists between two states, military operations may only be carried out by the parties on their territories and the high seas, including the airspace above them, the

seafloor below, and the exclusive economic zones (that is, outside the territorial waters) of neutral states.⁵⁰ IHL will apply to the hostilities in these areas and any other area where military operations are actually carried out.

As *Tadić* indicates,⁵¹ IHL applies to IACs until a general peace is concluded. Peace treaties may end an IAC, but they have not been common since WWII (the 1979 peace treaty between Israel and Egypt being a notable exception⁵²). Beyond that, the issue has arisen as to whether a ceasefire or an armistice agreement can end an armed conflict. Under the Hague Regulations 1907, these merely suspended military operations rather than ended a war.⁵³ This question remains significant, as there is not yet a peace treaty terminating the Korean conflict of the early 1950s or the conflict between Israel and some of her Arab neighbours since 1949. The better view, espoused by Greenwood, is that 'since armed conflict is not a technical, legal concept but a recognition of the fact of hostilities, the cessation of active hostilities should be enough to terminate the armed conflict'.⁵⁴ A fortiori, a ceasefire or armistice agreement will end a conflict where it is intended to do so⁵⁵ and is effective in practice.

The cessation of hostilities triggers certain duties, including to release prisoners of war⁵⁶ and detainees.⁵⁷ However, the termination of a conflict does not terminate the application of all IHL rules. Just as IHL imposes some obligations on states prior to the commencement of a conflict (eg the obligation to disseminate IHL and to train armed forces in it⁵⁸), certain rules apply beyond the cessation of hostilities or even the conclusion of an occupation. For example, those detained in the conflict continue to be protected.⁵⁹

(p. 36) **C. Occupation**

(i) The definition of occupation

Chapter 13 'Occupation' in this book addresses the law of occupation, including its commencement and termination. In brief, Common Article 2 to the Geneva Conventions 1949 states that the Conventions shall also apply to all cases of partial or total occupation of the territory of a party, even if there is no armed resistance (as in the case of the German annexation of Czechoslovakia before WWII). Although the Geneva Conventions do not define occupation, article 42 of the Hague Regulations 1907 does. That provision, which is regarded as customary international law,⁶⁰ states that 'territory is considered occupied when it is actually placed under the authority of the hostile army'. This means that the occupier must exercise effective territorial control, substituting its own authority for the authority of the territorial state without the consent of the latter's government.⁶¹ This usually requires the deployment of troops, as opposed to a brief incursion. A state may also occupy the territory of another state (or parts thereof) through a subordinate (or puppet) administration, where there is complete dependence or effective control.⁶²

The Fourth Geneva Convention imposes obligations with regard to occupation and occupied territory, including with regard to the status and treatment of protected persons (Part III, Section III) and internees (Part III, Section IV). According to article 6 of the Fourth Convention, its provisions apply 'from the outset of any conflict or occupation'. The ICRC had previously suggested ('the Pictet theory') that the definition of occupation for the purposes of the Fourth Geneva Convention was broader than the definition of occupation in the Hague Regulations of 1907.⁶³ On this theory, the Fourth Geneva Convention applies from the invasion phase of a conflict without requiring stable control of the territory.⁶⁴ However, although the Pictet theory was applied by the ICTY,⁶⁵ the ICRC, in its later Commentary to article 6, concluded that the concept of occupation used in the Geneva Conventions 'is not distinct from that used in the Hague Regulations'.⁶⁶

(ii) Conflicts with non-state armed groups in the context of occupation

During an occupation, the occupying power may be engaged in hostilities with, or otherwise take military action against, a local non-state group, as in Iraq after the 2003 US-UK invasion and the fall of Saddam Hussein's regime. To determine the applicable law, one must first determine that the situation involves hostilities governed by IHL, as opposed to internal disturbances or riots (in which case, domestic law and international human rights law apply). But questions (p. 37) arise as to whether the law of IACs or NIACs applies in those situations, as the context is one of occupation but the fighting is between a state and a non-state group.⁶⁷

There are two possibilities. First, the non-state group may be fighting on behalf of the occupied state or under a command responsible to the occupied state (within the meaning of article 4(A)(2) of the Third Geneva Convention or article 43 of API).⁶⁸ Second, the non-state group may be independent of the occupied state. In the first case, it is clear that the conflict is governed by the law applicable to IAC, since the group, though irregular, qualifies as part of the state's armed forces.

The second scenario is less straightforward. In the *Targeted Killings* case, the Israeli Supreme Court found that confrontations between the occupying party and non-state groups in occupied territory are governed by the law applicable to IAC, even where the non-state group is not fighting on behalf of a state.⁶⁹ To some degree this conclusion is arguably correct.⁷⁰ It follows from the fact that the Geneva Conventions and other rules concerning IAC, including API, apply to the *acts of the occupying power* and regulate its relationship both to the occupied state and the people in the occupied territory. However, it is also possible that *alongside the occupation* there exists a NIAC between the occupying power and an organized armed group (provided the criteria for NIAC, discussed below, are met).⁷¹

The critical question is not, however, what type of conflict exists between the state and the non-state group but what law applies to the acts of an occupying power in occupied territory. The law of occupation is not just about the relationship between two contending states or simply a means of indicating the temporary nature of the occupier's authority vis-à-vis the territorial state. It also regulates what may well be the tense relationship between the occupying power and persons within the occupied territory, particularly by restraining how the former treats the latter, including where there are confrontations. The fact that the local population has chosen to rise up in arms does not free the occupier from its obligations, but ought to reinforce them. Moreover, the law of occupation foresees that those who are not members of the occupied state's armed forces may engage in hostilities against the occupier, or commit acts of sabotage or other acts which imperil the occupier's security.⁷² Various IHL provisions accordingly address such activities.⁷³

(p. 38) Thus, the law of occupation and other IAC rules (including on targeting) continue to regulate how the occupier may respond to an uprising in the foreign territory. This conclusion finds supports in the International Court of Justice (ICJ)'s judgment in the *Armed Activities* case, where it applied the law of occupation and the law of IAC to Uganda's acts in the Ituri region of the Democratic Republic of Congo (DRC). This was despite the fact that Uganda was acting primarily against non-state groups.⁷⁴ However, this is not to suggest that the law of NIAC will never apply in occupied territory. Such a conflict might arise between two non-state groups who engage in hostilities, with the result that those parties are bound by the rules applicable to NIACs.⁷⁵ Also, where there is a NIAC between the occupier and an armed group, the conduct of the armed group will be subject to the law of NIACs, even if the occupier continues to have obligations under the law of IACs.⁷⁶

(iii) End of occupation

Occupation 'ends when [the occupying] State no longer *de facto* exercises its control over the territory'.⁷⁷ Usually, this will coincide with the forced or voluntary removal of the occupying power's troops. Nevertheless, control may extend beyond such removal, for example, where the direct control of the occupier is replaced by indirect occupation. More difficult is the situation, as in Gaza, where the armed forces of the occupier leave the territory and no longer exercise control over its governance, but continue to exercise control over other aspects of it (namely, control over Gaza's airspace, certain borders, and adjacent sea areas). Opinion is divided over whether such a situation constitutes a continuation of occupation.⁷⁸ Yet, it may be argued that, like the criteria for statehood (where creation and continuation are assessed by different standards⁷⁹), the criteria for the establishment of occupation may differ from the ones required for its maintenance. This suggests that even where a former occupying power no longer exercises the level of control used to establish the occupation, if such control is exercised to prevent another power from gaining full control, the occupation continues.

B. Self-Determination Conflicts of National Liberation under Article 1(4) of API

Although an IAC usually involves two (or more) states fighting each other, API 1977 also applies the laws of IAC to a special category of internal armed conflict. Under article 1(4), API extends to armed conflicts where 'peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination [...]'.

(p. 39) The provision reflects concerns prevailing at the time of API's negotiation and responds to the desire, mainly of developing countries, for legitimization of liberation struggles. The provision was primarily aimed at Israel's occupation of Palestine, the struggle in South Africa and Rhodesia (as it was then called), and the colonial struggles of the time.⁸⁰ However, API has never been applied in any of those situations. This is because the situations to which it applies are difficult to define. One key question is whether a movement is indeed fighting in the exercise of the right of self-determination. That matter is determined by general international law. However, in addition, a national liberation movement that seeks the application of article 1(4) to a conflict it is engaged in, may, under article 96(3), make a unilateral declaration undertaking to apply the provisions of the Geneva Conventions and API in that conflict. Such a declaration was first made in 2015 by the Polisario Front, which seeks independence for Western Sahara from Moroccan administration and control (of a non-self-governing territory previously administered by Spain until 1975). Most authors consider that article 1(4) is not part of customary international law.⁸¹

C. Recognition of Belligerency

As noted earlier in section 2 'History of the Distinction between IAC and NIAC', even before WWII, the laws of war applied to civil wars between a state and a rebel group where the latter was recognized as a belligerent.⁸² Such recognition could be done either by the opposing government or third states, usually through a declaration of neutrality by the foreign state. According to Oppenheim, recognition is warranted if the insurgents '(1) [...] are in possession of a certain part of the territory of the legitimate Government; (2) [...] have set up a Government of their own; and (3) [...] conduct their armed contention with the legitimate Government according to the laws and usages of war'.⁸³

The effect of a recognition of belligerency, by the state fighting against the rebel group, is the application of all laws of war between the parties. But these effects only operate between the recognizing state and the belligerent group, without prejudice to the relations between other states and the belligerent group.⁸⁴

The practice of recognizing belligerencies has declined since the regulation of NIAC and the doctrine is said to be obsolete or to have fallen into desuetude. However, while the Boer War (1899–1902) was the last instance of recognition of belligerency by a belligerent government, there have been cases of third states recognizing belligerency of insurgents operating in other countries.⁸⁵ Moreover, recognition of belligerency was mostly implied in (p. 40) the nineteenth century, such as through declarations of neutrality and acquiescence in the confiscation of contraband or a blockade.⁸⁶ Since 1949, blockades have been instituted in NIACs and these may be regarded as implicit recognition, thus internationalizing the conflict. It is worth noting that desuetude of a customary principle does not extinguish it.⁸⁷

6. The Scope of Application of IHL: NIACs

It is not always easy to determine when violence within a state is to be classified as a NIAC. Where it is regarded as merely internal strife or civil disturbance, the threshold of ‘armed conflict’ is not reached and IHL does not apply. Conversely, where the threshold is reached, IHL applies. The question, therefore, is what is the threshold for a NIAC to exist?

A. NIACs under Common Article 3

1. Criteria for the existence of NIACs

Unfortunately, Common Article 3 does not specify when it will apply, referring only to an ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’. Whether or not such a conflict is taking place is determined by criteria which have been fleshed out by customary international law. In the *Tadić* case, the ICTY Appeals Chamber referred to a NIAC as a situation of ‘protracted armed violence between governmental authorities and organised armed groups or between such groups within a State’.⁸⁸ This test is also adopted in article 8(2)(d) and (f) of the ICC Statute, which excludes from the definition of NIACs ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature’.⁸⁹

The first criterion for determining whether a NIAC exists is the involvement of an ‘*organised armed group*’.⁹⁰ Under customary law, a NIAC governed by Common Article 3 may be a conflict between a state and a non-state group, or between non-state groups. Thus, at least one side must be a non-state group. To be a party to an armed conflict a non-state group must have a certain level of organization with a command structure.⁹¹ Relevant factors that *may* be taken into account include the existence of a command structure and disciplinary rules and mechanisms; the existence of headquarters; control over territory; access to weapons, other military equipment, recruits, and military training; the ability to plan, coordinate, and carry out military operations, including troop movements and logistics; a unified military strategy and use of military tactics; and an ability to speak with one voice, to negotiate and conclude agreements such as ceasefire or peace accords.⁹²

Although groups involved in NIACs usually have a political purpose or aim, this is not a requirement under IHL. Thus, violence involving criminal groups acting for private, (p. 41) non-political motives may NIACs. What is important is that the group is sufficiently organized and is involved in an armed campaign reaching the required degree of intensity (the second criterion for a NIAC, discussed below). Factually, it is unlikely that these conditions will be met by criminal gangs, but the possibility cannot be ruled out and the UNSC has acknowledged the applicability of IHL to the fight against piracy.⁹³

The second criterion required for a NIAC is that the violence must reach a certain degree of *intensity*.⁹⁴ In *Tadić* the ICTY spoke of ‘protracted armed violence’.⁹⁵ While the word ‘protracted’ implies a certain duration, it is generally accepted that the key requirement is the intensity of the force rather than its timing. This indicates that the threshold of violence for NIACs is higher than in IACs. While an IAC exists from the initiation of inter-state violence, the situation with respect to NIACs is more fluid as often the violence pre-dates

the armed conflict and the application of IHL. Thus, it will often be necessary to assess *when* the violence crosses the threshold of applicability of IHL.

In *Haradinaj et al*, a case relating to the conflict in Kosovo between the Federal Republic of Yugoslavia and the Kosovo Liberation Army, the ICTY relied on several indicative factors to assess the two criteria of 'intensity' and 'organisation of armed groups'.⁹⁶ These include the number, duration, and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UNSC may also be a reflection of the intensity of a conflict.⁹⁷ This is a case-by-case evaluation of the overall situation and no particular formula exists for weighting the different factors.

Thus, it may be that violence of relatively short duration amounts to a NIAC where its scale and the destruction is particularly high. In the *Abella* case, the Inter-American Commission of Human Rights held that a thirty-hour confrontation between the Argentinian military and a dissident group of soldiers was covered by Common Article 3.⁹⁸ Alternatively, prolonged violence may suffice even though the individual confrontations are not destructive. However, where fighting involves state authorities, violence should be equivalent to that used by its armed forces, even if it is the activity rather than the state arm that is decisive.⁹⁹ Thus even operations conducted by law enforcement could be classified as NIACs.

(p. 42) 2. Geographical scope of NIACs

Two questions arise with regard to the geographical scope of the application of IHL in a NIAC. The first relates to the territorial extent of application of IHL *within* a state in which the NIAC takes place. In the *Tadić* case, the ICTY Appeals Chamber stated that in a NIAC, IHL 'continues to apply ... in the whole territory under the control of a party, whether or not actual combat take place there'.¹⁰⁰ However, since fighting in some NIACs is confined to only a part of the state with large parts of the state being unaffected, the view that IHL applies throughout the state has been questioned as being overbroad.¹⁰¹

The second question relates to whether NIACs, and thus the application of IHL, can extend beyond the boundaries of one state. Although many NIACs are internal conflicts confined to the territory of one state, particularly between the government of that state and a non-state group within that state, it is possible for the fighting in a NIAC to span more than the state. This will happen where the NSAG operates in more than one state. Where this is the case, the question may arise whether the hostilities that take place in different states between the same parties are: (i) part of the same armed conflict, for instance by aggregating the violence in the different states to cross the threshold of intensity for a NIAC; or (ii) to be regarded as separate conflicts, with the effect that the focus must be on whether the hostilities in each state separately meet the threshold for a NIAC.

Although Common Article 3 speaks of NIACs occurring in the territory of 'one of the High Contracting Parties', it is accepted that this provision was not intended to, and does not, limit NIACs to the territory of one state. It simply means that Common Article 3 will only apply where the conflict occurs on the territory of at least one High Contracting Party. It has been generally accepted that where a non-state armed group is based (or retreats) across the border, hostilities which spill across that border will be regarded as part of the same NIAC.¹⁰²

However, the US claimed that it is involved in a 'global war' with a number of terrorist groups and that its actions in many states are part of that same NIAC. It is more likely that hostilities will spill over across a land border than to a more distant country. However, where the same non-state group in a NIAC operates in another country, there seems to be no reason as a matter of law or logic why the same NIAC would not also extend there

too.¹⁰³ If this approach is followed, the intensity requirement for NIACS could be met by aggregation of violence in the different countries, rather than by examining the level of violence in each country.¹⁰⁴ Even if a NIAC may exist in more than one country under IHL, it is the law (p. 43) governing resort to force under the UN Charter and customary international law that determines whether a state may lawfully use force on the territory of another state. That such force will be part of a NIAC regulated by IHL does not authorize or determine the legality of such resort to force.

B. NIACs under APII

Both Common Article 3 and APII do not apply to situations of internal disturbance and tensions such as riots, or isolated and sporadic acts of violence (the threshold for 'armed conflict'). However, under article 1(1) of APII, the rules therein only apply to armed conflicts taking place on the territory of a party 'between its armed forces and dissident armed forces or other organised 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'. This threshold of application of APII is higher than that of Common Article 3 in a number of ways. The effect of the different thresholds is that there are at least two types of NIAC: those covered by both sources, and those covered only by Common Article 3.

The APII test, which is similar to the one for the recognition of belligerency,¹⁰⁵ is more stringent in various ways than the threshold in Common Article 3. First, it applies only if government forces are involved and APII does not apply to conflicts solely between organized armed groups. Second, the organized armed group must exercise control over territory, typically where a rebel group is fighting against the government for authority over the state or part thereof. While the actual carrying out of sustained and concerted military operations and compliance with APII are not strictly required (and only the ability to do so is required), in practice it is difficult to conceive of territorial control without such operations.

A third difference between APII and Common Article 3 is that the former applies to NIACs on the territory of a party between '*its* armed forces' and organized armed groups. This means that in NIACs where a third state intervenes in an internal conflict with the consent of the territorial state, APII will not apply to the acts of the intervening state, even if both states are parties to it. After all, the conflict does not take place on its territory and is not between its armed forces and armed groups. Applying this interpretation to the NIAC in Afghanistan since 2002 (after the formation of a new Afghan government) is illustrative. It would mean that although Afghanistan became party to APII in 2009, and some of the countries fighting there with its consent are also parties to it, the Protocol does not apply to the conflict between those intervening countries and armed groups.¹⁰⁶ It is not clear whether this was intended by the Protocol's drafters.

An alternative interpretation would be to consider the forces of the intervening state to be part of the armed forces of the territorial state.¹⁰⁷ Although this would be a desirable extension of the Protocol's humanitarian protections, this test for armed forces does not find (p. 44) support in the rest of IHL. The forces of a co-belligerent are not usually regarded as part of the armed forces of a party. Also, it would be a stretch to say that a state is responsible not only for the acts of own forces but also for those of the co-belligerent.¹⁰⁸ Nevertheless, APII could apply to acts of invited foreign forces if their acts are attributable to the territorial state under the law of state responsibility, as where the foreign forces are 'placed at the disposal of' the territorial state.¹⁰⁹ This means that they

must act under the exclusive direction and control of the territorial state rather than the sending state.¹¹⁰ This test will rarely be satisfied in practice.

7. Foreign Intervention in NIACs

Despite the significance of the distinction between IACs and NIACs, drawing this distinction in practice is often difficult. This is particularly so where there is foreign intervention in a NIAC. Since the end of WWII, NIACs have become more common than IACs. During the Cold War, this trend was coupled with the phenomenon of 'proxy wars' where foreign states intervened in many NIACs. Similarly, in the twenty-first century, there continues to be increased foreign intervention in what would otherwise be internal conflicts, as in Yemen, Syria, Iraq, Afghanistan, the DRC, and South Ossetia.

Since IACs are essentially inter-state conflicts, whether or not intervention in a NIAC transforms it into an IAC (or at least grafts an IAC onto an existing, and perhaps continuing, NIAC) will depend on which side of the conflict the foreign state intervenes. A proposal by the ICRC for all such conflicts to be deemed international was rejected during the negotiation of the Additional Protocols.¹¹¹

A. Foreign Intervention on the Side of a Non-State Armed Group against a State

Where the armed forces of a foreign state intervene on the side of the non-state group fighting against a state, there will be two opposing states involved in a conflict and, therefore, an IAC. This situation is hardly any different from a quintessential IAC. However, the fact that there is an IAC between two states does not necessarily affect the classification of the NIAC between the territorial state and non-state group, in so far as the latter does not act on behalf of the intervening state. Accordingly, there will be a mixed conflict with an IAC alongside a continuing NIAC, as in the *Nicaragua* case, where the actions of the US in and against Nicaragua were governed by the rules of IAC but the conflict between Nicaraguan forces and the Contra rebels remained a NIAC.¹¹²

It is more difficult where a foreign state does not send its own armed forces to fight alongside rebel forces but provides other means of support to them. It is accepted that where a (p. 45) non-state group fighting a state acts on behalf of a different state, there is an IAC. However, there has been much controversy as to what level of involvement by the intervening state internationalizes the conflict.¹¹³ In *Tadić*, the ICTY Appeals Chamber held that this question depends on whether the non-state group 'belongs to' a party to the conflict, within the meaning of article 4 of the Third Geneva Convention.¹¹⁴ This in turn relates to whether the non-state group is a *de facto* state organ; that is, whether its acts are attributable to the state under the law of state responsibility,¹¹⁵ in which case an IAC exists. The Appeals Chamber also found that the test of attribution is 'overall control', as opposed to the 'effective control' test developed by the ICJ in the *Nicaragua* case.¹¹⁶ It considered the ICJ's test to be too strict in cases of organized groups. The 'overall control' test would be satisfied:

when the State [...] *has a role in organising, coordinating or planning the military actions* of a military group, in addition to financing, training and equipping or providing operational support to the group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.¹¹⁷

On that basis, the Appeals Chamber held that the Bosnian Serbs were under the overall control of the Federal Republic of Yugoslavia, so that the conflict between such group and the Muslim-led Bosnian government was an IAC.¹¹⁸ The overall control test has been endorsed by the ICC in several cases.¹¹⁹

Although the decision on the facts in *Tadić* was probably correct, the reasoning for it has rightly been criticized.¹²⁰ The ICTY misinterpreted the *Nicaragua* test of attribution. As the ICJ confirmed in the *Bosnia Genocide* case,¹²¹ the *Nicaragua* case, customary international law, and the International Law Commission's (ILC) articles on State Responsibility do not contain one single test for the attribution of acts of non-state groups to a state, but at least two. The first is the test to determine whether a non-state group can be considered a de facto state organ under article 4 of the ILC's articles. If that test is satisfied, then *all* the acts of a non-state group are attributable to a state. In some ways, this is precisely what the Appeals Chamber was seeking to achieve in *Tadić*. But according to the ICJ, this is not a question of 'overall control' but requires a much stricter test of 'complete dependence and control', under which the group is seen as the mere instrument of the state.¹²² Thus, under the law of state responsibility the fact that a non-state group is under the 'overall control' of a state would not make it a state organ.

(p. 46) The second test applies where a group is not a de facto state organ under article 4, but *specific acts* of that group can be attributed to a state, under article 8 of the ILC's articles, where such acts are carried out on that state's instructions or under its direction or 'effective control'.¹²³ Thus, the tests for state responsibility are stricter than the one put forward by the ICTY and there are good reasons for this.¹²⁴ A state should only be held legally responsible for its own acts. Otherwise, depending on the primary rules in question, it may be held responsible for its failure to control others or for creating a situation which permitted particular acts to occur.¹²⁵

Nevertheless, the internationalization of armed conflict is not necessarily dependent on rules of attribution in the general international law of state responsibility, so that the test required for the former may not be equivalent to the latter. To be sure, as the ICTY noted, where a non-state group is a de facto state organ or is under its effective control when fighting against another state, the conflict will be international, as the group acts on behalf of the state. But the question remains whether IHL provides for a lower threshold of attribution for the purpose of conflict classification. This point was raised by the ICJ itself in the *Bosnian Genocide* case, where it stated:

Insofar as the 'overall control' test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. [...]

[L]ogic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.¹²⁶

If *Tadić* is wrong on the specific point that the 'overall control' test is the test of state responsibility under general international law, there are three further views on the test for internationalization of a NIAC as a result of state support for non-state groups. One view would agree with *Tadić* that the key question is whether the non-state group 'belongs to' a foreign state but would argue that this question depends on specific IHL rules, as opposed to the general law of state responsibility. Under those rules, an armed group would be regarded as belonging to a state, in particular under article 4 of the Third Geneva Convention, regardless of effective control by a state, provided that there is a de facto agreement or relationship (p. 47) between the state and the group.¹²⁷ This test draws from the ICRC commentary to article 4¹²⁸ and it is probably even looser than the 'overall control'

test. This approach postulates a *lex specialis* rule in the regime of state responsibility¹²⁹ for breaches of IHL. Thus, a state would be responsible for the acts of non-state groups that belong to it under a lower threshold of attribution.¹³⁰

A second approach is to argue that the 'overall control' test is simply a rule of IHL which exists for the classification of armed conflict, as opposed to being a more general rule of state responsibility. This view has been adopted by the ICC¹³¹ and it has the advantage of reconciling the conflicting views of the ICJ and the ICTY. However, it contrasts with the approach in *Tadić* in that it does not claim (as *Tadić* does) that the 'overall control' test is derived from general international law.

A third approach was adopted by Judge Shahabuddeen in his Separate Opinion in the *Tadić* Appeal Judgment. In his view, the question is whether a foreign state can be said to have used force against another state. With regard to the Bosnian conflict, he framed it as follows:

Ex hypothesi, an armed conflict involves a use of force. Thus, the question whether there was an armed conflict between the FRY [Federal Republic of Yugoslavia] and BH [Bosnia Herzegovina] depended on whether the FRY was using force against BH through the Bosnian Serbian Army of the Republika Srpska ('VRS').¹³²

If a foreign state has used force against another state, albeit indirectly by supporting a non-state group, there is an IAC between the two states. To determine whether one state uses forces against another we must turn to the international law rules prohibiting the use of force. Ironically, the leading case here is *Nicaragua*,¹³³ but not the parts referred to by the majority in *Tadić*. According to the ICJ's case law and customary international law, a state is taken to have indirectly used force against another state where it arms and trains non-state forces, without having sent its own troops or having used forces that are de facto its own.

While it is the second view, that the 'overall control' approach is simply a rule for classification of conflicts that appears to have greater judicial support, it is problematic to separate the rules of state responsibility from those for classification of conflicts. This is because that approach leads to the possibility that one side of an IAC, there is no state that is responsible for violations of the rules of IHL, because a state has sufficient 'overall' control over a non-state armed group for the conflict to be international but insufficient control to be held responsible for the acts of the group. For that reason, it would be better to align the test for classification and that of state responsibility using one of the other approaches (or a modified version of the second approach whereby the 'overall control test' is considered a *lex specialis* rule of responsibility for breaches of IHL).

(p. 48) B. Foreign Intervention at the Invitation (or with Consent) of a State against a Non-State Group

Where there is intervention by a foreign state in a NIAC on the side of the government (or at its invitation) against a non-state group, such intervention will not transform the NIAC into an IAC.¹³⁴ As noted above in section 2 'History of the Distinction between IRC and NIAC', the ICRC's proposal in the 1970s, that all conflicts involving foreign intervention are to be regarded as international, was rejected by states.¹³⁵

It may be that a foreign state intervenes initially on the side of rebels, who subsequently become the government and continue to fight against the former government. In those instances, when the foreign state was supporting a non-state group the conflict would have been international. Once a new government is formed and the foreign forces intervene at its invitation, the conflict is in principle transformed into a NIACs.¹³⁶ However, taking this position without safeguards would undermine the law of occupation, since establishing a puppet regime and consent from that regime would suffice to de-internationalize the conflict. Thus, some assurance that the new government is indeed independent from the

foreign forces is necessary. For this purpose, one should look at the degree of effectiveness of its control over the territory of the state and its international recognition,¹³⁷ factors which also determine whether the rebels can be considered the new government representing the state.

C. Mixed Conflicts

IACs and NIACs may go on simultaneously in the same area, as the aforementioned example of the *Nicaragua case* in section 7.A 'A Foreign Intervention on the Side of a Non-State Armed Group against a State' demonstrated. Likewise, the ICTY Appeals Chamber held in *Tadić*¹³⁸ that the conflict in the former Yugoslavia had both international and non-international characteristics, thus requiring a determination in each particular case. This approach, allowing for mixed (international and non-international) conflicts in the same factual situation, has been criticized for creating 'a crazy quilt of norms applicable in the same conflict'.¹³⁹ However, this possibility is neither new nor (p. 49) illogical.¹⁴⁰

Granted, it has made the application of IHL much more complicated in many recent conflicts. Standards for detention will sometimes depend solely on who happened to capture or to detain a particular person, since the Third and Fourth Geneva Conventions only apply to internment by state forces in an IAC.

In cases where there is intervention by foreign state forces alongside a non-state group fighting against the territorial state, whether the conflict is mixed or fully internationalized will depend on whether the non-state group is seen as 'belonging to' the intervening state. Where the foreign intervening state exercises the requisite degree of control over the group,¹⁴¹ the entire conflict will be an IAC, including confrontations between the group and the territorial state.

8. Intervention by Multinational Forces under UN Command or Authorized by the UN

Particular problems of classification arise when forces authorized by the UN or another international organization are involved in a conflict. The UN does not have any forces of its own and UN authorized forces are always composed of contingents from national armed forces. The key question is whether UN authorization of force affects the classification of a conflict. This requires, first, a determination of whether a particular UN force is simply a national armed force or one for whose acts the UN bears responsibility under international law.

Under article 7 of the ILC's Draft Articles on Responsibilities of International Organizations, an international organization is only responsible for the acts of a state organ, including armed forces, placed at its disposal.¹⁴² For instance, this would be the case if the forces of a peace-keeping or peace-enforcement operation are placed at the disposal, or are under the effective control, of the organization. Contrary to the view of the European Court of Human Rights,¹⁴³ the UN or another international organization will only have effective control of a national contingent if the organization has operational control of it.¹⁴⁴ Ultimate control over the force and the ability to terminate its mandate are immaterial. Without effective control, the force simply belongs to the state and the armed conflict is classified according to the principles discussed earlier.

Three types of armed forces may be authorized to use force by the UNSC. First, the UNSC may authorize states, acting individually, in coalition, or through regional arrangements, to (p. 50) take enforcement action under Chapter VII of the UN Charter. Examples include the authorization to remove Iraq from Kuwait in 1990 and to protect civilians in Libya in 2011.¹⁴⁵ In these cases, the forces are not under UN command but remain under national command or some other unified command. Second, the UN may create and authorize a traditional peacekeeping mission, where the force is under UN command, operates with the

consent of the host state and in a neutral manner, and uses force only in self-defence.¹⁴⁶ Third, the UN may authorize a 'robust' peacekeeping force, where the national contingents operate under UN command but the force is authorized to use 'all necessary means', including military force, to achieve certain objectives, such as protecting civilians, usually in an armed conflict. The second and third categories of forces are in principle subsidiary UN organs, as they are under UN command.¹⁴⁷ However, where a force is in fact under the effective control of a state, the UN will not be responsible for its acts.

While in the past there was much debate on the applicability of IHL to UN forces,¹⁴⁸ it is now generally accepted that these forces are bound by customary IHL when engaged in armed conflict.¹⁴⁹ The provisions of Status of Forces Agreements, concluded between the UN and host States, refer, in particular, to principles and rules mirrored in the Geneva Conventions and the APs.¹⁵⁰

Where multinational forces are involved in an armed conflict, it will be necessary to consider whether the conflict is an IAC or a NIAC. If they fight against the armed forces of a state, such as occurred with the United Nations Operation in the Congo (ONUC) in the 1960s, the conflict seems to be international.¹⁵¹ Although the conflict per se is between an international organization and a state, the actual fighting is carried out by national forces. However, as discussed earlier, in the unlikely scenario when those forces are under the effective control of the UN only, they are a UN organ only so no armed conflict exists between contributing states and the state against whose forces they engage.¹⁵² Still, there is either a customary rule broadening IACs to include conflicts involving international organizations and states, or the conflict could be regarded as international because contributing states remain bound by their treaty obligations to 'ensure respect' for IHL.¹⁵³

Where the UN fights against a non-state group within a state and its presence is with the consent of the host state, the conflict should be classified as NIAC, in line with the analysis above regarding foreign intervention. However, the situation is more difficult if the UN's presence lacks consent and is solely grounded in a Security Council resolution. Some argue (p. 51) that such conflicts are NIACs.¹⁵⁴ Yet the sovereignty concerns behind the less expansive regulation of NIACs by IHL are clearly absent in this case. Others take the view that any armed conflict involving the UN is an IAC, since the operations concerned are decided and carried out by international organizations.¹⁵⁵

It is difficult to determine when peacekeepers become direct participants in hostilities such that they are engaged in an armed conflict. Their mere presence or their use of force in self-defence does not necessarily imply involvement therein.¹⁵⁶ However, the mere fact that peacekeepers are using force in defence of their mandate also does not itself mean that they are *not* taking a direct part in hostilities, nor does it mean they have *not* become a party to an armed conflict.¹⁵⁷

Holding that UN peacekeepers are involved in an armed conflict with another entity when carrying out their mandate, but are not involved when exercising their individual right of self-defence, leads to an imbalance in the application of IHL to UN forces. It appears that UN forces are engaged in an armed conflict when the UN force uses force against another entity, but are not when the other entity has targeted the UN force. In that latter scenario, the UN force is acting in self-defence, is not involved in an armed conflict, and its members are protected as civilians. Thus, UN forces gain an advantage as they may carry out initial acts of targeting which would be lawful if they comply with IHL. By contrast other forces may not initiate attacks on UN forces as there would be no armed conflict with the UN at that point and those other forces would even be committing a war crime if they act in the

context of another armed conflict (eg, the one that the peacekeeping force is trying to bring an end to).¹⁵⁸

This result appears on one level, to be contrary to the principle of equal application of IHL. However, from a formal perspective it is not, given the fact that once an armed conflict is initiated between the UN forces and others, both sides are equal. All that the result being discussed here leads to is an imbalance as to who may start an armed conflict when UN forces are involved. In this way, the UN's special role has an impact on the application of IHL.

An alternative approach is to say that acts of individual self-defence by peacekeepers do not make them direct participants in an armed conflict, but where there is a sustained attack on such peacekeeping forces, which would normally pass the intensity threshold for an armed conflict, there should be recognized an armed conflict between the UN forces and the attackers (albeit one initiated by other forces). The difficulty with this approach is that it would mean that those attacks on UN peacekeepers would be made lawful (in terms of IHL) if they are sustained and draw the UN into a conflict, while lower-level attacks would not be lawful, since there would be no armed conflict with the UN and the peacekeepers would remain protected as civilians.

The temporal and geographical scope of armed conflicts involving UN peacekeepers is unclear. As in the case of inter-state conflicts, the involvement of one contingent in an armed (p. 52) conflict in principle means that all UN peacekeeping forces in the country are engaged in it. However, this would deprive all UN peacekeepers of the protected status they ordinarily enjoy. In addition, there is no definite answer as to when such armed conflicts end. It is unclear whether it is the end of hostilities or a general conclusion of peace. However, to require a general conclusion of peace seems artificial, as UN peacekeepers have been authorized to use force precisely to achieve that aim.

9. Extraterritorial Conflicts with Non-State Armed Groups

There are many situations where a state uses force on the territory of another state but does not directly target the territorial state, but only an NSAG based therein. Examples include the use of force by Israel in Lebanon against Hezbollah; acts by Uganda and Rwanda in the DRC; Colombian attacks on the FARC in Ecuador; US targeting of persons connected with Al-Qaeda in countries such as Yemen, Somalia, and Pakistan; Turkey's attacks on PKK targets in Northern Iraq and other Kurdish groups in Syria; and the strikes by the US, UK, and France, and others in Syria against Islamic State of Iraq and the Levant (ISIL) strongholds. In most of these cases, the extraterritorial attacks on non-state groups abroad are an extension of a pre-existing conflict in the foreign state, between the latter and the non-state group.

Whether such situations are IACs or NIACs has been controversial. On the one hand, although the foreign state uses force without the consent of the territorial state, the hostilities do not engage the armed forces of two states. Thus, they are factually different from the quintessential IAC. On the other hand, though the confrontations are between a state and a non-state group, they are not purely internal given their location on foreign territory. Furthermore, as discussed earlier in section 6 'The Scope of Application of IHL: NIACs', both Common Article 3 and APII, dealing with NIACs, appear on their face to confine such conflicts to the territory of one Contracting Party.

In light of this mismatch between the facts and the law, some have suggested that a new category of armed conflict should be recognized to account for the transnational aspects of these conflicts, as well as the fact they occur between states and non-state groups.¹⁵⁹ These new approaches have not been generally accepted. Rather, most commentators propose to

apply existing rules of IHL to such conflicts and to determine whether the situation involves an IAC or NIAC.¹⁶⁰

Following this approach, some have concluded that a NIAC exists to the extent that the force is directed solely at the non-state group.¹⁶¹ They rightly argue that the wording of Common Article 3 does not prevent a NIAC from straddling more than one state. The reference to *one* of the High Contracting Parties simply means that fighting must occur in the (p. 53) territory of *at least one* party to the Conventions.¹⁶² It is also argued that the conflict should be classified as a NIAC because the opposing parties are not two states but a state and a non-state group. Furthermore, it is said that non-state actors cannot comply with many rules applicable to IACs and states are unwilling to grant them combatant immunity.¹⁶³

A. A State Consent-Based Approach

The law that governs transnational conflicts between a state and a non-state group will depend, in the first place, on whether the territorial state in which the non-state group is based has given its consent to the foreign state using force against that group. Where such consent exists, then the conflict will be governed exclusively by the law of NIACs.¹⁶⁴ The situation is no different from one in which the territorial state is itself fighting the non-state group and invites the foreign state to intervene. The consent of the territorial state has the effect that there are not two opposing states involved in the conflict.¹⁶⁵

However, as indicated in section 7.C 'Mixed Conflicts' above, a state may be involved in a NIAC with an NSAG at the same time as it is involved in an IAC with another state. In the situation being considered, the conflict between the state and a non-state group would be a NIAC, but there would also be an IAC between the state using force and the state on whose territory the force is being used, *if such force is being used without the latter's consent*. This is because such use of force without consent is *against* the territorial state, even if it is not directed at its governmental structures or designed to coerce it. State practice and the jurisprudence of international tribunals supports this approach.¹⁶⁶

An IAC is no more than the use of armed force by one state against another.¹⁶⁷ It matters not whether the territorial state responds to the attack nor does it matter, as Common Article 2 of the Geneva Conventions makes clear, whether either state acknowledges the state of armed conflict. It is also irrelevant whether the targeted entities are part of the governmental structure of the state or whether the purpose of the use of force is to affect the government. In the first place, there is a distinction between a state and a government. IACs are conflicts between states. A government is but one part of a state. A state is also made of people and territory in addition to a government in control of the territory.¹⁶⁸ Attacks against people in a state or against the territory of a state are also attacks against the state.

Second, if it were attempted to limit IACs to cases where attacks were initiated against the governmental infrastructure of a state, it would be difficult to discern what is meant by the governmental infrastructure of a State and no uniform answer can be given to that question. Whether airports, sea ports, electricity-generating plants, roads, bridges and so forth are owned by the government of a state or by private parties (as is the case in some countries) (p. 54) will depend on the economic approach adopted by that country. None of these things are intrinsically governmental.

Third, and most importantly, to attempt to distinguish between force directed at a non-state group and force intended to influence the government is to condition the application of IHL on the mental state or motive of the attacker. It is to suggest that the very same acts of force directed by one state against the territory of another state would yield different legal results, depending on the intention of the intervening state regarding whom it seeks to affect. The protections afforded to the civilian population and to the infrastructure of the

territorial state ought not to depend on such motives, which additionally may not be easily discernible. What is important are the objective facts, which are: that force is being used by one state *against* another state (ie on its territory and without its consent).

The view that any use of force by a state on the territory of another without the consent of the latter brings into effect an IAC between the two states has been endorsed by several international tribunals. The ICJ only applied the law of IAC to Uganda's activities in the DRC, including its acts outside the Ituri province under Ugandan occupation, despite the fact that Uganda was in the DRC's territory primarily to fight non-state groups.¹⁶⁹ The view taken here also finds support in the decision of Judge Shahabuddeen in *Tadić*¹⁷⁰ and the Israeli Supreme Court in the *Targeted Killings* case.¹⁷¹ The UN Commission of Inquiry into the 2006 conflict in Lebanon found that there was an IAC between Israel, Hezbollah, and Lebanon, though the Lebanese forces were not involved in the fighting between Israel and Hezbollah.¹⁷² Both Israel and Lebanon accepted this view.¹⁷³ The same view has been clearly taken by the ICC in *Ntaganda* with respect to Uganda's intervention in the DRC.¹⁷⁴ It also has the support of the ICRC in its updated Commentary to Common Article 2,¹⁷⁵ and of some scholars.¹⁷⁶

The US Supreme Court decision in *Hamdan* might, at first glance, be read as taking a contrary view. This is because it held that Common Article 3 applied to the conflict between the US and Al-Qaeda in Afghanistan.¹⁷⁷ Yet, a more plausible interpretation is that the Court was simply referring to Common Article 3 as a minimum yardstick of protection in all armed conflicts. This is precisely what the ICJ held in *Nicaragua*, which was cited in that part of *Hamdan*.¹⁷⁸ Moreover, the Supreme Court explicitly abstained from determining the nature of the armed conflict, as the application of Common Article 3 made it unnecessary.¹⁷⁹ For those reasons, *Hamdan* cannot be decisive as to the classification of said conflict.¹⁸⁰

(p. 55) Where a state uses force against a non-state armed group on the territory of another state, without the consent of the territorial state, there will (depending on the intensity of the violence) be two simultaneous conflicts: a NIAC between the state and the non-state group, and an IAC between the state using force and the territorial state (irrespective of the involvement of the latter's armed forces). The question that then arises with respect to the state using force is whether its conduct will be governed by the law applicable in IACs or NIACs. Since the conflict with the non-state group will be so bound up with the IAC between the two states, it will be impossible, from the perspective of the state using force, to separate the two conflicts. With respect to the conduct of hostilities and targeting in general, every act of targeting by the foreign state will not only be an attempt to target the non-state group (or members thereof), but will also be at the same time a use of armed force against the territorial state (being a use of force on its territory without its consent). This means that every act of targeting or opening fire must comply with the law of IACs in addition to that of NIACs. At the same time, the non-state group continues to be bound by the laws applying to NIACs, as it does not have obligations under the rules applicable to IACs.

With regard to detention and the status of combatants, one anxiety expressed by some authors is that saying that there is an IAC between a state and non-state group would imply that the latter's fighters are entitled to combatant immunity or to prisoner-of-war (POW) status. However, this conclusion does not follow. It is one thing to assert that the law of IAC applies; it is another matter *how* that law applies. Applying the law of IACs would not grant combatant immunity or POW status to non-state fighters as they would not, in practically all cases, fulfil the criteria for these statuses: they do not fight on behalf of the state or belong to it; and they would be unlikely to fulfil the other legal conditions of combatancy.

Questions remain as to whether members of that non-state group should be entitled to the benefits that the rest of the population are entitled to. In particular, if they are detained should they be accorded the protections to which civilians are entitled under the Fourth Geneva Convention? In principle, and leaving aside important threshold questions regarding the personal and territorial scope of the application of the Fourth Geneva Convention, there is no reason why persons in the territory of the conflict, or removed to the territory controlled by the state using force, should be deprived of protections that they ordinarily enjoy under the Geneva Conventions. If a person were to be picked up by the foreign state and detained, it is impossible to see how the person's status as a protected person under the Geneva Conventions should be superseded by a claim that the person is a fighter in a NIAC. Such protected persons under the Geneva Conventions do not lose that status because they may have engaged in hostile acts, though where they are so engaged some derogations may be made, under article 5 of the Fourth Convention, in relation to protections to which they may otherwise be entitled.

Irrespective of the consent of the territorial state, there are at least two situations where a transnational conflict between a state and a non-state group will be governed by the law of IAC. First, where the non-state group belongs to a state other than the intervening foreign state: here there will be two opposing states. This would be the case of the conflict between Israel and Hezbollah if the latter was regarded as belonging to Lebanon or a third state. Second, where a state occupies another state to act against a non-state group or as a result of a conflict with the latter, the actions of the occupying state during the occupation will be (p. 56) governed by the law of occupation and other rules of IACs.¹⁸¹ This is the position of the ICJ and the ICC in relation to Uganda's occupation of the DRC's Ituri province.¹⁸²

10. Conclusion

This chapter has shown that the definition of armed conflict has been fleshed out over the years through state practice, international case law, and the writings of scholars. NIACs need to cross a threshold of intensity and take place between a state and a non-state group or between non-state groups themselves. Nevertheless, they are not restricted to purely internal contexts but may have a cross-border dimension. The clearest and most objective definition of IACs, in turn, is that which holds that two states are in conflict when one uses force against the other; that is, on its territory of another and without its consent. However, IACs are not limited to traditional confrontations between state forces. Rather, they extend to cases where one or more states use force indirectly through non-state actors. We have also seen that conflict classification, though often cumbersome, remains important for reasons of law and policy. Yet the lines between the two types of armed conflict have been gradually blurred under conventional and customary international law. While there have been calls to abandon the distinction, this is not likely to happen until certain sovereignty concerns and related issues relating to targeting and detention in NIACs are resolved.

Footnotes:

1 See Lorand Bartels, 'Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts' (2009) 91 *IRRC* 35, 44-8.

2 See Lassa Oppenheim, *International Law, Vol I: The Law of Peace* (Longmans 1912) 12 para 13.

3 Lassa Oppenheim, *International Law, Vol II: War and Neutrality* (Longmans 1906) 67.

4 *ibid* 65; Lindsay Moir, *The Law of Internal Armed Conflict* (CUP 2002) 5ff.

- 5** See Bartels (above n 1) 51; Moir (above n 4) 10.
- 6** Antonio Cassese, 'Civil War and International Law', in Antonio Cassese (ed), *The Human Dimension of International Law: Selected Papers* (OUP 2008) 114–16. See also Bartels (above n 1) 56; *Prosecutor v Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 63.
- 7** See Cassese 'Civil War' (above n 6) 116–17; Bartels (above n 1) 57.
- 8** See also Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) articles 18 and 19; Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (CUP 2006) 96–8.
- 9** ICC Statute ('ICCSt') article 8(2)(a) and (b).
- 10** *ibid* article 8(2)(c) and (e).
- 11** See Jelena Pejić, 'Conflict Classification and the Law Applicable to Detention and the Use of Force', in Elizabeth Wilmshurst (ed), *International Law and Classification of Conflicts* (OUP 2012), ch 4.
- 12** See section 6 'The Scope of Application of IHL: NIACs' below.
- 13** See Lindsay Moir, 'Towards the Unification of International Humanitarian Law?', in Richard Burchill, Nigel White, and Justin Morris (eds), *International Conflict and Security Law* (CUP 2005) 108.
- 14** *Tadić* Jurisdiction (above n 6) para 127.
- 15** *ibid* para 119.
- 16** Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Study: Vol I: Rules and Vol II: Practice* (ICRC and CUP 2005).
- 17** *ibid* Vol I xxxv.
- 18** See eg 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780(1992)', S/1994/674 (27 May 1994) 13 para 42.
- 19** See Daniel Bethlehem, 'The Methodological Framework of the Study' and Iain Scobbie, 'The Approach to Customary International Law in the Study', in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 3, 15; and also John Bellinger and William Haynes, 'A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law' (2007) 89(866) *IRRC* 443.
- 20** It should, however, be noted that the ICCSt's list of war crimes in IACs is longer than that of war crimes in NIACs, even though the difference has been narrowed through amendments. Compare ICCSt articles 8(2)(a)–(b) and 8(2)(c) and (e). The ICC Pre-Trial Chamber I has regarded this difference as reflecting IHL. See *Abu Garda*, ICC-02/05-02/09, Confirmation of Charges Decision, 8 February 2010.
- 21** For these differences, see chapters 5 'Persons Covered by International Law: Main Categories' and 12 'Detention in Armed Conflict' in this book. See also Pejić 'Conflict Classification' (above n 11).
- 22** Cassese 'Civil War' (above n 6) 116; Bartels (above n 1) 61–4. See also Howard Levie (ed), *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions* (Martinus Nijhoff 1987) for government statements made, during the drafting of AP II.

- 23** François Bugnion, 'Jus Ad Bellum, Jus in Bello and Non-International Armed Conflicts' (2003) 6 *YIHL* 167, 168.
- 24** See Dieter Fleck, 'The Law of Non-International Armed Conflicts', in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 590-1; Waldemar Solf, 'Non-International Armed Conflicts: Commentator' (1982) 31 *AULR* 927.
- 25** See also ICCSt article 8(3).
- 26** See Levie (above n 22) for statements made, during the drafting of AP II by Yugoslavia (47 para 6) and Mexico (49 para 14).
- 27** See eg UNSC Resolution 1973 (2011) with respect to Libya. See also the World Summit Outcome Document, UNGA Resolution 60/1 (2005) para 139.
- 28** See generally Simon Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (OUP 2001).
- 29** See International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts and accompanying commentary (2001) II-2 ILCYB ('ARSIWA') article 54 (referring to sanctions imposed on the former Yugoslavia for actions that occurred during armed conflict).
- 30** See Fleck (above n 24) 590-1.
- 31** Except in situations covered by AP I article 1(4), on which see section 5.B 'Self-determination Conflicts of National Liberation under Article 1(4) of API' below.
- 32** See UNGA Resolutions 1514 (1960) and 2625 (1970).
- 33** James Crawford, *The Creation of States in International Law* (OUP 2006) ch 9. The main exception is Bangladesh, which was admitted to the UN before consent by Pakistan.
- 34** See eg *Prosecutor v Milošević* (Decision on Motion for Judgment of Acquittal under Rule 98 bis) IT-02-54-T (16 June 2004) (holding that Croatia had become a state following the dissolution of the former Socialist Federal Republic of Yugoslavia). See generally Kubo Mačák, *Internationalized Armed Conflicts in International Law* (OUP 2018) ch 2.3.
- 35** Christopher Greenwood, 'Scope of Application of Humanitarian Law', in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (OUP 2008) 45.
- 36** See René Provost, *International Human Rights and Humanitarian Law* (CUP 2002) 249.
- 37** See Greenwood 'Scope of Application' (above n 35) 47; J Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Vol IV* (ICRC 1952) 2.
- 38** Greenwood 'Scope of Application' (above n 35) 49.
- 39** See examples cited in Christopher Greenwood, 'The Concept of War in Modern International Law' (1987) 36 *ICLQ* 283.
- 40** Greenwood 'Scope of Application' (n 35) 49.
- 41** Lord McNair and Arthur D Watts, *The Legal Effects of War* (4th edn, CUP 1966) 8.
- 42** *Tadić* Jurisdiction (above n 6) para 70.
- 43** Sylvain Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91 *IRRC* 69, 72; William Fenrick, 'Article 8, War Crimes', in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Hart 1999).
- 44** Vité (above n 43) 72.

- 45** See Greenwood 'Scope of Application' (n 35) 46 para 202.
- 46** UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP 2004) 29.
- 47** Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Vol III* (ICRC 1960) 23; ICRC, *Commentary on the First Geneva Convention*, (2nd edn, ICRC 2016) paras 236–244.
- 48** See International Law Association, 'Final Report of the Meaning of Armed Conflict in International Law' (ILA 2010).
- 49** See section 6 'The Scope of Application if IHL: NIACs' below.
- 50** See Greenwood 'Scope of Application' (n 35) 59 para 216. Note that military operations are prohibited in certain areas, such as hospital and safety, demilitarized and neutralized zones. *ibid* paras 219–20. See also chapter 3 'The Temporal and Geographic Reach of International Humanitarian Law' in this book.
- 51** *Tadić* Jurisdiction (above n 6) para 70.
- 52** Peace Treaty between Egypt and Israel (1979) 18 ILM 362.
- 53** Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention IV Respecting the Laws and Customs of War on Land (1907) article 36.
- 54** See Greenwood 'Scope of Application' (n 35) 72 para 250.
- 55** Yoram Dinstein, *War, Aggression and Self-Defence* (CUP 2017) 47.
- 56** Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GCIII) article 118.
- 57** Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV) articles 133 and 134.
- 58** See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (API) article 83.
- 59** See GCIII article 5 and GCIV article 6.
- 60** See *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (2005) ICJ Rep 168 ('Armed Activities case') paras 172ff.
- 61** See generally Adam Roberts, 'What is Military Occupation?' (1984) 55 *BYBIL* 249.
- 62** See *Armed Activities* case (above n 60) para 177 (finding that rebel groups operating in the Democratic Republic of Congo outside of the Ituri region were not under complete dependence or effective control of Uganda); Vité (above n 43) 74–5 (arguing that Armenia indirectly occupies Nagorno-Karabakh in Azerbaijan); *Loizidou v Turkey*, ECtHR App No 15318/89, 18 December 1996 (on Turkey's effective control over Northern Cyprus, which could qualify as indirect occupation).
- 63** See Pictet *Vol III* (above n 47) article 6, quoted with approval by the ICTY Trial Chamber in *Prosecutor v Rajić* (Review of the Indictment) IT-95-12 (13 September 1996).
- 64** See Knut Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85 *IRRC* 45, 61–3 and chapter 13 'Occupation' in this book.
- 65** See *Prosecutor v Naletilić & Martinović* (Trial Chamber Judgment) IT-98-34 (31 March 2003) paras 218–222. However, this theory was rejected by the English High Court in *Alseran v MoD* [2017] EWHC 3289 (QB) paras 266–272.

66 ICRC, *Commentary on the First Geneva Convention* (2nd edn, ICRC 2016) para 299; and paras 294–298.

67 See Andreas Paulus and Mindia Vashakmadze, ‘Asymmetrical War and the Notion of Armed Conflict—A Tentative Conceptualization’ (2009) 91 *IRRC* 95, 113–15.

68 See section 7.A ‘Foreign Intervention on the Side of a Non-State Armed Group against the State’ below.

69 *Public Committee against Torture in Israel v Government of Israel*, High Court of Justice, HCJ 769/02 (11 December 2005) (‘*Targeted Killings* case’) paras 16–23.

70 Similarly Antonio Cassese, *International Law* (OUP 2005) 420–3; Antonio Cassese, ‘On Some Merits of the Israeli Judgment on Targeted Killings’ (2007) 5 *JICJ* 339; Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 100. *Contra* Marko Milanovic, ‘Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli *Targeted Killings* Case’ (2007) 89 *IRRC* 373, 383–6; Yutuka Arai-Takahashi, *The Law of Occupation: Continuation and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Brill 2009) 300–3. See also section 6.A.1 below, ‘Criteria for the Existence of NIACs’.

71 See Milanovic ‘Lessons for Human Rights’ (above n 70); Kubo Mačák, ‘The Ituri Conundrum: Qualifying Conflicts between an Occupying Power and an Autonomous Non-State Actor’ (*EJIL: Talk!*, 15 July 2019) <https://www.ejiltalk.org/the-ituri-conundrum-qualifying-conflicts-between-an-occupying-power-and-an-autonomous-non-state-actor>.

72 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC 2016) 62.

73 For instance, articles 5 and 68 of GCIV contemplate persons who engage in sabotage, and the provisions of GCIV on internment deal with persons who may imperil the security of the State. Likewise, article 45(3) of API recognizes that persons engaging in hostilities during occupation, and who are not entitled to POW status, are entitled to the protections of GCIV or of the fundamental guarantees in article 75 of API (which mirrors customary law). See generally Dörmann (above n 64).

74 *Armed Activities* case (above n 60). For a similar view, see *Lubanga* (Decision on Confirmation of Charges) ICC-01/04-01/06 (29 January 2007) para 220.

75 See *Lubanga* (Trial Judgment) ICC-01/04-01/06 (14 March 2012) paras 563–565; *Katanga* (Trial Judgment) ICC-01/04-01/07-3436-tENG (7 March 2014) para 1182; Paulus and Vashakmadze (above n 67) 115.

76 *Ntaganda* (Trial Judgment) ICC-01/04-02/06-2359 (8 July 2019) paras 725 and 728.

77 Hans-Peter Gasser and Knt Dörmann, ‘Protection of the Civilian Population’, in Fleck (ed) 2013 (above n 24) 280 para 537.

78 See the discussion in chapter 13 ‘Occupation’ in this book; and Vité (above n 43) 83–5 (with extensive references to the opposing views); Iain Scobbie, ‘Gaza’, in Wilmshurst (ed) (above n 11) ch 9.

79 Crawford (above n 33) 667ff.

80 See George Aldrich, ‘Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions’ (1991) 85 *AJIL* 1, 6.

81 See eg Mačák *Internationalized Armed Conflicts* (above n 34) 73–4 and Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP 2010) 28; cf Antonio Cassese, ‘Wars of National Liberation and Humanitarian Law’ reprinted in Antonio

Cassese (ed), *The Human Dimension of International Law: Selected Papers* (OUP 2008) 99, 106.

82 See Eibe Riedel, 'Recognition of Belligerency', in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, Vol 4 (North-Holland 2000) 47 and Mačák *Internationalized Armed Conflicts* (above n 34) 74–82.

83 Lassa Oppenheim, *International Law, Vol II: Disputes, War and Neutrality* (2nd edn, Longmans 1912) 92.

84 Lassa Oppenheim, *International Law, Vol II: Disputes, War and Neutrality* (7th edn, Longmans 1952) 251.

85 For instance, the recognition of the belligerency of the Nicaraguan Sandinistas by the Andean Group in 1979, cited in Nieto Navia, 'Hay o no hay conflicto armado en Colombia' (2008) 1 *Anuario Colombiano de Derecho Int'l* 139, 147; the recognition, in 1981, by France and Mexico of El Salvadoran rebels; recognition by Venezuela of the FARC group in Colombia in 2008.

86 Riedel (above n 82) 48.

87 Scobbie 'Gaza' (above n 78) 303.

88 *Tadić* Jurisdiction (above n 6) para 70.

89 See also APII article 1.

90 *Tadić* Jurisdiction (above n 6) para 70.

91 Jelena Pejić, 'Status of Armed Conflicts', in Wilmshurst and Breau (eds) (above n 19) 85–6.

92 *Haradinaj et al* (Trial Judgment) IT-04-84-T (3 April 2008) para 60.

93 See UNSC Resolution 1851 (2008) and Robin Geiss, 'Armed Violence in Fragile States: Low Intensity Conflicts, Spill Over Conflicts, and Sporadic Law Enforcement Operations by External Actors' (2009) 91(873) *IRRC* 127, 139ff; Michael Passman, 'Protections Afforded to Captured Pirates under the Law of War and International Law' (2008) 33 *Tulane Maritime L J* 1; cf Douglas Guilfoyle, 'The Law of War and the Fight against Somali Piracy: Combatants or Criminals?' (2010) 11 *MJIL* 141.

94 For a summary of the two criteria, see Dietrich Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (1979) 163 *Recueil des cours* 147.

95 *Tadić* Jurisdiction (above n 6) para 70.

96 *Haradinaj* (above n 92). See also *Milošević* (above n 34) para 14ff; *Katanga* (above n 75) paras 1186–1187; *Ntaganda* (above n 76) paras 704, 716–717. See generally Anthony Cullen, *The Concept of Non-International Armed Conflicts in International Humanitarian Law* (CUP 2010) and Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) ch 5.

97 *Haradinaj* (above n 92) para 49.

98 *Abella v Argentina*, IACmHR, Case No 11.137, Report No 55/97, 8 November 1997. However, this case is criticized by Michael Schmitt and Noam Lubell in Wilmshurst (ed) (above n 11) chs 9 and 11.

99 Note that the threshold of derogation from human rights treaties in case of a 'public emergency threatening the life of the nation' is separate from the threshold of a Common

Article 3 conflict. See UN Human Rights Committee, 'General Comment 29: States of Emergency (article 4)', CCPR/C/21/Rev.1/Add.11 (2001).

100 *Tadić* Jurisdiction (above n 6) para 70.

101 See Sivakumaran (above n 96) 250–1 and ch 3 'The Temporal and Geographic Reach of International Humanitarian Law' in this book.

102 See the position of the ICRC on spillover conflicts at ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (Report of the 31st Conference of the International Red Cross and Red Crescent), pp. 9–10 <https://www.icrc.org/en/doc/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm>: 'it is submitted that the relations between parties whose conflict has spilled over remain at a minimum governed by Common Article 3 and customary IHL. This position is based on the understanding that the spill over of a NIAC into adjacent territory cannot have the effect of absolving the parties of their IHL obligations simply because an international border has been crossed.'

103 See eg Noam Lubell and Nathan Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict' (2013) 11 *JICJ* 65. See also Chapter 3 'The Temporal and Geographic Reach of International Humanitarian Law' in this book for a more general discussion.

104 See Lubell and Derejko (above n 102) 78; Christoph Heyns, Dapo Akande, Lawrence Hill-Cawthorne, and Thompson Chengeta, 'The International Law Framework Regulating the Use of Armed Drones' (2016) 65 *ICLQ* 791, 806–9.

105 See eg the criteria set out by Oppenheim *International Law, Vol II: Disputes, War and Neutrality* 2nd edn (above n 83) 92.

106 Dapo Akande, 'Afghanistan Accedes to Additional Protocols to Geneva Conventions: Will APII Govern the Conflict in Afghanistan?' (*EJIL Talk!*, 30 June 2009) <https://www.ejiltalk.org/afghanistan-accedes-to-additional-protocols>.

107 See Vité (above n 43) 80.

108 For IAC see API article 91.

109 See ARSIWA article 6. See also discussion in Akande (above n 106).

110 See ARSIWA commentary to article 6.

111 ICRC, 'Protection of Victims of Non-International Armed Conflicts' (1971) cited by Vité (above n 43) n 31.

112 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 para 219. See section 7.C below for a discussion of 'Mixed Conflicts'.

113 See generally Christine Byron 'Armed Conflicts: International or Non-International' (2001) 6 *JCSL* 63.

114 *Prosecutor v Tadić* (Appeal Judgment) IT-94-1-A (15 July 1999) paras 92–95.

115 *ibid* paras 96–97.

116 *ibid* paras 120–138.

117 *ibid* para 139.

118 *ibid* paras 146–162.

119 *Lubanga* Decision on Confirmation of Charges (above n 74) para 541; *Katanga* (above n 75) para 1178; *Bemba* (Trial Judgment) ICC-01/05-01/08-3343 (21 March 2016) para 130; *Ntaganda* (above n 76) paras 726–727.

120 See Stefan Talmon, ‘The Responsibility of Outside Powers for Acts of Secessionist Entities’ (2009) 58 *ILCQ* 493; Marko Milanovic, ‘State Responsibility for Genocide’ (2006) 17 *EJIL* 553; Marko Milanovic, ‘State Responsibility for Genocide: A Follow-Up’ (2007) 18 *EJIL* 669.

121 *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) (*Bosnian Genocide* case) [2007] ICJ Rep 43 paras 385–395.

122 *ibid* paras 392–93.

123 *ibid* paras 396–402. See in particular para 400, where the Court stated that: ‘It must [...] be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.’

124 See Talmon (above n 120) 517.

125 See eg *Bosnian Genocide* case (above n 121) (holding that while Serbia was not responsible for the genocide in Bosnia, it breached its duty to prevent and to punish the genocide).

126 *ibid* paras 404–405. See Marina Spinedi, ‘On the Non-Attribution of the Bosnian Serbs’ Conduct to Serbia’ (2007) 5 *JICJ* 829.

127 See Katherine del Mar, ‘The Requirement of Belonging under International Humanitarian Law’ (2010) 21 *EJIL* 105.

128 Pictet *Vol III* (above n 47) 23.

129 A possibility contemplated by ARSIWA article 55.

130 See API article 91.

131 See (n 119).

132 See *Tadić* Appeal Judgment (above n 114), Separate Opinion of Judge Shahabuddeen para 7.

133 *Nicaragua* (above n 112) para 227. See also *Armed Activities* case (above n 60) paras 160–165.

134 See Fleck (above n 24) 582; *Bemba* Trial Judgment (n 119) 649–66; *Bemba* (Confirmation of Charges Decision) ICC-01/05-01/08 (15 June 2009) para 246 (finding that the conflict in the Central African Republic (CAR) was non-international, despite the presence of foreign troops in the country, as those troops were there to support CAR’s government).

135 But see George Aldrich, ‘The Laws of War on Land’ (2000) 94 *AJIL* 42, 62–3 (arguing that such conflict should be regarded as international as it would be practically impossible to apply both the rules on IACs and NIACs, using the example of the Vietnam War).

136 See the letter to the UK House of Commons by Philip Spoerri, Legal Adviser to the ICRC www.publications.parliament.uk/pa/cm200203/cmselect/cmintdev/84/84ap09.htm (asserting that conflict in Afghanistan could no longer be viewed as an IACs following the establishment of an Afghan transitional government on 19 June 2002). Others have suggested this happened earlier: see Yutuka Arai-Takahashi, ‘Disentangling Legal Quagmires: The Legal Characterisation of the Armed Conflicts in Afghanistan since 6/7 October 2001 and the Question of Prisoner of War Status’ (2002) 5 *YIHL* 61, 97 (citing the

signature of the Bonn Agreement of 5 December 2001 as the date when the conflict became a NIAC).

137 For a similar situation in Libya, see Marko Milanovic, 'How to Qualify the Armed Conflict in Libya' (*EJIL: Talk!*, 1 September 2011) <https://www.ejiltalk.org/how-to-qualify-the-armed-conflict-in-libya>.

138 *Tadić* Jurisdiction (above n 6) paras 72–77.

139 See Theodor Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout' (1998) 92 *AJIL* 236, 238.

140 Christopher Greenwood, 'Development of International Humanitarian Law by the ICTY' (1998) 2 *Max Planck YB UN Law* 98, 117.

141 See section 7.A 'Foreign Intervention on the Side of a Non-State Armed Group against a State' above.

142 See ILC, 'Draft Articles on the Responsibility of International Organizations' (2011) A/CN.4/L.778 ('DARIO') article 7.

143 See *Behrami and Saramati v France and others*, ECtHR Apps No 71412/01 and 78166/01, 2 May 2007 (holding that the UN was responsible for forces in Kosovo). But see *Al Jedda v UK*, ECtHR App No 27021/08, 7 July 2011 para 84 (where the Court mentioned effective control together with ultimate control).

144 In its commentary to article 6 (now art 7) of DARIO, the ILC has pointed out that the ECtHR's decision in *Behrami and Saramati* (above n 143) misunderstood the scope of article 6. See ILC, 'Report on the Work of its 61st Session', A/64/10 (2009) ch IV: 'Responsibility of International Organizations', 67. The ECtHR decision has been criticized by many scholars. See eg Marko Milanovic and Tatjana Papic, 'As Bad as it Gets: The European Court of Human Rights' *Behrami and Saramati* Decision and General International Law' (2009) 58 *ICLQ* 267.

145 See UNSC Resolutions 678 (1990) and 1973 (2011), respectively.

146 Examples include the UN Emergency Forces I and II deployed in the Middle East after the conflicts in 1956 and 1973 and the UN Missions in Ethiopia and Eritrea. See <https://peacekeeping.un.org/en>.

147 See Letter of 3 February 2004 by the UN Legal Counsel to the Director of the Codification Division, A/CN.4/545 (2004) section II.G.

148 See Hialaire McCoubrey and Nigel White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Ashgate 1996).

149 See Christopher Greenwood, 'International Humanitarian Law and United Nations Military Operations' (1998) 1 *YIHL* 3; Zagreb Resolution on the Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces may be Engaged (1971) 54 (II) *Annuaire de L'Institut de Droit International* 465.

150 Greenwood 'International Humanitarian Law' (above n 149) 21. See also 'Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law', ST/SGB/1999/13 (6 August 1999).

151 Vité (above n 43) 88. See also Greenwood 'International Humanitarian Law' (above n 149) 27; McCoubrey and White (above n 148) ch 8; Zagreb Resolution (above n 149) art 2.

152 Unless one accepts that attribution of the acts to the UN does not also preclude attribution to the State.

- 153** UK Ministry of Defence (above n 46) 376.
- 154** Vité (above n 43) 88 (asserting that this is also the ICRC's position).
- 155** See Vité (above n 43) and the extensive literature referred to in n 70.
- 156** *Abu Garda* (above n 20) para 83 and *Sesay, Kallon and Gbao* (Trial Judgment) SCSL-04-15-T (2 March 2009) para 233.
- 157** Sivakumaran (above n 96) 326. The opposite assumption appears to have been made *Sesay, Kallon and Gbao* (above n 156) para 233, final sentence.
- 158** ICCSt article 8(2)(b)(iii) and (2)(e)(iii).
- 159** See Geoffrey Corn, 'Hamdan, Lebanon, and the Regulation of Armed Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict' (2006) 40 *Vanderbilt J Transn'l L* 295; Roy Schöndorf, 'Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?' (2004) 37 *NYUJILP* 26.
- 160** Marco Sassòli, 'Transnational Armed Groups and International Humanitarian Law' (2006) Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper No 6, 5; Paulus and Vashakmadze (above n 67) 111; Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (OUP 2010) Part II (particularly ch 4); Claus Kreß, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15 *JCSL* 245.
- 161** See (above n 160) (with the exception of Sassòli).
- 162** See Vité (above n 43); Lubell *Extraterritorial Use* (above n 160) ch 4; Sassòli (above n 160); ICRC *Commentary* 2016 (above n 66) paras 465–472. See also *Hamdan v Rumsfeld*, 548 US 557 (2006); cf *Situation in Afghanistan* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17-33 (12 April 2019) para 53.
- 163** See Noam Lubell, 'The War (?) against Al-Qaeda', in Wilmshurst (ed) (above n 11) ch 13.
- 164** *Katanga* (above n 75) para 1184; ICRC *Commentary* 2016 (above n 66) paras 259, 263.
- 165** See section 7.B 'Foreign Intervention at the Invitation (or with Consent) of a State against a Non-State Group' above. Similarly Fleck (above n 24) 582.
- 166** *Armed Activities* case (above n 60) para 163.
- 167** *Tadić* Jurisdiction (above n 6) para 70; Greenwood 'Scope of Application' (above n 35) 46 para 202.
- 168** Montevideo Convention on the Rights and Duties of States 1933 article 1.
- 169** *Armed Activities* case (n 60) paras 163 and 165.
- 170** See *Tadić* (Appeal Judgment) (above n 114), Separate Opinion of Judge Shahabuddeen.
- 171** See *Targeted Killings* case (above n 69) para 18.
- 172** UN HRC, 'Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1*', A/HRC/3/2, 23 November 2006 paras 50–62.
- 173** *ibid* paras 59 and 62.
- 174** *Ntaganda* (above n 76) paras 726, 728. See also *Lubanga* Decision on Confirmation of Charges (above n 74) para 541, implicitly reaching the same result.
- 175** ICRC *Commentary* 2016 (above n 66) paras 257–262.

176 See Fleck (above n 24) 584; Sassoli (above n 160) 5; James Stewart, 'The UN Commission of Inquiry on Lebanon: A Legal Appraisal' (2007) 5 *JICJ* 1043.

177 *Hamdan* (above n 162) part C.ii.

178 *ibid* n 63.

179 *ibid* sentence with n 61 attached.

180 See also Harold Koh, 'The Obama Administration and International Law' (25 March 2010) Remarks at the Annual Meeting of the American Society of International Law, 25 March 2010 (noting that the same ambiguity exists in the position of the Obama administration as to the conflict between the US and Al Qaeda).

181 See section 5 'The Scope of Application of IHC: IACs' above.

182 See (n 75).

7. A taxonomy of armed conflict

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1. Introduction

With some relatively minor exceptions international humanitarian law (IHL) applies only when a certain threshold is met: the existence of an armed conflict or belligerent occupation. The purpose of this chapter is to explore the many difficulties surrounding the classification of armed conflicts in modern IHL.¹ While the two main archetypes – international armed conflict (IAC) and non-international armed conflict (NIAC) – are reasonably clear in their basic forms, their boundaries are complex and obscure. Many recent conflicts do not fit the classical archetypes well, provoking debates on spill-over, internationalized, mixed or hybrid and even transnational armed conflicts.

The qualification exercise is often deliberately avoided, for several reasons. First, politically, the classification of armed conflict may have an impact on the *perceptions* of the legitimacy of the warring parties. Second, pragmatically, the qualification exercise can be so complex and indeterminate that dwelling on it overlong would threaten to bog down the implementation of basic rules of IHL and undermine the whole purpose of the regime. Third, normatively, for the last two decades or so IHL has developed along the lines of a reasonably coherent project of bringing together the *substantive* law applicable in IACs and NIACs. Largely influenced by considerations of morality and the impact of human rights on IHL, or by the humanization of international law more generally,² and spearheaded by diverse actors – academics, NGOs, international tribunals,³ the International Committee of the Red Cross (ICRC),⁴ and finally even states⁵ – this project has been remarkably successful. In a relatively short time-span, it transformed the received wisdom from the pre-*Tadić* standpoint that in

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¹ We will not be dealing with the threshold of belligerent occupation, on which see, for example, Y. Dinstein, *The International Law of Belligerent Occupation*, (Cambridge: Cambridge University Press, 2009).

² See T. Meron, 'The Humanization of Humanitarian Law', (2000) 94 *AJIL* 239.

³ As most famously articulated in *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1- AR72, 2 October 1995, at para. 119: '[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.' See also T. Hoffmann, 'The Gentle Humanizer of International Law – Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflicts,' in C. Stahn and L. van den Herik (eds), *Future Perspectives on International Criminal Justice*, (The Hague: TMC Asser Press, 2010) 58.

⁴ See J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (Cambridge: Cambridge University Press, 2005).

⁵ For instance, by accepting and developing in the Rome Statute of the International Criminal Court (ICC) the *Tadić* holding that war crimes were criminalized at the international level even in internal armed conflicts.

NIACs there are no war crimes under international law⁶ to the ICRC Customary IHL Study view that the law in IACs and the law in NIACs have largely converged.⁷

From the perspective of this project, the question of classification of armed conflict is at best redundant and at worst dangerous.⁸ Redundant, because if nothing hinges on the classification of conflict, since the substantive law that applies in all armed conflicts is always the same, then it is enough to label a particular situation as ‘armed conflict’ *simpliciter*; there is no need to say what *kind* of conflict it is. Dangerous, as insisting on the classification exercise implicitly threatens the foundations of the project as it invariably emphasizes the differences, rather than the similarities, between the two kinds of armed conflict.⁹ While fully accepting the normative desirability and indeed the considerable results of this project, our aim here is to test its limits. We will show that the time will shortly come, if it has not come already, when that project will have exhausted its potential, and there are *some* differences between IACs and NIACs that *cannot* be erased simply by reasoning from analogy or from moral imperative.¹⁰ Therefore, the classification of armed conflict is an issue that *matters* and will continue to matter for the considerable future.

Our purpose in this chapter is not to produce some earth-shatteringly original account of the various types of armed conflict in contemporary international law. Rather, our goal is above all *clarity*, clarity in a conceptual and doctrinal framework which can enable legal and policy debates to be properly had and argued without their participants talking past each other.¹¹ Thus, while we are confident that those reading this chapter are aware, and indeed take part, in the current debates on the classification of armed conflicts, we still need to cover some familiar ground. Although the main topic of our inquiry are the controversies of today, to get there we must provide some context; it is impossible to comprehend the categories and concepts of modern IHL in clinical isolation, without understanding how and why they evolved. So bear with us – in Section 2 we will be briefly examining the framework of war and peace in classical international law, while in Section 3 we will be looking at the conceptual revolution brought about by the aftermath of the Second World War, namely the separation of the *jus ad bellum* from the *jus in bello*, and the rejection of ‘war’ as an operative legal concept. Section 4 will finally bring us to the modern law and to developing a

⁶ See, for example, C. Greenwood, ‘International Humanitarian Law and the *Tadić* Case’, (1996) 7 *EJIL* 265, at 280 (citing *inter alia* ICRC comments on the proposal to establish the ICTY, stating that ‘according to international humanitarian law as it stands today [in 1993], the notion of war crimes is limited to situations of international armed conflict.’) See also C. Kress, ‘Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts’, (2010) 15 *JCSL* 245, at 273. For more on war crimes see Robert Cryer’s chapter in this volume.

⁷ *Supra* n. 4. The study thus posits that out of the total of 161 customary rules binding in IACs 148 also apply in NIACs. See J. Pejic, ‘The Protective Scope of Common Article 3: More than Meets the Eye’, (2011) 93 *IRRC* 189, at 205-206.

⁸ On the dangers of the project itself see esp. N. Modirzadeh, ‘The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict’, (2010) 86 *U.S. Naval War College International Law Studies (Blue Book) Series* 349.

⁹ Cf. J. Stewart, ‘Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict’, (2003) 83 *IRRC* 313.

¹⁰ In that regard see especially S. Sivakumaran, ‘Re-envisioning the International Law of Internal Armed Conflicts’, (2011) 22 *EJIL* 219; G. Blum, ‘Re-envisioning the International Law of Internal Armed Conflict: A Reply to Sandesh Sivakumaran’, (2011) 22 *EJIL* 265.

¹¹ For the purposes of clarity we also include as an annex to the chapter a schema of armed conflict, which we hope can be useful to the reader.

comprehensive taxonomy of armed conflict, while we will be discussing the practical consequences of classification throughout.

2 War and peace in classical international law

A The law of war and the law of peace

International law developed in parallel with the emergence and subsequent domination of the modern state in organized human society.¹² A horizontal system designed to regulate relations between sovereign units with their own means of coercion but without such authority over them had no choice but to accept inter-state violence as an unavoidable reality.¹³ Since that violence, however, had significant consequences on the application of the rules designed to govern ‘normal’¹⁴ or ‘peaceful’ relations between the states, two separate regimes evolved in parallel – the law of war and the law of peace.

Classical international law was compartmentalized. Like war and peace, the law of war and the law of peace excluded each other.¹⁵ It was considered that the moment ‘war enters on the scene, all law that was previously concerned with the dispute retires, and the new law steps in, directed only to secure fair and not too inhumane fighting.’¹⁶ The general rule of classical international law was that war abrogates treaties between the belligerents and that their revival had to be determined through a peace treaty once the war was over.¹⁷ This wartime suspension of peacetime rights and obligations included even the most fundamental of principles upon which pacific international relations were built, such as respect for the sovereignty, territorial integrity and independence of a state.¹⁸ Into the void left by the law of peace stepped in the law of war.¹⁹ These rules were primarily concerned with the rights and obligations of belligerents concerning their subjects, armies and property, and gradually started including some rudimentary rules on the means of warfare.²⁰ The outbreak of war also triggered the laws of neutrality that governed the relations between the belligerents and third states. These special rights and obligations came into effect once the outbreak of war was notified or otherwise made known to the neutral states and expired with the cessation of the war.²¹ The laws of neutrality were thus designed to preserve the relations of third states with the belligerents as far as the circumstances allowed it.

For most of the classical period international law did not regulate when states could resort to war. While war was perhaps not considered a right, since there was no corresponding

¹² What follows is an admittedly simplified account of the international legal regulation of war. For a sophisticated one, see S. Neff, *War and the Law of Nations: A General History*, (Cambridge: Cambridge University Press, 2005).

¹³ See L. Oppenheim, *International Law: A Treatise: Vol. II – War and Neutrality*, 3rd edn, (London: Longmans, 1920), at 66; W.E. Hall, *International Law*, (Oxford: Clarendon Press, 1880), at 51.

¹⁴ See Hall, *supra* n.12, at 36; J.S. Risley, *The Law of War*, (London: A.D. Innes and Co, 1897), at 1.

¹⁵ See Neff, *supra* n.12, at 178 ff; I. Detter, *The Law of War*, 2nd edn, (Cambridge: Cambridge University Press, 2000), at 6.

¹⁶ J. Westlake, *International Law: Part II – War*, 2nd edn, (Cambridge: Cambridge University Press, 1913), at 4.

¹⁷ *Ibid.*, at 32.

¹⁸ Oppenheim, *supra* n.13, at 66, 145 ff.

¹⁹ Some pacific rules would, however, continue to apply if they were specifically designed to continue during the war. See Hall, *supra* n.12, at 322 ff; Oppenheim, *supra* n.13, at 145 ff.

²⁰ See, for the discussion on the evolution of the rules regulating warfare, R. Kolb and R. Hyde, *An Introduction to the International Law of Armed Conflicts*, (Oxford: Hart Publishing, 2008), at 37 ff.

²¹ Article 2 of the Hague Convention III relative to the Opening of Hostilities, 18 October 1907.

obligation,²² it was seen simply as an expression of a state's sovereignty. The power to wage war was inherent to the state as the sole legitimate monopoly of force. Naturalist just war theories were rejected by classical positivists.²³ War did not even need to be a measure of last resort, however loosely defined.²⁴ Rudimentary limitations on the unlimited freedom of states to wage war started to emerge only after the Hague peace conferences, while war itself was finally renounced as an instrument of national policy under the terms of the 1928 Kellogg-Briand Pact.²⁵ This prohibition on war, however, ultimately unveiled all of the shortcomings of 'war' as a legal term of art, to which we now turn.²⁶

B War as a subjective legal concept

Because its outbreak had far reaching legal consequences on inter-state relations, 'war' was not merely a state of fact, but a full-fledged legal institution.²⁷ And since the waging of war was an expression of the sovereign will of a state, war could not legally exist without an *animus belligerendi*, or at least many so argued.²⁸ This subjective *animus* could be proven, or not, by reference to criteria such as the severance of diplomatic relations between belligerents, the existence of a declaration of war or of a notification of the state of war to neutral powers, recognition of the state of war by these neutral powers, and so on.

In search of this *animus* more objective criteria such as the intensity of any clashes between states' armies often fell by the wayside. This in turn opened the way to situations of widespread and protracted fighting in which the states concerned for political reasons refused to recognise the existence of war. A gap opened up between a common sense, factual understanding of 'war' and one derived from the niceties of international law, a gap to be exploited when it served state interests. It not only introduced a large degree of uncertainty with regard to the rights of private citizens,²⁹ but more importantly created a major obstacle to the application of any humanitarian rules of the law of war. All a state had to do to avoid the law of war was to deny the existence of war *in the legal sense*, no matter how much blood was being shed in a very real sense. One of the most notorious historical examples in which belligerents (as well as third states and even the League of Nations Commission of Inquiry)³⁰ refused to recognise a state of war despite all evidence to the contrary was the 'Manchurian crisis' or the Sino-Japanese war.³¹ The 'crisis' started with the full-scale Japanese invasion and the occupation of Manchuria, a Chinese province. It involved heavy military clashes with great loss of life.³² Eventually, Japan renamed Manchuria into Manchukuo and established it

²² Oppenheim, *supra* n.13, at 99.

²³ *Ibid.*, at 79, 81-82.

²⁴ *Ibid.*, at 67.

²⁵ See, generally, Y. Dinstein, *War, Aggression and Self-Defence*, 5th edn, (Cambridge: Cambridge University Press, 2011), at 84 ff.

²⁶ See also Neff, *supra* n.12, at 293-296.

²⁷ A.D. McNair, 'The Legal Meaning of War, and the Relation of War and Reprisals', (1926) 11 *Tr. Grotius Sc.* 29, at 33.

²⁸ See Hall, *supra* n.12, at 63; more recently, C. Greenwood, 'War, Terrorism and International Law', (2003) 56 *CLP* 505, at 513, 515. For discussion see Dinstein, *supra* n.25, at 14; Neff, *supra* n.12, at 172 ff.

²⁹ One of the most famous discussions on the subject occurred on private lawsuit in the case of *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham Steamship Company, Ltd*, [1939] 2 K.B. 544 (Court of Appeal).

³⁰ The Report of the Commission of Inquiry appointed by the Council of the League of Nations, Lytton Report, Series League of Nations Publications, VII, Political, 1932, 12.

³¹ For a detailed legal and factual account of the Sino-Japanese war see A. Carty and R.A. Smith, *Sir Gerald Fitzmaurice and the World Crisis: a Legal Adviser in the Foreign Office 1932-1945*, (The Hague: Martinus Nijhoff, 2000), at 41 et seq.

³² See J.L. Brierly, 'International Law and Resort to Armed Force', (1932) 4 *CLJ* 308, at 312.

as a puppet state. Yet both China and Japan refused to recognise that a state of war existed between them. Japan did so in order to preserve its good standing as a founder of the League of Nations and a signatory of the Kellogg-Briand Pact.³³ China did not want to disturb its trade with the United States by activating the laws of neutrality.³⁴ As the existence of war was denied by both parties, the law of war could not apply.

It was precisely the rigidity of the law of peace/law of war framework and the strict consequences that followed the transition from one to the other that provided the incentive for states to avoid recognizing the existence of war. This led some scholars of the period to argue for the legal recognition of a third, middle category between war and peace – a *status mixtus*.³⁵ Others, in turn, wanted to objectivize war.³⁶ But what the humanity-minded lawyers may have wanted and what states thought to be in their interest was not necessarily one and the same. Rather than bringing some resolution the controversies on the legal nature of war brought even more uncertainty.³⁷

C War as inter-state conflict

With one exception, which we will address below, war as a legal concept denoted solely inter-state armed conflict.³⁸ Although from the modern perspective this looks like an excessively rigid, formalistic position, a system built upon the presumption that sovereign states are the sole legitimate bearers of the monopoly of force could not initially do anything but dismiss non-state violence as illegitimate and hence irrelevant in international law.³⁹ It was thought that only modern states with their trained, disciplined standing armies could observe and create the laws of war; non-state armed groups were not only undeserving of protection, but could not comply with rules designed to regulate the conduct of states.⁴⁰

This state-centric conception of war was not entirely without humanitarian benefits. Burdened with notions of collective responsibility, pre-classical international law made no distinction between combatants and civilians.⁴¹ The belligerents' populations were seen as participants in the conflict and 'every subject of a belligerent, whether an armed and fighting individual or not, whether man or woman, adult or infant, could be killed or enslaved by the other belligerent at will.'⁴² Warfare was essentially unrestrained, and it was precisely the emergence of the 'civilized' state, possessed with 'absolute sovereignty' and 'ordered diplomacy', with 'lawful bearers of arms' embodied in its standing army that enabled a measure of restraint.⁴³

³³ See D. Kritsiotis, 'When States Use Armed Force', in C. Reus-Smit (ed.), *The Politics of International Law*, (Cambridge: Cambridge University Press, 2004) 45, at 53.

³⁴ *Ibid.*

³⁵ See G. Schwarzenberger, 'Jus Pacis ac Belli?', (1943) 37 *AJIL* 460, at 470; P. C. Jessup, 'Should International Law Recognize an Intermediate Status between Peace and War?', (1954) 48 *AJIL* 98, at 100.

³⁶ See Brierly, *supra* n.32; T.S. Woolsey, 'The Beginning of a War', (1900) 9 *YaleLJ* 153.

³⁷ For a discussion see M.S. McDougal and F.P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order*, (The Hague: Martinus Nijhoff Publishers, 1994), at 99-101.

³⁸ See, for example, Dinstein, *supra* n.25, at 5-6.

³⁹ The tradition of such thinking in Western legal thought is a long one – see Neff, *supra* n.12, at 250 ff.

⁴⁰ See Oppenheim, *supra* n.13, at 86.

⁴¹ See T. Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*, (Oxford: Hart Publishing, 2006), at 13-14.

⁴² Oppenheim, *supra* n.13, at 70.

⁴³ J. Keegan, *A History of Warfare*, 2nd edn (London: Pimlico, 2004), at 12, 23.

The narrow state-centric approach to war completely excluded conflicts waged by European empires at the margins of the ‘civilised world.’ This, however, was precisely the point of this approach – the laws of war applied only to those belonging to the ‘civilized family of nations’ for which they were designed,⁴⁴ thus enabling European imperialism against the not-so-civilized in all its brutality. As the German nationalist writer Heinrich von Treitschke so openly put it at the close of the nineteenth century:

There is nothing in international law more beautiful, or showing more unmistakably the continual progress of mankind, than a whole series of principles, grounded only upon *universalis consensus* and yet as firmly established as those of the Common Law of any country the whole trend of political life has come into the open to such a degree that any gross breach of international law immediately causes great irritation in every civilized country. ... It is mere mockery, however, to apply these principles [of international law] to warfare against savages. A Negro tribe must be punished by the burning of their villages, for it is the only kind of example which will avail. If the German Empire has abandoned this principle to-day it has done so out of disgraceful weakness, and for no reasons of humanity or high respect for law.⁴⁵

Similarly, even in the ‘civilized world’ the state-centred approach excluded organized violence between a state and its own subjects from international regulation; the peculiar ‘sporting outlook’⁴⁶ that sovereigns applied to limiting warfare amongst themselves did not have the same sway when it came to maintaining their own power internally. We will now briefly turn to the *ad hoc* attempts to regulate internal conflicts in the classical, rigid framework of the laws of war and peace.

D Civil war: rebellion, insurgency and belligerency

The exclusion of internal conflicts from the scope of international legal regulation may have been the rule, but it was not an absolute rule.⁴⁷ The need to regulate at least some internal conflicts gradually became apparent, first in order to protect the interests of third states and then for interests of humanity. As already explained, within the purview of the classical law of war were not only the relations between the belligerents, but also those between belligerents and neutrals. The latter were of pivotal importance in developing the notion of the recognition of belligerency.⁴⁸ It was first accepted that once an internal conflict endangered the ‘normal’ relations of a third state with the state embroiled in civil strife, ‘the law of nations will step in to define and to fix the rights and duties of belligerents relatively to

⁴⁴ See, generally, Oppenheim, *supra* n.13, at 108; M. Koskenniemi, *Gentle Civilizer of Nations: The Rise and Fall of International Law*, (Cambridge: Cambridge University Press, 2001), at 98 ff; D. Pendas, “‘The Magical Scent of the Savage’: Colonial Violence, the Crisis of Civilization and the Origins of the Legalist Paradigm of War”, (2007) 30 *BCIntl&CompLRev* 29; G. Gong, *The Standard of “Civilization” in International Society*, (Oxford: Clarendon Press, 1984); L. Arimatsu, ‘Territory, Boundaries and the Law of Armed Conflict’, (2009) 12 *YIntlHL* 157, at 162-165.

⁴⁵ H. von Treitschke, *Politics*, (Hans Kohn ed., 1963) (1898), at 300-01, 306, quoted according to Pendas, *supra* n.44.

⁴⁶ Neff, *supra* n.12, at 189.

⁴⁷ See esp. A. Cassese, ‘The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts’ in A. Cassese, *The Human Dimension of International Law: Selected Papers* (Oxford: Oxford University Press, 2008) 128 (arguing that customary law started regulating internal conflicts as such even before the Second World War).

⁴⁸ Neff, *supra* n. 12, at 251.

neutrals.’⁴⁹ Subsequently, the law of nations was also allowed to step in and define the relations between the (civil) belligerents themselves. This interference of international law in internal conflicts was, however, of a limited character, with regulation being of an *ad hoc*, inconsistent and even arbitrary character.

Internal armed struggles came to be seen through three legal categories – rebellion, insurgency and belligerency. Any one of these could have been characterised in common parlance as a civil war. A rebellion was an uprising of limited duration and intensity which could have been successfully resolved with regular police action.⁵⁰ Insurgency involved ‘the existence of an armed revolt of grave character and the incapacity, at least temporarily, of the lawful Government to maintain public order and exercise authority over all parts of the national territory.’⁵¹ The two were outside the scope of international law unless the insurgency ultimately proved to be successful, whether in replacing the prior government of the country or in managing to effect secession of part of its territory.

Belligerency, in contrast, was regulated by international law if a number of conditions were met. As canonically summarised by Wheaton these were: ‘the existence of a *de facto* political organization of the insurgents, sufficient in character, population and resources, to constitute it, if left to itself, a State among the nations, reasonably capable of discharging the duties of a State; the actual employment of military forces on each side, acting in accordance with the rules and customs of war’.⁵² While these criteria seemed objective, they were much debated due to their openness to different interpretations. The malleability and vagueness of the criteria suggested that the recognition of belligerency was always more a matter of political expediency rather than a matter of law.⁵³

Despite the existence, *vel non*, of these objective requirements, belligerency had to be recognised either by the state fighting the insurgency or by third states.⁵⁴ These recognitions did not have the same legal effect. Recognition of belligerency by third states led to the application of the rules of neutrality, but it made no difference with regard to the relations of belligerents themselves. The legitimate government, which was in conflict with its own subjects, was perfectly free to decide whether or not to treat the insurgency as a belligerency, whatever the attitude of third states.⁵⁵ If it did recognize belligerency, third states could be notified thereof in order to activate the rules of neutrality. Hence, depending on its originator the effect of recognition of belligerency was the transformation of a civil war into a ‘war’

⁴⁹ J.F. Macqueen, *Chief Points in the Laws of War and Neutrality*, (London, Edinburgh: William and Robert Chambers, 1862), at 15.

⁵⁰ See S. Sivakumaran, *The Law of Non-International Armed Conflict*, (Oxford: Oxford University Press, forthcoming 2012) (manuscript on file with the authors); R. Falk, ‘Janus Tormented: The International Law of Internal War’, in J.N. Rosenau (ed.), *International Aspects of Civil Strife* (Princeton: Princeton University Press, 1964), at 185, 197; L. Kotsch, *The Concept of War in Contemporary History and International Law*, (Geneva: Droz, 1956), at 230.

⁵¹ S. Sivakumaran, *supra* n.50; E. Castrén, *Civil War*, (Helsinki: Suomalainen Tiedekatemia, 1966), at 211.

⁵² C. Phillipson, *Wheaton’s Elements of International Law*, 5th edn, (London: Stevens and Sons Ltd, 1916), at 411.

⁵³ See S. Sivakumaran, *supra* n.50; E. Luard, ‘Civil Conflicts in Modern International Relations’, in E. Luard (ed.), *The International Regulation of Civil Wars*, (London: Thames and Hudson, 1972) 20; H.A. Wilson, *International Law and the Use of Force*, (Oxford: Clarendon Press, 1988), at 26; D.A. Elder, ‘The Historical Background of Common Article 3 of the Geneva Conventions of 1949’, (1979) 11 *CaseWResJIntL* 37.

⁵⁴ See Neff, *supra* n.12, at 258 ff; D. Schindler, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’, (1979-II) 163 *RdC* 131, at 145-146.

⁵⁵ See Oppenheim, *supra* n.13, at 76.

proper, regulated by the international law of war.⁵⁶ With recognition, the insurgents acquired international personality vis-à-vis those who recognized them to the extent necessary for the regulation of the hostilities, thus being effectively admitted as putative members into the family of ‘civilized’ nations. Recognition of belligerency, however, did not prevent the lawful and ultimately successful government from treating the insurgents as traitors once the conflict was over.⁵⁷

Despite some notable examples, such as the United States Civil War and the Boer War,⁵⁸ recognitions of belligerency were rarely granted. Third states were reluctant to recognize belligerency in order to avoid the restrictions on commerce and all other consequences that the rules of neutrality imposed, and in order to avoid causing great offence to governments embroiled in civil strife.⁵⁹ On the other hand, for such governments recognizing belligerency would invariably be seen as an admission of weakness and a legitimization of the insurgents. The most notable example of the doctrine’s failure was the Spanish Civil War of 1936-1939, in which belligerency was not recognized despite the conflict’s intensity and duration.⁶⁰ The *ad hoc* attempts to regulate internal armed conflict were thus structurally prone to failure.

3 A conceptual revolution: impact of the Second World War

A Separation of the *jus ad bellum* and the *jus in bello*

The Second World War was the crucible that shaped the modern law of armed conflict and broke the rigid, formalist framework of classical international law. Its aftermath brought about two sets of conceptual changes in the law, as a reaction to the inadequacies of the classical legal regime of war and peace as applied in the first half of the twentieth century. The first was the separation of the *jus ad bellum* and the *jus in bello*, the second the rejection of the concept of ‘war’ in both the *ad bellum* and the *in bello* contexts. We will briefly deal with each in turn.

Despite the Latin veneer of antiquity, the two terms were first used only in the interwar period, in the early 1930s.⁶¹ This is not to say that the law of nations, as it stood before, could not distinguish between *ad bellum* and *in bello* issues and considerations, but that there was little practical point in doing so as the two types of questions were considered to be inextricably linked. In the naturalist tradition the principal issue was whether a war was *just*, primarily by reference to considerations of the *ad bellum* variety, and only a just war was legally regulated. In the classical positivist tradition *ad bellum* considerations almost evaporated together with just war theory. War was now seen as the ultimate prerogative and a matter of discretion of any sovereign – and it was only then that the *jus in bello*, equally applied between sovereigns, naturally started to emerge as a fully-fledged corpus of rules and institutions. While any state could resort to force any time it wished, the *manner* in which

⁵⁶ See J.F. Macqueen, *Chief Points in the Laws of War and Neutrality*, (London, Edinburgh: William and Robert Chambers, 1862), at 15.

⁵⁷ See Oppenheim, *supra* n.13, at 76.

⁵⁸ See L. Moir, *The Law of Internal Armed Conflict*, (Cambridge: Cambridge University Press, 2002), at 19.

⁵⁹ *Ibid.*; Neff, *supra* n.12, at 268.

⁶⁰ See also H. Lauterpacht, *Recognition in International Law*, (Cambridge: Cambridge University Press, 1978), at 272 ff. A. Cassese, ‘The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts’, in A. Cassese, *The Human Dimension of International Law: Selected Papers*, (Oxford: Oxford University Press, 2008) 128.

⁶¹ See, generally, R. Kolb, ‘Origin of the Twin Terms *Jus ad Bellum/Jus in Bello*’, (1997) 37 (320) *IRRC* 553.

force was used required some basic legal regulation, resting on the reciprocity and mutuality of obligations; it took the devastation of the two world wars to bring *ad bellum* considerations fully back into the picture.⁶²

With the entry into force of the UN Charter in 1945 and the four Geneva Conventions in 1949, the separation between the *jus ad bellum* and the *jus in bello* was complete – though it has never been safe from challenge. Separation has become a cardinal principle of those seek to preserve the humanitarian integrity of the *jus in bello*, now rebranded as IHL.⁶³ It is because we know from experience that every party to a conflict will portray itself as having a just cause that we cannot accept a principle by which a ‘just’ party would have to abide by less obligations, as that would invariably lead to a spiral of law-breaking that the law and the humanitarian interests it seeks to protect could not survive.⁶⁴ For the purposes of the present chapter, we will leave the question of separation aside.⁶⁵ More pertinent for our analysis of thresholds of IHL is the second principal conceptual shift after the Second World War – that of the rejection of ‘war’ itself as an operative legal concept.

B Discarding the concept of war in both the jus ad bellum and the jus in bello

Although ‘war’ was used in common parlance and as an operative legal concept before the Second World War, in both (as yet formally undivided) *in bello* and *ad bellum* contexts,⁶⁶ states decided to discard it in both. In the *jus ad bellum*, war was replaced with the more general concept of the use of (armed) *force*, with Article 2(4) of the UN Charter providing that ‘[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’⁶⁷ In the *jus in bello*, war was replaced with the notion of international armed conflict, as provided for in Common Article 2 of the 1949 Geneva Conventions.⁶⁸

⁶² *Ibid.* See also J. Moussa, ‘Can *Jus ad Bellum* Override *Jus in Bello*? Reaffirming the Separation of the Two Bodies of Law’, (2008) 872 *IRRC* 963.

⁶³ See, for example, Neff, *supra* n.12, at 342.

⁶⁴ See Dinstein, *supra* n.25, at 167-170.

⁶⁵ For strong defenses of the separation between the *jus ad bellum* and the *jus in bello*, and the concomitant principle of equal application of the *jus in bello* to all parties to a conflict, see especially R. Sloane, ‘The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War’, (2009) 34 *YaleJIntL* 47; A. Roberts, ‘The Equal Application of the Laws of War: A Principle Under Pressure’, (2008) 90 *IRRC* 931; M. Sassoli, ‘*Ius ad Bellum* and *Ius in Bello* – The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?’, in M. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein*, (Leiden: Martinus Nijhoff, 2007) 241.

⁶⁶ See, for example, J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, 4 vols., (Geneva: ICRC, 1952–1959; the full text of the Commentary is available at www.icrc.org), at 19: ‘The Hague Convention of 1899, in Article 2, stated that the annexed Regulations concerning the Laws and Customs of War on Land were applicable “in case of war”. This definition was not repeated either in 1907 at The Hague or in 1929 at Geneva; the very title and purpose of the Conventions made it clear that they were intended for use in war-time, and the meaning of war seemed to require no defining.’ As for the nascent *jus ad bellum*, in Article I of the 1928 Kellogg-Briand Pact the states parties ‘condemn[ed] recourse to war for the solution of international controversies, and renounce[d] it, as an instrument of national policy in their relations with one another’ (emphasis added).

⁶⁷ See the chapters by Nicholas Tsagourias and Mary-Ellen O’Connell in this volume for more on the threat and use of force.

⁶⁸ For a detailed account see D. Kritsiotis, ‘Topographies of Force’, in Schmitt and Pejic, *supra* n.65, at 29.

There were four basic reasons for discarding war as an operative concept. First, it was much too rigid in its consequences. As we have seen, the classical division between the law of peace and the law of war assigned to the existence of war effects such as the rupture of diplomatic and treaty relations, rights and obligations of neutrality for third parties, etc. In some situations, however, while being perfectly content with fighting one another states did not want such consequences to ensue, thus leading them to deny the existence of war as the applicable legal condition.⁶⁹ Second, war was much too contested as a concept, with significantly diverging views being offered as to its elements. Third, and relatedly, war was regarded by many as being *subjective* in nature, as requiring a specific *animus belligerendi* for its existence. Finally, and consequently, a significant number of instances of inter-state use of armed force went legally unregulated, since the law of war could not apply where there legally was no war.

Additional to these concerns in the interstate context was the lack of any systemic regulation of internal conflict. The concept of war thus outlived its usefulness, while in the post-UN Charter world the word itself became politically unpalatable, with formal declarations of war falling into disuse. The principal purpose in replacing it was to provide *objective* thresholds to describe interstate violence that was subject to legal regulation.⁷⁰ In the *jus ad bellum*, politically more controversial and hence legally more open to indeterminacy, that endeavour was less successful. Article 2(4) of the Charter is famously open to interpretation due to its reference to a particular purpose for the use of force,⁷¹ while the scope of the self-defence exception in its Article 51 is similarly contested.⁷² The *jus in bello* concepts of IAC and NIAC are more stable and explicitly objective and factual,⁷³ although of course far from crystal clear – their apparent firmness when compared to the *jus ad bellum* is thus more one of degree than one of kind. Most importantly, as a matter of *general* international law neither the *ad bellum* use of force nor the *in bello* armed conflict produce overarching legal effects as war did in classical international law. The law is no longer strictly divided into the law of peace and law of war;⁷⁴ neither treaty nor diplomatic relations are ruptured *ipso facto* merely because the *ad bellum* or *in bello* thresholds are crossed. Thus, for example, in Article 3 of its Draft Articles on the Effects of Armed Conflict on Treaties that it recently adopted on second reading, the International Law Commission (ILC) reverses the classical presumption by stipulating the general principle that the ‘existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties.’⁷⁵ Modern IHL is now simply one of a number

⁶⁹ See, for example, Neff, *supra* n.12, at 286, 296 ff (on the ‘art of avoiding war’); Schindler, *supra* n.54, at 125.

⁷⁰ See, for example, E. Holland, ‘The Qualification Framework of International Humanitarian Law: Too Rigid to Accommodate Contemporary Conflicts?’, (2011) 34 *Suffolk TransLRev* 145, at 149-151; Stewart, *supra* n.9, at 316-318; S. Vité, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’, (2009) 91 *IRRC* 69, at 72.

⁷¹ See, generally, Dinstein, *supra* n.25, at 88-94. See the chapters by Mary-Ellen O’Connell and Christine Gray in this volume for examples of this argument.

⁷² See, for example, Neff, *supra* n.12, at 317 ff, especially at 328 (‘Self-defence claims blossomed so luxuriantly, and expanded in so many directions as effectively to encompass *any* arguably justifiable resort to force’). See also the chapter by Dino Kritsiotis in this volume.

⁷³ See, for example, Pictet, *supra* n.66, at 23: ‘It remains to ascertain what is meant by “armed conflict”. The substitution of this much more general expression for the word “war” was deliberate. It is possible to argue almost endlessly about the legal definition of “war”. A State which uses arms to commit a hostile act against another State can always maintain that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression “armed conflict” makes such arguments less easy.’

⁷⁴ See, especially, C. Stahn, ‘“Jus ad bellum”, “jus in bello” . . . “jus post bellum”? – Rethinking the Conception of the Law of Armed Force’, (2007) 17 *EJIL* 921. For more on the *jus post bellum* see Part III of this volume.

⁷⁵ UN Doc. A/CN.4/L.777, 11 May 2011.

of interlocking and overlapping legal sub-regimes applying simultaneously to the same situation.⁷⁶ The rigidity of the legal regime that the concept of war once brought to bear, and accordingly the incentive for states to avoid recognizing the existence of war with the consequent lack of legal regulation of hostilities, are thereby avoided.⁷⁷

C Outline of the thresholds of armed conflict

The Geneva Conventions set out three distinct thresholds for their applicability. First, Common Article 2 (CA2), paras 1 and 2, provides that:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all 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.

The Convention shall also apply to 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.

Paragraph 1 defines international armed conflict as a conflict between two or more high contracting parties, which could be definition only be states. A declaration of war automatically creates an IAC even before the start of hostilities,⁷⁸ but as we have seen they have fallen into disuse. The fact that a state of war is not recognized by a party or indeed *both* parties is made irrelevant, thereby removing the subjectivity that plagued the earlier regime and making IAC a purely factual threshold.⁷⁹ Paragraph 2 sets out belligerent occupation as a distinct threshold of application.

Common Article 3 (CA3) of the Conventions provides for NIAC, the third threshold of application, by stipulating that '[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum' a number of humanitarian provisions with respect to persons who are *hors de combat*. While CA2 is the threshold of application for *all* of the Conventions but for CA3, CA3 is the threshold only for its own applicability.⁸⁰ As is well known, during the drafting of the Convention the original proposal by the ICRC was to apply most of the Conventions to internal or non-international armed conflicts, but that proposal was met with overwhelming opposition from states.⁸¹

CA3 was the first true attempt at regulating internal armed conflict systematically, rather than arbitrarily and *ad hoc* through recognitions of belligerency as in the classical law of war. It grew precisely out of a moral need to regulate such type of conflict which could be just as

⁷⁶ See also Stahn, *supra* n.74, at 926.

⁷⁷ The question to what extent the concept of 'war' has continuing relevance regarding issues such as neutrality is a difficult one, and we will leave it aside. See, generally, Dinstein, *supra* n.25, and Neff, *supra* n.12, at 347-356. Suffice it to say that it has no bearing on the application of modern IHL. See, for example, N. Lubell, *Extraterritorial Use of Force against Non-State Actors*, (Oxford: Oxford University Press, 2010), at 87-88.

⁷⁸ See Schindler, *supra* n.54, at 131-132.

⁷⁹ See Pictet, *supra* n.66, at 23; D. Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' (forthcoming in a Chatham House collection edited by Elizabeth Wilmshurst, manuscript on file with the authors), at 9-10.

⁸⁰ Although the substantive *content* of CA3 applies as a matter of custom to both NIACs and IACs.

⁸¹ See, for example, Stewart, *supra* n.9, at 313-314; Akande, *supra* n.79, at 3.

devastating as interstate wars. But that moral imperative went only so far in 1949. It is easy to forget from the standpoint of our modern project of humanizing IHL and creating substantive law in NIACs by analogy to IACs that at the time of its drafting there was *no law* in internal armed conflicts but CA3. Together with the 1948 Genocide Convention, whose prohibitions were so narrow that even Stalin was perfectly happy with the final product, CA3 was the first substantial limitation that states have accepted with regard to their own population. Human rights law was barely embryonic, and for many decades the law of internal armed conflict contained no rules on the conduct of hostilities nor were serious violations of CA3 considered as creating individual criminal responsibility at the international level, i.e. as constituting war crimes.

In short, states saw CA3 as a major constraint on their sovereignty and their ability to effectively suppress rebellions, and thus minimized its scope as much as they could, in tension with moral considerations under which distinctions between IACs and NIACs made no sense. They accordingly elevated the threshold of internal armed conflict so that it required a level of intensity that the ICTY Appeals Chamber in *Tadić* was later to characterize as ‘protracted armed violence’, which rose above the level of mere riots or disturbances.⁸² Similarly, CA3 carefully provided that the existence of a NIAC would not affect the legal status of the parties to the conflict, i.e. would not legitimize rebellion against the lawful (or at least extant) authority. And when further rules were added to regulate NIACs in response to the humanitarian imperative and the growing influence of human rights, as in the 1977 Additional Protocol II to the Geneva Convention, the price to be paid for these additional rules was the heightening of the applicability threshold.⁸³

With the 1949 Geneva Conventions being the only treaties to achieve universal ratification, the CA2 and CA3 thresholds have undoubtedly long achieved customary status.⁸⁴ New states, as they spring up from time to time, would be bound by customary IHL that would apply on the basis of the CA2 and CA3 thresholds, regardless of their accession or succession to the Conventions. New thresholds and new rules can of course be created, whether by treaty, as with Additional Protocols I and II (AP I, AP II), or under custom, with the treaty threshold applying only *inter partes* so long as they, in turn, do not reach customary status. For the time being, however, CA2 and CA3 remain the baselines and the principal thresholds of IHL’s applicability.

D *Is there a generic concept of armed conflict?*

Before turning to the typology of armed conflicts, it is necessary to ask ourselves whether there is a *generic* concept of armed conflict. Looking at the text of CA2 and CA3, it seems as if the concept of NIAC is defined *residually* from or in opposition to IAC, i.e. a NIAC would be an armed conflict which is *not* an IAC.⁸⁵ The analytical approach to qualifying a particular situation would then be as follows: (1) is it an armed conflict? (2) if so, is it an IAC? (3) if not, it must be a NIAC. ‘Armed conflict’ would then be a generic term, whose definitional elements could logically be met *before* making the further step of qualifying it in kind either

⁸² See, e.g., Pejic, *supra* n.7, at 192.

⁸³ See *infra* Section 4B.

⁸⁴ As rules of general international law, both CA2 and CA3 would necessarily be reformulated so that the reference to ‘high contracting parties’ is changed to (any) states. Note, of course, the general difficulty in deriving custom from widely accepted treaties.

⁸⁵ Cf. Holland, *supra* n.70, at 155; Vité, *supra* n.70, at 75-76.

as an IAC or a NIAC.⁸⁶ Indeed, not only does this reasoning follow textually from CA2 and CA3, but it is frequently resorted to in practice, if implicitly. A good example is the *Hamdan* case before the US Supreme Court,⁸⁷ in which the Court found that (1) there was an armed conflict between the US and Al-Qaeda,⁸⁸ (2) that this conflict could not be international in character, as IACs are defined as conflicts between states, which Al-Qaeda was not,⁸⁹ and consequently (3) that the conflict was a NIAC.⁹⁰ The Court was not entirely clear on whether this conflict was a NIAC in *Afghanistan* or in some other locale, or was rather *global* in character.⁹¹

That particular ambiguity aside, however, the Court's logic is flawed. While it is certainly correct that the US 'war on terror' against Al-Qaeda cannot be an IAC under the CA2 definition, it does *not* follow from that conclusion that it must be a NIAC. Despite the textual impulse to define NIACs negatively or residually from IACs and a broader notion of armed conflict this is *not* how the thresholds work.⁹² In mathematical terms, if you will, the two are not subsets of the same set. 'Armed conflict' cannot be defined generically.⁹³ Any such definition requires an inquiry into the *party structure* of the conflict,⁹⁴ which is the most important, but not the *only*, distinguishing criterion between IACs and NIACs. Rather, unlike IACs, NIACs require a level of sustained hostilities between a state and a non-state actor, or between two or more non-state actors, the continued existence of 'protracted armed violence' taking place within a certain defined area.⁹⁵ Only once this threshold is crossed would a NIAC legally exist, since states did not and do not want every outburst of internal violence to be regulated by IHL, seeing this as a potential intrusion upon their sovereignty.⁹⁶

Rather than being a generic concept, 'armed conflict' is merely shorthand for an IAC or a NIAC and all their descriptive sub-types. If a third category of armed conflict were to

⁸⁶ Perhaps most notably, this is now the view of the ILA Use of Force Committee, chaired by Mary Ellen O'Connell, in its Final Report on the Meaning of Armed Conflict in International Law (2010).

⁸⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁸⁸ This was admittedly more of an unchallenged assumption than a true legal and factual finding. See also M. Ramsden, 'Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki', (2011) 16 *JCSL* 385, at 390.

⁸⁹ *Hamdan*, *supra* n.83 at 630: 'The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being "international in scope," does not qualify as a "conflict not of an international character." 415 F. 3d, at 41. That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations.'

⁹⁰ *Ibid.*: 'The latter kind of conflict [NIAC] is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning.'

⁹¹ See, for more, M. Milanovic, 'Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli *Targeted Killings* Case', (2007) 89 *IRRC* 373; N. Balendra, 'Defining Armed Conflict', (2008) 29 *Cardozo LRev* 2461, at 2474; Holland, *supra* n.70, at 167-169.

⁹² See, generally, the incisive analysis by D. Kritsiotis, 'The Tremors of *Tadić*', (2010) 43 *IsLR* 262.

⁹³ Cf. Schindler, *supra* n.54, at 131: 'the term "armed conflict" is not understood in exactly the same way in the case of international and of non-international conflicts.'

⁹⁴ See, for example, Y. Sandoz *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), at 1319: 'a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory.'

⁹⁵ Cf. Stewart, *supra* n.9, at 435 (noting how the intensity threshold poses a problem for a generic definition); Lubell, *supra* n.77, at 87, 89.

⁹⁶ See, for example, Sandoz, *ICRC Commentary to Additional Protocols*, *supra* n.94, at 1320.

develop through treaty or custom, for example transnational armed conflict,⁹⁷ then ‘armed conflict’ would be shorthand for that as well. But one *cannot* first say that a particular situation *clearly* constitutes an armed conflict and then proceed to classify or qualify that conflict. That is not how the concepts legally work, since NIACs are not defined simply as not being IACs.⁹⁸ We can see this from how the Appeals Chamber used the term ‘armed conflict’ in *Tadić*, when it found that ‘that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’⁹⁹ – or, in other words, an armed conflict exists whenever there is an IAC or a NIAC, not the other way around.¹⁰⁰ As well explained by Kritsiotis, while at first glance

‘by its choice and use of words, the Appeals Chamber might be taken to have been defining the concept of an “armed conflict” as a generic proposition ... nothing could be further from the truth for it becomes immediately apparent upon reading this *dictum* in full that the Appeals Chamber was in fact committing itself to the provision of not one but two definitions.’¹⁰¹

Its otherwise abundant references to ‘armed conflict’ were not to some generic term, but were again shorthand for ‘IAC or a NIAC.’¹⁰²

‘Armed conflict’ is particularly convenient as shorthand when one wants to deliberately *avoid* qualifying the conflict, either because the qualification would be politically or legally difficult,¹⁰³ or even because we feel that qualification is unnecessary since the substantive

⁹⁷ See *infra* Section 4E.

⁹⁸ As well put by Sivakumaran:

I find the descriptor ‘non-international’ to be somewhat misleading as it unhelpfully defines the category by what it is not. It suggests that there is but one armed conflict and, if it is not international in character, by default it is non-international. However, in practice, an internal/non-international armed conflict is identified in a rather different manner. For example, in order for an internal/non-international armed conflict to exist, the violence must reach a certain level of intensity; yet, for an international armed conflict to exist one dominant view is that there is no such requirement. The category of internal/non-international armed conflict is thus in no way a default category which serves to catch those conflicts which are excluded from the international category. Yet this is what is suggested through the use of the terminology of ‘non-international’ armed conflict.

S. Sivakumaran, ‘Re-envisioning the International Law of Internal Armed Conflict: A Rejoinder to Gabriella Blum’, (2011) 22 *EJIL* 273.

⁹⁹ *Prosecutor v. Tadić*, IT-94-1, Appeals Chamber, Decision on Jurisdiction, 2 October 1995, at para. 70.

¹⁰⁰ Similarly, see Article 2(b) of the ILC Draft Articles on Effects of Armed Conflict on Treaties, *supra* n.75, which takes up the *Tadić* definition.

¹⁰¹ Kritsiotis, *supra* n.92, at 267.

¹⁰² *Ibid.*, at 268: ‘We should therefore be alert to, and most cautious of, the littering of references to “armed conflict” that occur within the *Tadić* jurisprudence of the sort recalled here; these should be regarded as a convenient form of abbreviation for pluralized references to both international and non-international armed conflicts—but only as and where such references are appropriate and make genuine and accurate legal sense.’ Similarly, the Appeals Chamber itself said ‘[t]he definition of “armed conflict” varies depending on whether the hostilities are international or internal,’ *Tadić*, at para. 67, thus ‘suggesting that the quantum of hostilities is intrinsic to the very definition of each of the concepts of international and non-international armed conflicts as the Appeals Chamber understood them.’ Kritsiotis, *ibid.*, at 292.

¹⁰³ Thus, for example, the ICRC frequently does not disclose its own qualification of a particular armed conflict publicly (for example with respect to the 2006 Israel/Hezbollah/Lebanon conflict), and indeed its internal doctrine pursuant to which it makes the qualification remains confidential. See S. Ratner, ‘Law Promotion

law applicable in both kinds of conflicts is (now) the same.¹⁰⁴ But that this approach is at times appealing does not mean that the identification of an ‘armed conflict’ is possible *without* qualifying it – it is not, because IACs and NIACs are categorically different rather than defined residually from each other. It is as inappropriate to conceive of NIACs as *non*-IACs as it is for IACs to be seen as *non*-NIACs.

E Why the distinction persists, and why it matters

Despite all the successes of the IAC/NIAC unification project in the past two decades, the distinction between the two persists, and will continue to be enormously important in the foreseeable future. While the modern law has managed to gradually elide the differences between the two regimes when these were *morally* unsustainable, for example so that rape would be a war crime in both internal and international armed conflict, others are not susceptible to the same kind of normative pressure. This elision has come – if it has indeed come – through custom; the difference between the conventional law applicable in IACs and NIACs is as vast as ever.

The persistence of the IAC/NIAC dichotomy despite these customary developments is a function of state interest. IACs rest on the fundamental presupposition that these are equal actors who have the authority, if not the right, to engage in organized violence in a state-ordered and centred international system. It is for this reason, and not simply considerations of humanitarianism, that those lawfully fighting on behalf of sovereign parties are entitled to the combatant’s privilege – they may take life, limb and property consistently with IHL, and they may be prosecuted for such acts only insofar as they violate IHL.¹⁰⁵ It is also for this reason that captured combatants are entitled to the elaborate and detailed protections granted to prisoners of war. A soldier should not be punished simply for fighting on the losing side. In NIACs, however, the fighter of a rebel armed group can be prosecuted merely for rising against the lawful, or at least the winning, government, even if he is guilty of no war crimes.¹⁰⁶ So long as this difference remains NIACs can never become truly equal to IACs.

Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War’, (2011) 22 *EJIL* 459, at 474-477 (arguing that the ICRC worries that states may react adversely enough to the ICRC’s opinions that they will withhold cooperation from it).

¹⁰⁴ See, for example, Report of the United Nations Fact-Finding Mission on the Gaza Conflict (‘Goldstone Report’), UN Doc. A/HRC/12/48, 25 September 2009, at paras. 281-283, especially para. 282 (‘as the Government of Israel suggests, the classification of the armed conflict in question as international or non-international, may not be too important.’) Similarly, in the *Gotovina* case before the ICTY, dealing mainly with crimes against the Serbs in Croatia, the Prosecution explicitly argued that it was not necessary to qualify the armed conflict as the crimes charged existed in both IAC and NIAC. The Trial Chamber accepted that an ‘armed conflict’ existed, but then proceeded to qualify it as an IAC, based on the FRY’s overall control over the Croatian Serbs. See *Prosecutor v. Gotovina et al*, IT-06-90-T, Judgment, 15 April 2011, at paras 1679-1682, 1693.

¹⁰⁵ See, for example, K. Dörmann, ‘Combatants, Unlawful’, in *Max Planck Encyclopedia of Public International Law*, available at www.mpepil.com, at para. 4: ‘In international armed conflicts, the term “combatants” denotes the right to participate directly in hostilities (Art. 43(2) Additional Protocol I). Consequently, (lawful) combatants cannot be prosecuted for lawful acts of war in the course of military operations even if their behaviour would constitute a serious crime in peacetime. They can be prosecuted only for violations of IHL, in particular for war crimes.’

¹⁰⁶ See, for example, Dörmann, *supra* n.105, at para. 36: ‘The law applicable in non-international armed conflicts does not foresee a combatant’s privilege (ie the right to participate in hostilities and impunity for lawful acts of hostility);’ Stewart, *supra* n.9, at 320; M. Sassoli, ‘Combatants,’ in *Max Planck Encyclopedia of Public International Law*, available at www.mpepil.com, at paras. 35-38.

IACs are thus predicated on the existence of combatants and civilians as formal statuses, which cannot operate in NIACs. These statuses, in turn, have ripple effects on targeting and detention rules,¹⁰⁷ which are often difficult to apply by analogy in NIACs. Similarly, belligerent reprisals, although greatly limited in scope, are available as lawful measures only in IACs, since states would never recognize the right of non-state actors to take such measures against them, while in turn the principle of equal application of IHL mandates that states likewise cannot resort to reprisals against non-state actors. Finally, the grave breaches regime of the Geneva Conventions is explicitly confined to IACs, with important consequences for any duty to suppress international crimes.¹⁰⁸ In short, even assuming the existence of some non-state actors which are organizationally so well developed that they can effectively comply with the detailed obligations that IHL imposes on states in IACs, some differences between the two kinds of armed conflict are structurally embedded and cannot be overcome simply on the basis of humanitarian or human rights-protective impulses.¹⁰⁹

4 Thresholds in the modern law of armed conflict

A *International armed conflict*

(i) *Generally* As we have seen, IAC was crafted as an explicit replacement for the concept of war. As with war, IAC as defined in CA2 is of an exclusively interstate nature, a conflict between two equal sovereigns. In the words of the authoritative Pictet *Commentary*:

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of [Common] Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4 [of the Third Geneva Convention]. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application.¹¹⁰

The CA2 threshold is thus remarkably low – all it needs is a difference between two states leading to the intervention of their armed forces.¹¹¹ Whether Pictet is indeed correct in this, or whether a *de minimis* level of violence needs to occur in order to avoid mere border incidents being classified as IACs, is not the object of our inquiry at this time. Opinions and practice on this point seem to be conflicted.¹¹² What we *do* wish to emphasize is that however exactly

¹⁰⁷ See, for example, J. Pejic, “‘Unlawful/Enemy Combatants’: Interpretations and Consequences’, in Schmitt and Pejic, *supra* n.65, at 335; Akande, *supra* note 79, at 6-9. See also, in a different vein, E. Crawford, *The Treatment of Combatants under the Law of Armed Conflict*, (Oxford: Oxford University Press, 2010). See also the chapters by David Turns and Arjen Vermeer in this volume on targeting and security detainees.

¹⁰⁸ See also J. Stewart, ‘The Future of the Grave Breaches Regime: Segregate, Assimilate or Abandon?’, (2009) 7 *JICJ* 855.

¹⁰⁹ Cf. R. Bartels, ‘Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts’, (2009) 91 *IRRC* 35.

¹¹⁰ Pictet, *supra* n.66, at 23.

¹¹¹ See also Schindler, *supra* n.54, at 128, 131.

¹¹² See, for example, Kritsiotis, *supra* n.92, at 279-280; Lubell, *supra* n.77, at 94-95; Akande, *supra* n.79, at 12; G. Solis, *The Law of Armed Conflict* (Cambridge: Cambridge University Press, 2010), at 151-152.

defined the IAC threshold is far lower than the NIAC ‘protracted armed violence’,¹¹³ as it is not subject to the same sovereignty concerns as NIACs. The exact same amount of violence may produce an IAC if perpetrated between states, but might not qualify as a NIAC if committed by non-state actors.¹¹⁴

It is simply not correct to assert, as the Supreme Court of Israel did in the *Targeted Killings* case,¹¹⁵ that the defining criterion of IACs is their *cross-border* nature.¹¹⁶ That position finds no support either in the text of the treaties or in state practice; it is certainly not true, for example, that any NIAC which crosses a state border is thereby *ipso facto* internationalized.¹¹⁷ While it is true that hostilities in IACs will cross state borders, it is not the *locale* of the fighting, but the identity of the actors – states – which defines international conflicts. The policy that drives the definition is not statehood as such, but the *legitimacy* that international law confers upon states, primarily but not exclusively.¹¹⁸ Statehood remains the baseline against which other potential actors should be measured, and it will remain such so long as statehood is the fundamental ordering principle of the international system. In other words, the fact that the hostilities between a non-state actor and a state cross state borders does not justify treating that non-state actor as being on par with the state in terms of the IAC/NIAC distinction.

The contours of IACs are thus reasonably clear, but for three main sets of definitional problems. The first is that of possible internationalization of *prima facie* NIACs, which we will deal with in detail further below. The second and the third are problems of international personality and state representation that we will address now.

(ii) *Problems of international personality* If IACs are under CA2 defined as conflicts between states parties to the Geneva Convention, and defined under its customary equivalent as conflicts between any two states, the most basic problem that can arise is whether a specific entity which claims statehood is, in fact, a state. The paradigmatic example would be that of a secessionist territory claiming independence from its mother country. Consider Kosovo, which declared independence from Serbia in 2008 but which Serbia still claims as a part of its own territory. If a new conflict were to erupt between them, it would be an IAC only if Kosovo does in fact fulfil the criteria for statehood under international law.¹¹⁹ This is

¹¹³ See, for example, Vité, *supra* n.70, at 72, 76.

¹¹⁴ See, for example, Kritsiotis, *supra* n.92, at 296: ‘if, *arguendo*, the tragic acts that transpired in the United States on September 11, 2001, had been committed by members of the regular armed forces of Afghanistan, there is no question that an international armed conflict would have been inaugurated between Afghanistan and the United States by virtue of those events. However, if the same set of events had occurred at the instigation of members of an organized armed group, all of whom, *arguendo*, had carried the nationality of the United States, it cannot be assumed that as a matter of international law, those acts would have constituted a non-international armed conflict within the United States.’

¹¹⁵ *The Public Committee against Torture in Israel et al v. The Government of Israel et al*, Supreme Court of Israel sitting as the High Court of Justice, Judgment, 11 December 2006, H CJ 769/02, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM (hereinafter *Targeted Killings*).

¹¹⁶ *Ibid.*, at para. 18: ‘This law applies in any case of an armed conflict of international character – in other words, one that crosses the borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation.’

¹¹⁷ See also Milanovic, *supra* n.91, at 382-386.

¹¹⁸ See *supra* Section 2D on recognition of belligerency; *infra* Section 4C(iii) on wars of national liberation.

¹¹⁹ At least under the (unlikely) assumption that the international forces deployed in Kosovo took no part in the conflict. If they did so, the question is whether the conflict would be internationalized even if Kosovo did not

obviously a matter which remains highly controversial. Similarly, consider a hypothetical conflict between China and Taiwan in which the latter formally renounced the authority of Beijing and claimed independence, or indeed possible resurgence of conflict between Georgia and its separatist territories of Abkhazia and South Ossetia. In all these scenarios the qualification of the conflict would depend on a *renvoi* to general international law and its criteria for statehood, which carry their own difficulties and complexities. In principle, it is quite difficult for a secessionist entity to gain statehood on the basis of force alone; while international law does not prescribe a duty of loyalty to one's state nor prohibit secession as such, it does not favour it either.¹²⁰

The second possible problem of international personality arises when an IAC is *multilateral*, i.e. when a number of states join alliances and coalitions and then proceed to fight one another. Such alliances are of course as old as war itself and in and of themselves pose no difficulties. A single IAC can have many states on opposite sides, as the text of CA2 itself allows. In effect, such as an IAC is reducible to a network of bilateral relationships. Any single state can pursue a separate peace or change sides, and the legal framework is perfectly capable of accommodating that.

The real problem is when states act jointly with or through separate, distinct international legal persons, above all international organizations (IOs), and place their forces under the command of other actors. Consider the 2011 campaign of allied forces against Libya, which is complicated by the involvement of two IOs – the UN and NATO. In early 2011, a rebellion was underway against the Gaddafi regime, to which the regime responded with a military crackdown, ostensibly committing crimes against humanity.¹²¹ The insurgency became centred on the area of Benghazi and at some point the hostilities reached the level of 'protracted armed violence', thereby initiating a NIAC. On 17 March 2011 the UN Security Council adopted Resolution 1973, authorizing the use of force against Libya in order 'to protect civilians and civilian populated areas under threat of attack.' Immediately thereafter US and allied forces launched air strikes against Libyan state forces, while on 31 March NATO took command over the coalition operations. We will turn to the example of Libya once more when we discuss internationalized and mixed armed conflicts. Now, however, we wish to examine the role of IOs.

When a UK aircraft operating under UN authorization and NATO command engages in hostilities against Libya, the question arises whether the UK is engaged in an IAC with Libya or rather whether IOs as separate international legal persons themselves participate in the conflict and perhaps even remove the UK out of the equation. Note, in that regard, that IOs are not parties to the major IHL treaties, simply because it was never really foreseen that IOs

fulfill the criteria for statehood (we think not), or whether there would be an IAC between Serbia and third states and a NIAC between Serbia and Kosovo running in parallel, i.e. a mixed IAC/NIAC (the better view). See also *infra* Sections 4C and D.

¹²⁰ See, generally, J. Crawford, *The Creation of States in International Law*, 2nd edn, (Oxford: Oxford University Press, 2006), at 374 ff.

¹²¹ In Resolution 1970 the UN Security Council referred the situation in Libya to the International Criminal Court, acting under Chapter VII of the UN Charter and pursuant to Article 13(b) of the Rome Statute. On 27 June 2011 the ICC issued warrants of arrest for Muammar Gaddafi and several associates, finding that there are reasonable grounds to believe that crimes against humanity have been committed in Libya – see Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, No. ICC-01/11.

as such could directly participate in armed conflicts.¹²² In short, whose aircraft is it – the UK's, the UN's, NATO's, or indeed everyone's? In answering that question we may either find IHL-specific solutions or approach it from the standpoint of attribution under the general international law of responsibility.¹²³ The same problem arises with regard to the possible internationalization of a NIAC due to the intervention of a third state, an issue that we will address below.¹²⁴ For now, however, we will proceed on the assumption that attribution may be the appropriate conceptual framework in this particular context as all relevant actors are international legal persons in their own right.

If so, we can distinguish between three different legal and factual situations. In the first scenario the conduct of a military asset would be attributable exclusively to the state, despite some involvement on the part of the IO. In the second the conduct would be attributable *both* to the state and to the IO or IOs, i.e. this would be a scenario of dual or multiple attribution and accordingly of shared responsibility. In the third, and the most problematic as far as the applicability of IHL is concerned, the conduct would be attributable only to the IO.

We can see these eventualities at play in our Libyan example. First, the fact that the UN Security Council authorized the use of force against Libya does *not* make the conduct of military assets deployed by states for that purpose *ipso facto* attributable to the UN since the UN lacked effective control over these forces, contrary to the lamentable admissibility decision of the European Court of Human Rights in the *Behrami and Saramati* case.¹²⁵ At least at the initial stages of the operation, it is clear that the conduct of US, UK, French and other coalitions forces was attributable to these states, and that there was an IAC between Libya on the one hand and the US, UK, France and other states on the other, which ran in parallel with the NIAC between the Libyan government and the rebels.¹²⁶

Second, because NATO is a separate international legal person the situation becomes more complicated after 31 March 2001, when it assumed command of the operation. A reasonable argument can be made that the acts of forces under NATO command are attributable only to NATO.¹²⁷ However, we submit that the better view is that in such cases attribution becomes *dual* – the conduct of these forces is attributable both to NATO and to states whose forces are

¹²² Despite the fact that the original scheme of UN collective security essentially envisaged a standing army at the disposal of the Security Council. See also Schindler, *supra* n.54, at 127 and the chapter by Christian Henderson in this volume.

¹²³ On which the ILC recently completed a major codification project, the Draft Articles on the Responsibility of International Organizations (2011), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf. See esp. Art. 7 and commentary thereto.

¹²⁴ Section 4C(ii).

¹²⁵ *Behrami and Behrami v. France, Saramati v. France, Germany and Norway* [GC] (dec.), App. Nos. 71412/01 & 78166/01, 2 May 2007. For critiques of the decision see, for example, M. Milanovic and T. Papic, 'As Bad As It Gets: The European Court of Human Rights' *Behrami and Saramati* Decision and General International Law', (2009) 58 *ICLQ* 267; A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases,' (2008) 8 *HRLR* 151; K. Mujezinovic Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test,' (2008) 19 *EJIL* 509; LA Sicilianos, 'Entre multilatéralisme et unilatéralisme : l'autorisation par le Conseil de sécurité de recourir à la force,' (2009) 339 *RdC* 13, at 377 ff.

¹²⁶ See also Akande, *supra* n.79, at 39-40.

¹²⁷ As an example with the acts of KFOR troops in Kosovo. See, generally, A. Pellet, 'L'imputabilité d'éventuels actes illicites—Responsabilité de l'OTAN ou des Etats membres', in C. Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (The Hague: Kluwer, 2002) 193.

put under NATO command. It is a general principle of the law of state responsibility that the acts of state organs are attributable to the state so long as they act in their official capacity.¹²⁸ Putting these organs under the operational command of a third party does not by itself change this legal position; something more is required for their acts to *cease* being attributable to their own state.¹²⁹ Particularly bearing in mind the institutional make-up of NATO, which receives both political direction and troop contribution from states who remain its ultimate masters and who always retain the final decision to contribute or withdraw troops, there are sound considerations of policy against attributing the acts of NATO-led troops exclusively to NATO.

So long as the conduct of armed forces remains attributable to the troop contributing states, whether exclusively or jointly with an IO, no serious qualification issue will arise under IHL, since an IAC would exist between all relevant states. A qualification problem would arise only if the conduct of (some of) the troops were to be attributable *exclusively* to an IO, as in our third scenario, since the major IHL treaties do not allow for the eventuality that IOs as such can be parties to an IAC, nor to the treaties themselves. What is clear is that as a matter of policy states cannot be permitted to evade the application of IHL by acting through IOs as proxies. Whether the evolution of a customary rule that IOs have the capacity to be parties to IACs just like states would be appropriate and necessary is a difficult question that we will leave aside at this point, except to say that the only alternative to such a rule would be to treat IOs like any other non-state actors, despite them being established by states, and to qualify conflicts in which forces exclusively belonging to IOs fight with those of some state as NIACs.¹³⁰

Problems of personality and qualification are particularly acute in one specific area – peacekeeping, especially under UN auspices. It was long in doubt whether IHL can apply to UN forces as such, precisely because of the UN’s separate legal personality and the fact that it is not a party to the relevant treaties. Today, after developments in practice and the UN’s own self-regulation, it can be taken for granted that IHL can in principle apply to peacekeeping forces.¹³¹ That, however, does not resolve the difficulties we can have in terms of qualifying an armed conflict. Our starting point is that IHL has opted to treat peacekeepers as *civilians* with regard to an *existing* armed conflict between some other parties, even though they are professional soldiers.¹³² From the criminal law standpoint, the Rome Statute of the ICC provides that ‘[i]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the

¹²⁸ See Article 4 of the International Law Commission’s Draft Articles on State Responsibility.

¹²⁹ As the European Court of Human Rights now acknowledged in *Al-Jedda v. UK*, App. No. 27021/08, 7 July 2011, at para. 80: ‘[The Court] does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – *more importantly, for the purposes of this case* – *ceased to be attributable to the troop-contributing nations*’ (emphasis added).

¹³⁰ See also Akande, *supra* n.79, at 43-44.

¹³¹ See, generally, C. Greenwood, ‘International Humanitarian Law and United Nations Military Operations’, (1998) 1 *YIntlHL* 3; D. Shrager ‘The Secretary-General’s Bulletin on the Observance by United Nations Forces of International Humanitarian Law: A Decade Later’, (2009) 39 *IsraelYBHumRts* 357; M. Zwanenburg, ‘United Nations and International Humanitarian Law’, in *Max Planck Encyclopedia of Public International Law*, available at www.mpepil.com, and the references cited therein.

¹³² This is admittedly a bit bizarre. One can, however, analogize members of peace operations to other armed individuals who do not normally take part in hostilities, for example police forces.

protection given to civilians or civilian objects under the international law of armed conflict' is a war crime in both IACs and NIACs.¹³³ So long as this situation persists, i.e. so long as the peacekeepers are essentially passive observers in the conflict, using force only on a very limited basis, the nature of the conflict would remain the same.¹³⁴ If, on the other hand, peacekeepers start directly participating in hostilities, not only would they lose protection from attack, but the nature of the conflict itself may be at issue, as the peacekeepers may *themselves* become parties to the conflict.¹³⁵ To the extent the existing conflict is a NIAC it is hard to see how or why it could be internationalized as a whole (although the matter is admittedly controversial); at the very least any component of the conflict which involves engagements with rebel armed groups would have to remain a NIAC, as the status of rebels could not be upgraded merely because they are fighting international forces.¹³⁶

(iii) *Problems of state representation* This brings us to problems of state representation. It may be easy to say that IACs are fought between states and statehood may even be uncontested in a given case, but who gets to *represent* the state may turn out to be a very difficult issue. Not only is this question important for the initial qualification of a conflict, but it may also prove to be crucial for its requalification or transition from one type to another.

Consider, first, the invasion of Afghanistan by US-led coalition forces in 2001. The first representational difficulty we encounter in qualifying the conflict is that the Taliban regime was not recognized as the lawful government of Afghanistan by the states that launched the invasion or by the international community generally. That difficulty is however reasonably easy to deal with. It is precisely because historically the recognition of states and governments was a way to avoid the application of the law of war that the position in modern IHL is that it is *de facto* government and not recognition that matters.¹³⁷ While they never controlled all of Afghanistan, at the time the Taliban were in effective power in most of the country, including the capital Kabul, and they had established institutions of government. Accordingly, there was an IAC between the US and other coalition states on one side and the state of Afghanistan, represented *de facto* by the Taliban regime, on the other, while there was also a NIAC running in parallel between the Taliban and the forces of the Northern Alliance.

But then the Taliban were defeated; their institutional rule over Afghanistan could not survive the joint coalition-Northern Alliance assault. Today we of course know that the defeat of the Taliban was far from complete, but it is still true to say that they lost the territorial control of the kind that denotes a government rather than simply an armed group. That vacuum was filled through a long transitional process, lasting from the end of 2001 up until 2003, which was approved by the UN Security Council and ultimately resulted in the establishment of a new Afghan government. The new government not only consented to the presence of international forces in Afghanistan, but together with the international forces continued to fight the growing Taliban insurgency.¹³⁸

¹³³ Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute.

¹³⁴ For a thoughtful discussion see O. Engdahl, 'The Status of Peace Operations Personnel under International Humanitarian Law', (2008) 11 *YIntlHL* 109.

¹³⁵ See, for example, Pejic, *supra* n.7, at 194-195.

¹³⁶ See also Vit , *supra* n.70, at 87-88; Engdahl, *supra* n.134, at 120.

¹³⁷ See Schindler, *supra* n.54, at 128-130.

¹³⁸ For a general overview see, for example, A. Bellal, G. Giacca and S. Casey-Maslen, 'International Law and Armed Non-State Actors in Afghanistan', (2011) 93 *IRRC* 47, and S. Wills, 'The Legal Characterization of the Armed Conflicts in Afghanistan and Iraq: Implications for Protection', (2011) 58 *NILR* 173.

The question thus is whether and at what point the conflict transitioned from a mixed IAC/NIAC to a NIAC pure and simple, i.e. at what point the Taliban lost the capacity to represent the state of Afghanistan, and accordingly lost belligerent rights *vis-à-vis* third states intervening in Afghanistan. At the heart of this question lies a tension between competing policy considerations. On one hand, we do not want the mere fact of military defeat to allow the intervening states to transform the character of the conflict simply by setting up a quisling administration that could then ‘consent’ to their presence in the country¹³⁹ – think only of the Third Reich’s *modus operandi* throughout Europe during the Second World War. At the same time, however, in some cases we want to enable the situation to move forward and allow a transition from an authoritarian regime to a more representative one under some level of international supervision. Such introduction of considerations of *legitimacy*, while perhaps inevitable both politically and legally, poses a particular danger for IHL as it smacks of the *jus ad bellum* that we for good reason wish to keep IHL insulated from.¹⁴⁰

We can observe the same dynamics at play in the case of Iraq post-2003, where there was initially undoubtedly an IAC which resulted in belligerent occupation; following a transitional process under international supervision a new Iraqi government was formed which provided its consent to the presence of coalition forces, thereby terminating the IAC and the occupation; as this process was underway, an insurgency erupted which for a substantial period crossed the threshold of ‘protracted armed violence’, thereby creating a NIAC.¹⁴¹

The most recent examples of such problems of state representation are the conflicts in the Côte d’Ivoire and Libya.¹⁴² As for the former, the story of the disputed Ivorian elections in 2010 and the ensuing crisis is well known. According to international observers, the incumbent president Laurent Gbagbo lost the elections to his challenger Alassane Ouattara, but the results were overturned by a Gbagbo-appointed commission. After a number of unsuccessful attempts at resolving the crisis, Ouattara was formally recognized as the lawful president of the Côte d’Ivoire by the UN, ECOWAS, the African Union and many countries. A conflict erupted between state forces loyal to Gbagbo and various armed groups supporting Ouattara, in which the latter was the ultimate winner. This conflict was at all times undoubtedly a NIAC. But what complicates matters is the intervention near the end of this conflict by UN and French peacekeepers in support of Ouattara.¹⁴³ Leaving the involvement of UN forces aside, when the French forces attacked Gbagbo’s compound and military assets, was this an IAC between France and the Côte d’Ivoire, or was it rather a NIAC since the French forces acted with the consent of Ouattara, the lawful and legitimate president of the country?

Similarly, in Libya, as we have already said the conflict was initially a mixed one: an IAC between Libya and the coalition states, and a NIAC between the Gaddafi regime and the

¹³⁹ See, in that vein, D. Turns, ‘The International Humanitarian Law Classification of Armed Conflicts in Iraq Since 2003’, (2010) 86 *US Naval War College International Law Studies* 97, especially at 113-114.

¹⁴⁰ Cf. Stewart, *supra* n.9, at 342-344 (discussing Soviet intervention in Afghanistan starting in 1979), and W.M. Reisman and J. Silk, ‘Which Law Applies to the Afghan Conflict’, (1988) 82 *AJIL* 459.

¹⁴¹ See, generally, Turns, *supra* n.141.

¹⁴² See, for example, C. Henderson, ‘International Measures for the Protection of Civilians in Libya and Côte d’Ivoire’, (2011) 60 *ICLQ* 767.

¹⁴³ See, for example, ‘Strikes by U.N. and France Corner Leader of Ivory Coast’, *The New York Times*, 4 April 2011, available at http://www.nytimes.com/2011/04/05/world/africa/05ivory.html?_r=3.

Benghazi rebels. However, as the conflict intensified and the rebels became better organized, forming a National Transitional Council (NTC), a number of states recognized this Council as the legitimate government of Libya.¹⁴⁴ Together with the crumbling of the Gaddafi regime, did such recognition lead to the transformation of the IAC into a NIAC, with the coalition at some point intervening on behalf of the legitimate government of the country?

What is at stake here is a process of internalization, or de-internationalization, of a conflict, i.e. its transformation from an IAC into a NIAC. Looking at the competing policy considerations, we can see what is *not* enough for such internalization to occur. That the incumbent government of a country is defeated cannot by itself transform the conflict, nor can the establishment of a proxy government by the victors, as this would allow them to effectively strip by force the protections granted in IACs to the remaining combatants of the defeated state, turning them into unprivileged belligerents. Similarly, that a rebel group is recognized as the new legitimate government of the country cannot of itself transform the character of the conflict, as this would again allow the intervening states to unilaterally do what they will.¹⁴⁵

When would the transformation of the conflict then occur? In our opinion, both considerations of policy and recent practice support a rule consisting of the following three elements: the conflict would transform from an IAC into a NIAC only when (1) the old regime has lost control over most of the country, and the likelihood of it regaining such control in the short to medium term is small or none (negative element); (2) the new regime has established control over a significant part of the country, and is legitimized in an inclusive process¹⁴⁶ that makes it broadly representative of the people (positive element); (3) the new regime achieves broad international recognition (external element). None of these elements is enough by itself, but jointly they take into account both questions of legitimacy and factual developments on the ground while providing safeguards against abuse. With regard to both the positive and the negative elements, the degree of control would be looked at holistically, taking into account not just troops on the ground but also direction over state institutions more generally, its economic assets, the media, and the like.

Thus, there is at least a strong majority view that the transitional processes in Iraq and Afghanistan at some point led to the transformation of the conflicts from IACs or mixed IACs/NIACs into NIACs pure and simple.¹⁴⁷ Similarly, looking at the Ivorian example, when the Gbagbo regime was effectively reduced to Abidjan, with the forces of the internationally recognized president Ouattara holding the remainder of the country, the intervention by French troops cannot be said to have constituted an IAC. When it comes to Libya, the tipping point probably came with the NTC's takeover of Tripoli, the acceptance of their representatives by UN General Assembly's credentials committee, and the endorsement of

¹⁴⁴ See, for example, S. Talmon, 'Recognition of the Libyan National Transitional Council', *ASIL Insights*, 16 June 2011, available at <http://www.asil.org/insights110616.cfm>. Note that the process of recognition was somewhat more complicated, with some recognitions perhaps capable of being conceptualized as recognitions of belligerency. For our purposes, however, we are interested at this point only in recognitions of the (former) rebels as *the* government of the country.

¹⁴⁵ See also Akande, *supra* n.79, at 36-37.

¹⁴⁶ Not necessarily requiring democratic elections, but certainly favouring them.

¹⁴⁷ See, for example, Bellal *et al*, *supra* n.138, at 51-53, and the works cited therein; R. Geiss and M. Siegrist, 'Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?', (2011) 93 *IRRC* 11, at 13-16; Turns, *supra* n.139 (stating that this is the majority view despite disliking it as a matter of policy); Pejic, *supra* n.7, at 196.

the new government by the Security Council. Obviously, it is hard to pinpoint the exact moment of internalization in any given case, and thankfully in most cases it may be unnecessary to do so, but it is necessary for us to be aware of the relevant elements and their interplay. And while fully acknowledging the fluid nature of these elements, we must also be aware that the internalization of a conflict has as its consequence a possible reduction of various protections under IHL.¹⁴⁸

B Non-international armed conflict

(i) *Generally* The evolution of the NIAC definition was not linear, but has been the object of a process of long duration that included the adoption of successive treaties, such as APII and the Rome Statute of the ICC, as well as major judicial developments, above all *Tadić* and its progeny. This process has ultimately produced a certain level of clarity, clarity that is all the more necessary because the incidence of NIACs today by far surpasses the incidence of IACs.

A number of controversial issues of course still remain. None of the major treaties actually contain a comprehensive definition of NIACs. They speak generally of ‘conflicts not of an international character’, as if the phrase was self-explanatory, its purpose being less to define a concept and more to accommodate fundamental disagreements between the drafters. Some do not even operate within the same legal framework or regime. CA3 and APII are parts of IHL, and the provisions on their material application are contextual bases for the application of this body of law. The Rome Statute is an instrument of international criminal law, and the provisions of its Articles 8(2)(c) and 8(2)(e) seek to determine the field of applicability of war crimes committed in NIAC that are within the ICC’s jurisdiction, rather than directly prescribe rules of IHL.

As it stands today, NIAC is a plural legal concept, defined differently under different treaty regimes. The basic definition of NIAC, which encompasses all others, is that in CA3. Its terms were famously elaborated by the ICTY Appeal Chamber in the *Tadić* Interlocutory Decision on Jurisdiction,¹⁴⁹ which has been widely accepted as reflecting custom¹⁵⁰ by the *ad*

¹⁴⁸ See Wills, *supra* n.138. See the chapter by Robert Cryer in this volume.

¹⁴⁹ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995), at para. 70.

¹⁵⁰ See, for example, Kritsiotis, *supra* n.92, at 262-263.

hoc international criminal tribunals¹⁵¹ and the ICC,¹⁵² other international bodies,¹⁵³ national legislation,¹⁵⁴ and the ICRC.¹⁵⁵

Uncertainties regarding the exact contours of NIAC must be observed against the political context, at the centre of which is sovereignty as the legal expression of a legitimate monopoly on violence that rests solely, or mainly, with states.¹⁵⁶ IACs are conflicts in which this monopoly is expressed, NIACs those in which it is challenged. As the first systematic attempt at regulating internal violence by international law, CA3 was a remarkable breakthrough. Prior to the 1949 Geneva negotiations, proposals for such regulation were vigorously opposed by most states. When in 1912 the ICRC tried to introduce a convention which would merely define its role in situations of civil war, this attempt was firmly dismissed by states claiming that any assistance offered by the Red Cross to insurgents would be ‘aiding and abetting ... common criminals and traitors.’¹⁵⁷ The proposal simply stood too far from the established, state-centred and ‘regimental’ world that states at the time wished to preserve.¹⁵⁸

Both the sparse content of CA3 and its lack of a precise definition of NIAC, as well as the restrictive requirements in Article 1 APII were consequences of interminable battles between the advocates of humanitarianism and those concerned with the realities of a state-centered system of institutionalized violence, with the humanizing impulse eventually leading to the regime of the Rome Statute and the formulation of a fairly inclusive customary rule. We will first look at some of the most notable differences with regard to the NIAC threshold between these diverse regimes. We will then concentrate on one specific aspect of the threshold requirement which is most relevant for contemporary conflicts led by states against transnational armed (terrorist) groups – the geographical scope of NIACs, with NIACs commonly understood as being synonymous with internal armed conflicts. We will then address the applicability of the existing concepts of NIAC to two basic scenarios of cross-border non-international violence, spillover and foreign intervention.

¹⁵¹ For the ICTR see, for example, *Prosecutor v. Akayesu*, ICTR-96-4, Trial Chamber Judgment, 2 September 1998, at para. 619; *Prosecutor v. Rutaganda*, ICTR-96-3, Trial Chamber Judgment, 6 December 1999, at para. 92. For the Special Court for Sierra Leone see *Prosecutor v. Fofana et al*, Decision on Appeal against ‘Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence’, Appeals Chamber Decision of the Special Court for Sierra Leone, Separate Opinion of Justice Robertson, 16 May 2005, at para. 32.

¹⁵² *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, at para. 233; *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08, Decision on the Confirmation of Charges, 15 June 2006, at para. 229.

¹⁵³ Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010, at paras 470-1; Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 31 March 2011, at para. 181; Children and Armed Conflict: Report of the Secretary-General, A/62/609-S/2007/757, 21 December 2007, at para. 5, n.2; ILC First Report on the Effects of Armed Conflicts on Treaties, A/CN.4/627, 22 March 2010, at para. 30 (Draft Article 2(b)).

¹⁵⁴ See, for example, Philippines Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes against Humanity, Section 3(c).

¹⁵⁵ ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law?: International Committee of the Red Cross (ICRC) Opinion Paper’, March 2008, at 4, available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

¹⁵⁶ See, for example, Pejic, *supra* n.7, at 200.

¹⁵⁷ D.A. Elder, ‘The Historical Background of Common Article 3 of the Geneva Conventions of 1949’, (1979) 11 *CaseWResJIntL* 37, at 41.

¹⁵⁸ See Keegan, *supra* n.43, at 12, 23.

(ii) *Plurality of non-international armed conflicts* The text of CA3 gives few clues as to what a NIAC actually is, despite introducing the concept into the legal vocabulary. This lack of a clear definition was deliberate on the part of the drafters,¹⁵⁹ and for long presented a significant challenge to the effective applicability of IHL.¹⁶⁰ An effort in the authoritative Pictet *Commentary* to elaborate on the (non-)definition was little more than a rather unselective compilation of rejected proposals during the drafting process.¹⁶¹ Some elements of NIACs, however, are apparent from the outset. In terms of party structure, being ‘not of an international character’ NIACs are conflicts in which at least one party is a non-state armed group, and indeed all of the parties might be such armed groups.¹⁶² The group must have a sufficient level of organization that would enable it to effectively implement IHL.¹⁶³

The text of CA3 also *prima facie* delineates the geographical scope of the conflict, which must occur ‘in the territory of one of the High Contracting Party.’ This particular requirement has been given several different interpretations to which we will turn shortly. No other element can be conclusively inferred from the text while the *travaux* provide only limited guidance. While CA3 was not intended to regulate situations of ‘disorder, anarchy or brigandage’,¹⁶⁴ and ‘mere riot or disturbances caused by bandits’,¹⁶⁵ it does not explain how to distinguish these situations from an armed conflict.¹⁶⁶ As a result, although CA3 was a significant breakthrough in regulating NIACs it was by design of limited success.¹⁶⁷ The lack of clarity in defining NIAC enabled governments to often avoid implementing IHL by simply refusing to characterise violence as an armed conflict, which was the whole point of the ambiguous definition.¹⁶⁸

At the time of its adoption CA3 was the sum total of all the law regulating NIACs; there was no other treaty or custom complementing it.¹⁶⁹ The need for a more comprehensive instrument became evident soon thereafter, but it took some thirty years until APII was adopted in 1977. The added regulation came at a price. On one side, APII provided wider

¹⁵⁹ See Sivakumaran, *supra* n.50.

¹⁶⁰ See D.P. Forsythe, ‘Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts’, (1978) 72 *AJIL* 272, at 273.

¹⁶¹ Pictet, *supra* n.66, at 49-52.

¹⁶² This raises the difficult questions as to how exactly a treaty provision created binding rules for non-state actors who did not and could not agree to it – see especially A. Cassese, ‘The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts’, (1981) 30 *ICLQ* 416; S. Sivakumaran, ‘Binding Armed Opposition Groups’, (2006) 55 *ICLQ* 369; L. Zegveld, *The Accountability of Armed Opposition Groups in International Humanitarian Law*, (Cambridge: Cambridge University Press, 2002), at 134 ff; see also M. Milanovic, ‘Is the Rome Statute Binding on Individuals? (And Why We Should Care)’, (2011) 9 *JICJ* 25.

¹⁶³ See, for example, Pejic, *supra* n.7, at 191-192; Schindler, *supra* n.54, at 147.

¹⁶⁴ E. La Haye, *War Crimes in Internal Armed Conflicts*, (Cambridge: Cambridge University Press, 2008), at 7.

¹⁶⁵ *Ibid.*

¹⁶⁶ On which see, e.g., Vité, *supra* n.70, at 76-77.

¹⁶⁷ Minimum Humanitarian Standards: Analytical Report of the Secretary-General Submitted Pursuant to Commission on Human Rights Resolution 1997/21, E/CN.4/1998/87, 5 January 1988, at para. 74; Moir, *supra* n.58, at 34; A Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, (Cambridge: Cambridge University Press, 2010), at 57.

¹⁶⁸ *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May-12 June 1971): Submitted by the International Committee of the Red Cross (Geneva, 1971) Part V: Protection of Victims of Non-International Armed Conflicts*, at 43; K. E. Kilgore, ‘Geneva Conventions Signatories Clarify Applicability of Laws of War to Internal Armed Conflicts’, (1978) 8 *GaJIntl&CompL* 945.

¹⁶⁹ But see Cassese, *supra* note 47.

protection in NIACs and defined a subset thereof with more precision. On the other, APII's definition of NIAC significantly reduced its field application when compared to CA3.¹⁷⁰

The APII NIAC threshold consists of two major elements – intensity of the violence and the quality of the parties. While a requirement of organization is presumed with regard to governmental armed forces,¹⁷¹ due to the informal nature of non-state armed groups Article 1(1) APII requires an organizational structure with a responsible command, control of a part of state territory, the ability to conduct sustained and concerted military operations and the ability to implement the Protocol. The requirements are cumulative. Article 1(2) further specifies that APII 'shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.'

The requirement that an armed group must control a part of the territory of a state with which it is in conflict is specific to APII. How much territory a group should control is uncertain, but it has been suggested that the territory does not have to be substantial nor the control stable.¹⁷² APII is, moreover, applicable only to conflicts in which one of the parties is a state.¹⁷³ Unlike CA3, APII cannot govern hostilities between two non-state armed groups.¹⁷⁴ Finally, an APII NIAC can only occur between the armed forces of a state on whose territory the conflict is ongoing and an armed group which controls a part of that state's territory.¹⁷⁵ For example, APII cannot govern a conflict between Turkey and Kurdish rebels controlling only parts of *Iraqi* territory and occurring solely on Iraqi soil, or between the intervening states assisting the Afghan government and the Taliban.¹⁷⁶

The APII regime and its NIAC definition do not modify the CA3 definition, but exist simultaneously and in parallel. However, it could be said that since *Tadic* the two thresholds have been brought closer together and that their differences are not as great. It is today generally accepted that some level of organization of an armed group is also required for the application of CA3,¹⁷⁷ although this requirement 'should not be exaggerated.'¹⁷⁸ Similarly, even CA3 requires 'protracted armed violence.' While, as suggested by the ICTY in the *Boškovski* case,¹⁷⁹ this might be a lower threshold than that of 'sustained and concerted

¹⁷⁰ See, e.g., Vité, *supra* n.70, at 79-80.

¹⁷¹ APII does not require a formal military structure. According to the ICRC Commentary of APII, governmental armed forces can include such formations as customs, police forces, national guard etc. See ICRC Commentary AP II, at para. 4462, available at <http://www.icrc.org/ihl.nsf/COM/475-760004?OpenDocument>.

¹⁷² ICRC Commentary, *ibid.*, at para. 4464-4467; *Akayesu*, Trial Judgment, *supra* n.151, at para. 626.

¹⁷³ Schindler, *supra* n.54, at 148-149.

¹⁷⁴ *Ibid.*

¹⁷⁵ Under Article 1(1) AP II the conflict must 'take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups' (emphasis added). See also Lubell, *supra* n.77, at 100.

¹⁷⁶ See Geiss and Siegrist, *supra* n.147, at 16.

¹⁷⁷ Schindler, *supra* n.54, at 147; R.J. Wilhelm, 'Problèmes relatifs à la protection de la personne humaine par le droit international dans les conflits armés ne présentant pas un caractère international', (1972) 137 *RdC* at 347-348.

¹⁷⁸ C. Kress, 'The 1999 Crisis in East Timor and the Threshold of the Law on War Crimes', (2002) 13 *CrimLF* 409, at 416.

¹⁷⁹ For the different view see: *Boškoski and Tarčulovski*, Case no. IT-04-82, Trial Judgment, 10 July 2008, at para. 197. See also: A. Zimmerman, 'War Crimes', in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, (München: Beck, 1999), at 501; A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, (Cambridge: Cambridge University Press, 2010), at 128, 142.

military operations’ the two are not necessarily far apart. Finally, it is also generally accepted that Article 1(2) APII analogously applies to CA3 conflicts.¹⁸⁰

That said, CA3 NIAC and APII NIAC remain two distinct thresholds as a matter of conventional IHL. To what extent exactly that distinction remains practically relevant is a different and difficult matter. First, it can be argued that the difference in thresholds is rendered largely irrelevant because most, if not all of the rules under APII have been transposed to CA3 NIACs under customary law. Thus, for example, in its customary IHL study the ICRC not only claims that most rules applicable in IACs are today also applicable in NIACs, but in doing so it does not distinguish between CA3 and APII NIACs, opting rather to apply all these rules to CA3 conflicts.¹⁸¹ Whether practice in fact supports this claim is a matter of some disagreement; the possibility that several NIAC thresholds exist in custom cannot be excluded.¹⁸²

Second, and also subject to reasonable disagreement, the adoption of the Rome Statute arguably further eroded the gap between the two concepts of NIAC, at least in the context of international criminal law. Views are divided as to whether the Statute introduced a single threshold for all war crimes applicable in NIACs in Articles 8(2)(d) and (f), or whether it sets a higher threshold for crimes derived from APII when compared to serious violations of CA3.¹⁸³

Article 8(2)(d), which sets the threshold of NIAC for serious violations of CA3 in Article 8(2)(c), only distinguishes armed conflict from internal disturbances and tensions. Article 8(2)(f), defining the scope of ‘other serious violations of laws and customs applicable’ in NIAC under Article 8(2)(e), makes the same distinction but adds that it applies to armed conflicts that ‘take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.’ Both the text and the drafting history of this provision show that it was derived from the *Tadic* formula, itself defining CA3 rather than APII conflicts.¹⁸⁴ Does, therefore, Article 8(2)(f) set a higher threshold than Article 8(2)(d), or are they in fact one and the same, their artificial separation merely a consequence of convoluted drafting?¹⁸⁵

¹⁸⁰ G. Abi-Saab, ‘Non-International Armed Conflicts’, in R. Baxter and C. Pilloud (eds.), *International Dimensions of Humanitarian Law* (Paris: UNESCO, 1988), at 229; ICRC, ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law?’, *supra* n.155, at 5; Holland, *supra* n.70, at 156.

¹⁸¹ The stated basis for this approach is that states do not distinguish between the two thresholds in practice – see Pejic, *supra* n.7, at 191.

¹⁸² See, for example, J. Pejic, ‘Status of Armed Conflicts’, in E. Wilmschurst and S. Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, (Cambridge: Cambridge University Press, 2007) 88; Bellal *et al*, *supra* n.138, at 62; J. Bellinger and V. Padmanabhan, ‘Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law’, (2011) 105 *AJIL* 201, at 208-209.

¹⁸³ See Vit , *supra* n.70, at 82-83; A. Bouvier and M. Sassoli (eds.), *How Does Law Protect in War?*, Vol. I, (Geneva: ICRC, 2006), at 110; R. Provost, *International Human Rights and Humanitarian Law*, (Cambridge: Cambridge University Press, 2002), at 268; W. Schabas, *An Introduction to the International Criminal Court*, 3rd edn, (Cambridge: Cambridge University Press, 2007), at 116.

¹⁸⁴ See S. Sivakumaran, ‘Identifying an Armed Conflict Not of an International Character’, in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009), at 374-375; Kress, *supra* n.178, at 419.

¹⁸⁵ See Kritsiotis, *supra* n.92, at 286-290; Akande, *supra* n.79, at 28-29.

It is certain that Article 8(2)(f) did not integrate the strict APII threshold into the Rome Statute. Such a proposal was rejected during the drafting process,¹⁸⁶ and the Court in its case law made clear that the requirement of territorial control by an armed group is not a part of the Statute.¹⁸⁷ The requirement for (a level of) organizational structure of an armed group, as already said, has become an integral part of CA3 NIAC, and the ICC accepted it as such.¹⁸⁸ The sole potential discrepancy is, therefore, in the requirement of ‘protracted armed conflict’ for APII crimes and the (textual) absence of such a requirement for CA3 crimes, an issue that the Court has so far managed to avoid.¹⁸⁹ The Court, however, did integrate most of the requirements from Article 8(2)(f) into Article 8(2)(d) through the interpretation of requirements intrinsic to CA3 and it is quite possible that if it is ever forced to do so¹⁹⁰ it will take the same route in integrating the temporal requirement as well.

It is hence entirely possible that the law regulating NIACs went through a process of unification and that the plurality of NIACs has been lost for all purposes but the applicability of APII as a treaty. If, after all, soldiers must comply with APII requirements even if the APII threshold is not met because they would be subjected to criminal sanction under the Rome Statute if they did not do so, then the applicability of APII as such becomes a rather moot point as far as parties to the Rome Statute are concerned.¹⁹¹ That said, we will for the time being continue to treat APII as a distinct NIAC threshold. Similarly, and crucially, whether or not a plurality of NIACs exists in terms of applicable law it certainly exists *descriptively*, so as to help us better understand the various factual situations that are legally to be characterized as NIACs.

It is also possible that an entirely new kind of legally cognizable armed conflict between states and non-state actors has evolved or is evolving post-9/11, and we will deal with this eventuality further below.¹⁹² Now, however, we must first address the question of geographical scope of NIACs and the further question whether NIACs are confined to purely internal situations, or indeed whether the law recognizes some varieties of non-internal non-international armed conflicts or cross-border NIACs.

(iii) *Are NIACs exclusively internal?* All definitions of NIAC are closely bound up with the question of its geographical scope. CA3 talks about conflicts ‘occurring in the territory of one of the High Contracting Parties’, Article 1(1) APII similarly about conflicts ‘which take place in the territory of a High Contracting Party’, the ICTY in *Tadić* about conflicts ‘within a state’¹⁹³ and the Rome Statute about conflicts ‘that take place in the territory of a State.’¹⁹⁴

¹⁸⁶ See A. Cullen, ‘The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold Contained in Article 8(2)(f)’, (2007) 12 *JCSL* 419, at 429.

¹⁸⁷ *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08, Decision on Confirmation of Charges, 15 June 2006, at para. 236.

¹⁸⁸ *Ibid.*, at para. 227 and 232.

¹⁸⁹ *Ibid.*, at para. 235.

¹⁹⁰ The Court might never come into situation to deal with the borderline instances considering the gravity threshold from Article 17(1)(d) of the ICC Statute. In addition, most of the conduct which can be categorised as a war crime in NIAC can also be qualified as a crime against humanity which can be perpetrated in the time of peace. Accordingly, the ICC Prosecutor is likely to opt for the latter qualification if the fact of the existence of armed conflict is not fairly easy to prove. As an example of such an approach see: *Prosecutor v. Gaddafi et al*, issued on 27 June 2011 (the charges enlisted in the warrant are all concerned with the crimes against humanity).

¹⁹¹ Note, however, that not every rule in AP II is subject to criminal punishment for a violation as a war crime under the Rome Statute.

¹⁹² See *infra* Section 4E.

¹⁹³ *Tadić*, *supra* n.99, at para. 70.

The natural interpretation of all these texts would confine the meaning of NIAC to conflicts which take place within the territory of a single state.¹⁹⁵ In other words, NIAC would equal internal armed conflict.

There is little (if any) historical evidence that the drafters of the major IHL instruments had anything other than purely internal conflicts in mind when formulating the relevant provisions. After all, the overwhelming concerns about the possible impact of these instruments on state sovereignty and the freedom of states to deal with their own problems as they see fit make sense only in the context of internal insurrections and rebellions. Of course, cross-border incursions of armed groups were occurring even prior to the adoption of the Geneva Conventions.¹⁹⁶ While these occurrences did raise significant questions with regard to state responsibility for revolutionary acts and within the *jus ad bellum* framework, they were rarely, if ever perceived as requiring specific regulation in the *jus in bello*. Even as spillovers of internal conflicts became more frequent, as in the developing world during anti-colonial struggles, the primary concern was legitimization (or not) of national liberation movements which was the object of Article 1(4) API.¹⁹⁷ The sporadic nature and low intensity of cross-border incursions by armed groups meant that the issue was politically hardly one of global concern, and it was largely off the legal radar. For all intents and purposes, NIACs were synonymous with purely internal conflicts, and that was that, for states and scholars alike.¹⁹⁸

Things have since changed. Al-Qaeda's 9/11 attacks and the ensuing US 'war on terror' and conflicts in Iraq and Afghanistan (and Pakistan and Yemen) raised serious issues of conflict qualification and the continuing desirability of the exclusively binary IAC/NIAC mould. Nor was this the only such example. The conflict between Israel and Hezbollah in Lebanon,¹⁹⁹ the situation in the DRC and constant spillovers of multiple NIACs occurring there to the territories of neighbouring countries, the incursions of Ogaden militias from Ethiopia and Al-Shabaab militia from lawless Somalia onto Kenyan territory,²⁰⁰ and the Kurdish fight for independence against Turkey and Iran²⁰¹ all pose serious challenges to the binary framework and NIAC's narrow geographical scope. These conflicts are not IACs as they are not inter-state; nor are they purely internal in character as they cross the borders of several states. What then are they?

Can the text of CA3 accommodate a cross-border dimension? There are two ways in which the CA3 reference to conflicts 'occurring in the territory of one of the High Contracting Parties' can be interpreted. The first, and perhaps more natural, is to say that the territory referred to is that of a state actually taking part in the conflict – in other words, CA3 would

¹⁹⁴ Article 8(2)(f) of the ICC Statute.

¹⁹⁵ See, for example, Pejic, *supra* n.7, at 199 (citing further commentary to that effect); Lubell, *supra* n.77, at 100.

¹⁹⁶ See, for example, H. Lauterpacht, 'Revolutionary Activities by Private Persons against Foreign States', (1928) 22 *AJIL* 105; I. Brownlie, 'International Law and Armed Bands', (1958) 7 *ICLQ* 720.

¹⁹⁷ See, generally, A. Cassese, 'Wars of National Liberation and Humanitarian Law', in Cassese, *supra* n.162, at 99 ff.

¹⁹⁸ But see D. Jinks, 'September 11 and the Laws of War,' (2003) 28 *Yale JIL* 1.

¹⁹⁹ For more see Lubell, *supra* n.77, at 250.

²⁰⁰ See V. Hadzi-Vidanovic, 'Kenya Invades Somalia Invoking the Right to Self-Defence', *EJIL: Talk!*, 18 October 2011, available at <http://www.ejiltalk.org/kenya-invades-somalia-invoking-the-right-of-self-defence/>.

²⁰¹ See T. Franck, *Recourse to Force: State Practice against Threats and Armed Attack*, (Cambridge: Cambridge University Press, 2002), at 63 ff.

inherently be limited to conflicts which are purely internal in scope. The second would be to say that the reference is to the territory of *any* High Contracting Party, not necessarily that of a state actually a party to the conflict.²⁰² The latter interpretation allows CA3 NIACs to encompass situations which are not confined within the borders of a single state, and should in our view be preferred.²⁰³

While NIACs have historically certainly been treated as synonymous with purely internal conflicts, and while such internal conflicts remain the paradigmatic examples of NIACs, NIACs can today also be seen as a somewhat wider category. Interpreted evolutively and in accordance with contemporary practice, the CA3 threshold textually allows for non-internal or cross-border NIAC, to which we will now turn while continuing our discussion of NIACs' territorial scope. We will distinguish (if not very rigidly) between two major sub-types of cross-border NIACs – spillover and foreign intervention²⁰⁴ – and then see how the definitions of NIAC, as explained above, would apply to these factual situations.

(iv) *Cross-border or non-internal NIACs: spillover conflicts and foreign intervention* The first sub-type of cross-border or non-internal NIAC, and perhaps the easier to deal with, is the spillover scenario. Initially, an ordinary, internal NIAC is fought on the territory of state A, either between the armed forces of state A and armed group X, or between armed groups X and Y. Then, however, fighting crosses the border and spills over onto the territory of state B (normally, but not necessarily adjacent to A), which itself may or may not join in the fighting; combat operations on B's territory may be either sporadic or intense and protracted.

Examples of such spillover conflicts are legion. One of the most recent would be the situation along the Somali border with Kenya. There is an ongoing internal NIAC between Al-Shabaab militants and the Transitional Federal Government of Somalia (TFG) on the territory of Somalia. The Al-Shabaab militants, however, frequently cross onto the territory of Kenya and conduct sporadic attacks there. Kenyan forces respond to these attacks in order to expel the group from the Kenyan territory, at times crossing over the Somali border.²⁰⁵

How does the law qualify such spillover scenarios? Two basic approaches seem to be appropriate. First, if the spilled-over component of the conflict taking place on the territory of state B by itself satisfies the 'protracted armed violence' threshold, then we can speak of two separate NIACs, one in state A and the other in state B. But what if the conflict on the territory of state B never independently reaches the CA3 threshold of NIAC as it is lacking the needed duration and intensity? Would, in other words, a *sporadic* spillover scenario that fails to reach the NIAC threshold thereby leave those particular instances of violence unregulated by IHL? While domestic law could to an extent fill the regulatory gap, in some cases at least such a result would morally be completely arbitrary; a rape by a rebel soldier on one side of the border would constitute a war crime, but not on the other.

²⁰² In other words, CA3 just like any other treaty provision applies *qua* treaty only for the parties to the treaty – see Vité, *supra* n.70, at 88-89; M. Sassoli, 'Transnational Armed Groups and International Humanitarian Law', *HPCR Occasional Paper Series*, Winter 2006, No. 6, at 8-9; Pejic, *supra* n.7, at 200-201.

²⁰³ See also Holland, *supra* n.70, at 159-160; Lubell, *supra* n.77, at 101-104; Akande, *supra* n.79, at 46-47.

²⁰⁴ See also Holland, *supra* n.70, at 161.

²⁰⁵ Since October 2011, however, Kenya commenced a full-scale invasion of the Somali territory intervening against Al-Shabaab with the consent of the transitional Somali Government. See Letter dated 17 October 2011 from the Permanent Representative of Kenya to the United Nations addressed to the President of the Security Council, UN Doc. S/2011/646.

Such a gap can in our view be largely avoided. Recall how in its analysis of the geographic scope of NIACs *within* the state the ICTY Appeal Chamber in *Tadić* held that it is sufficient to show that certain military operations ‘were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict’ to subsume these events under the ongoing NIAC.²⁰⁶ In other words, if there is a sufficient nexus between an ongoing NIAC and military operations that are occurring outside the areas in which the conflict and ‘protracted armed violence’ normally take place, these military operations will nevertheless be understood as part of the overall armed conflict. This reasoning can be extended by analogy to military operations *outside* the state.²⁰⁷ Thus, IHL would be applicable to sporadic military clashes between Colombian forces and FARC spilling over onto Ecuadorian territory if a sufficient nexus with the ongoing NIAC between the two entities in Colombia could be established, i.e. if the spilled-over component was still clearly between the forces of Colombia and FARC that are engaged in the core part of the NIAC and the hostilities in the two territories were not completely unconnected.

Simply put, while NIAC requires ‘protracted armed violence’ within the territory of a state, it does not necessarily need *all* of that violence to take place within that state, so long as there is an organic or structural link between the sporadic extraterritorial outbreaks of violence and the main body of the conflict. The application of this nexus requirement would of course depend on the facts of each particular case of sporadic spillover. In cases in which either the nexus was lacking and thus the violence could not be tied to an existing NIAC or the spilled-over violence failed to independently reach a level of intensity and duration, the spilled-over violence would not be part of any legally cognizable NIAC and would be unregulated by IHL. The geographical scope of NIACs would accordingly largely resemble the geographical scope of IACs; just like the fighting between say France and Germany could spill over onto Italian territory, with the IAC not being confined exclusively to French and German sovereign territory, so could a NIAC expand into something more than a purely internal conflict.

The second sub-type of cross-border NIAC is that of foreign intervention: state A is engaged in internal conflict with armed group X on its own territory, and then invites state B to help it in the conflict against X, which B does on A’s territory. The paradigmatic example is of course the US involvement in Afghanistan after the ousting of the Taliban regime, the establishment of a new Afghan government of Afghanistan and its invitation to the United States to assist it in its armed conflict against Al-Qaeda and the Taliban.²⁰⁸ The ongoing conflict between the Afghan government and the Taliban is an internal NIAC. As we will see below, a foreign intervention on behalf of the country’s government does not *ipso facto* internationalize the NIAC. The United States is, therefore, involved in a cross-border NIAC taking place in Afghanistan and not on its own soil.

Another variant of a foreign intervention scenario is when state B enters into protracted armed violence against armed group X on the territory of state A, but this time *without* A’s invitation, as when Israel intervened in Lebanon against Hezbollah in 2006. Depending on whether the lack of state A’s consent is to be given normative relevance in internationalizing the conflict, the conflict could be characterized either as a cross-border NIAC or as an IAC, as we will explain below.

²⁰⁶ *Tadić*, *supra* n.99, at para. 70.

²⁰⁷ See also Kress, *supra* n.6, at 265.

²⁰⁸ See, e.g., Vité, *supra* n.70, at 73.

Not only is a combination of spillover and foreign intervention scenarios possible, but *any* spillover conflict which involves the forces of one state crossing onto the territory of another state is also a case of foreign intervention, with or without the territorial state's consent. Similarly, a foreign intervention may itself spill over, for example if state B intervenes in the conflict between state A and armed group X, but that conflict crosses onto the territory of state C, or even onto the territory of more than one state. This is very much the case with the current engagement of the United States in Afghanistan and the wider region. In Afghanistan, the US is involved in a NIAC between the Afghan government and the Taliban. Frequently, however, the United States conducts attacks, particularly drone strikes, against Al-Qaeda and Taliban targets on Pakistani territory, with or without the permission of Pakistani authorities. One such attack was the operation of US special forces which led to the death of Osama bin Laden. For its part, Pakistan also fights its own militants, whose connections with the Afghan Taliban are not always clear, while the US has been using drone strikes against various Al-Qaeda affiliated groups in Yemen and Somalia.

Legally characterizing this politically undeniably connected jumble of conflicts is a difficult exercise. First, it should be borne in mind that it is entirely possible to have multiple and distinct parallel conflicts even in the same territory.²⁰⁹ Second, if the United States engagement with armed groups in Pakistan reaches a level of protracted armed violence, it could be characterized as an independent NIAC, as would any such fighting between Pakistani forces and the armed groups. Alternatively, these operations could be considered as parts of the Afghan NIAC if the nexus criteria outlined above are met.

C *Internationalized non-international armed conflict*

(i) *Generally* Now we need to look at one of the most complex and discussed topics of contemporary IHL: internationalized armed conflicts. Before this discussion can advance any further, we believe it crucial to clarify, first, the *concept* of internationalized armed conflict, and second, the *mechanism* or mechanisms of internationalization.

In our view, the concept of internationalization is only truly useful if it is defined as the transformation of a *prima facie* NIAC into an IAC, thereby applying to this conflict the more comprehensive IAC legal regime.²¹⁰ The most important of these legal consequences is the grant, in principle, of privileged belligerency to combatants on both sides of the conflict. As for the mechanism of internationalization, we have seen that under CA2 IACs are defined as differences leading to the use of armed force *between two states*. Accordingly, there are two basic ways of internationalizing a NIAC. First, a *prima facie* NIAC can be subsumed under the *existing* CA2 definition. In other words, what at first glance looks like a conflict between a state and a non-state actor is a on a deeper look actually a conflict between two states. Secondly, a NIAC can be internationalized through the *redefinition* of IAC in terms of its party structure, so that the CA2 definition is exceptionally expanded under a treaty or customary rule so as to potentially include some non-state parties. Internationalization under this heading would clearly require proof of a specific rule to that effect. We will now deal in turn with both types of internationalization.

²⁰⁹ See *infra* Section 4D.

²¹⁰ Note that one can use the term internationalized armed conflict in a different, descriptive sense, as any NIAC in which there is some type of foreign intervention – see, for example, Geiss and Siegrist, *supra* n.147, at 14, n.8. This is again, *not* how we will be using the term, in order to maximize both its utility and precision.

(ii) *Internationalization under the existing definition* We have already mentioned one way in which internationalization can occur under the CA2 definition – if a non-state actor embroiled in a CA3 conflict with a state manages to create a new state in the course of the conflict.²¹¹ Think only of the dissolution of the former Yugoslavia, or the possible emergence of a state of Palestine; as we have said above, statehood is to be measured by the rules of general international law. From the moment of the new state's creation, any conflict with the other state would become an IAC.²¹²

Other than through the process of state creation internationalization can occur under the CA2 definition in two basic scenarios: (1) if state A intervenes on the territory of state B in support of non-state actor C against state B; and (2) if state A intervenes on the territory of state B against non-state actor C without B's consent. In both cases what at first glance appears to be a NIAC between (1) B and C and (2) A and C may actually amount to an IAC between A and B.

In the first scenario, the intervening state must use the non-state actor as a proxy against the territorial state, i.e. A acts through C to attack B. It is generally not disputed in doctrine that internationalization can occur in such circumstances; what is in dispute is the precise nature of the link between the intervening state and the non-state actor that suffices for internationalization.²¹³ On one view, this link must be that of attribution as a matter of the secondary rules of state responsibility.²¹⁴ This, of course, was famously the approach of the ICTY Appeals Chamber in the *Tadić* appeals judgment,²¹⁵ where it considered that the acts of the Bosnian Serbs had to be attributable to the FRY/Serbia in order for the conflict to become international in character, and fashioned the 'overall control' test of responsibility in order to do so, thereby rejecting the reasoning of the International Court of Justice (ICJ) on attribution in the *Nicaragua* case.²¹⁶

There is an intuitive appeal to the *Tadic* approach. After all, what else could it mean for a non-state actor to be acting on behalf of state than for its acts to be attributable to the state? However, as one of us has argued at length elsewhere,²¹⁷ the Appeals Chamber's approach was erroneous for two basis reasons. First, it actually misinterpreted the ICJ's *Nicaragua* judgment as setting out only *one* test of attribution, that of effective control, and thought that this single test was unreasonable and impracticable. Indeed, it would be so, had the ICJ not set out *two* tests of attribution in its judgment – that of complete dependence and control, operating at a general level and seeking to attribute *all* of the acts of a non-state actor to a state, and that of effective control, seeking to attribute *specific* acts controlled by the state.²¹⁸ Secondly, and more importantly for our purposes, it is conceptually inappropriate for secondary rules of attribution to determine the scope of application of the primary rules of

²¹¹ See, for example, Akande, *supra* n.79, at 14.

²¹² See also *supra* Section 4A(ii).

²¹³ See, for example, Arimatsu, *supra* n.44, at 174-175; Holland, *supra* n.70, at 162-163; Vité, *supra* n.70, at 90-92; Lubell, *supra* n.77, at 97-99; Akande, *supra* n.79, at 30; Solis, *supra* n.112, at 155.

²¹⁴ See also our discussion of problems of international personality in IACs in *supra* Section 4A3.

²¹⁵ *Prosecutor v. Tadić*, IT-94-1, Appeals Chamber, Judgment, 15 July 1999.

²¹⁶ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment (Merits), 27 June 1986, [1986] ICJ Rep 14 (hereinafter *Nicaragua*).

²¹⁷ See M. Milanovic, 'State Responsibility for Genocide', (2006) 17 *EJIL* 553, at 575 ff.

²¹⁸ See also S. Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities', (2009) 58 *ICLQ* 493.

IHL. Rather, it is upon IHL to fashion a test which determines when the relationship between a state and a non-state actor is such that a NIAC is to be internationalized – and that test may well be that of overall control.²¹⁹

In its 2007 *Bosnian Genocide* merits judgment,²²⁰ the ICJ rejected the overall control test in the context of attribution, finding that it was too loose to fit that particular purpose. However, the Court left open the possibility that the test is valid for the IHL-specific purposes of qualifying a conflict:

This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the “overall control” test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the “overall control” test as equally applicable under the law of State responsibility for the purpose of determining – as the Court is required to do in the present case – when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict.²²¹

We submit that the ICJ has the better of this argument.²²² Again, we do not disagree that there is an intuitive appeal to the *Tadić* approach; for example, the ICJ’s holding to the contrary was criticized by Marina Spinedi in an excellent article.²²³ However, in our view, *Tadić* is right only to the extent that if the acts of the Bosnian Serbs were attributable to Serbia then the conflict would surely have been international in nature, since the Bosnian Serbs would not have been a non-state actor at all, but agents of Serbia. In other words, attribution *suffices*, but it need not be *necessary*, for internationalization.²²⁴ IHL, as a distinct body of primary rules, can adopt its own solution regarding the link between a state and a non-state actor that would suffice for internationalization of a conflict, and that link need not be attribution as a matter of state responsibility.²²⁵

²¹⁹ For more see Milanovic, *supra* n.217, at 584-585, as well as M. Milanovic, ‘State Responsibility for Genocide: A Follow-Up’, (2007) 18 *EJIL* 669.

²²⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, [2007] ICJ Rep 43.

²²¹ *Ibid.*, at paras. 404-405.

²²² See also Akande, *supra* n.79, at 31-33.

²²³ M. Spinedi, ‘On the Non-Attribution of the Bosnian Serbs’ Conduct to Serbia’, (2007) 5 *JICJ* 829.

²²⁴ See also Akande, *supra* n.79, at 33-35.

²²⁵ To clarify, we are not arguing for an IHL-specific set of *secondary* rules of attribution that would regulate state responsibility for violations of IHL. Rather, we are arguing for a set of *primary* rules of IHL that would better define IHL’s own scope of application. In short, if an IAC is defined as a use of force between two states,

In short, the internationalization of a *prima facie* NIAC in the first scenario set out above – an intervention into a civil conflict by a third state – depends on the nature of the relationship between the intervening state and a non-state actor. That relationship may, but need not be, attribution. A relationship of overall control, which does not suffice for attribution, may suffice for internationalization, as the ICJ itself allows.²²⁶

What then of our second scenario, where state A intervenes on the territory of state B against the non-state actor C? As we have seen above,²²⁷ if state B actually consents to the intervention the conflict can only be qualified as a NIAC. For the intervening state or states this is a cross-border NIAC, for the territorial state it is simply internal in nature. Conflicts in Iraq and Afghanistan after the establishment of their new governments, which gave consent to the participation of foreign troops in the conflict, provide good examples. Hence, when it comes to internationalization the only additional situation is one in which the territorial state does *not* give its consent to the foreign intervention. Consider in that regard the Israel/Hezbollah/Lebanon conflict in 2006 – how is it to be qualified?

We can initially treat this second scenario exactly like the first: so long as non-state actor C is under B's overall control or C's acts are attributable to B, there would be an IAC between states A and B. What first looks like a non-state actor is really a state actor, and what first looks like a NIAC is really an IAC. Thus, if the acts of Hezbollah were attributable to the state of Lebanon, for example because Hezbollah acted in the absence or default of official authorities in Southern Lebanon or because of the participation of Hezbollah in the Lebanese government,²²⁸ or if regardless of attribution Lebanon exercised overall control over Hezbollah,²²⁹ then the 2006 Israel/Hezbollah/Lebanon conflict would in fact simply have been an IAC between Israel and Lebanon.

But what if Hezbollah was not fighting on behalf of Lebanon? How would the conflict be characterized then? One solution would be to say that the conflict was then a mixed one: an IAC between Israel and Lebanon and a cross-border NIAC between Israel and Hezbollah (so long as there was 'protracted armed violence' between the two in Lebanon). Another view would be to say that the territorial state's *consent* to the foreign intervention, or lack thereof,

the primary rules of IHL would further develop this definition by saying that if state A exercises overall control over non-state actor B which is directly engaged in hostilities with state C, such control would qualify as an inter-state use of force for IHL classification of conflict purposes.

²²⁶ The *Tadić* overall control test was endorsed for the purposes of conflict qualification by the ICC Pre-Trial Chamber in *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06, 29 January 2007, at para. 211.

²²⁷ See *supra* Sections 4B(iii) and (iv).

²²⁸ See Articles 4, 5 and 9 of the ILC Articles on State Responsibility. Note that at the time of the conflict the Israel government made conflicting statements as to whether it considered the acts of Hezbollah to be attributable to Lebanon. On 12 July 2006 it thought that 'the Lebanese government, of which Hizbullah is a member, is trying to undermine regional stability. Lebanon is responsible and Lebanon will bear the consequences of its actions.' On 16 July 2006, 'Prime Minister Olmert emphasized that Israel is not fighting Lebanon but the terrorist element there, led by Nasrallah and his cohorts, who have made Lebanon a hostage and created Syrian- and Iranian-sponsored terrorist enclaves of murder.' See M. Milanovic, 'Self-Defense and Non-State Actors: Indeterminacy and the *Jus ad Bellum*,' *EJIL: Talk!*, 21 February 2010, at <http://www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/>.

²²⁹ This conclusion is unlikely on the facts, but there is also the possibility that some third state may have exercised such control, for example Syria or Iran, thereby complicating the qualification issue even further.

would have bearing on the matter.²³⁰ Note that there is little doubt that the very fact that state A uses force on the territory of state B without its consent creates an IAC between the two states, at least in addition to any separate conflict with the non-state actor.²³¹ Again, an IAC is *any* ‘difference arising between two States and leading to the intervention of members of the armed forces.’²³² Israel’s invasion of Lebanon initiated a conflict with Lebanon, *inter alia* by imposing a maritime blockade, not just with Hezbollah.²³³ This would have remained the case even if Israel limited itself strictly to attacking Hezbollah targets (which it did not), and Hezbollah fighters could perhaps be classified as civilians taking a direct part in hostilities in the IAC between Lebanon and Israel. Similarly, the 2008 incursions by Colombia into Ecuador in order to attack the FARC rebels could be qualified as an IAC between Colombia and Ecuador in which the FARC were civilians taking a direct part in hostilities, regardless of any institutional link between FARC and Ecuador; all that would matter is that Ecuador did not consent to the deployment of Colombian troops.

Relying on consent as an additional criterion for internationalization in our second scenario could greatly simplify the qualification analysis. We would only have a single IAC to deal with. It would not, however, be entirely without its problems. There are cases in which it is hard to say whether the territorial state consented to the foreign intervention or not because for political reasons that state wishes to maintain an ambiguous position. The best current example is that of the use of drones by the US military against Taliban assets on Pakistani territory, which the Pakistani government expressly neither condemns nor endorses. There can also be cases in which consent is given by the territorial state, but the intervening state exceeds the boundaries of that consent.

Moreover, the greater the cohesion of the armed group and its organizational independence from the government of the territorial state, the more artificial it would seem to label the conflict as a single IAC, even if the territorial state does not consent.²³⁴ For instance, while the Israeli intervention against Hezbollah in Lebanon significantly affected Lebanon itself, Colombia targeted FARC in the jungle, far away from any assets or the population of Ecuador. One could wonder whether the quality of the territory affected and the potential targets could also play a role in deciding on internationalization. What would be the use of the application of the rules of IAC in the Colombia/FARC/Ecuador scenario when the only potential addressees of those rules on one side of the conflict would be FARC irregulars? The NIAC regime would appear to be more appropriate, and would govern the hostilities between Colombia and FARC, while a parallel IAC between Colombia and Ecuador, while formally in effect, would have very little practical relevance.²³⁵ In the Israel/Hezbollah/Lebanon scenario, however, the exposure of the Lebanese civilian population and infrastructure to the

²³⁰ See, for example, Arimatsu, *supra* n.44, at 177, 184; Akande, *supra* n.79, at 48-51.

²³¹ See, for example, Kritsiotis, *supra* n.92, at 280-281.

²³² Pictet, *supra* n.66, at 23.

²³³ Note that this does not mean that we would be introducing *ad bellum* considerations into the *in bello* qualification framework. What matters is not the *lawfulness* of the use of interstate force, but only whether the territorial state *consented* to the use of force; the two are not necessarily one and the same. For example, it may well be that Israel had the right to self-defence under Article 51 of the UN Charter to engage Hezbollah in Lebanon. Considerations of proportionality aside, this would have made its invasion of Lebanon lawful under the *jus ad bellum*. But for IHL qualification purposes, all that would matter is that Lebanon did not consent to the intervention, with the use of force thereby initiating an IAC between the two states.

²³⁴ See Kress, *supra* n.6, at 253-254.

²³⁵ Cf. Lubell, *supra* n.77, at 110-111.

fighting would make internationalization a more viable option, and if not the conflict would at the very least be a mixed IAC/NIAC.²³⁶

Thus, whether consent should be a distinct criterion of internationalization in our second scenario, or whether that scenario should be treated exactly like the first, will be a matter of some controversy. In any event, we would caution against relying exclusively on the secondary rules of attribution in either scenario, as these general rules are not suited for this purpose and do not necessarily take into account IHL-specific policy considerations. Limiting internationalization strictly to those cases where the acts of a non-state actor could be attributed to a state would have a number of adverse consequences. Since the general rules of attribution are strict precisely because they need to be of general application, this would either greatly limit the number of possible cases of internationalized NIACs, or would lead to fragmentationist jurisprudential conflicts on attribution of the *Nicaragua/Tadic/Genocide* variety;²³⁷ it is good both for IHL and for general international law to separate internationalization from attribution.²³⁸

(iii) *Internationalization through redefinition* We have now dealt with internationalization of NIACs under the existing CA2 definition of IACs as conflicts between states. The other broad rubric of internationalization is that of IACs *redefined* as something other than conflicts between states, with the status of a non-state actor upgraded, so that the same privileges that international law recognizes to states and their agents are exceptionally extended to some other type of actor. This type of internationalization of necessity requires proof of some additional rule, whether based in treaty or custom; CA2 is not enough. There are several possible candidates for such a rule.

First, the only such rule which exists beyond any doubt is Article 1(4) AP I, on wars of national liberation.²³⁹ The rationale behind this rule is that a people fighting against racist foreign domination is legitimately entitled to be prospectively treated as a state, even if it is yet to realize external self-determination and create a new state. When AP I was drafted such conflicts were mostly a historical relic, as decolonization had already largely been completed. The only conflicts that could potentially qualify as such today are the Israeli-Palestinian one and the one in Western Sahara. However, this redefinition of IACs in AP I proved to be very controversial and was objected to by a number of states, who for that reason either refused to ratify AP I or did so with reservations.²⁴⁰ Accordingly, Article 1(4) has not achieved

²³⁶ See also Akande, *supra* n.79, at 52-53.

²³⁷ *Tadić* was, for instance, driven by a very strong double dynamic: in order to maximize international criminalization and the possibility of effective prosecution, the ICTY Appeals Chamber both held that war crimes exist in internal armed conflicts and wanted to allow as much as possible for the internationalization of these conflicts through the overall control test, thus hedging its bets in case the success of its first strategy was limited. It is precisely because of such a specific policy-driven context that the application of general rules of attribution is inappropriate, as the same dynamic might not replicate itself in other contexts, with international criminal law and IHL demanding their own sets of rules tailored to their particular needs.

²³⁸ The same argument can be made for the *jus ad bellum* context. See M. Milanovic, 'State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücker', (2009) 22 *LJIL* 307.

²³⁹ See, generally, Schindler, *supra* n.54, at 133 ff.

²⁴⁰ This was for example the position of the US government. In his Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, dated 29 January 1987 and reproduced in (1987) 81 *AJIL* 910-912, President Reagan refused to submit Protocol I to the Senate for ratification, stating that:

Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would

customary status.²⁴¹ Internationalization under this rule can occur *only* with respect to *prima facie* NIACs occurring in the territory of one of AP I's contracting parties which has not made a reservation to this provision.

Second, despite having fallen into disuse the recognition of belligerency did not necessarily fall into desuetude and may still have relevance in modern law.²⁴² Even historically such recognition was rarely explicit, i.e. made as such in a formal declaration, but was made implicitly, for example through the invocation of neutrality by third states. It is possible that such implicit recognition can operate today as well, if the relevant non-state actor is sufficiently state-like in its qualities and exercise institutional control over territory, thereby upgrading a NIAC into an IAC.²⁴³ One possible such recent example is that of the maritime blockade imposed by Israel on Hamas-controlled Gaza, resulting *inter alia* in the 2010 Mavi Marmara incident. A reasonable argument can be made that a maritime blockade, which involves the interdiction of the shipping on third states on the high seas, can only be effected in an IAC; it traditionally took place only in wars, and it necessarily involves a relinquishment by third states of their rights to the belligerents. Both the imposition of the blockade by Israel and any acquiescence by third states in it may be interpreted as recognitions of Hamas' belligerent status,²⁴⁴ accordingly transforming a *prima facie* cross-border NIAC between Israel and Hamas into an IAC.²⁴⁵ From the Israeli perspective, the problem here would be that the principle of equal application of IHL would grant *Hamas* the equal right to blockade Israel, if it had the factual ability to do so, not to mention that from a political standpoint its legitimacy may be perceived as having been accepted by Israel. This is at least one of the reasons why Israel argues that it is engaged in an 'armed conflict' with Hamas while studiously avoiding to qualify this conflict.²⁴⁶ For our present purposes we do not wish to claim conclusively that the Gaza blockade constitutes recognition of

automatically treat as an international conflict any so-called "war of national liberation." Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology.

²⁴¹ See, for example, Akande, *supra* n.79, at 21.

²⁴² See, in that regard, Y. Lootsteen, 'The Concept of Belligerency in International Law', (2000) 166 *MillRev* 109; Akande, *supra* n.79, at 22.

²⁴³ One should also bear in mind in that regard the possibility of *ad hoc* agreements under CA3, which do not amount to a recognition of belligerency but can bring IAC rules to bear.

²⁴⁴ See, for example, Lauterpacht, *supra* n.60, at 177: 'In particular, acquiescence in the exercise of the right of blockade may, in the absence of indications to the contrary, not improperly be regarded as recognition of belligerency'; Sandoz, *ICRC Commentary to Additional Protocols*, *supra* n.94, at 1320-1321: 'Tacit recognition of belligerency, which covers the majority of cases, can be deduced from government measures or attitudes towards an internal situation of conflict (for example, a blockade);' Neff, *supra* n.12, at 267.

²⁴⁵ See also in that regard, D. Akande, 'Legal Issues Raised by Israel's Blockade of Gaza', *EJIL: Talk!*, 2 June 2010, at <http://www.ejiltalk.org/legal-issues-raised-by-israels-blockade-of-gaza/>; K. Heller, 'Why is Israel's Blockade of Gaza Legal?', *Opinio Juris*, 2 June 2010, available at <http://opiniojuris.org/2010/06/02/why-is-israels-blockade-of-gaza-legal/>; K. Heller, 'The Civil War and the Blockade of Gaza (a Response to Posner)', *Opinio Juris*, 4 June 2010, available at <http://opiniojuris.org/2010/06/04/eric-posners-incomplete-editorial-on-the-blockade-of-gaza/>, and comments thereto.

²⁴⁶ See, for example, Israeli Ministry of Foreign Affairs, 'The Gaza flotilla and the maritime blockade of Gaza - Legal background,' 31 May 2010, available at http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Gaza_flotilla_maritime_blockade_Gaza-Legal_background_31-May-2010.htm.

belligerency,²⁴⁷ but merely to point out that a reasonable argument can be made to that effect and that the recognition of belligerency doctrine may still have some life to it.²⁴⁸

Third, as we have also seen above it is possible that a special rule of IHL has evolved that transforms armed conflicts in which IOs directly participate as parties into IACs when fighting states, even though IOs are not states themselves and would thus presumably be covered by default by the NIAC regime.. This is a difficult and complex question that we for reasons of space cannot develop here any further.

(iv) *Circumstances which do not lead to internationalization* Having now defined the circumstances which *do* lead to internationalization, we can briefly dispense with those that do not. Indeed, we have already dealt with all or some of them implicitly in our preceding discussion. First, the mere fact that hostilities cross state borders does not lead to internationalization. In terms of the CA2 definition it is not the location of the hostilities but the identity of the actors that creates an IAC.²⁴⁹ Outside of that definition there does not seem to be any practice in support of a rule that a conflict between a state and a non-state actor that crosses a border *ipso facto* becomes internationalized. On the contrary, there is no good reason of policy to grant privileged status to non-state actors merely because of the

²⁴⁷Note that the argument presumes that NIAC requirements of intensity and duration would already be independently met. For a critique of the belligerency argument, see especially D. Guilfoyle, 'The *Mavi Marmara* Incident and Blockade in Armed Conflict', (2011) 81 *BYIL* (forthcoming, available through Oxford Journals Advance Access), at 21-24. See also R. Buchan, 'The International Law of Naval Blockade and Israel's Interception of the *Mavi Marmara*', (2011) 58 *NILR* 209.

²⁴⁸ Note in that regard the Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (Palmer Committee Report), leaked by the New York Times and available at <http://graphics8.nytimes.com/packages/pdf/world/Palmer-Committee-Final-report.pdf>, which in paragraph 73 qualifies the conflict between Israel and Hamas as an IAC with a more-or-less political justification, but perhaps implicitly taking the recognition of belligerency route:

The Panel now turns to consider whether the other components of a lawful blockade under international law are met. Traditionally, naval blockades have most commonly been imposed in situations where there is an international armed conflict. While it is uncontested that there has been protracted violence taking the form of an armed conflict between Israel and armed groups in Hamas-controlled Gaza, the characterization of this conflict as international is disputed. The conclusion of the Panel in this regard rests upon the facts as they exist on the ground. The specific circumstances of Gaza are unique and are not replicated anywhere in the world. Nor are they likely to be. Gaza and Israel are both distinct territorial and political areas. Hamas is the de facto political and administrative authority in Gaza and to a large extent has control over events on the ground there. It is Hamas that is firing the projectiles into Israel or is permitting others to do so. The Panel considers the conflict should be treated as an international one for the purposes of the law of blockade. This takes foremost into account Israel's right to self-defence against armed attacks from outside its territory. In this context, the debate on Gaza's status, in particular its relationship to Israel, should not obscure the realities. The law does not operate in a political vacuum, and it is implausible to deny that the nature of the armed violence between Israel and Hamas goes beyond purely domestic matters. In fact, it has all the trappings of an international armed conflict. This conclusion goes no further than is necessary for the Panel to carry out its mandate. *What other implications may or may not flow from it are not before us, even though the Panel is mindful that under the law of armed conflict a State can hardly rely on some of its provisions but not pay heed to others* (emphasis added).

The italicized sentence is crucial here – if this is indeed an IAC, then Hamas fighters are presumptively combatants. This is obviously not a conclusion that Israel would like, or indeed would be likely to accept, as it essentially upgrades the status of Hamas from that of a terrorist organization to that of a government.

²⁴⁹ See also Guilfoyle, *supra* n.247, at 16-17; Holland, *supra* n.70, at 160.

transnational element, and as we have seen the existing framework is perfectly capable of accommodating various kinds of cross-border NIACs.

Similarly, the fact that a conflict erupts in an occupied territory between the occupying state and a non-state actor does not mean that this *prima facie* NIAC becomes internationalized. It is true that the Israeli Supreme Court in the *Targeted Killings* case, relying on the opinion of Professor Cassese, held to the contrary,²⁵⁰ as did the ICC Pre-Trial Chamber in *Lubanga*.²⁵¹ However, not only do these decisions not provide adequate reasoning for their holding, but there does not seem to be any relevant practice to support it.²⁵² Nor is it somehow warranted by logic. The occupation may well outlive the conflict that created it, as it did in the Israeli-Palestinian case. Why should a more or less unrelated outbreak of violence, whose actors are completely different, be treated as an IAC? Unless we follow the controversial logic of Article 1(4) AP I, why should the status of a non-state actor be upgraded to full belligerent rights if the actor is not fighting on behalf of any state? That two legal regimes would apply in parallel is not reason enough. As with cases of mixed or parallel armed conflicts, IHL can allow for the possibility of the simultaneous existence of occupation and of a NIAC in occupied territory.²⁵³

Finally, the mere fact that international or foreign forces are deployed in a certain territory does not of itself suffice for the internationalization of the whole conflict.²⁵⁴ As we have seen, the qualification of such situations depends on the existence, *vel non*, of the consent of

²⁵⁰ *Targeted Killings* *supra* n. 115, at para. 18:

The normative system which applies to the armed conflict between Israel and the terrorist organizations in the *area* is complex. In its centre stands the international law regarding international armed conflict. Professor Cassese discussed the international character of an armed conflict between the occupying state in an area subject to belligerent occupation and the terrorists who come from the same area, including the armed conflict between Israel and the terrorist organizations in the *area*, stating:

An armed conflict which takes place between an Occupying Power and rebel or insurgent groups – whether or not they are terrorist in character – in an occupied territory, amounts to an international armed conflict (A. CASSESE, *INTERNATIONAL LAW* 420 (2nd ed. 2005), hereinafter CASSESE).

This law includes the laws of belligerent occupation. However, it is not restricted only to them. This law applies in any case of an armed conflict of international character – in other words, one that crosses the borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation. This law constitutes a part of *ius in bello*. From the humanitarian perspective, it is part of international humanitarian law. That humanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (*lacuna*) in that law, it can be supplemented by human rights law.

²⁵¹ In *Lubanga*, the Chamber seemed to consider that occupation internationalizes any other conflict – see *Lubanga* Confirmation Decision, para. 220. In *Katanga*, the Chamber characterized the conflict as international without making explicit the legal basis for doing so; it considered the intervention by Ugandan troops in the Congo to have internationalized the conflict, but it is unclear whether it considered the relevant non-state armed groups to have been under Uganda's overall control, or whether the mere presence of foreign troops led to internationalization. The possibility of parallel conflicts was not discussed. See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07, 30 September 2008, at para. 240.

²⁵² For more see Milanovic, *supra* n.91, at 382-386. See also Guilfoyle, *supra* n.247, at 11- 17.

²⁵³ For a contrary view see Akande, *supra* n.79, at 18-19.

²⁵⁴ See, for example, Pejic, *supra* n.7, at 194.

the territorial state to the presence of the international forces and of their relationship with the relevant non-state actors.²⁵⁵ Thus, for instance, the fact that NATO intervened against Serbia in 1999, which was at the time fighting the KLA insurgency in Kosovo, does not mean that the whole conflict was internationalized. There was certainly an IAC between the NATO states and Serbia, but the NIAC between Serbia and the KLA would have been internationalized only if the NATO states exerted the necessary degree of control over the non-state actor.

D Parallel or mixed armed conflicts

We have already dealt extensively with parallel or mixed armed conflicts throughout the preceding analysis. In complex conflicts fought between a variety of state and non-state actors a mixed characterization may be unavoidable, as for example in Bosnia, Afghanistan or Libya. Internationalizing the whole lot may be an appetizing prospect, as the whole structure and accordingly the applicable law are simplified.²⁵⁶ That, however, may not always be possible, considering the criteria for internationalization that we have just examined. Similarly, as a matter of policy, treating a complex conflict purely as an IAC may risk imposing obligations that were made for and fit states on non-state actors, obligations that they may well feel to be over-burdensome and hence simply ignore. Consequently, rather than treating a particular situation as a singular IAC there may be sound reasons to treat it as a network of separate conflicts or bilateral relationships, whose characterization would depend foremost on the identity of the actors.²⁵⁷

The possibility of mixed or parallel conflict is generally accepted in the case law, as for instance in *Tadić*. Perhaps the first such example was given by the ICJ in *Nicaragua*, when it stated that:

The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character, whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.²⁵⁸

While acknowledging that it has not been without its opponents,²⁵⁹ we think the category of mixed conflicts to be so well-established that we will not belabour on it in detail beyond the analysis that we have already provided. Suffice it to say that mixed or parallel conflicts serve as a fall-back category of sorts in cases in which arguments in favour of internationalization fail. Accordingly, those authors who see the process of internationalization in much broader terms than we do will also see the category of mixed conflicts as either misplaced or undesirable. But if we are correct about the current scope of the two main processes of internationalization – under the basic IAC definition or through redefinition – then the incidence of mixed conflicts will invariably be relatively high.²⁶⁰

²⁵⁵ See also Stewart, *supra* n.9, at 328-335 (discussing relevant ICTY case law).

²⁵⁶ Cf. Holland, *supra* n.70, at 177-180.

²⁵⁷ See Schindler, *supra* n.54, at 150; Greenwood, *supra* n.6, at 270 ff; Kress, *supra* n.6, at 256-257; Guilfoyle, *supra* n.247, at 17-18.

²⁵⁸ *Nicaragua*, at para. 219.

²⁵⁹ See, for example, T. Meron, 'Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua's* Fallout', (1998) 92 *AJIL* 236.

²⁶⁰ See also Akande, *supra* n.79, at 37-38.

E Transnational armed conflict

This brings us to our final topic. The increased political relevance of the activities of transnational armed or terrorist groups, frequent cross-border interventions of states against such groups, and particularly the controversies regarding the legal characterization of the US ‘global war on terror’ prompted some authors to contemplate a reform of the IAC/NIAC duopoly of armed conflict by introducing a third category, variously called transnational armed conflict (TAC) or extra-state armed conflict.²⁶¹ Different authors offer different reasons for and different conceptions of this third category. Lumping them all together, as we are about to do, comes at the cost of diminishing the sophistication of some of their arguments. That said, we believe that this can be safely done for our present taxonomical purposes, and that the purported third category of armed conflict raises two basic questions that we will try to briefly address. First, *de lege lata*, does it exist in the modern *jus in bello*? Second, *de lege ferenda*, should it exist even if we do not already have it?

(i) *Does TAC exist de lege lata?* The first of these questions is easier to answer. Hardly anybody suggests that this new type of conflict already exists as a distinct threshold in positive IHL. It would not, in our opinion, be reasonably possible to argue differently. A third category cannot be inferred from the treaty rules of IHL.²⁶² None of the conventions mentions nor regulates it. There is no state practice or *opinio juris* which would suggest that such a category of conflicts emerged in customary international law independently of conventional IHL or that the states actually desire the emergence of such a category. This is, of course, not to deny the controversies regarding the qualification of the ‘war on terror’ or other recent conflicts between states and non-state actors. But, as far as states have formally expressed their positions regarding these controversies, they have exclusively limited themselves to arguing about qualification under the existing IAC/NIAC framework, as is well shown the example of the United States, to which we will turn shortly. One cannot impute to states legal positions that they have themselves not taken.²⁶³ Hence, at least for the time being, any discussion about TAC or some other third category can be had only at the level of *de lege ferenda* policy arguments either in favour or against its emergence.

Note, however, that one can speak of ‘transnational armed conflict’ in a different sense, as a purely *descriptive* category rather than as a *legal* concept.²⁶⁴ Just like we have used the notion of ‘cross-border NIAC’ to better describe a complex factual situation to which the existing law can still apply, so can one deploy the idea of TAC to advance our understanding of a peculiar modern phenomenon. Such use of the term may or may not be useful, but it is certainly legitimate, so long as one avoids any confusion with a purported third legal threshold of armed conflict. One can, in short, pin the TAC label on any given situation, but

²⁶¹ See, for example, G. Corn, ‘Making the Case for Conflict Bifurcation in Afghanistan: Transnational Armed Conflict, Al Qaida, and the Limits of the Associated Militia Concept’, (2009) 85 *US Naval War College International Law Studies* 181; G. Corn and E. Talbot, ‘Transnational Armed Conflict: A Principled Approach to the Regulation of Counter-Terror Combat Operations’, (2009) 42 *IsLR* 46; R. Schondorf, ‘Extra - State Armed Conflicts: Is there a Need for a New Legal Regime?’, (2003) 37 *NYUJIntlL&Pol* 61; E. Posner, ‘Terrorism and the Laws of War’, (2005) 5 *ChiJIntlL* 421.

²⁶² Thus, the ICRC’s official position is that ‘no other type of armed conflict exists’ but for IAC and NIAC. See ICRC, ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law’, *supra* n.155.

²⁶³ *Nicaragua*, para. 207. For a discussion see D. Kritsiotis, ‘Arguments of Mass Confusion’, (2004) 15 *EJIL* 233, at 238.

²⁶⁴ For works which use the TAC label in this descriptive sense, see, for example, Kress, *supra* n.6;

if that situation cannot be qualified as either an IAC or a NIAC it is not an armed conflict in the legal sense of the word.²⁶⁵

(ii) *Should TAC exist as a separate legal category of armed conflict?* This brings us to the second, more complex question regarding TAC or some other third legal category of armed conflict – do we need it? This question is clearly far more open to disagreement than the first. There are two related and overlapping reasons, or groups of reasons, for arguing in favour of such a category. First, if the existing regime has gaps in coverage, i.e. if there are some situations that look like armed conflict, walk like armed conflict, and quack like armed conflict, yet legally are *not* armed conflict, this is something that we need to remedy, if nothing else then for humanitarian reasons.²⁶⁶ Second, even if there are no gaps in coverage, the transnational context may warrant the modification of existing substantive rules so as to provide a better fit with reality and/or remove some of the constraints of the IAC/NIAC duopoly.

(a) Is there a gap that TAC could fill? It is likely that cross-border conflicts between states and non-state armed groups were not envisioned by the drafters of the Geneva Conventions and their Protocols simply because of their rarity and lack of political relevance at the time. Accordingly, it can be reasonably argued that the specific circumstances under which these conflicts are waged largely escape the binary Geneva framework of IHL or do not fit it well.²⁶⁷ And, since cross-border armed conflicts are a factual novelty, they should be followed by legal innovation. Authors advocating for TAC point out that the responsiveness of IHL to new realities is precisely what has kept this body of law current and relevant.²⁶⁸

While it is probably true that the drafters of the Conventions and Protocols did not have cross-border armed conflicts between states and non-state armed groups in mind, their novelty is exaggerated; their incidence has been growing for at least 30 years.²⁶⁹ States have had plenty of time to create special treaty or customary rules governing these conflicts if they deemed it necessary. What is relatively new is the increasing political relevance of these conflicts, which now have bearing on the interests of the most powerful members of the international community. But, as we have seen, even in the past decade states have not shown a particular desire for a third legal category.

In that regard, although the CA3 notion of NIAC was clearly intended to cover situations of internal strife and it would be ahistorical to claim otherwise, this does not mean that the text of the treaty, its object and purpose, and its customary gloss cannot reasonably apply to cross-border situations.²⁷⁰ The direction of both state practice and scholarship has indeed been towards such stretching of the idea of NIAC, the historical intentions of the drafters notwithstanding. And this *is* new. Admittedly, it is somewhat artificial to call a situation in which the United States fights the Taliban in Afghanistan, or Israel fights Hezbollah in Lebanon, a non-international armed conflict. But this does not mean that the category does

²⁶⁵ See *supra* Section 3D.

²⁶⁶ See, for example, Pejic, *supra* n.7, at 203 (discussing the ‘gap theory’).

²⁶⁷ See Schondorf, *supra* n.261, at 51.

²⁶⁸ See Corn, *supra* n.261, at 184.

²⁶⁹ For the enumeration of the most prominent examples prior to 9/11 see Schondorf, *supra* n.261, at 9; H.P. Gasser, ‘Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon’, (1983) 33 *AmULRev* 145, at 155-156; C. Le Mon, ‘Unilateral Intervention by Invitation in Civil War: The Effective Control Test Tested’, (2003) 35 *NYUJ IntlL&Pol* 741.

²⁷⁰ See also Lubell, *supra* n.77, at 122-123.

not do the job, together with the remainder of the IAC/NIAC conceptual apparatus, i.e. internationalized and mixed conflicts.²⁷¹ If this apparatus is applied as we have suggested in this paper, few if any gaps will remain, particularly when it comes to more orthodox or large-scale instances of violence, as in our Israel/Hezbollah/Lebanon and Colombia/FARC/Ecuador examples. But this serves only to better delineate the two lines of inquiry that we have identified: even accepting all the varieties of cross-border NIAC, will there still be situations which will not be but should be characterized as an armed conflict? And even if not, could TAC introduce new rules that would overcome any substantive deficiencies in treating these situations as NIACs?

(b) Shifting dynamics of the perception of IHL In order to proceed along these two lines of inquiry we must first understand some relatively recent shifts in the underlying legal and political dynamics. As originally designed and through most of its history IHL was seen by states as a system of *limitations* on their sovereignty and freedom of action, particularly so when it comes to the law of internal armed conflict. In other words, the *baseline* for international regulation from the classical period onwards was that states had the unrestrained freedom to wage war, both against each other and internally, and the law of war evolved precisely to impose such restraints, first and foremost in the inter-state context. As we have seen, states resisted the regulation of internal conflict because of the fear – founded or not – that it would impose limits on how they could deal with rebels, and confer on these rebels some rights in international law. It is this sovereignty-induced concern of states that explains the IAC/NIAC dichotomy in the modern law and the principal features of NIACs, such as the *Tadic* intensity and duration criteria and the distinction between NIACs and mere riots or disturbances. Hence, it was rarely if ever in the interest of a state embroiled in internal conflict to recognize the existence of such conflict – it simply *did not want* IHL to apply.²⁷² This is why, for instance, the United Kingdom consistently denied the existence of a NIAC in Northern Ireland, or why it made a reservation to Article 1(4) AP I which explicitly excluded acts of terrorism, whether concerted or in isolation, from the scope of armed conflict.²⁷³

Now, however, human rights have gradually replaced, or are in the process of replacing, the idea of unrestrained freedom of action as the baseline for regulation, as much as *culturally* as formally. Instead of IHL being the only set of limitations on states, a more rigid, demanding and legalistic set of limitations has emerged, particularly in the internal context. States, or at least some states, have accordingly stopped seeing IHL as a constraining body of rules whose application they want to avoid in their engagements with non-state actors.²⁷⁴ Rather, they have progressively started seeing IHL as an *authorizing* body of rules liberating them or derogating from human rights or other constraints, often on the dubious basis of the *lex*

²⁷¹ See also Pejic, *supra* n.7, at 204-205.

²⁷² See Sassoli, *supra* n.202, at 7-8.

²⁷³ ‘It is the understanding of the United Kingdom that the term “armed conflict” of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation. The United Kingdom will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under paragraph 3 of Article 96 unless the United Kingdom shall have expressly recognised that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the type to which Article 1, paragraph 4, applies.’ Reservation of 28 January 1998, available at <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>.

²⁷⁴ Cf. Lubell, *supra* n.77, at 123-124.

specialis principle.²⁷⁵ For example, while IHL targeting or detention rules evolved as limitations (e.g. you must not deliberately target civilians),²⁷⁶ they are now seen as permissive rules authorizing departures from human rights (e.g. you may kill an enemy fighter even if he does not pose an imminent threat; you may detain preventively for reasons of security even if human rights law generally prohibits preventive detention).²⁷⁷

To see how these dynamics evolved we need only look at US policy post-9/11.²⁷⁸ The US government from the outset decided to cast the Al-Qaeda threat and US response as a ‘war’ for both domestic and international purposes, in order to get the detention and targeting authority that it thought it needed and thus derogate from any applicable rules of domestic constitutional law as well as international human rights law. The moniker ‘global war on terror’ denoted a supposed IHL-conflict between the US on one side and Al-Qaeda and its affiliates on the other. Initially, the US characterized this conflict as an IAC, albeit a strange sort of IAC which transcended the Geneva CA2 definition as one of its parties was not a state. In the US government’s view, the CA2 definition did not create ‘field pre-emption’, i.e. was not all-encompassing; put in more traditional international legalese, the notion of IAC was wider under customary law.²⁷⁹ This, as we have seen, was a completely ahistorical argument; the notion of IAC was *invented* in Geneva and replaced the equally inter-state notion of war, while there was no evidence that it was redefined either through treaty or through custom in this particular fashion.²⁸⁰ The administration also considered that the conflict could not be a NIAC as it transcended the borders of a single state.²⁸¹ In *Hamdan*, the US Supreme Court rejected the government’s arguments and found that the conflict with Al-Qaeda could not be an IAC, and in an ambiguous holding that we have already examined qualified it as a NIAC.²⁸² The position of both the Bush and Obama administrations post-*Hamdan* has hence been that the conflict with Al-Qaeda is some sort of *global* NIAC, which is territorially unlimited in scope.

Even under the framework that we have outlined above, which allows for various kinds of cross-border NIACs, the idea of a global NIAC makes sense only as an oxymoron. Any NIAC requires the existence of protracted armed violence which by definition has to take place *somewhere*, i.e. has to be localized at least to the territory of one state. As we have seen, that violence can spill over to the territory of another state (which need not necessarily

²⁷⁵ For more see M. Milanovic, ‘Norm Conflicts, International Humanitarian Law and Human Rights Law’, in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, (Oxford University Press, 2011) 95.

²⁷⁶ See the chapter by David Turns in this volume

²⁷⁷ See, for example, Bellinger and Padmanabhan, *supra* n.182 (repeatedly referring to targeting and detention authority under IHL, and identifying gaps of such authority in NIACs, which they feel is needed). See also Kress, *supra* n.6, at 260 (speaking of states ‘availing themselves of the wider powers they can derive from the application of the law of non-international armed conflict (compared with international human rights law) than they are concerned by the restraining effect of the ensuing obligations.’). See the chapter by Arjen Vermeer in this volume.

²⁷⁸ In that regard, see especially K. Anderson, ‘Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a “Legal Geography of War”,’ Hoover Institution (2011), available at <http://ssrn.com/abstract=1824783>.

²⁷⁹ *Hamdan v. Rumsfeld*, Government Brief on the Merits, available at <http://www.hamdanvrumfeld.com/HamdanSGmeritsbrief.pdf>, at 26.

²⁸⁰ See also Kress, *supra* n.6, at 255; Pejic, *supra* n.107, at 344-347; Sassoli, *supra* n.202, at 4-5; Lubell, *supra* n.77, at 96.

²⁸¹ See Pejic, *supra* n.7, at 195.

²⁸² See *supra* Section 3D.

be adjacent to the primary state), but there has to be a *nexus* to the protracted violence in the primary state. Thus, while one can safely speak of a NIAC between the United States and the Taliban and other armed groups in Afghanistan and once in Iraq, and while that conflict can spill over into say Pakistan or any other country, the existing legal framework does not seem to allow for a construction as amorphous as a global NIAC,²⁸³ particularly one in which a loose terrorist network such as Al-Qaeda is treated as a single organizational entity and belligerent party.²⁸⁴

The US position has had little traction outside the US itself. Within it, however, the conversation is very different. Bearing in mind that all branches of the US government and all major groups within the two main political parties accept the premise of a global war, denying this premise is pretty much a non-starter, even in academic circles, to the extent that academics want their work to have practical relevance and exert some influence on US policy. Despite the low quality of the reasoning of the major US Supreme Court cases on point – indeed the lack of *any* real reasoning or meaningful engagement with modern IHL – they all either hold or assume the existence of an armed conflict with Al-Qaeda, however defined.²⁸⁵ That assumption now seems to be set in stone, and has been built upon by a multitude of lower courts deciding *habeas corpus* cases from Guantanamo or elsewhere. To the extent that those of us outside the United States want to engage in the legal conversation within it, accepting or at least not continuously challenging that assumption may seem the most expedient course. The divergence of views has become so insurmountable that for some, at least, creating a new threshold of TAC may provide a viable mediating option.

(c) The ‘costs’ in recognising a NIAC This new preparedness of the US not only to accept, but to positively *desire* the legal recognition of an armed conflict with a non-state actor does not come only from the shift in perception of IHL from a limiting to an authorizing body of rules. While in traditional, purely internal NIACs it is in the state’s interest to deny the existence of the NIAC as IHL can be perceived as legitimizing rebels fighting against its authority and as an admission of its weakness and inability to exert a monopoly on physical force throughout its territory, such sovereignty concerns can have much less relevance in a cross-border context. When the US fights the Taliban in Afghanistan, the Taliban are challenging or trying to topple the Afghan government, but they obviously have no such impact on US soil. When Israel fights Hezbollah in Lebanon, Hezbollah is not a direct threat to its own sovereignty, whatever it may be to Lebanon’s. And when the US targets Osama bin Laden in Pakistan, or Anwar Al-Awlaki in Yemen,²⁸⁶ it is the sovereignty of these states rather than that of the US itself that is at issue. In other words, in a foreign intervention scenario it is politically far less costly for the intervening state to recognize the existence of a NIAC – or, perhaps, some third category of armed conflict.

²⁸³ See Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd edn, (Cambridge: Cambridge University Press, 2010), at 56: ‘from the vantage point of international law ... a non-international armed conflict cannot possibly assume global dimensions.’

²⁸⁴ See also Kress, *supra* n.6, at 261; Ramsden, *supra* n.88, at 390; Vite, *supra* n.70, at 92-93; Pejic, *supra* n.7, at 196; Lubell, *supra* n.77, at 114-121.

²⁸⁵ See, for example, Bellinger and Padmanabhan, *supra* n.182, who do not seriously even entertain the idea that there is no global armed conflict with Al-Qaeda as such, and in a similar vein L. Blank, ‘Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat’, (2010) 39 *GaJIntl&CompL* 1.

²⁸⁶ See, generally, Ramsden, *supra* n.88; R. Chesney, ‘Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force’, (2010) 13 *YIntlHL* 3.

(d) Evaluating TAC Bearing these policy considerations in mind we can better evaluate any benefits that TAC could bring to the existing framework of armed conflict. First, there are few if any good reasons to create a new category for larger scale cross-border conflicts between states and non-state actors, as, for example, with the US against the Taliban in Afghanistan or Israel against Hezbollah in Lebanon. The cross-border NIAC sub-type seems perfectly capable of handling such a scenario, particularly bearing in mind that all or some parts of the conflict may become internationalized, and that an IAC would exist at least in parallel in cases where one state intervenes on the territory of another without its permission, protecting the latter state's civilians, infrastructure and cultural objects, while the law of belligerent occupation would also apply if such an occupation is established. This admittedly eclectic mix of overlapping regimes is messy, but not inadequate, nor would putting a TAC label on it somehow significantly improve it.²⁸⁷ Moreover, in the era of convergence of IAC and NIAC one can question the desirability of the emergence of yet another type of armed conflict with its own set of norms which would fragment rather than unify this area of law, even if the convergence projects has already (over?) reached its safe limits. Whether one fully accepts the ICRC's contention that most of the customary rules are now the same in both IAC and NIAC, the necessity of creating an entirely new type of conflict with its own set of rules is doubtful, while introducing an additional category of conflicts (except, again, in a purely descriptive sense) would necessarily bring even more uncertainty into the conflict qualification exercise.²⁸⁸

There is, however, one particular factual scenario in which the possible utility of TAC might be at its highest – that of a relatively isolated or sporadic use of force by a state against a diffuse and decentralized transnational non-state group. Consider, again, the targeted killings of Osama bin Laden and Anwar Al-Awlaki, that the United States sees through the prism of armed conflict. As we have explained above, unless a nexus can be shown between these individuals and uses of force to an established NIAC, i.e. protracted armed violence in Afghanistan, Pakistan, or Yemen, the targeted killings cannot be said to have taken course in a NIAC. Let us assume *arguendo* that no such nexus existed on the facts of those particular cases.²⁸⁹ If so, the killings – at least that of Al-Awlaki, to which Yemen consented – did not take place in any legally cognizable armed conflict, within the framework that we suggest in this chapter. Hence, the only two applicable bodies of international law would have been the *jus ad bellum* and human rights law, which in our view applies extraterritorially.²⁹⁰ From the *jus ad bellum* standpoint, the lawfulness of each killing would depend in whether the territorial state gave its consent to the use of force, and if not, whether the US could make a valid self-defence claim in justification.²⁹¹ From the human rights standpoint, the lawfulness of the killing would depend above all on whether the US exhausted all practicable non-lethal

²⁸⁷ Note, for instance, Schondorf's argument that in TACs civilians could be protected under rules applicable in IACs, while fighters should be treated as they are in NIACs, in essence making TACs more protective for the civilian population than NIACs. See Schondorf, *supra* n.261. Again, however, for reasons that we give above this potential increase in protection does not seem to be all that large. More importantly, to the extent that TAC might be appealing for states this is *not* because it would be *more* protective than NIAC. See Sassoli, *supra* n.202, at 22-23.

²⁸⁸ See also Kress, *supra* n.6, at 257-258; Sassoli, *supra* n.202, at 25.

²⁸⁹ For a detailed argument that Al-Awlaki was killed in the context of a NIAC in Yemen, see Chesney, *supra* n.286, at 31-34.

²⁹⁰ See, generally, M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, (Oxford: Oxford University Press, 2011).

²⁹¹ See the chapter by Dino Kritsiotis in this volume.

means in order to capture the dangerous individual in question before resorting to deadly force.²⁹²

That is not, of course, how the United States sees the matter. It consistently denies that human rights treaties can apply extraterritorially. But – perhaps paradoxically considering its formal rejection of a human rights baseline in this scenario – it both sees IHL as a grant of authority and sees no downside to its application as its own sovereignty is unaffected, and hence deploys the notion of a global NIAC. Moreover, it sees this grant of authority as relevant not only for the *jus in bello*, but also for the *jus ad bellum*. As John Brennan, President Obama’s chief advisor on terrorism stated in a recent speech:

As the President has said many times, we are at war with al-Qa’ida. In an indisputable act of aggression, al-Qa’ida attacked our nation and killed nearly 3,000 innocent people. And as we were reminded just last weekend, al-Qa’ida seeks to attack us again. *Our ongoing armed conflict with al-Qa’ida stems from our right—recognized under international law—to self defense.*

An area in which there is some disagreement is the geographic scope of the conflict. The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to “hot” battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa’ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa’ida and its associated forces *without doing a separate self-defense analysis each time*. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments *are unwilling or unable to take the necessary actions themselves*.²⁹³

While acknowledging that Mr Brennan is himself not a lawyer, this is in fact the fullest articulation to date of the Obama administration’s legal position on extraterritorial uses of force against Al-Qaeda members and affiliates.²⁹⁴ And it is here – even if we dismiss as mere rhetorical flourish some legally truly dubious points, for example that the US is at ‘war’ with a non-state actor which committed an ‘act of aggression’ – that we can see the work that the idea of global armed conflict does as a matter of US policy. Note the persistent conflation between the *jus ad bellum* and the *jus in bello*. The armed conflict thus *stems* from the right to self-defence, even though the two are neither legally nor logically interrelated; whether the US and Al-Qaeda are *factually* in armed conflict does not depend one bit on whether the US has the *right* to pursue Al-Qaeda, or has exceeded that right. But there is a policy behind this conflation – the US needs this idea of persistent armed conflict in order to have ‘the authority to take action against al-Qa’ida and its associated forces *without doing a separate self-defense analysis each time*.’ Thus, if Anwar Al-Awlaki was a member of Al-Qaeda he could

²⁹² Cf. Leiden Policy Recommendations on Counter-Terrorism and International Law, 1 April 2010, at <http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf>, paras. 38-48, 75-77.

²⁹³ Remarks of John O. Brennan – As Prepared for Delivery, Assistant to the President for Homeland Security and Counterterrorism, Program on Law and Security, Harvard Law School, 16 September 2011 (emphasis added), quoted in full in M. Lederman, ‘John Brennan Speech on Obama Administration Antiterrorism Policies and Practices’, *Opinio Juris*, 16 September 2011, at <http://opiniojuris.org/2011/09/16/john-brennan-speech-on-obama-administration-antiterrorism-policies-and-practices/>.

²⁹⁴ This speech elaborates on a prior statement by Harold Koh, the State Department Legal Adviser, on which see especially Ramsden, *supra* n.88, at 388-389

have been killed by the US, even if Yemen had not consented, and even if Al-Awlaki was not himself involved in any ongoing or imminent armed attack against the US, so long as Yemen was unwilling or unable to apprehend him. Note also how the unwilling or unable test is imported from self-defence analysis, even though this is an analysis that the US supposedly does not have to make!²⁹⁵

This is, we believe, a deeply flawed, and even dangerous position for the US government to take. It is flawed because even if an armed conflict is ‘global’ in scope this does not obviate the need for a *jus ad bellum* justification if a particular use of force infringes on the territory of some other state without its consent. It is dangerous because its conflation of the *jus ad bellum* and the *jus in bello* can have unintended ripple consequences and undermine the whole structure of the modern law of war.²⁹⁶

That said, and the *jus ad bellum* aside, a case could be made that IHL should cover even such isolated targeted killings. Especially if the argument that human rights treaties apply extraterritorially is rejected, IHL could not merely provide states with authorization to use deadly force that they desire, but also some meaningful humanitarian protection.²⁹⁷ And it is perhaps precisely TAC that could fill this gap, in essence serving the same purpose as the current US construction of a global NIAC while explicitly dispensing with the *Tadić* criteria of intensity and duration.²⁹⁸ A TAC could thus be defined as any use of force between a state and a non-state actor outside that state’s borders.

The desirability of such a low threshold of TAC is ultimately a matter of policy and value judgment. For our part, we remain unpersuaded. To the extent that there are any gaps in need of filling, human rights – applied flexibly – appear to be far better suited to the task,²⁹⁹ as do other branches of international and municipal law.³⁰⁰ Similarly, while it is easy to see why a low threshold of TAC would be in the interest of states wishing to use force extraterritorially against non-state actors, it is also hard to see any principled reason why the higher *Tadić* threshold should remain for instances of larger scale violence, external or internal, and how one could prevent the collapse of any NIAC threshold altogether.³⁰¹

In sum, we maintain that the existing binary framework of IHL is capable of responding to the challenges posed by modern conflicts. We say so without making an appeal to some sort of overly defensive conservatism. While the character of modern armed conflicts has changed

²⁹⁵ The unwilling and unable test has generally been applied in the literature as part of the necessity analysis to situations in which a non-state actor has committed or is committing an armed attack, but its acts are not attributable to any state. But the test is *not* generally applied in situations in which there is no armed attack, and no consequent specific self-defence claim. See, generally, Kress, *supra* n.6, at 248-252; K. Trapp, ‘Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors’, (2007) 56 *ICLQ* 142; M. Schmitt, ‘Responding to Transnational Terrorism under the *Jus ad Bellum*: A Normative Framework’, in Schmitt and Pejic, *supra* n.65, 157, at 176 ff.

²⁹⁶ See *supra* Section 3A.

²⁹⁷ Cf. Chesney, *supra* n.286, at 36-38.

²⁹⁸ See, for example, comments by M. Lederman to A. Margalit, ‘The Bin Laden Killing: Clarifying the Normative Framework(s) Governing the ‘War on Terror’?’, *EJIL: Talk!*, 12 October 2011, at <http://www.ejiltalk.org/the-bin-laden-killing-clarifying-the-normative-frameworks-governing-the-war-on-terror/>; M. Lewis, ‘Drones and the Boundaries of the Battlefield’, (2011) 47 *TexIntLLJ* (forthcoming), draft available at <http://ssrn.com/abstract=1917461>, at 7-8, 11 ff.

²⁹⁹ For more see Milanovic, *supra* n.290.

³⁰⁰ See also Sassoli, *supra* n.202, at 25-27.

³⁰¹ See also R. Geiss, ‘Asymmetric Conflict Structures’, (2006) 88 *IRRC* 757; Lubell, *supra* n.77, at 129-131.

significantly, and the political, technological, strategic and tactical changes may have been great, they do not *ipso facto* require radical changes to the existing legal framework as it has evolved through state practice.³⁰² Despite some viable policy arguments in favour of recognizing TAC as a third type of conflict, the arguments against it are stronger, even if reasonable people can disagree. We do not think, however, that there can be reasonable disagreement with regard to the non-existence of TAC *de lege lata*, unless TAC is seen purely as a descriptive category.

5 Conclusion

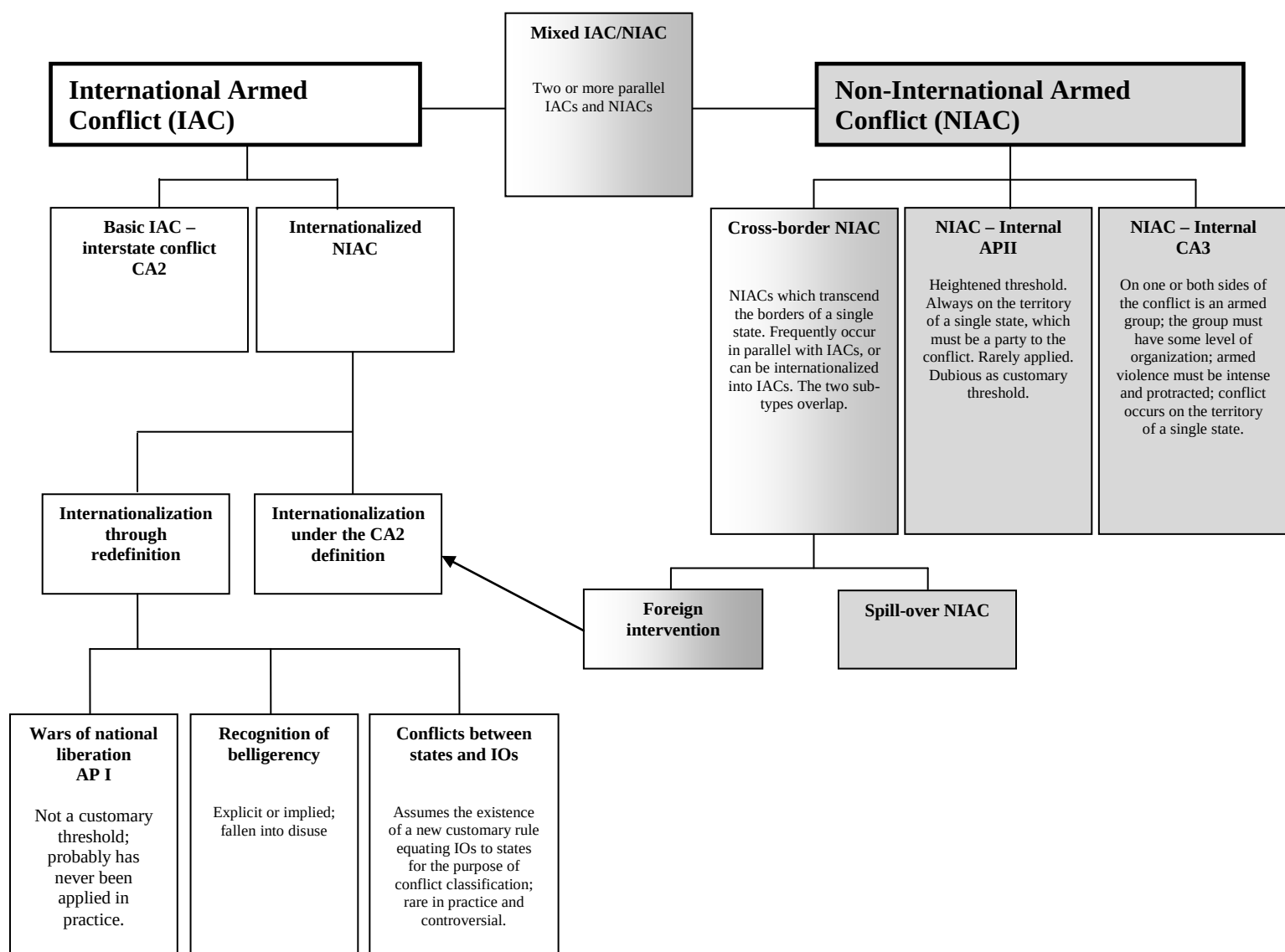
The apparent simplicity of the IAC/NIAC dichotomy belies the true complexity of the conflict classification exercise in modern IHL. Again, our main purpose in writing this chapter was to clarify as much as possible the conceptual foundations of the taxonomy of armed conflict, rather than advocate for one particular position or the other. We hope to have succeeded in pointing out areas of reasonable disagreement, as well as those in which such disagreement does not seem to be possible. This, we also hope, will allow discussions on the classification of specific problematic situations to progress further, as clarifying our common vocabulary lessens the odds of us speaking past each other. And while these taxonomical arguments are often formalistic and sterile, they are with us to stay for the foreseeable future, despite all of the successes of the humanity-driven project of unifying the substantive laws of IAC and NIAC.³⁰³ Because classification still crucially affects the status of the parties to the conflict and their perceived legitimacy, it remains a function of states' interests and their particular policy preferences which may differ in any given situation.³⁰⁴ In principle, however, so long as states remain unwilling to extend the same belligerent rights to organized non-state actors that they claim for themselves, the dichotomy remains, and with it the need to approach threshold questions of application in a coherent and systematic way.

³⁰² For a similar conclusion regarding substantive rather than threshold issues, see especially Geiss and Siegrist, *supra* n.147.

³⁰³ As acknowledged, for example, by one of the main authors of the ICRC customary IHL study: 'The divide between law on international and non-international armed conflicts, in particular concerning the conduct of hostilities, the use of means and methods of warfare and the treatment of persons in the power of a party to a conflict, has largely been bridged. But this is not to say that the law on international and non-international armed conflicts is now the same. Indeed, concepts such as occupation and the entitlement to combatant and prisoner-of-war status still belong exclusively to the domain of international armed conflicts.' J-M Henckaerts, 'Customary International Humanitarian Law: A Response to US Comments,' (2007) 89 *IRRC* 473, 487.

³⁰⁴ See also N. Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War,' (2004) 43 *Columbia JTL* 1.

Annex: Schema of Armed Conflict



(p. 81) 4 General Principles of International Humanitarian Law

4.01

The right of the parties to an armed conflict to choose means (Article 22 HagueReg) and methods (Article 35, para. 1 AP I) of warfare is not unlimited. It is particularly prohibited to employ means or methods which are intended or of a nature:

- to cause superfluous injury or unnecessary suffering (Article 23 lit. e HagueReg; Article 35, para. 2, AP I);**
- to harm military objectives, civilians, or civilian objects without distinction (Article 51, paras 4 and 5, AP I; see below, sub-Chapter III 2); or**
- to offend elementary principles of humanity.**

1. General. The first sentence reproduces the fundamental maxim of humanitarian rules that constitutes the basis for any regulation of methods and means of warfare.¹ This formula was adopted in Article 22 of the 1899 and 1907 Hague Regulations. It also appears almost verbatim in Article 35, para. 1, AP I and in the Preamble of the UN Weapons Convention. The belligerent's limited right in the choice of means and methods echoes the protection war victims enjoy under what the Martens Clause proclaimed the 'principles of international law derived from established custom, from the principles of humanity, and from the dictates of public conscience'. It is only justifiable to curtail the objective of humanizing warfare in so far as military necessity inevitably requires certain military action. This justification is subject to the further condition that the damage inflicted must be proportionate to the military advantage sought.²

2. Prohibition against Unnecessary Suffering. The prohibition against *maux superflus*—that is, against weapons and materials causing excessive suffering—is an old principle indeed.³ One precursor to this principle took the form of a ban on poisoned weapons and on the use of poison as a means of warfare, a notion already deeply rooted in medieval custom.

By outlawing explosive projectiles under 400 g weight, the 1868 St Petersburg Declaration became the first instrument to formulate *expressis verbis* the prohibition against superfluous injury/unnecessary suffering.⁴ The 1899 Hague Declaration concerning dum-dum bullets continued with the same, weapon-specific regulatory approach.⁵ (p. 82) The 1925 Geneva Gas Protocol⁶ and the 1972 Biological Weapons Convention marked further steps towards a total ban on the use of certain particularly barbaric weapons.

This may be contrasted with the 1899 and 1907 Hague Regulations. These Regulations prohibited in more general terms arms or material 'of a nature to cause superfluous injury' (Article 23, lit. e HagueReg 1899) and those 'calculated to cause unnecessary suffering' (Article 23, lit. e HagueReg 1907). Article 35, para. 2, AP I reiterated the abstract prohibition against weapons causing unnecessary suffering.

The 1980 UN Weapons Convention gave more precise content to the prohibition on specific weapons that had originally been intended for inclusion in Additional Protocol I.⁷ Further weapon-specific rules followed suit, via the UN Weapons Convention's Protocols on Blinding Laser Weapons (see Sections 6.27) and on Explosive Remnants of War (see Section 6.20), as well as the 1997 LandMinesConv introducing a complete ban on anti-personnel mines⁸ (see Section 6.07). An attempt to weaken the 2008 Cluster Munitions Convention's comprehensive ban failed in 2011 when the majority of States parties to the UN Weapons

Convention rejected draft Protocol VI. While that protocol would have banned all cluster munitions produced before 1980, it would have also authorized others in certain circumstances. Most recently, a 2017 UN conference adopted a Treaty on the Prohibition of Nuclear Weapons (*see below*, Section 6.32).

The foregoing shows that the prohibition against *maux superflus* is characterized by an intricate mixture of very definite prohibitions on certain specific categories of arms, on one hand, and a rather abstract prohibition on means of warfare which cause unnecessary suffering, on the other.

The relationship between these two sets of rules is far from clear. The Rome Statute of the International Criminal Court is emblematic in this respect. Article 8, para. 2, lit. b, sub-para. xx, enumerates as a war crime in international armed conflicts the employment of weapons, projectiles, and material and methods of warfare 'of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate'. This provision, however, is immediately qualified by the proviso that it only encompasses weapons, projectiles, and material and methods that 'are the subject of a comprehensive prohibition and are included in an annex' to the Rome Statute. No such annex exists as yet. Instead, Article 8, para. 2, lit b, itself was amended in 2018 to include three separate provisions rendering the employment of biological weapons, non-detectable fragments, and blinding lasers, respectively, as three distinct war crimes in international armed conflicts.

Do specific weapons prohibitions merely concretize a general prohibition? Or do they develop what initially began as no more than a political programme envisaged in Article 23, lit. e HagueReg? These are questions that demand careful consideration.⁹

3. Principle of Distinction. The utmost protection of the civilian population is also an old concept. While it has existed primarily as a customary principle, it is now codified in (p. 83) Article 48 (basic rule) and Article 51 (specific provisions on the protection of the civilian population) AP I.

The humanitarian principles of Islamic legal culture and the moral theological postulates of medieval scholars distinguished between combatants and civilians and called for the latter's extensive protection.¹⁰ By the nineteenth century, legal practice had established the prohibition against indiscriminate warfare as a customary rule.¹¹

This customary rule was only incompletely reflected in the Hague Regulations (*see* Articles 23, para. 1, lit. g, and 25 HagueReg). Distinction as a requirement did not find expression in a general formula. Nor did any of the specific provisions regulate collateral damage in the course of attacks on military objectives. Some decades later, the Hague Rules on Air Warfare attempted but did not succeed in its effort to codify the prohibition of indiscriminate attacks by air.

Nevertheless, the customary validity of the prohibition against indiscriminate warfare was never seriously disputed.¹² Not even the excesses of World War II irreparably invalidated the civilian population's customary protection.¹³

Part IV of Additional Protocol I laid down for the first time these firmly established principles of customary law in treaty form. Article 48 formulates the basic principle of distinction thus: 'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.' The overall validity of this principle is uncontested today. While Article 48 contains an ancient and well-established rule of customary law, rather than a new principle created recently by

conventional law,¹⁴ it is mainly the detailed provisions of Articles 50-6 (cf. Sections 7.12-7.24) that give this fundamental maxim concrete shape.

4. Considerations of Humanity. Since time immemorial, war's brutality has powerfully stirred what we would nowadays call humanitarian sentiments. Political leaders, military strategists, and moral philosophers alike acknowledged the need to moderate warfighting in the interest of man's compassion and dignity.

This is not to say that humanity has always played the definitive role in moderating belligerent conduct. Other considerations, such as pecuniary gain and economy (p. 84) of force, sometimes provided more compelling impetus for restraint. According to one commentator:

It may well be that much of the Law of Arms of the pre-Grotian period imposed binding legal restrictions, well understood by those engaged in warfare, for reasons that had little to do with our modern philosophy of humanitarianism. The sparing of prisoners and the system of parole had little basis in humanitarian considerations. Dead prisoners cannot pay ransom and a prisoner cannot raise the ransom unless he has the chance to go home and persuade his family and friends to put up the money for his liberty.¹⁵

Carl von Clausewitz dryly noted:

If, then, civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their methods of warfare and has taught them more effective ways of using force than the crude expression of instinct.¹⁶

Nevertheless, humanity was clearly *a* source of normative constraints on the waging of war. Thus, Hugo Grotius pleaded for *temperamenta belli*, or humane moderations in the conduct of war.¹⁷ For Jean-Jacque Rousseau:

War, then, is not a relation between man and man, but a relation between state and state, in which individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers; not as members of their fatherland, but as its defenders ... The aim of war being the destruction of the hostile state, we have a right to slay its defenders so long as they have arms in their hands; but as soon as they lay them down and surrender, they become again simply men, and no one has the right over their lives.¹⁸

By the mid- to late nineteenth century, war-time humanitarianism had become widely accepted and readily demanded. Even then, however, the manner of its interaction with military necessity in the making of war rules fluctuated. The 1868 St. Petersburg Declaration described banning the use of explosive projectiles under 400 grams as the 'technical limits at which the necessities of war ought to yield to the requirements of humanity'. On its face at least, this is a strongly worded assertion that purports to subordinate military necessity to humanity. Hague Convention II (1899), adopted three decades later, struck a somewhat different tone. The Convention's preamble proclaimed its provisions 'inspired by the desire to diminish the evils of war so far as military necessities permit'. Here, it is military requirements that appear to permit the diminishment of war-time evils and set the latter's parameter. Indeed,

[d]espite a public outcry for humane limits on warfare at the turn of the [twentieth] century, the sovereign nations that drafted the Hague laws were overwhelmingly concerned with protecting their military interests. Predictably, the resulting laws banned only those means and methods of combat that had no military utility while permitting new and destructive technologies, like aerial warfare, to develop unhindered.¹⁹

(p. 85) Be that as it may, modern rules of war are noticeably more ‘humanized’²⁰ or ‘homo-centric’.²¹ International human rights law emerged from the ashes of World War II, and calls grew for the observance of human rights in armed conflict.²² From the late 1960 onwards, the word ‘humanitarian’ began appearing when describing the body of rules previously known as the ‘laws and customs of war’, ‘laws of war’, ‘law of armed conflict’, and the like. Today, we focus mostly on how humanitarian considerations constrain belligerent conduct.²³

5. The following Sections will discuss specific provisions of humanitarian law that elaborate and regulate in detail the equilibrium struck between the damage likely to result from the operation and the military advantage anticipated.

4.02

‘Superfluous injury’ and ‘unnecessary suffering’ are caused by the use of weapons and methods of combat whose foreseeable harm would be clearly excessive in relation to the lawful military advantage intended.

1. This rule derives itself from Article 35, para. 2, AP I. It clarifies the limits imposed on the belligerent’s right to choose means and methods of warfare. The prohibition against *superfluous injury* / *unnecessary suffering* was first laid down in the 1868 St Petersburg Declaration and later codified in the Hague Regulations.²⁴ The infliction of physical or psychological harm is justified only in so far as it is really necessary to attain the military advantage sought.²⁵ Accordingly, necessity and proportionality condition the lawfulness of the specific weapons used.²⁶ Article 23, lit. e HagueReg and Article 35, para. 2 AP I prohibit in a nearly identical manner the use of weapons, projectiles, and materials of war calculated to cause superfluous injury or unnecessary suffering.²⁷

2. *Superfluous injury*. This term was used already in the 1899 version of Article 22, lit. e HagueReg, and re-integrated in the provision of Article 35, para. 2 AP I. Though implicitly, it embodies what should properly constitute the decisive criterion of proportionality.

(p. 86) Injury can be ‘superfluous’ in two ways. First, it is superfluous if militarily unnecessary. This rarely happens, however, since the injurious effect intended generally serves a military goal, namely the neutralization of enemy combatants or military material. Second, injury is superfluous if manifestly disproportionate to the military advantage reasonably expected from the weapon’s use. Such would be the case, for instance, where the weapon in question is at least relatively superfluous. This, in turn, involves a comparison among the degrees of suffering caused by various weapons and whether some weapon could achieve the same result with less suffering.²⁸

3. *Unnecessary Suffering*. It is much harder to describe the effects of a weapon that would be outlawed on account of the ‘unnecessary suffering’ (*maux superflus*) it causes. ‘Suffering’ is a notion that is medically unquantifiable, for it is defined according to psychological criteria.²⁹ Attempts have been made to find alternative formulae that are more amenable to technical application. Recent trends show a preference for the (more objective) term ‘injury’.³⁰ At any rate, the traditional notion of ‘unnecessary suffering’ means essentially the same thing—namely, a physical or emotional impairment which cannot be justified by military necessity.³¹ ‘Unnecessary suffering’ is therefore a concept that also enables the effects of various methods of warfare to be compared and opens to question the

military usefulness of a weapon in relation to the adverse consequences on those affected by it.³² In the words of the ICJ in its Advisory Opinion on Nuclear Weapons, ‘unnecessary suffering’ stands for ‘a harm greater than that unavoidable to achieve legitimate military objectives’.³³

Here, ‘military advantage’ is assessed strictly by reference to direct attacks upon military objectives. Importantly, this assessment does not involve the fear and terror caused among enemy personnel and the civilian population. The expression ‘lawful military advantage intended’ used in Section 4.02 denotes this type of direct advantage. The precise definition of a military advantage justifying the use of arms against it is provided elsewhere, in the law on methods and means of warfare (see below, Section 7.03).

4.03

The prohibition of indiscriminate warfare means that both the civilian population as a whole and individual civilians shall be spared as far as possible from attack.

1. Perhaps nothing more closely embodies the belligerent’s limited right to choose means and methods than the prohibition of indiscriminate warfare.

2. *Principle of Distinction.* The obligation to distinguish between the civilian population and combatants, as well as between military objectives and civilian objects (Article 48 AP I), emanates directly from warfare’s restriction to acts of violence against the enemy that are strictly ‘necessary’ from a military point of view. Use of force is permitted only in so far as it is directed against a specific military objective—be it a military installation, an object used for military purposes, or an individual combatant or group of combatants.³⁴

(p. 87) A ‘specific military objective’ is therefore a fundamental precondition for any act of force to be justifiable under humanitarian law (see below, Section 7.02). Not only must the belligerent use force against a specific (and separable) target; it must, in addition, employ weapons and methods of warfare that are or can be limited in their effects. In other words, the effects of a military instrument may not exceed what is warranted by the military objective of the operation.³⁵ It follows that the use of means of warfare must be limitable in its intention exclusively to target military objectives, and that it must be limited in its effect to exclusively damaging military targets (Article 51, paras 2 and 4 AP I).³⁶

Military operations may nevertheless target civilians taking a direct part in hostilities as well. The privatization of war and the proliferation of non-international armed conflicts in recent years means that more and more civilians are engaged in and around hostilities. As a consequence, the situation on the ground is more blurred and the principle of distinction harder to implement.

Traditionally, civilians were employed for support roles such as the provision of equipment, food, and administration, and at locations away from the battlefield. Nowadays, however, civilians find themselves in close proximity to combat action and discharging formerly military functions.³⁷ Meanwhile, in many of today’s armed conflicts, non-state organized armed groups engage in hostilities vis-à-vis State forces and/or vis-à-vis one another. Those who make up such groups do not hold formal combatant status. According to Article 51, para. 3 AP I and Article 13, para. 3 AP II, civilians benefit from protection against the effects of hostilities ‘unless and for such time as they take a direct part in hostilities’. During their direct participation in hostilities, civilians lose this protection and become targetable. What one is to understand by ‘direct participation in hostilities’ becomes key.

In 2009, the ICRC adopted an Interpretive Guidance on the Direct Participation in Hostilities with a view to strengthening the principle of distinction. The publication includes ten recommendations and a detailed commentary reflecting the ICRC's position on the matter.³⁸ In it, the ICRC concluded that there are three constitutive elements to a civilian act being characterized as direct participation in hostilities. They are: (i) a threshold of harm, (ii) a direct causation between the act and the harm, and (iii) a belligerent nexus.³⁹ Those civilians who directly participate in hostilities 'on a merely spontaneous, sporadic or unorganized basis' lose their protection against direct attacks only for the duration of each concrete act of direct participation.⁴⁰ The situation is different for those in non-international armed conflicts who 'cease to be civilians' and become members of a non-State organized armed group by virtue of the continuous combat function they assume therein.⁴¹ The latter lose protection against direct attack for as long as they assume this function—in other words, even while they do not in fact commit concrete acts of direct participation.⁴²

(p. 88) There may be circumstances in which it is doubtful whether a civilian is or is not directly participating in hostilities. The ICRC argued that such a civilian must be presumed protected against direct attack⁴³ (i.e., presumed not directly participating in hostilities). In addition, the ICRC effectively if implicitly asserted that the least injurious means test applies when targeting a civilian directly participating in hostilities. This is so, according to the *Guidance*, because

the principles of military necessity and humanity reduce the sum total of permissible military action from which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.⁴⁴

3. Principle of Proportionality. The prohibition against indiscriminate warfare also entails the fundamental principle of proportionality.⁴⁵ The expectation of excessive incidental loss of civilian life, injury to civilians, and/or damage to civilian objects, renders illegal even an attack that is otherwise properly directed against a lawful military target and anticipated to offer a concrete and direct military advantage. Manifestly disproportionate collateral damage inflicted in order to achieve operational objectives will result in the action being deemed a form of indiscriminate warfare (Article 51, para. 5, lit. b AP I) and a war crime if committed in international armed conflicts (Article 8, para. 2, lit. b, sub-para. iv Rome Statute).

4. Means and Methods of Warfare Prohibited on Account of Their Indiscrimination. All methods and means of warfare which primarily harm the civilian population such as indiscriminate area bombing⁴⁶—practiced extensively by both sides during World War II⁴⁷—are prohibited. Likewise, 'scorched earth' strategies on enemy territory, the indiscriminate dispersal of mines and booby traps on enemy territory (see Sections 412–418), and several other forms of warfare which primarily damage the civilian population, including the use of incendiary weapons against civilian settlements (see below, Section 6.24), starving the civilian population of besieged areas, artillery bombardment of 'enemy' settlements, and the use of snipers to terrorize the 'enemy' civilian population, are also forbidden.⁴⁸

Article 54, para. 1 AP I prohibits the starvation of civilians as a method of warfare. In the past, destroying the logistical basis of the enemy was a popular military tactic.⁴⁹ A party besieging encircled settlements sought to force the enemy to lay down their weapons by starving trapped civilians; belligerents retreating from enemy territory or abandoning their own territory often 'scorched earth' with a view to impeding enemy advances.⁵⁰ The international community has outlawed these techniques in view of their (p. 89) severe consequences for the civilian population. Articles 54 AP I and 14 AP II impose strict boundaries on traditional tactics of siege, laying waste of areas, and so on.⁵¹ (For further

details, *see* Sections 7.12–7.24, 7.33.) The Rome Statute designates as a war crime intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies, when committed in international armed conflicts (Article 8, para. 2, lit. b, sub-para. xxv) and, through an amendment adopted in December 2019, when committed in non-international armed conflicts (Article 8, para. 2, lit. e, sub-para. xix).

The general prohibition against indiscriminate warfare applies independently of Articles 48 and 51 AP I. The principle of distinction is a well-established rule of customary humanitarian law, and the corresponding provisions in the Additional Protocols merely codify it.⁵² There is also little need to distinguish between international and non-international armed conflict in this respect. Article 3 common to the Geneva Conventions provides for the extensive protection of persons taking no active part in hostilities in internal armed conflicts. It is undisputed that common Article 3 sets out the customary minimum standards under which attacks on the life and health of such persons, in particular intentional killing and cruel treatment such as torture and mutilation, are absolutely prohibited.⁵³ In its Advisory Opinion on Nuclear Weapons, the ICJ highlighted the special importance of protecting the civilian population—which encompasses the distinction between combatants and non-combatants, as well as the prohibition against the use of indiscriminate weapons—as one of the two ‘cardinal principles contained in the texts constituting the fabric of humanitarian law’.⁵⁴

4.04

The principle of humanity entails additional demands and condemnations on the conduct of states, international organisations, fighters, and civilians.

1. Humanity and Hague Law. By the nineteenth century, war had become a matter of ‘litigation between nations’⁵⁵—in other words, a legitimate means of settling disputes between States. The prospect of settling differences in the battlefield had rendered preserving some room for militarily necessary violence and destruction despite their inhumanity a foregone conclusion. State representatives met in The Hague to delineate where war’s necessary evils (hence to be legally tolerated) ended, and where its unnecessary evils (hence to be prohibited or restricted) began.

Our discussion earlier shows how this line was drawn along key concepts such as superfluous injury, unnecessary suffering, distinction, and proportion. Deception as a method of combat also illustrates this boundary well. It may happen that a combatant kills, injures, or captures an enemy by camouflaging him- or herself successfully into a position of tactical advantage. This is a ruse of war and therefore permissible, as it does not invite the (p. 90) confidence of an adversary with respect to protection under international humanitarian law (Article 37, para. 2 AP I).

If the combatant achieves the same result by feigning incapacitation by wounds or sickness, however, he or she acts perfidiously and hence in violation of international humanitarian law (Article 37, para. 1 AP I). The law prohibits perfidy—i.e., those acts that invite ‘the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under [that law], with intent to betray that confidence’—because it fundamentally undermines the law’s ability to regulate the conduct of hostilities and protect war victims.

It is also prohibited to make improper use of internationally recognized protective emblems (e.g., the Red Cross and Red Crescent emblems), as well as the emblems and other identifying symbols of the UN and neutral parties (Articles 38 and 39, para. 1 AP I). Improper use of such emblems is prohibited—whether it involves perfidious intent or not, and whether it results in the killing, injury, or capture of an adversary or not. At stake here rather is the humanitarian demand that Red Cross and Red Crescent workers, UN officials,

and representatives of Protective Powers be able to discharge their functions without hindrance or suspicion.⁵⁶

2. Humanity and Geneva Law. The somber task of distinguishing unnecessary evil from necessary evil that shaped early Hague Law instruments stood in contrast to the spirit animating the 1864 Geneva Convention and its successors known as the ‘Geneva Law’. Henri Dunant and his fellow Swiss philanthropists were concerned about ameliorating the condition of wounded and sick soldiers abandoned in the field and facilitating relief work undertaken by medical personnel and local volunteers. Unlike those gathered in The Hague, there was no need for those in Geneva to demarcate where necessary suffering ended and where unnecessary suffering began. Geneva rules mostly addressed themselves to war victims whose further suffering was, by definition, already of no military value and therefore unnecessary. The same may also be said of today’s prisoners of war regime—despite its historical origin as an institution driven by the captor’s personal prestige and monetary gain, and its initial codification efforts bearing fruit in the Hague Regulations. If countering military necessity was not Geneva’s primary challenge, countering other considerations, such as those of state sovereignty, certainly was. Geneva rules are often characterized by the intractable interplay between their obvious humanitarian underpinnings and deeply entrenched sovereign prerogatives. Two particularly salient features of this interplay may be noted here.

One is the extension of humanitarian protection to civilians. The notion that they deserve to be protected and humanely treated would appear intuitive and uncontroversial. Yet, with the notable exception of residents of occupied territory, the war-time treatment of civilians had remained entirely a matter of customary international law.

In 1949, Geneva Convention IV, a long-awaited international instrument dedicated in its entirety to the protection of civilian persons in war, was adopted. Disappointingly, however, that Convention achieved this only for fairly narrow categories of aliens in the hands of a party to the conflict who are unlikely to enjoy protection by their States of nationality. Article 4 GC IV limited its protection essentially to enemy civilians, stateless (p. 91) persons, and neutral and allied nationals whose States of nationality did not have normal diplomatic representation in the State in whose hands they found themselves.⁵⁷

Article 4’s narrow scope excluded two major groups of civilians in particular. Refugees who were nationals of neutral or co-belligerent States would not enjoy Geneva Convention IV protection while in the hands of a State to which they had fled, as long as their States of nationality maintained normal diplomatic representation in their States of refuge. Nor would civilians in the hands of their own State of nationality enjoy protection under Geneva Convention IV.⁵⁸ Additional Protocol I brought only modest improvements to these groups. Thanks to Article 73 AP I, *de jure* refugees now stood to benefit from Parts I and III of Geneva Convention IV. Some, such as Finland and the ICRC, asserted that persons in the power of their own State would enjoy the fundamental guarantees offered under Article 75 AP I.⁵⁹

Article 4 GC IV’s limited reach closely echoes the approach international law has traditionally taken to the treatment of individuals. Humanity may demand certain standards, but the law defers to States of their nationality as the primary providers and guarantors of such standards. In its original commentary on Article 4, the ICRC succinctly summarized the then-prevailing rationale: ‘The Convention thus remains faithful to a recognized principle of international law: it does not interfere in a State’s relations with its own nationals.’⁶⁰ Article 4 also mirrors the rationale that ensuring the well-being of a person abroad—even in war zones—would first and foremost be in the natural interest of his or her State of nationality through diplomatic representations, and that Geneva Convention IV would come to an alien’s rescue only interstitially where this rationale was unlikely to hold. It might be argued that the ICTY’s 1999 *Tadić* Appeal Judgment partially

rectified this deficiency when it held that ‘in modern inter-ethnic armed conflicts ... ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance.’⁶¹ On this view, during international armed conflicts, Article 4 GC IV would protect civilians even against their own State of formal nationality as long as their ethnic allegiance lay elsewhere. It would still appear, however, that this interpretation merely replaced the State of one’s formal nationality with the State or entity enjoying his or her ethnic allegiance as the primary provider and guarantor of that person’s well-being.

The other salient feature concerns the extension of humanitarian protection to victims in non-international armed conflicts. The ICRC’s failure to broaden the four 1949 Geneva Conventions’ scope of application to include non-international armed conflicts,⁶² as well as the adoption of common Article 3 as an ‘intermediate solution’ on which negotiators found it necessary to ‘fall back’,⁶³ is well known. Similarly, last-minute efforts to ensure Additional Protocol II’s adoption towards the very end of the 1973–77 (p. 92) Diplomatic Conference resulted in the near-mechanical deletion of numerous would-be provisions deemed incompatible with ‘national sovereignty and non-interference with internal affairs’.⁶⁴ For abundant caution, Article 3 AP II contains explicit disclaimers that nothing in the Protocol affects the sovereign right and responsibility of a State to maintain or re-establish law and order and justifies foreign intervention in its internal or external affairs. Mention may also be made of Article 5, para. 5. This provision admonishes State authorities in power after hostilities that they ‘endeavour to grant the broadest possible amnesty’. This is at once a clear expression of humanitarian considerations and an acknowledgement that it remains a key countervailing State prerogative to treat rebels as criminals and traitors.

Despite these challenges, Additional Protocol II did add clarity, detail, and strength to common Article 3’s generic protection. It did so by introducing specific provisions on fundamental guarantees; the deprivations and restrictions of liberty; the safeguarding of due process rights; the treatment of wounded, sick, and shipwrecked persons; and the protection of medical and relief actions. Most if not all of the Geneva rules identified in the ICRC Customary Law Study apply in international and non-international armed conflicts alike.⁶⁵

Footnotes:

¹ See F. Kalshoven, ‘Les principes juridiques qui sou-tendent la Convention sur les armes classiques’ (1990) 72 *RIC* 556–67, at 556–63; F. Kalshoven and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 3rd edn (ICRC, 2001), 35; *UK Manual* (2004), Section 2.1.

² Cf. Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edn (CUP, 2016), 152; G. Venturini, *Necessità e proporzionalità nell’uso della forza militare in diritto internazionale* (Milan: Giuffrè, 1988), 145–50. On the role of ‘necessity’ and ‘proportionality’ in contemporary international humanitarian law, see also J. G. Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP, 2004).

³ Rule 70 *CIHL*.

⁴ See esp. F. Kalshoven, ‘Arms, Armaments and International Law’ (1985 II) 191 *RdC* 183–341, at 205–13; Y. Sandoz, *Des armes interdites en droit de la guerre* (Geneva: Grounauer, 1975), 16–22; Dinstein, above (n. 2), 73–6; W. H. Boothby, *Weapons and the Law of Armed Conflict*, 2nd edn (OUP, 2016), 10–11, 73.

⁵ Boothby, *op. cit.*, 12–13.

⁶ Ibid., 16–17.

⁷ On the efforts to include prohibitions of specific categories of arms in Additional Protocol I, see W. Solf, in M. Bothe, K. Partsch, and W. Solf, *New Rules for Victims of Armed Conflicts* (Nijhoff, 1982), 197–8; Boothby, *op. cit.*, 18–20.

⁸ For the LandMinesConv, see ICRC, *Banning Anti-Personnel Mines: The Ottawa Treaty Explained* (ICRC, 1998); S. Maslen, *Commentaries on Arms Control Treaties, Vol. I. The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction* (OUP, 2004).

⁹ See Kalshoven, above (n. 1) 556–67, at 563–6; E. David, *Principes de droit des conflits armés*, 3rd edn (Bruylant, 2002), 316–25.

¹⁰ Cf. J. S. Pictet, *Development and Principles of International Humanitarian Law* (Institut Henry-Dunant, 1985), 5–25; esp. concerning the Islamic concepts, cf. H. Sultan, ‘La conception islamique’, in UNESCO/Institut Hneri Dunant (eds), *Les dimensions internationales du droit humanitaire* (Pedone, 1986), 47–60, at 56–9.

¹¹ ICRC *Commentary to the Additional Protocols*, paras 1823–7; Rules 1, 11 *CIHL*.

¹² See J. Kunz, *Kriegsrecht und Neutralitätsrecht* (Springer, 1935), 75–6 with extensive references to the literature of that time; but cf. also E. Castrén, *The Present Law of War and Neutrality* (Suomalaisen Kirjallisuuden Seuran Kirjapainon Oy, 1954), 174–8; G. Schwarzenberger, ‘The Law of Armed Conflict: A Civilized Interlude?’ (1974) 28 *Yearbook of World Affairs* 293–309; Ch. Rousseau, *Le droit des Conflits Armés* (Pedone, 1983), 67–9.

¹³ See M. Bothe, ‘Moderner Luftkrieg und Schutz der Zivilbevölkerung’ (2002/1) 15 *HuV-I* 31; the intense discussion about this question is reflected in detail in the article by H. Meyrowitz, ‘Le bombardement stratégique d’après le Protocole additionnel I aux Conventions de Genève’ (1981) 41 *ZaöRV* 1–68, at 24–5.

¹⁴ See M. Sassòli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht mit besonderer Betrachtung der Regeln zum Schutze der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten* (Basel/Frankfurt: Helbing & Lichtenhahn, 1990), 342–59. Cf. also Venturini, above (n. 2), 149; M. N. Schmitt, ‘Fault Lines in the Law of Attack’, in S. Breau and A. Jachec-Neale (eds), *Testing the Boundaries of International Humanitarian Law* (British Institute of International and Comparative Law, 2006), 277–307 at 278–9.

¹⁵ G. I. A. D. Draper, ‘Military Necessity and Humanitarian Imperatives’ (1972) 12 *Military Law and the Law of War Review* 129–42, at 129.

¹⁶ C. v. Clausewitz, *On War* (Princeton: Princeton University Press, 1976), 76.

¹⁷ See H. Grotius, *De iure belli ac pacis libri tres* (Buffalo, New York: William H. Hein, 1995).

¹⁸ J.-J. Rousseau, *The Social Contract or Principles of Political Right* (Ware: Wordsworth Editions Limited, 1998), 10–11.

¹⁹ C. af Jochnik and R. Normand, ‘The Legitimation of Violence: A Critical History of the Laws of War’ (1994) 35 *Harvard International Law Journal* 49–95, at 68.

²⁰ Th. Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’ (2000) 94 *American Journal of International Law* 78–89, at 88.

²¹ R. Kolb, ‘The Main Epochs of Modern International Humanitarian Law Since 1864 and Their Related Dominant Legal Constructions’, in K. Mujezinović Larsen, C. G. Guldahl Cooper, and G. Nystuen (eds), *Searching for a ‘Principle of Humanity’ in International Humanitarian Law* (CUP, 2013), 23–71, at 54.

- ²² See International Conference on Human Rights resolution XXIII ‘Human rights in armed conflict’, adopted at Tehran, 12 May 1968 (A/CONF.32/41), 18; UNGA Res 2444 (XXIII) ‘Respect for human rights in armed conflicts’ (19 December 1968).
- ²³ See below, commentary, para. 1, to Section 8.02. Recent international rulings underscore this trend. See ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (2 October 1995), para. 97; ICJ, *Nuclear Weapons*, Advisory Opinion (GA Request), *ICJ Reports 1996*, 257 (para. 95).
- ²⁴ For the historical development of the prohibition against *maux superflus*, see R. S. Clark, ‘Methods of Warfare that Cause Unnecessary Suffering or are Inherently Indiscriminate: A Memorial Tribute to Howard Berman’ (1998) 28 *California Western International Law Journal* 379–89, at 384; Kalshoven, above (n. 4) 205–24; Kalshoven, above (n. 1) 557–63; Boothby, above (n. 4), 55–68.
- ²⁵ In that sense already provided in the Preamble to the St Petersburg Declaration of 1868—see Kalshoven, above (n. 4), 206, 212.
- ²⁶ See N. Sitaropoulos, ‘Weapons and Superfluous Injury or Unnecessary Suffering in International Humanitarian Law’ (2001) 54 *Revue hellénique de droit international* 71–108, at 81. Concerning that problem, see comments on Art. 35 para. 2 AP I by J. de Preux, in *ICRC Commentary on the Additional Protocols*, 399–410 (paras 1410–39) and by Solf, in Bothe/Partsch/Solf, above (n. 7) 195–8; see also Gardam, above (n. 2) 15–16.
- ²⁷ Concerning the textual differences between the two provisions, see Solf, in Bothe/Partsch/Solf, above (n. 7) 195.
- ²⁸ See Solf, in Bothe/Partsch/Solf, *op. cit.*, 196.
- ²⁹ See P. Bretton, ‘Principes humanitaires et impératifs militaires dans le domaine des armes classiques à travers le droit international actuel’, in *Société Française pour le Droit International, Colloque de Montpellier—le droit international et les armes* (Pedone, 1983) 35–50, at 39.
- ³⁰ Ibid.
- ³¹ See Sitaropoulos, above (n. 26) 91.
- ³² See Solf, in Bothe/Partsch/Solf, above (n. 7), 196; see also Kalshoven, above (n. 4) 234–6.
- ³³ *ICJ Reports 1996*, 257 (para. 78).
- ³⁴ Concerning the classical principle of distinction, see Kunz, above (n. 12), 75–7; Castrén, above (n. 12), 174–83; Pilloud/Pictet, in *ICRC Commentary on the Additional Protocols*, paras 1863–71.
- ³⁵ See A. Cassese, ‘The Prohibition of Indiscriminate Means of Warfare’, in R. J. Akkerman (ed.), *Declarations on Principles, Festschrift für B.V.A. Röling* (Sijthoff, 1977), 171–94, at 171–82.
- ³⁶ See comments on Article 51 AP I by Solf, in Bothe/Partsch/Solf, above (n. 7), 299–311; R. R. Baxter, ‘Comportement des combattants et conduite des hostilités (Droits de la Haye)’, in UNESCO and Institut Henri Dunant (eds), *Les dimensions internationales du droit humanitaire* (Pedone, 1986), 117–62, at 146–58; H. Blix, ‘Moyens et méthodes de combat’, *ibid.* 174–8.
- ³⁷ N. Melzer, ‘Civilian Participation in Armed Conflict’ (2010), *MPEPIL*, para. 2.
- ³⁸ N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, 2009).

- ³⁹ Ibid., 46.
- ⁴⁰ Ibid., 69.
- ⁴¹ Ibid., 71.
- ⁴² Ibid., 73.
- ⁴³ Ibid., 75.
- ⁴⁴ Ibid., 79.
- ⁴⁵ Concerning the principle of proportionality generally regarded as already embodied in customary law, see A. Cassese, 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law' (1984) 3 *UCLA Pacific Basin Law Journal* 85-6; Bretton, above (n. 29) 47-8; Venturini, above (n. 2) 145-50; Dinstein, above (n. 2) 128-30; A. P. V. Rogers, *Law on the Battlefield*, 3rd edn (Manchester University Press, 2012), 21-72.
- ⁴⁶ See Article 51, para. 5, lit. a AP I.
- ⁴⁷ See W. H. Parks, 'Air War and the Law of War' (1990) 32 *Air Force Law Review* 1-225, at 1-2; Rogers, above (n. 45), 17-20.
- ⁴⁸ See Article 54, para. 1 AP I.
- ⁴⁹ See Y. Dinstein, 'Siege Warfare and the Starvation of Civilians', in A. J. M. Delissen and G. J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead—Essays in Honour of F. Kalshoven* (Nijhoff, 1991), 145-52, at 145-7.
- ⁵⁰ See Solf, in Bothe/Partsch/Solf, above (n. 7), 337 and Dinstein, *ibid.*, 146-7.
- ⁵¹ Concerning Article 54, para. 1 AP I, see Pilloud/Pictet, in *ICRC Commentary on the Additional Protocols*, paras 2083-91; Solf, in Bothe/Partsch/Solf, *op. cit.*, 336-42; Dinstein, *ibid.*, 148-52; David, above (n. 9) 290-4; Dinstein, above (n. 2) 251-9.
- ⁵² See Cassese, above (n. 45) 82 *et seq.*; D. Fleck, 'The Protocols Additional to the Geneva Conventions and Customary International Law' XXIX *RDMilG* (1990), 495-517, at 500-1; Rogers, above (n. 45) 11; Rules 1, 7, 11 *CIHL*.
- ⁵³ See Kalshoven, above (n. 4) 296.
- ⁵⁴ *ICJ Reports 1996*, 257 (para. 78). The ICJ notes the prohibition against causing unnecessary suffering to combatants as the other cardinal principle.
- ⁵⁵ I. Brownlie, *International Law and the Use of Force by States* (OUP, 1961), 21.
- ⁵⁶ The prohibition against improper use of uniforms and other identifiers of the enemy is arguably based on a separate rationale. See N. Hayashi, *Military Necessity: The Art, Morality and Law of War* (CUP, 2020), 207-10.
- ⁵⁷ The *ICRC Commentary GC IV* (1958), 48-9, suggests that neutral nationals on occupied territory do qualify as persons protected under Geneva Convention IV, even if their state of nationality has normal diplomatic representation in the occupying power.
- ⁵⁸ By dint of Article 70, nationals of the occupying power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State are nevertheless protected against certain measures taken by the occupation authorities.
- ⁵⁹ See Pilloud/Pictet, in *ICRC Commentary on the Additional Protocols*, paras 2913-15.
- ⁶⁰ *ICRC Commentary GC IV* (1958), 46.
- ⁶¹ ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, *Judgment* (15 July 1999), para. 166.

⁶² *ICRC Commentary on the First Geneva Convention* (CUP, 2016), 138–40.

⁶³ J. S. Pictet (ed.), *Commentary on the Geneva Conventions (I)* (Geneva, 1952), 48.

⁶⁴ Junod, in *ICRC Commentary*, on the Additional Protocols, para. 4412.

⁶⁵ That is, except Rules 41, 51, 106–8, 114, 130, *CIHL*.

(p. 125) 6 Fundamental Guarantees

1. Introduction

Cicero's maxim 'Silent enim leges inter arma' is generally interpreted as 'During war, the law falls silent'.¹ Often, however, the context is forgotten—he was advocating for the right to kill in self-defence, albeit in breach of Roman law, in a time of civil riot and conflict. Cicero was no advocate of lawlessness or the absence of law—as a lawyer, advocate, politician, and philosopher, this was against every grain of his being.² To use law instrumentally, and to selectively deny the applicability of certain rules—absolutely; this was his stock in trade. But to deny the applicability of law to a sphere of human activity in toto—no, this was not his point. Even the Romans, for whom 'no quarter' across both combatants and civilians was formally permissible in the absence of surrender before engagement, specific law applied in time of war³—to designate and assign status,⁴ to govern conduct, to provide for fighting in a way that viably left an option for the future incorporation of the defeated entity into the Roman polity.⁵ And although not as detailed as modern IHL, Roman law as applicable in times of conflict clearly addressed issues that would today touch upon fundamental guarantees—such as the status of 'deditio' surrender, which entitled the defeated party to favourable treatment and the (p. 126) preservation of certain fundamental rights and guarantees.⁶ This recognition of the need to ensure that the law of war continued to include explicit regimes for reducing the deleterious effects of armed conflict upon civilians and (to a lesser extent) certain categories of participants, retains its most eloquent canonical expression in the Martens Clause:

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of public conscience.⁷

Yet this admonition to protect those fundamental guarantees of treatment that civilization has progressively endowed should not disguise the unambiguous record of barbarity and atrocity that has generally accompanied warfare, despite Geoffrey Best's poignant description of the law of war as a great but paradoxical achievement.⁸ It was still part of the expectation of statesmen in the 1800s that insurgents not entitled to treatment as combatants in accordance with the laws of war, could 'legally' fall into the deep black hole of harsh and unregulated extrajudicial treatment still acquiesced in for rebels.⁹ It is not surprising, as Brian Dirck has noted, that in some quarters there remains a persistent assumption that 'humanitarian needs and military necessity are natural enemies of each other and extra scrutiny is necessary to ensure a harmonious balance between the two'.¹⁰ Whilst these two drivers of IHL are not as antithetical to each other as is often asserted—indeed, the concept (p. 127) of counter-insurgency (COIN) warfare is to some extent premised upon achieving each through the other¹¹—it is true that scrutiny remains essential to ensuring that humanitarian needs, in particular the IHL fundamental guarantees addressed in this chapter, remain as equally governing of conduct as military necessity. The recent history of US jurisprudence dealing with the iconic and indicative issue of habeas corpus in conflict situations certainly bears witness to this constant tension.¹²

Given the central importance of such fundamental guarantees as a significant counterweight to military necessity, it is perhaps surprising that there is no central or core instrument which coherently and collectively delineates their content: As Emily Crawford notes, analysing the course by which the current state of the law has evolved,

The question of the scope and content of minimum humanitarian standards or fundamental standards of humanity as they are now termed—has become clearer with time, especially through the growth of international criminal case law and works such as the International Committee of the Red Cross (ICRC) study into customary international humanitarian law. Yet the adoption of a document that outlines these fundamental standards is no more imminent than when the issue first moved to the United Nations.¹³

Thus despite sustained advocacy from, *inter alia*, Theodor Meron, and regardless of the burgeoning attention paid to the substantive content of the individual rules within the scheme, a ‘short, simple and modest instrument ... [detailing the] irreducible and non-derogable core of human rights that must be applied at a minimum in situations of internal strife and violence’¹⁴ still eludes insofar as the fundamental guarantees proscribed under the law of armed conflict (LOAC) are concerned.

In this chapter, I will iteratively address three matters. The first section provides a general overview of the context and background of the IHL fundamental guarantees, with a focus upon describing the concept through reference to three definitional aspects: rationale, sources in law, and scope. Section two provides a brief outline of one indicative example of the category of general, procedural, fundamental guarantees—those that presage, contextualize, or underpin many of the other, more specific treatment-based fundamental guarantees. To this end, the analysis will address the requirement of legality. The final section will then deal with a number of specific fundamental guarantees under two broad category headings. The first is humane treatment, which is itself an umbrella fundamental guarantee encompassing: violence to life (such as murder, but not battlefield killing in accordance with LOAC, which is subject to different rules and is dealt with elsewhere in this book); through other violent breaches of fundamental guarantees (such as torture, and rape); to the (p. 128) proscriptions relating to degrading treatment. The second broad category is restriction of freedoms, focusing upon forced labour and slavery (but not upon detention, which is dealt with more fully elsewhere in this book). Whilst this provides but a slim and selective assessment across the broad and still evolving concept of fundamental guarantees, it is hoped that it will nevertheless furnish some indication of the scope and content of this externally referencing, inclusive category of IHL rights and obligations.

2. ‘Fundamental Guarantees’ within the Broader IHL/LOAC Scheme

A. What are ‘Fundamental Guarantees’?

Adopting a list-based approach to the concept of the IHL fundamental guarantees certainly accords an appreciation of their scope, but does not adequately describe them as a coherent category of rights and obligations. Additionally, the list-based approach can risk being interpreted as exclusive and fixed, rather than incorporative and still evolving, as is in fact the case. It is, consequently, more meaningful to attempt a generic and holistic approach to concept description. This can be achieved through a brief examination of three components: contextual rationale; the sources from which the rules are drawn; and their scope of application.

1. Rationale

The rationale behind the IHL fundamental guarantees is, in short, to ensure that the unique context of armed conflict cannot be cited as strategic or legal authority for dispensing with the de jure applicability of certain key guarantees of treatment, and the availability of certain rights and protections. To this end, there are a number of indicators that may assist in differentiating fundamental guarantees from other rules in IHL. First, the fundamental guarantees apply to both civilians who are not taking a direct part in hostilities ('DPH') and combatants who are *hors de combat*.¹⁵ However, some of the rules do have differing substantive content depending upon the status of the recipient. One example of this, as will be discussed below, is uncompensated or inadequately compensated forced labour, which is prohibited for civilians, but a form of which is permissible in respect of prisoners of war (POWs). Another example is the IHL fundamental guarantee against discrimination,¹⁶ the application of which must nevertheless account for certain sanctioned distinctions that carry significant consequences—such as the specific right to inter former military personnel (which is permissible in LOAC¹⁷), and the separate and (p. 129) distinct (and prima facie discriminatory) right to inter those whose political views (eg, exhorting acts of sabotage) mean that they constitute an imperative threat to security.¹⁸ Similarly, whilst the fundamental guarantee against discrimination encompasses nationality,¹⁹ LOAC also provides some more specific rules that allow for limited discrimination on exactly these grounds; for example, article 40 of Geneva Convention IV (GCIV), which provides that:

Protected persons may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are.

If protected persons are of enemy nationality, they may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations.

In the cases mentioned in the two preceding paragraphs, protected persons compelled to work shall have the benefit of the same working conditions and of the same safeguards as national workers, in particular as regards wages, hours of labour, clothing and equipment, previous training and compensation for occupational accidents and diseases.

The key, it serves repeating, is always to confirm the scope of the specific guarantee in question: whilst the IHL fundamental guarantee of non-discrimination between enemy nationals, own nationals, and other nationals applies to humane treatment, it does not apply to, for example, employment options.

A second indicator—which is to some extent a corollary of the first—is that the IHL fundamental guarantees do not apply during attacks to combatants, members of organized armed groups ('OAGs'), and civilians DPH, and are irrelevant in terms of the infliction of death or injury to civilians in their unwelcome capacity as 'collateral damage'. This is because other rules apply in those situations and the conduct is de jure contextualized and characterized differently. Thus the permissible killing of a civilian in the course of a lawful application of the targeting rules, or the killing of a combatant or civilian DPH/OAG member in compliance with LOAC, cannot equate to murder precisely because it is permissible to kill a combatant/civilian DPH/OAG member in such circumstances; it is also permissible to cause incidental civilian deaths in a proportionate attack. Outside of these circumstances, however, the killing would need to be assessed against the IHL fundamental guarantee in relation to murder or wilful killing, as opposed to the lawfulness of the killings

under the targeting law regime. Thus the killing of a civilian, or a POW, outside the accepted bounds of LOAC would constitute *prima facie* murder.

The third indicator of the need to apply an assessment scheme based in the fundamental guarantees as opposed to another component of LOAC, is where there is a clear disparity in the power relationship within a situation, expressed most clearly in the assertion of control by one of the belligerent parties over a person and their situation. (p. 130) That is, the IHL fundamental guarantees come into play in situations where the subject is within the control of an adversary; this is why the fundamental guarantees *do not* apply to combatants/civilians DPH/OAG in the normal course of events during attacks. Conversely, this is exactly why the IHL fundamental guarantees *do* apply to civilians at all times (excepting the issue of targeting law), and to combatants/DPH/OAG when detained or *hors de combat*, and thus within the power/control of the adversary force. Additionally, there are jurisprudential indications that an armed group must also afford—as a minimum—certain of the fundamental guarantees to vulnerable persons within its structure as equally as to those whose allegiance lays with a neutral or an adversary belligerent. In the International Criminal Court (ICC) Appeals Chamber decision on jurisdiction in relation to the prosecution of Bosco Ntanganda for, *inter alia*, rape and sexual slavery offences against members of his own armed group, the unanimous view of the court was that:

Having regard to the established framework of international law, members of an armed force or group are not categorically excluded from protection against the war crimes of rape and sexual slavery under article 8 (2) (b) (xxii) and (2) (e) (vi) of the Statute when committed by members of the same armed force or group. Nevertheless, it must be established that the conduct in question ‘took place in the context of and was associated with an armed conflict’ of either international or non-international character. It is this nexus requirement that sufficiently and appropriately delineates war crimes from ordinary crimes.²⁰

2. Rule sources

The second component of a holistic description of the concept of IHL fundamental guarantees is that although the notion, as an articulable component of LOAC, dates at least as far back as the Martens Clause, the manner by which this is achieved in modern LOAC is through the integration and iterative construction of a rule set leveraging both LOAC and international human rights law (IHRL). As the UN General Assembly made clear in 1970, ‘fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict’.²¹ This requirement to recall both bodies of law in order to identify the IHL fundamental guarantees is explicitly noted in the preamble to one significant attempt at encapsulating the scope and content of these fundamental guarantees—the *1990 Turku Declaration*:

Confirming that any derogations from obligations relating to human rights during a state of public emergency must remain strictly within the limits provided for by international law, that certain rights can never be derogated from and that humanitarian law does not admit of any derogations on grounds of public emergency;(p. 131)

Confirming further that measures derogating from such obligations must be taken in strict conformity with the procedural requirements laid down in those instruments, that the imposition of a state of emergency must be proclaimed officially, publicly, and in accordance with the provisions laid down by law, that measures derogating from such obligations will be limited to the extent strictly required by the exigencies of the situations, and that such measures must not

discriminate on the grounds of race, colour, sex, language, religion, social, national or ethnic origin.²²

As to LOAC, for example, the International Court of Justice, in the *Nicaragua* case, determined that:

Article 3 which is common to all four *Geneva Conventions* of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts, and they are rules which, in the Court's opinion, reflect what the Court in 1949 [*Corfu Channel* case] called 'elementary considerations of humanity'.²³

As Emily Crawford then goes on to observe of the *Turku Declaration*,

Nearly half of the rules are derived from fundamental rules of international humanitarian law. They include a prohibition on attacks against non-combatants; proportionality in the use of force; prohibition on the use of illegal means and methods of warfare; prohibition on spreading terror throughout the population; special protection for the sick, wounded, and medical and religious personnel; special respect/protection for the dead; and free access to humanitarian organizations.²⁴

The 'other half' of the rules, therefore, source their more refined elucidation in IHRL, from both treaty and CIL sources.²⁵ Thus Natasha Balendra has described the orthodox approach whereby 'IHL and HRL can be applied simultaneously and can complement each other without there being a conflict between the two sets of norms. This is what occurs when some norms of IHL are interpreted by reference to the more developed norms of HRL.'²⁶ Again, in an oft-cited ICJ passage from the *Nuclear Weapons Advisory Opinion*,

In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be (p. 132) determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [ICCPR], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.²⁷

Thus, as a component of this interaction it is important to also bear in mind that the integration of IHL and IHRL in the construction of the modern IHL fundamental guarantees is not one of unmitigated imperialism by IHRL over IHL—the need to accommodate both rule sets means that they necessarily act upon one another. As Louise Doswald-Beck noted of the ICJ's *Nuclear Weapons Advisory Opinion* formulation:

This is a very significant statement, for it means that humanitarian law is to be used to actually interpret a human rights rule. Conversely, it also means that, at least in the context of the conduct of hostilities, human rights law cannot be interpreted differently from humanitarian law.²⁸

This bivalency and interoperability was further described by the ICJ in the 2004 *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*:

As regards the relationship between IHL and HRL, there are thus three possible situations: some rights may be exclusively matters of IHL; others may be exclusively matters of HRL; yet others may be matters of both these branches of international law.²⁹

As Laucci notes of the ICRC's Customary International Humanitarian Law Study's (CIHL Study) approach, 'the fundamental guarantees provided for in Rules 87-105' generally 'fall within this third category'.³⁰

There is one significant outlier in this clear trend for IHL fundamental guarantees to reflect this IHL-IHRL bivalency—rape. Whilst the prohibition of rape in war has a long and inglorious history as one of the most breached and least enforced 'rules' of combatant conduct, recent treaty and case law—whilst clearly reiterating the place of rape within the highest echelons of IHL fundamental guarantees—has been haphazard. As Shane Darcy notes, rape has been prosecuted and convicted as variously genocide (p. 133) (*Akayesu* case), a crime against humanity (*Celebici* case), and torture (*Furunzija* case).³¹ It has also been prosecuted as sexual slavery, including as an offence perpetrated within and against members of one's own OAG.³² But it has rarely been prosecuted as rape simpliciter; that is, rape is often dealt with as a manifestation of the violation of another IHL fundamental guarantee. In this respect, a number of international tribunals have looked beyond the IHL-IHRL sources, and into national criminal law, in order to develop a definition of rape as a war crime, and thus as a self-contained, distinct, and separately identified violation of an IHL fundamental guarantee. This has not been without challenges—most particularly around the issue of whether it is coercion, or consent, or both that defines the circumstances. A very unsubtle generalization might be that the International Criminal Tribunal for Rwanda (ICTR) tended towards the former,³³ the International Criminal Tribunal for the former Yugoslavia (ICTY) tended towards the latter,³⁴ and that the Special Court for Sierra Leone and ICC appear to utilize both, noting that the ever-present threat of violence, and the coercive context of armed conflict in itself, can evidence non-consent.³⁵

3. Scope

The final descriptive component useful in attempting to achieve a more holistic appreciation of the concept of IHL fundamental guarantees is that they are applicable in all armed conflict contexts—that is, across both non-international armed conflict (NIAC) and international armed conflict (IAC). To that end, they are universal and the substance of the rules does not differ between IAC and NIAC, as can be the case with other aspects of LOAC (eg the rules on maritime visit and search, which apply in IAC and in certain NIACs of belligerency status, but not across all NIAC types). Thus, the fundamental guarantee prohibiting rape has the same substantive content regardless of conflict type. The thresholds that are relevant to the application of the IHL fundamental guarantees are those between: (i) a situation below the threshold of Common Article 2 (that is, the situation is not an IAC); (ii) a situation that is below the lowest threshold for a NIAC—that is, Common Article 3; and (iii) formal belligerent occupation. Any situation below the relevant threshold for an armed conflict or formal belligerent occupation³⁶ is thus not governed de jure by the IHL fundamental guarantees precisely because IHL is de jure inapplicable; such situations are governed by IHRL alone. Thus it is the case that a single act—for example, torture—is at once definable in the context of an armed conflict as a breach of an IHL fundamental guarantee, a war crime, and perhaps also a crime against humanity if the systemic element is present; but at another time, outside of armed conflict, is definable as a breach of IHRL, and potentially (given the almost inevitable (p. 134) presence of the systematic element

implied by the requirement for an official capacity element for torture in IHRL), also a crime against humanity.

A second point worth brief note in relation to the applicability of the fundamental guarantees across both IAC and NIAC is that it illustrates one of the very few situations within the corpus of LOAC where NIAC LOAC initially offered a level of detail that was then cross-referred back into IAC LOAC—the reverse of the standard practice. This is because for some time the ‘minimal’ guarantees within Common Article 3 had no single, concise, or as encompassing parallel elsewhere in the Geneva Conventions scheme, and thus were applied universally.³⁷ It has now been replicated and further evolved in Additional Protocols I (API) and II (APII).³⁸

B. Conclusion

The description of ‘IHL fundamental guarantees’ proffered by and employed within this chapter is thus as follows: that body of rules, equally applicable in both forms of armed conflict, that deals with the treatment (and its consequences) of civilians, and of combatants/civilians DPH/OAG who are *hors de combat* or otherwise under the control of an adversary belligerent party (and, in some cases, of their own party), when and whilst they remain under that control, and where no other more contextually specific rule of LOAC applies to the treatment or consequence in question.

3. The Procedural Fundamental Guarantee of Legality

The principle of legality³⁹—*nullum crimen sine lege*—is described in the CIHL Study as follows:

No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the (p. 135) time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed.⁴⁰

This principle, as both a procedural and substantive fundamental guarantee in IHL, is of long—albeit imprecise—provenance; as Laucci notes:

The International Military Tribunal in Nuremberg for instance broadly relied on customary law as codified in The *Hague Regulations* of 1907. The same reasoning was applied by the ICTY Appeals Chamber in its decision of 2 October 1995 in the *Tadic case*^[41] to extend the definition of war crimes under Article 3 of the ICTY Statute to non-international armed conflicts.⁴²

At the ICTY, the court specifically recognized the risks inherent in determining if, the point at which, and in relation to what conduct, illegality in international law could be said to have coalesced into a clear indication of individual criminal responsibility. In the *Vasiljevic* case, the Court cited the progressive ambitions expressed in (inter alia) the *Aleksovski* and *Delalić* appeal judgments, but in a note of caution noted that:

The principle of *nullum crimen sine lege* ‘does not prevent a court from interpreting and clarifying the elements of a particular crime’. Nor does it preclude the progressive development of the law by the court. But under no circumstances may the court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable and punishable, or by criminalising an act which had not until the present time been regarded as criminal.⁴³

This principle has also long been applied by national courts when dealing with war crimes legislation. An example of the former risk—inadequate coalescence as a crime of individual criminal responsibility—is found in the seminal Australian High Court case of *Polyukovich v The Commonwealth* (1991).⁴⁴ One point at issue related to the validity of Australian legislation (the *War Crimes Act* 1945,⁴⁵ which had been ‘almost entirely repealed and replaced’ via 1989 amending legislation⁴⁶). This Act made proscribed conduct (primarily in Europe) between 1 September 1939 and 8 May 1945—that is, prior to the coming into force of the Act—prosecutable under Australian law; the question was, on one reading, whether this amounted to a Bill of Attainder.⁴⁷ As Mr Justice Deane observed, ‘it is basic to our penal jurisprudence that a person who has disobeyed no relevant law is not guilty of a crime’, and thus ‘the whole focus of a criminal trial is the ascertainment of whether it is established that the accused in fact committed a past act which constituted a criminal contravention of the requirements of a valid law which was applicable to the act at the time the act was done’.⁴⁸

(p. 136) The majority ultimately held that the Act was a valid exercise of the Commonwealth’s external affairs power. However, for the purposes of legality in terms of retrospectivity, this is not the relevant finding. The inherent ‘legality’ question was eloquently expressed by Mr Justice Brennan, who ultimately dissented, finding that the offence as formulated in the Act did not reflect the offence as it existed in international law at the time, and thus the Act itself was invalid to this extent.⁴⁹ Consequently, Brennan J continued:

[The] primary question on this branch of the case is whether the material relied on establishes that in 1989 there was either an obligation under customary international law or a matter of international concern that war criminals from the pre-1945 years be sought out and tried for their offences.⁵⁰

He concluded that:

... international law not only refuses to countenance retrospective provisions in international criminal law; it condemns as offensive to human rights retrospective municipal criminal law imposing a punishment for crime unless the crime was a crime under international law at the time when the relevant act was done. It follows that there can be no international obligation to enact a municipal law to attach a penalty to past conduct unless that conduct, at the time when it was engaged in, was a crime under international law.⁵¹

Retrospectivity in the absence of an international law offence existing at the relevant time is thus a strong indicator of a breach of the IHL fundamental guarantee of legality.

A clear example of the second dilemma noted by the ICTY in the *Vasiljevic* case is the conviction of David Hicks—who came into US custody after having joined an adversary force in Afghanistan—on the charge of ‘providing material support for terrorism’ under the US Military Commissions Act 2006.⁵² At issue was the question of whether this offence was known to LOAC, or to other international law applicable in that context, at the alleged time of Hicks’ conduct—which was prior to the elucidation of the offence in the Military Commissions Act of 2006. In a subsequent appeal to the US Court of Military Commission Review, the conviction was vacated on the basis that he could not plead guilty (as he had) to an offence that was not a crime at the relevant time.⁵³

(p. 137) 4. Key Specific Fundamental Guarantees

A. Humane Treatment

1. In general

The CIHL Study describes ‘humane treatment’ as ‘an overarching concept’.⁵⁴ As Laucci notes, ‘what exactly constitutes “humane treatment” is not defined. The Study mentions different texts referring to “respect for dignity” and “prohibition of ill-treatment” as alternative formulations for “humane treatment”’.⁵⁵ As a matter of IHL treaty law and commentary, the general concept of dignity and humane treatment has a long provenance,⁵⁶ and is found in some form in each of the four Geneva Conventions and in API and APII.⁵⁷ It is also routinely found in human rights treaties,⁵⁸ and in the Rome Statute of the ICC.⁵⁹ The prohibition on inhumane treatment is also noted in many military manuals.⁶⁰ For example, the German *Law of Armed Conflict Manual* (2013) states that:

Civilians not taking a direct part in hostilities must be respected and protected. They must be treated humanely in all circumstances and are entitled to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs.⁶¹

The case law of a number of international tribunals also deals with cruel and inhumane treatment within armed conflict contexts. In the ICTY *Delacic* case—cited with approval in the *Aleksovski* appeal decision—the concept was held not to require a ‘discriminatory intention or motive’.⁶² The definition the Court ultimately adopted was that of:

(p. 138)

... an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity ... Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed ‘grave breaches’ in the Conventions fall. Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment.⁶³

In the *Taylor* case before the SCSL, cruel treatment was characterized in terms of examples: amputation, mutilation, assaults, and so on.⁶⁴ Other cases evince a similar approach—cruel treatment and inhumane treatment are not of fixed scope in the way that murder is, but rather are of the ‘you will know it when you see it’ species of offence. Hence forced trench digging (although this was characterized by the Court as ‘a serious attack on human dignity’ which caused ‘serious mental—and depending on the circumstances physical—suffering or injury’, thus straddling the permeable line between inhumane-as-cruel, and inhumane as an outrage on dignity),⁶⁵ incapacitation in a well (which similarly was described as both ‘serious mental suffering and ... a serious attack on ... human dignity’),⁶⁶ and being kept in inhumane camp conditions⁶⁷ have also been cited as instances of cruel and inhuman treatment.

To this end, it is perhaps useful to attempt to point to conduct that is considered to have fallen below the cruel-as-inhumane threshold, so as to illustrate whether there is actually any meaningful line of demarcation between this more serious breach of an IHL fundamental guarantee, and breaches of the overlapping strata of IHL fundamental guarantees characterized as degrading treatment and outrages upon personal dignity. At paragraphs 64–65 of the ICC Prosecutor’s article 53(1) Report in relation to the *Mavi*

Marmara referral, (p. 139) she listed a series of allegations that arose out of treatment of the people onboard by IDF personnel:⁶⁸

The statements and accounts of passengers indicate that such mistreatment included: overly tight handcuffing for extended periods (in some instances causing swelling, discoloration, and numbing in their hands and causing lingering problems after the incident); being beaten; being denied access to toilet facilities and medication (such as for diabetes, asthma, and heart conditions); being given only limited access to food and drink; being forced to remain kneeling on the decks, exposed to the sun (reportedly resulting in 13 passengers receiving first-degree burns) as well as continuous seawater spray and wind gusts from helicopters hovering nearby, for a period of several hours; being subjected to various physical and verbal harassment such as pushing, shoving, kicking, and threats and intimidation (including from dogs which reportedly also bit a few passengers); being blindfolded or having hoods put over their heads.

As a result of the denial of access to bathrooms, some passengers reportedly soiled themselves, and in one described case, 'a kneeling passenger who tried to move away from urine coming down from his neighbour had his face pressed down into the puddle.' There is some information that those who were permitted to use toilet facilities were kept handcuffed and were watched.

This list of conduct and consequences thus provides a useful set of acts against which to measure the differing levels of characterization of conduct. For example, in relation to inhumane treatment, the Prosecutor ultimately concluded that:

... it does not appear that the mistreatment by the IDF amounts to infliction of 'severe' pain or suffering so as to fall within the intended scope of inhuman treatment under article 8(2)(a)(ii) ... Instead, considering the level of suffering and discomfort as well as humiliation caused to passengers, the mistreatment of the passengers on the *Mavi Marmara* by IDF soldiers, could rather amount to the war crime of outrages upon personal dignity, in particular humiliating and degrading treatment pursuant to article 8(2)(b)(xxi).⁶⁹

However, as the examples noted above tend to indicate, the line between inhumane treatment that is cruel and that which is merely an outrage upon dignity is at best ambiguous.

2. Spectrum of proscribed conduct

Humane treatment, consequently, covers a wide range of individual crimes. At the lower end of the scale, as noted in section 2 ' "Fundamental Guarantees" within the Broader IHL/ LOAC Scheme' above, are the prohibitions against corporal punishment,⁷⁰ and serious breaches of dignity.⁷¹ In relation to the latter, this lower threshold was described in the *Katanga* case at the ICC thus:

(p. 140)

The types of actions or omissions which could constitute a crime under article 8(2)(b)(xxi) were left undefined. As a result, the core element of this war crime is the humiliation, degradation, or violation of the person's dignity. In addition, the acts of humiliation, degradation or violation to the person's dignity must be committed with objectively sufficient gravity so as to be 'generally recognized as an outrage upon personal dignity.' Nevertheless, the jurisprudence of the ICTY provides that 'so long as the serious humiliation or degradation is real and serious,' there is no

requirement that such suffering be lasting, or that it is 'necessary for the act to directly harm the physical or mental well-being of the victim.'⁷²

At the other end of the scale, inhumane treatment also encompasses crimes that manifest as violence to life (murder,⁷³ torture⁷⁴ enforced disappearance⁷⁵) and—in a variety of manifestations and characterizations—rape.⁷⁶ Of significance with respect to murder or willful killing (held to be, in almost every context, the same offence),⁷⁷ is the oft-cited maxim that the 'potential discrepancy between the provisions of HRL and IHL with respect to the right to life is rendered especially stark in situations in which the killings take place far from any conventional battlefield'.⁷⁸ However, as noted previously, it is vital that a battlefield killing—of a combatant within the bounds of LOAC, or of a civilian as permissible incidental injury/collateral damage as the result of a lawful attack—should not be assessed as a potential breach of the IHL fundamental guarantee prohibiting murder and willful killing. This is because in this narrow set of circumstances, the matter is de jure subject to more specialized rules of IHL, the application of which renders a different characterization of both the conduct and the result.

(p. 141) 3. Some current interpretive challenges

There is a range of challenges associated with distilling and applying this broad category of IHL fundamental guarantees; for illustrative purposes, however, it will suffice to briefly highlight only two. The first is that a single incident of conduct may simultaneously transgress a number of IHL fundamental guarantees. For example, the ICC *Elements of Crimes* defines torture as 'severe physical or mental pain or suffering' inflicted for the specific purpose of 'obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind'.⁷⁹ Indeed, inhumane treatment more generally can be differentiated from torture specifically by the absence of a specific purpose requirement.⁸⁰ This differentiation between cruel treatment and torture as hinging around the presence of a 'punishment, coercion, discrimination or intimidation' purpose has a long history in LOAC, having been clearly expressed (albeit as limited to 'extorting confessions') in the *Lieber Code*.⁸¹ The European Court of Human Rights, the Inter-American Commission on Human Rights, and the ICTY (for example) have all found that rape can also be characterized as torture—both as a breach of a human right, and as a violation of an IHL fundamental guarantee when committed in the context of an armed conflict.⁸²

This point raises a second ongoing challenge worth brief noting: that the content of a parallel or similarly named human right/IHL fundamental guarantee may differ as between IHL on the one hand, and IHRL on the other. The classic example is, again, torture.⁸³ The most authoritative IHRL definition of torture is that found in article 1 of the Convention against Torture 1984 (CAT):

(p. 142)

For the purposes of this Convention, the term 'torture' means 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.⁸⁴

This definition—as is logical given the original state power-citizen victim focus of IHRL—requires an element of official capacity in respect of the perpetrator. However, the IHL fundamental guarantee in relation to torture does not contain this element. Although a number of early ICTY cases read this official capacity element into the offence insofar as it constituted a crime within ICTY jurisdiction,⁸⁵ in the 2002 *Kunarac* case appellate judgment, the ITCY Appeals Chamber engaged in a clarification exercise, noting that whilst torture for the purposes of the CAT required this element, torture as a more generally prohibited act under customary international law did not necessarily do so.⁸⁶ The Appeals Chamber approved ‘the conclusions of the Trial Chamber identifying the crime of torture on the basis of three elements, these being respectively an intentional act, inflicting suffering, and the existence of a prohibited purpose’.⁸⁷ ‘The public official requirement’, consequently, ‘is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the *Torture Convention*’.⁸⁸ Thus the elements of the offence of torture as a breach of human rights—and perhaps also as a crime against humanity⁸⁹—differ from torture as a violation of the relevant IHL fundamental guarantee.⁹⁰

(p. 143) B. Non-Detention-Based Restrictions on Freedom

Slavery and the slave trade,⁹¹ and uncompensated or abusive forced labour,⁹² must at the outset be distinguished from the compellable utilization of POWs as a labour force in certain industries (including, if they volunteer, in dangerous and unsafe industries), and for the purposes relating to the functioning of the POW camp⁹³ (for which POWs are entitled to remuneration⁹⁴). Slavery of POWs and civilians was a common consequence of ancient warfare,⁹⁵ and continued as a routine practice in the early modern period—for example, after engagements between Ottoman and other European forces.⁹⁶ However, it was falling into disuse after the 1700s—although approximately 1000 British soldiers who had served in Bonnie Prince Charlie’s forces during the 1745 uprising were sent to the American colonies as slaves (being traitors, not POWs).⁹⁷ Forced labour, however, is in some circumstances indistinguishable in effect from slavery, and remains a persistent source of breaches of IHL fundamental guarantees in one form or another.⁹⁸ ‘Rape camps’, such as those that existed during the 1991–1995 breakup of the Former Yugoslavia, along with sexual slavery as prosecuted in the SCSL and ICC, are an associated evil in a category of their own, combining the restrictions of slavery (or, if the ‘ownership rights’ component of slavery is not admitted, then at the very least forced labour) with the inhumane treatment attendant upon violence, torture, and rape.⁹⁹

However, it is equally important to recall that violence is not a definitional component of slavery as a breach of the parallel IHL fundamental guarantee. In *US v Oswald Pohl and Others*, the US Military Tribunal sitting in Germany after the Second World War asserted that:

Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, (p. 144) beatings, and other barbarous acts, but the admitted fact of slavery—compulsory uncompensated labour would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.¹⁰⁰

Pohl was cited and updated in the ICTY *Kunarac* appeal judgment—albeit as a crime against humanity rather than as a war crime:

The Appeals Chamber accepts the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as 'chattel slavery', has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with 'chattel slavery', but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of 'chattel slavery' but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.¹⁰¹

This reasoning is arguably indicative of a trend towards collapsing the previously distinct concepts of slavery and uncompensated or inadequately compensated forced labour into a single concept, often by using the latter as an indicator of the former. This tendency is most evident in, for example, the *Krnojelac* case:

To establish the allegation that detainees were forced to work and that the labour detainees performed constituted a form of enslavement, the Prosecution must establish that the Accused (or persons for whose actions he is criminally responsible) forced the detainees to work, that he (or they) exercised any or all of the powers attaching to the right of ownership over them, and that he (or they) exercised those powers intentionally.

International humanitarian law does not prohibit all labour by protected persons in armed conflicts. Generally, the prohibition is against forced or involuntary labour. It is clear from the Tribunal's jurisprudence that 'the exaction of forced or compulsory labour or service' is an 'indication of enslavement', and a 'factor to be taken into consideration in determining whether enslavement was committed'.¹⁰²

This trend is understandable, but perhaps unnecessary. The IHL fundamental guarantee against forced labour could readily cover the modern field, encompassing a spectrum of conduct in armed conflict that extends from enslavement (with its traditional requirement for the exercise of 'ownership rights') through to the 'indentured servitude' that characterizes much trafficking of workers. The differences may be akin to those between murder and wilful killing—situationally arguable, but for all practical effects negligible or even (p. 145) irrelevant. So long as differentiation is maintained between this—unlawful—category of slavery/forced labour, and those limited circumstances at the lower end of the scale in which adequately compensated forced labour of civilians, and forced labour of POWs, is retained, then clarity around the distinction should remain. To some extent this conundrum simply requires application of the same sort of symbiotic interpretive approach that attends differentiating wilful killing of a civilian (a breach of an IHL fundamental guarantee) and the (permissible) incidental killing of a civilian in a lawful targeting operation.

5. Conclusion

Justice O'Connor stated in the US Supreme Court case of *Hamdi* that 'it is during our most challenging and uncertain moments that ... we must preserve our commitment at home to the principles for which we fight abroad'.¹⁰³ Compliance with the IHL fundamental guarantees provides a sensitive and reliable barometer for this purpose. Informed as it is by IHL, IHRL, and practice, the concept of IHL fundamental guarantees both represents and embodies this general commitment through its broad-based ambit requirements—such as

humane treatment and legality. Yet the concept also furnishes a detailed and interlocking rule set calibrated to foster practical attainment of this goal. Certainly, discrete elements of this rule set are still evolving—the increasing deployment of the war crime of rape as a response to the breach of an independent IHL fundamental guarantee, rather than as a crime indicative of the breach of some other IHL fundamental guarantee, still has some way to go. Similarly, some currently separate IHL fundamental guarantees may in the future consolidate around a single umbrella concept—as seems to be the trend with slavery, enslavement, and impermissible forms of forced labour. Additionally, the assertive independence that some courts and interpretive communities continue to display in ensuring focused differentiation, where required, between the substantive elements of an IHL fundamental guarantee on the one hand and its IHRL counterpart on the other—as with torture—also speaks well of the continuing dynamism and fitness for purpose of IHL fundamental guarantees as both concept and detailed rule set.(p. 146)

Footnotes:

1 Marcus Tullius Cicero, *Pro Milone* 2.6, trans NH Watts, ed J Henderson (Harvard University Press 1953): ‘I beg and implore you, gentlemen, that, having lost all else, this right at least we may retain—the right of fearlessly defending our life against the unscrupulous weapons of our foes’; Cicero, 4.10–11:

There does exist therefore, gentlemen, a law which is a law not of the statute-book, but of nature; a law which we possess not by instruction, tradition, or reading, but which we have caught, imbibed, and sucked in at Nature’s own breast; a law which comes to us not by education but by constitution, not by training but by intuition—the law, I mean, that, should our life have fallen into any snare, into the violence and the weapons of robbers or foes, every method of winning a way to safety would be morally justifiable. When arms speak, the laws are silent; they bid none to await their word, since he who chooses to await it must pay an undeserved penalty ere he can exact a deserved one.

2 Anthony Everitt, *Cicero: The Life and Times of Rome’s Greatest Politician* (Random House 2003) chapters 6–10, 13, 15.

3 See eg Alexander Gillespie, *A History of the Laws of War* (Hart 2011) Vol I, 112–15; Vol II, 114–212. For example, Tacitus records that when the town of Uspe (Armenia) offered to surrender and provide 10,000 slaves ‘in return for mercy for the freeborn’, the Romans felt obliged to refuse it because (as summarized by Gillespie) the Roman force did not have the capacity ‘to guard all of the prisoners who would have been taken. Due to the fact that the Romans felt it would have been barbarous to slaughter men who had surrendered, they refused to take the surrender and fought them to their deaths ...’: Gillespie, Vol I, 112; Vol II, 115.

4 See eg the often misunderstood nature of Roman law appertaining to pirates, described succinctly in Tamsin Paige, ‘Piracy and Universal Jurisdiction’ (2013) 12 *MLJ* 131, 132–4.

5 See generally, Benedict Kingsbury and Benjamin Straumann, ‘Introduction’, in Benedict Kingsbury and Benjamin Straumann (eds), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (OUP 2010); Clifford Ando, ‘Empire and the Laws of War: A Roman Archaeology’, in Kingsbury and Straumann (eds); Diego Panizza, ‘Alberico Gentili’s *De armis Romanis*: The Roman Model of the Just Empire’, in Kingsbury and

Straumann (eds); David Lupher, 'The *De Armis Romanis* and the *Exemplum* of Roman Imperialism', in Kingsbury and Straumann (eds).

6 Arthur Nussbaum, 'The Significance of Roman Law in the History of International Law' (1952) 100 *U Pa L Rev* 678.

7 The Martens Clause was originally promulgated in the preamble to the Hague Convention (II) with Respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 429 (Hague Convention II):

[u]ntil a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

The slightly modified version cited above is from the preamble to Hague Convention (IV) Respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 227 (Hague Convention IV).

8 Geoffrey Best, *War and Law since 1945* (Clarendon Press 1997) 3: '[r]esort to the violence of armed conflict, with all its usual chances and accidents, its frequent furies and inhumanities, its lists of casualties, trails of desolation, and legacies of hatred, looks like the antithesis of everything comprised in that ark of civilization's covenant, the rule of law'.

9 This was well evidenced, eg in Lord Canning's letter to Lord Wellesley, the British Minister in Vienna, concerning Austrian refusals to treat the Greek rebels fighting against the Ottoman Empire as full belligerents:

The doctrine of Prince Metternich, that the Greeks, as rebels, are not entitled to the same rights of war, as legitimate belligerents, is one, of which, we think His Highness would do well to weigh all the consequences, before he promulgates it to the world. The practical enforcement of that doctrine could have no other effect than to convert the contest which has been brought, in a great measure by our exertions, into one of a regular and civilized character, into one of indiscriminate rapine and massacre (Letter from Lord Canning to Lord Wellesley (31 December 1824) (FO 7/181, no 34), extracted in Herbert Smith, *Great Britain and the Law of Nations* (King & Son 1932) 296.

See similarly the US Supreme Court in *Ford v Suget*, which was also of the view that the application of the international law of war during the American Civil War 'was conceded, in the interest of humanity, and to prevent the cruelties of reprisals and retaliations': *Ford v Suget*, 97 US 594 per Harlan J.

10 Brian Dirck, *Waging War on Trial: A Handbook with Cases, Laws, and Documents* (ABC-Clio 2003) 35-6.

11 See US Army-Marine Corps, 'Counterinsurgency', in *Field Manual* 3-24 (Marine Corps Warfighting Publication No 3-33.5 2006); the updated version is US Army-Marine Corps, 'Insurgencies and Countering Insurgencies', in *Field Manual* 3-24 (Marine Corps Warfighting Publication No 3-33.5 2014) paras 1.27-1.33.

12 See eg Ashley Nikkel, 'Painting Ourselves into a Corner: The Fundamental Paradoxes of Modern Warfare in *Al Maqaleh V. Gates*' (2011-12) 12 *Nevada LJ* 443, 446-51.

13 Emily Crawford, 'Road to Nowhere? The Future for a Declaration on Fundamental Standards of Humanity' (2012) 3 *Int'l Hum Studs* 43, 45, with background analysis of the course of discussions and attempts outlined at 46–55.

14 See eg Theodor Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument' (1983) 77 *AJIL* 589; see also Theodor Meron, 'Towards a Humanitarian Declaration on Internal Strife' (1984) 78 *AJIL* 859.

15 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol I: Rules* (CUP 2005) (CIHL) 299.

16 CIHL rule 88; Common Article 3; Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 12 October 1950) 75 UNTS 135 (GCIII) article 16; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV) article 13; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API) articles 9(I), 69(1), 70(1), and 75(I); and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII) articles 2(1), 4(1), and 18(2).

17 See eg GCIII article 4(B)(1).

18 See eg GCIV articles 5, 41–46.

19 See eg API article 75(1):

... shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria ...

20 ICC Appeals Chamber, *Judgment on the appeal of Mr Ntaganda against the 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9'* No ICC-01/04-02/06 OA5 (15 June 2017) para 2.

21 UNGA Resolution 2675 (XXV) (9 December 1970) para 1.

22 'Declaration of Minimum Humanitarian Standards Adopted by an Expert Meeting Convened by the Institute for Human Rights' (meeting convened by the Institute of Human Rights, Åbo Akademi University, Turku Finland, 2 December 1990) (Turku Declaration) www.ifrc.org/Docs/idrl/I149EN.pdf.

23 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14 (*Nicaragua* case) para 218.

24 Crawford (above n 13) 53.

25 On the dissolving of hard paradigmatic borders between IHL and IHRL, see in general: CIHL ch 32; Cyril Laucci, 'Customary International Humanitarian Law Study: Fundamental Guarantees' (2009) 6 *Slovenian L Rev* 191; Natasha Balendra, 'Defining Armed Conflict' (2007–2008) 29 *Cardozo L Rev* 2461; Jeremy Marsh, 'Rule 99 of the Customary International Humanitarian Law Study and the Relationship between the Law of Armed Conflict and International Human Rights Law' (2009) *Army Law* 18.

26 Balendra (above n 25) 2495.

27 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 66 para 25.

28 Louise Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons' (1997) *IRRC* 35, 51; see also, Aldo Zammit Borda 'Introduction to International Humanitarian Law' (2008) 34(4) *CLB* 739, 747:

[b]ut the effective protection of the victims of armed conflict requires not only that they should enjoy certain basic human rights, but also that they should benefit from certain supplementary rights which are necessary precisely because of the armed conflict, such as medical care, the right of prisoners of war to correspond with their families, the right of repatriation in certain circumstances, etc. In these areas, the provisions of IHL go beyond the requirements of basic human rights law.

29 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 para 106.

30 Laucci (above n 25) 194.

31 Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (CUP 2014) 178.

32 *Prosecutor v Charles Taylor* (Trial Chamber II Judgment) SCSL-03-01-T-1283(18 May 2012) paras 1017–1207 (count 5); *Ntanganda 2nd Jurisdiction Appeal* decision (above n 20).

33 *Prosecutor v Jean Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) paras 685–697.

34 *Prosecutor v Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic* (Appeals Chamber Judgment) IT-96-23& IT-96-23/1-A (12 June 2002) paras 127–133.

35 *Prosecutor v Issa Hassan Sesay, Morris Kallon, and Augustine Gbao* (Trial Chamber Judgment) SCSL-04-15-T (2 March 2009) paras 147–148.

36 That is, a formal GCIV occupation where LOAC continues to apply, as opposed to the mixed provenance concept of 'transformative occupation', as set out so clearly by Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 *AJIL* 580.

37 *Prosecutor v Dusko Tadić* (Trial Chamber Judgment) IT-94-1-T (7 May 1997) para 607: 'For that reason, each of the victims of the acts ascribed to the accused in Section III of this Opinion and Judgment enjoy the protection of the prohibitions contained in Common Article 3, applicable as it is to all armed conflicts ...'; see generally, Darcy (above n 31) 163–5.

38 APII article 4; API article 75(2):

The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

- (i) murder;
- (ii) torture of all kinds, whether physical or mental;
- (iii) corporal punishment; and
- (iv) mutilation;

- (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
- (c) the taking of hostages;
- (d) collective punishments; and
- (e) threats to commit any of the foregoing acts.

39 GCIII article 99; GCIV article 67; API article 75(4)(c); APII article 6(2)(c); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 15(1).

40 CIHL rule 101.

41 *Prosecutor v Tadić* (Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 89.

42 Laucci (above n 25) 203.

43 *Prosecutor v Mitar Vasiljevic* (Trial Chamber Judgment) IT-98-32-T (29 November 2002) para 196.

44 *Polyukovich v The Commonwealth* [1991] HCA 32.

45 War Crimes Act 1945 (Commonwealth) www.legislation.gov.au/Details/C2010C00110.

46 *Polyukovich v The Commonwealth* (above n 44) para 5 (Mason CJ).

47 *ibid* paras 23–41 (Mason CJ), 27 (Deane J).

48 *ibid* para 27 (Deane J).

49 *ibid* para 76 (Brennan J).

50 *ibid* paras 8, 26 (Brennan J).

51 *ibid* para 48.

52 Military Commissions Act of 2006 (US) 120 STAT 2617, section 950v(b)(25):

Providing Material Support For Terrorism—'(A) Offense: Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.' '(B) Material Support Or Resources Defined: In this paragraph, the term "material support or resources" has the meaning given that term in section 2339A(b) of title 18.'

53 *David Hicks v United States of America* CMCR 13-004, 8–9, United States Court of Military Commission Review, 18 February 2015 citing, inter alia, the recent precedent of *Al Bahlul v United States of America*, 767 F.3d 1 (DC Cir 2014) 29.

54 CIHL 307–308 rule 87.

55 Laucci (above n 25) 195.

56 See the brief discussion in the CIHL (Vols I and II) with respect to rule 87.

57 See eg: Common Article 3; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GCI) article 12(1); Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 12 October 1949) 75 UNTS 85 (GCII) article 12(1); GCIII article 13 ('Prisoners of war must at all times be humanely treated ...'); GCIV articles 5 and 27 (article 27: 'Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity ...'); API article 75(1) ('In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances ...'); APII article 4(1).

58 See eg ICCPR article 10(1): 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'

59 As a crime against humanity, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) article 7(i)(k): 'Other inhumane acts ... intentionally causing great suffering, or serious injury to body or to mental or physical health ...'; as a war crime, eg, article 8(2)(a)(ii) (international armed conflicts—'torture or inhuman treatment'), and article 8(2)(c)(i)–(ii) (non-international armed conflicts: 'violence to life and person ... cruel treatment and torture', 'committing outrages upon personal dignity, in particular humiliating and degrading treatment').

60 See the CIHL database for a comprehensive list from those manuals made available to the ICRC.

61 Bundesministerium der Verteidigung Joint Service Regulation (ZDv), 15/2, *Law of Armed Conflict Manual* (May 2013) para 504 (references excluded).

62 *Prosecutor v Zlatko Aleksovski* (Appeals Chamber Judgment) IT-95-14/1-A (24 March 2000) para 26.

63 *Prosecutor v Zejnil Delalić, Zdravko Mucić also known as 'Pavo', Hazim Delić, Esad Landžo also known as 'Zenga'* (Trial Chamber Judgment) IT-96-21-T, (16 November 1998) paras 543, 552.

64 *Prosecutor v Taylor* (above n 32) paras 433–437, 1208–354 (counts 7 and 8 of the indictment).

65 *Prosecutor v Tihomir Blaskić* (Appeals Chamber Judgment) IT-95-14-A (29 July 2004) paras 596–597:

The Appeals Chamber finds that the use of persons taking no active part in hostilities to prepare military fortifications for use in operations and against the forces with whom those persons identify or sympathise is a serious attack on human dignity and causes serious mental (and depending on the circumstances physical) suffering or injury. Any order to compel protected persons to dig trenches or to prepare other forms of military installations, in particular when such persons are ordered to do so against their own forces in an armed conflict, constitutes cruel treatment.

66 *Prosecutor v Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj* (Appeals Chamber Judgment) IT-04-84-A (19 July 2010) paras 93–97:

his treatment caused him serious mental suffering and constituted a serious attack on his human dignity ... [his] wife was taken away to be interrogated at a headquarters of the KLA, which had a reputation for violence ... [he] suffered serious mental harm when he was incapacitated in the well and separated from his wife, who was now in the hands of armed KLA soldiers.

67 *Delalić* (above n 63) para 558:

Given that, in the context of Article 3 of the Statute, cruel treatment carries the same meaning as inhuman treatment in the context of Article 2, this allegation of inhumane conditions is appropriately charged as cruel treatment. However, in light of the above discussion of these offences, the Trial Chamber is of the view that, while it is possible to categorise inhumane conditions within the offence of wilfully causing great suffering or serious injury to body or health under Article 2, it is more appropriately placed within the offence of inhuman treatment.

68 Office of the Prosecutor (ICC), *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report* (6 November 2014) (*Mavi Marmara Report*) paras 62–72, in relation to inhuman treatment pursuant to article 8(2)(a)(ii)-2, and committing outrages upon personal dignity, in particular humiliating and degrading treatment pursuant to article 8(2)(b)(xxi).

69 *ibid* para 69.

70 CIHL rule 91; GCIII article 87; GCIV article 32; API article 75(2)(a)(iii); APII article 4(2)(a).

71 *Mavi Marmara Report* (above n 68) para 70:

The war crime of ‘outrages upon personal dignity’ requires the two following elements: (i) the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons; and (ii) the severity of the humiliation, degradation or other violation was of such a degree as to be generally recognized as an outrage upon personal dignity.

72 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/04-01/07 (30 September 2008) para 369.

73 CIHL rule 89; Common Article 3; GCI article 50; GCII article 51; GCIII articles 13–14; GCIV article 147; API article 75(2)(a)(i); APII article 4(2)(a); ICCPR article 6(1); Turku Declaration article 8(1): ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his or her life ...’.

74 CIHL rule 90 combines torture, cruel or inhuman treatment, and outrages upon personal dignity, and (as a subset of this latter) humiliating and degrading treatment, into a single rule; Common Article 3; GCI article 12; GCII article 12; GCIII articles 17, 87, and 89; GCIV article 32; API articles 75(2)(a)(ii); APII article 4(2)(a); ICCPR article 7.

75 CIHL rule 98; Rome Statute article 7(2)(i):

the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

See generally, Balendra (above n 25) 2504:

Enforced disappearances are not as such addressed by IHL treaties. However, they are closely connected to other forms of IHL violations, such as arbitrary deprivations of liberty, torture and other cruel treatments and murder, of which they may, under certain circumstances, constitute a consequence. The UN Declaration on Enforced Disappearance of 1992 specifically addresses the case of enforced disappearances, without defining it.

76 CIHL rule 93; GCIII article 14; GCIV article 27; API article 75(2)(b); APII article 4(2)(e).

77 See eg *Prosecutor v Tihomir Blaskic* (Trial Chamber Judgment) IT-95-14-T (3 March 2000) para 181.

78 Balendra (above n 25) 2504.

79 ICC, *Elements of Crimes* (PrintPartners Ipskamp 2011) articles 8(2)(a)(ii)-1 and 8(2)(c)(i)-4.

80 See eg CIHL 317.

81 *Instructions for the Government of Armies of the United States in the Field*, General Orders No 100 (24 April 1863) article 16: 'Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions ... '.

82 *Aydin v Turkey* App No 571199616761866 (ECtHR, 25 September 1997) para 86; Inter-American Commission on Human Rights (IACCommHR) *Fernando and Raquel Mejia v Peru* Case No 10.970 (1 March 1996) Report No 5/96, section V.B.2.3.a; *Delalić* (above n 63) paras 475–497:

494. In view of the above discussion, the Trial Chamber therefore finds that the elements of torture, for the purposes of applying Articles 2 and 3 of the Statute, may be enumerated as follows:

- (i) There must be an act or omission that causes severe pain or suffering, whether mental or physical,
- (ii) which is inflicted intentionally,
- (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,
- (iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.

495. The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or

intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict.

496. Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criteria.

83 See generally CIHL rule 90 commentary, 317–18.

84 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

85 See eg *Akayesu* (above n 33) paras 593–594; *Prosecutor v Anton Furundzija* (Trial Judgment) IT-95-17/1-T (10 December 1998) paras 134–164; *Prosecutor v Anton Furundzija* (Appeal Chamber Judgment) IT-95-17/1-A (21 July 2000) para 111:

The Trial Chamber correctly identified the following elements of the crime of torture in a situation of armed conflict: (i) ... the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition; (ii) this act or omission must be intentional; (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person; (iv) it must be linked to an armed conflict; (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g., as a de facto organ of a State or any other authority-wielding entity.

86 *Kunarac* (above n 34) paras 142–148.

87 *ibid* para 134.

88 *ibid* para 148; this now appears to be the accepted trajectory of ICTY jurisprudence—eg *Prosecutor v Miroslav Kvocka, Mlado Radic, Zoran Zigic, Dragoljub Prcac* (Appeals Chamber Judgment) IT-98-30/1-A (28 February 2005) paras 280–284.

89 ICC, *Elements of Crimes* (above n 79) article 7(1)(f) does not specify this, but it is arguably implicit in the ‘widespread or systematic attack on the civilian population’ contextual requirement.

90 See eg ICC *Elements of Crimes* (above n 79) article 8 (2)(a)(ii)-1, which has no ‘official capacity’ nexus or requirement; the offence does, however, require that the proscribed conduct be carried out in the context of (in this case) an IAC.

91 CIHL rule 94; APII article 4(2)(f); ICCPR article 8; Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319.

92 CIHL rule 95; GCIII articles 49–68; GCIV articles 40, 51–52, 95–96 and 132–135.

93 GCIII articles 49–57.

94 *ibid* article 62: ‘The rate shall be fixed by the said authorities, but shall at no time be less than one-fourth of one Swiss franc for a full working day ...’.

95 See eg Gillespie (above n 3) Vol II, 112 (Ancient Greece).

96 See eg: Noel Malcolm, *Agents of Empire: Knights, Corsairs, Jesuits and Spies in the Late Sixteenth-Century Mediterranean World* (OUP 2015) chapter 11, on the lucrative practice of hostage and POW slave ransoming and exchange that existed between the Ottoman Empire on one hand, and its routine adversaries—Spain, Venice, The Papacy, and the Holy Roman Empire—in the 1500s.

97 Gillespie (above n 3) Vol I, 142.

98 For example, German labour and concentration inmate ‘Ausländereinsatz’ policy during WWII: ‘Nazi Germany created one of the largest forced labor systems in history: Over twenty million foreign civilian workers, concentration camp prisoners and prisoners of war from all of the occupied countries were required to perform forced labor in Germany in the course of the Second World War’: Forced Labor 1939–1945: Memory and History Archive, ‘Nazi Forced Labor: Background Information’ www.zwangsarbeit-archiv.de/en/zwangsarbeit/zwangsarbeit/zwangsarbeit-2/index.html.

99 See eg *Prosecution v Taylor* (above n 32) para 1028; for a summary of the ICTY’s case law, see Matteo Fiori, ‘The Foca “Rape Camps”: A Dark Page Read through the ICTY’s Jurisprudence’ *Hague Justice Portal* (19 December 2007) www.haguejusticeportal.net/index.php?id=8712.

100 *US v Oswald Pohl and Others* (Judgement) (3 November 1947), reprinted in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10* (1997) Vol 5, 970.

101 *Kunarac* (above n 34) para 117.

102 *Prosecutor v Milorad Krnojelac* (Trial Chamber Judgment) IT-97-25-T (15 March 2002) paras 350–351, 358–359.

103 *Hamdi v Rumsfeld* 542 US 507, 532 (2004).

(p. 93) 5 Combatants and Non-Combatants

Introductory Remarks

1. International law regarding persons taking part in or affected by an international armed conflict makes a fundamental distinction between combatants and civilians, a distinction being the leading principle and the unchangeable core of international humanitarian law applicable in international armed conflicts.¹ This distinction determines the international legal status of these two categories. They indicate the *primary status* of persons in the event of an international armed conflict. The acquisition of a new, *secondary status* is linked to this primary status when there is an actual change in circumstances (the combatant who falls into the power of the enemy becomes a prisoner of war). The primary status determines the protection afforded to a person by international law (e.g. the general protection of civilians against dangers arising from military operations; the special protection of a combatant *hors de combat*). Finally, an individual's primary status determines the *legal consequences* of his or her conduct (e.g. the consequences of a violation of international law by a combatant, or of the direct participation in hostilities by a civilian).

2. International law applicable in international armed conflicts determines which persons are entitled to the status of combatant or of civilian. Regardless of this basic classification, persons can be in closer proximity to one or the other primary status—either due to national law or administrative measures, or because of actual circumstances. As a rule, for example, members of the armed forces of a state (or another party to the conflict which is a recognized subject of international law) are combatants; thus they are authorized, within the limits imposed by international law applicable in international armed conflicts, to participate directly in hostilities. Members of the medical and religious personnel are exceptions to this rule. In addition, other members of the armed forces may, in accordance with decisions made at national level, be excluded from a direct participation in hostilities, thus being 'non-combatants' in the literal sense. Finally, persons can be attached to the armed forces without actually being members. They are generally known as 'persons who accompany the armed forces', which is an indication that their primary status is that of civilians. The authorization to fight as a combatant is denied, on one hand to 'non-combatants' *despite* their membership of the armed forces, and on the other hand to 'persons who accompany the armed forces' *because* of their primary status. However, persons who do *not* belong to the armed forces can, under exceptional circumstances, attain combatant status by virtue of an act of their state or through their own decision, as (p. 94) is illustrated by the inclusion of police forces in the 'armed forces' or the armed resistance of the civilian population against an invasion (the '*levée en masse*').

3. It follows from the above that the heading of this chapter should not be taken to indicate that combatants and non-combatants are categories on the same level of legal quality. The primary status under international law of persons in an international armed conflict will be one of two categories of persons: '*combatants and civilians*'. Combatants may fight within the limits imposed by international law applicable in international armed conflict, that is they may participate directly in hostilities, which members of medical or religious personnel and 'non-combatants' may not do because they are excluded—the former by international law and the latter by a legal act of their party to the conflict—from the authorization to take a direct part in hostilities.

I. General Rules

5.01

The armed forces of a party to a conflict consist of combatants and non-combatants. Combatants are persons who may take a direct part in the hostilities (Article 3 HagueReg; Article 43, para. 2, AP I), that is participate in the operation or control of a weapon or a weapon-system in an indispensable function. Other members of the armed forces may be qualified as non-combatants. The status of the various groups of service personnel will be determined by national decision in accordance with the aforementioned international legal principles.

1. To the extent that the armed forces are described as consisting of 'combatants', this corresponds to the fundamental tenet of international law that a party to an international armed conflict, being a subject of international law, exercises the force of arms against another party to the conflict through an organ expressly denoted as its 'armed forces' and that, in accordance with the armed forces' capacity and its tasks, its members as a rule have combatant status. This means that only a party to a conflict which is a subject of international law can have armed forces whose members are combatants. This reflects the basic relation in international law between the state (as a subject of international law), its armed forces (as its organ), and the members of the armed forces (as combatants). The armed forces are described as consisting also of 'non-combatants'; this refers to the exception that, in addition to the medical and religious personnel, there may be other members of the armed forces which are not authorized to participate directly in hostilities. The description of the armed forces as comprising combatants and non-combatants should not, however, detract from the fact that for members of the armed forces combatant status is the rule, while the classification as non-combatant is an exception. This follows both from the ordinary meaning and additionally from the historical origin of the relevant norms of international law. Article 3 HagueReg provides that the armed forces of the parties to a conflict 'may' consist of combatants and non-combatants. This reflects the basic fact, already generally recognized at the time when the HagueReg came into being, that according to a national decision, armed forces may consist of persons both with and without combat tasks.² Both the ordinary meaning and the drafting history of Article 3 HagueReg prove that it was intended to afford to all captured members of the (p. 95) armed forces the status of prisoner of war, regardless of whether or not they were directly involved in the hostilities. That the combatant status of members of armed forces has always been and is still today the deciding factor is made particularly clear by the wording of Article 43, para. 2, AP I, which in brackets expressly identifies medical personnel and chaplains as an exceptional group not possessing combatant status. In the light of this state of international law it should be underlined that members of armed forces as a rule are combatants and that a non-combatant status of members of the armed forces only applies in exceptional cases.

2. In the description of combatants in the second sentence of this section as 'persons who may take a direct part in the hostilities', the legal definition of combatants contained in Article 43, para. 2, AP I is repeated almost *verbatim*. The additional explanation that combatants 'participate in the operation or control of a weapon or a weapon-system in an indispensable function' in no way restricts the ambit of the definition: members of the armed forces whose function in the operation or control of a weapon or a weapon-system is not 'indispensable' do not, for this reason, lose their combatant status. The formula of the 'indispensable function' can only serve to differentiate between combatant and non-combatant members of the armed forces in national organizational decisions. Persons, however, who participate in the operation or control of a weapon or a weapon-system in an

indispensable function may not under any circumstances be designated as non-combatants by national decision.

On the basis of the ordinary meaning, a combatant is a person who fights. This is also the generic meaning of the term. If, however, the generic meaning of the term 'combatant' is understood as 'indicating persons who do not enjoy the protection against attack accorded to civilians',³ only a mere consequence for the adverse party to the conflict is defined, but not the generic meaning of the term. As an international legal term, 'combatant' means a person who is *authorized* by international law to fight in accordance with international law applicable in armed conflicts. This authorization is not an individual right afforded to the combatant by international law, but results from the affiliation of the combatant to an organ (i.e. the armed forces) of a party to the conflict, which is itself a subject of international law.⁴

The fundamental and indispensable structure with regard to combatant status is, therefore, the legitimizing chain consisting of a state (or at least a belligerent entity recognized as a partial subject of international law), the armed forces as an organ of this state or entity, and combatants as constituent parts of that organ. This legitimizing chain is the unchanged and unchangeable basis of international humanitarian law to legally qualify a person as a combatant. Article 3 HagueReg as well as Article 43, para. 2, AP I are (p. 96) the conclusive proofs of the said chain. Thus, the mere statement that a combatant is a person who fights is a purely factual description of an activity, but not at all appropriate to qualify a legal status under international humanitarian law.

Moreover, the attempt of the ICRC at CDDH to introduce the notion of 'combatant' as a generic term of the same meaning into the drafts of AP I and AP II has been rejected in the Working Group of the 3rd Commission. The result of the Working Group has been the definition of combatant which is right now binding as Article 43, para. 2, AP I for about 85 per cent of the existing states. Nearly the same percentage of states are parties of AP II in the draft of which the said Working Group had deleted every mentioning of 'combatant'. This status of the respective treaties does not permit to replace or to supplement in a mere act of interpretation the doubtless legal quality of the notion by resort to its generic meaning. It has, of course, to be noticed that during the first decades of this century round about 80 per cent of the armed conflicts had been non-international. In spite of this fact there are, however, no indicators that the parties of the APs have developed a common understanding of 'combatant' as a generic term, thus creating a general practice which they have accepted as law.

Hence any attempt to replace or simply to supplement the legal term of combatant by a generic term is neither possible with the instrument of pure interpretation (in this connection methodically a grievous fault), nor with the resort to an alleged new customary law superseding or only supplementing the legal term.⁵ Authors supporting such a development in order to extend the protective purpose of international humanitarian law in non-international armed conflicts thus try to reach a humanitarian object which, however, might include the impression of an implicit authorization of the citizens of a state to take a direct part in the hostilities against the said state. Such a development of CIHL as well as of treaty law would always find a vast majority of persistent objectors.

3. The statement that '[t]he other members of the armed forces are regarded as non-combatants' could be taken to mean that the combatant is defined narrowly as a specific member of the armed forces and that all other members of the armed forces are non-combatants. Such a false conclusion would be diametrically opposed to the principle of

international law: that members of the armed forces are as a rule combatants, and are non-combatants only in exceptional cases.

4. Finally, the observation that the 'status of the various groups of service personnel will be determined by national decision in accordance with the aforementioned international legal principles' does not mean that, regardless of the definition of a combatant in Article 43, para. 2, AP I, a state or other party to the conflict which is recognized as a subject of international law has a broad discretion in classifying the members of its armed forces as combatants or as non-combatants. In fact, the opposite is true.

If a state, or a party to a conflict bound in accordance with Article 1, para. 4, Article 96, para. 3, AP I, maintains armed forces, then the members of these armed forces (with the exception of medical and religious personnel) *are* combatants by international legal (p. 97) definition, that is they are entitled to participate directly in hostilities without any further legal act beyond the act of establishing armed forces.

If, however, the subject of international law maintaining the armed forces wishes to exclude members of the armed forces beyond the medical and religious personnel from direct participation in hostilities, then for *this reason alone* an internal legal act is required. Reduced to a concise formula: a member of the armed forces is a combatant by nature; the status of non-combatant can only be granted to a member of the armed forces by an internal constitutive legal act.

5.02

Whereas combatants may not be punished for the mere fact of fighting, persons who take a direct part in the hostilities without being entitled to do so (unprivileged belligerents or unlawful combatants) face penal consequences. They do not have the right to prisoner-of-war status. Yet they have a legitimate claim to certain fundamental guarantees (Article 75 AP I) including the right to humane treatment and a proper judicial procedure.

1. The 'mere fact of fighting', for which combatants are not punishable, means participating directly in hostilities within the limits imposed by international humanitarian law, provided that all of the relevant norms of this body of law with respect to military activities are observed (*see below*, Section 5.04). Thus the combatant must particularly abide by the rules on methods and means of combat (Chapters 6 and 7 below) as well as by the regulations concerning persons receiving special protection (Chapters 8–13 below).

If combatants breach rules of international law applicable in international armed conflict and relevant for their military acts, they shall be called to account in accordance with the military or military penal law of their party to the conflict. If, following the violation of international law, they come into the power of the adversary, then the punishment under criminal law is determined by Articles 99 *et seq.* GC III (*see Chapter 21 VII below*).

If, on the other hand, persons who do not have combatant status participate directly in hostilities then they are treated as unprivileged belligerents or unlawful combatants if they fall into the hands of the enemy.⁶ Such fighters cannot be classified as belonging to a state or a party to the conflict recognized as a subject of international law, and are therefore not authorized to undertake armed acts against the adversary. Such irregular fighters, that is fighters not belonging to a subject of international law involved in the conflict, if taken by the adversary, are prosecuted as criminals and sentenced for their direct participation in hostilities, in compliance with Article 45 AP I.

If it becomes clear that neither the assumption of prisoner-of-war status (Article 45, para. 1, AP I) can be invoked for the captured person, nor that the preliminary judicial decision about prisoner-of-war status (Article 45, para. 2, AP I) has been successful, then the person shall at least be treated in accordance with the fundamental guarantees of Article 75 AP I, provided that GC IV—to the extent that it is applicable—does not grant a more favourable treatment.

(p. 98) **2.** The term ‘unlawful enemy combatant’ was particularly used after 11 September 2001, to introduce a third category of persons which under existing law may be either combatants or civilians, but are denied such status as not fulfilling essential conditions. The US Military Commissions Act of 2006⁷ defined an unlawful enemy combatant as ‘(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaida, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006 has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense’. Although ‘lawful enemy combatants’ are correctly defined by this Act, the strict avoidance of the distinctive legal term ‘civilian’ combined with the provision that no alien unlawful enemy combatant under the jurisdiction of military commissions is permitted to invoke the Geneva Conventions as a source of rights is hardly compatible with the spirit, object, and purpose of these Conventions. The US Supreme Court ruling on the Military Commissions Act in re *Boumediene v Bush*⁸ has held the Guantánamo prisoners as authorized by reason of *habeas corpus* to appeal to the US judicial system; the Combatant Status Review Tribunals were estimated to be inadequate. The Supreme Court, however, has not adequately criticized the third category in addition to combatants and civilians which, due to another proponent of this category,⁹ means that ‘any so-called civilian who takes a ‘direct’ (or ‘active’) part in hostilities, becomes *eo ipso* an unlawful combatant, that is to say, not only does he lose the status of civilian but he fails to gain the status of an ordinary (lawful) combatant’.

Hence the treatment of ‘unlawful enemy combatants’ as a third category is and will remain controversial and, indeed, questionable. If a person is not a combatant, he or she may be targeted only if he or she takes a direct part in hostilities. Neither does such third category exactly define the crime committed by the person in question, nor does it indicate the amount of humanitarian protection even criminals are entitled to.¹⁰ To use this third category in order to reduce the individual protection below the minimum standard of human rights is under no circumstances legally acceptable.

5.03

In particular, mercenaries shall be regarded as unlawful combatants. A mercenary is any person who is motivated to take a direct part in the hostilities by the desire for private gain without being a national or a member of the armed forces of a party to the conflict (Article 47 AP I). The provisions of the 1989 MercenaryConv then also apply.

Under Article 47, para. 1, AP I, mercenaries are not entitled to the status either of combatant or of prisoner of war. To regard them as ‘unprivileged belligerents’ or ‘irregular fighters’ does not accord with the meaning of these terms, as mercenaries can certainly take part in hostilities on the side of a recognized subject of international law which is a party to the conflict.

(p. 99) The denial of the status of combatant and prisoner of war to mercenaries can be explained by the crucial and fatal role which mercenaries—especially of European and North American origin—have played in armed conflicts on the African continent. In 1967, the UN Security Council had already called upon states to prohibit the recruitment of mercenaries on their territory for the purpose of removing foreign governments; the Security Council repeated this request specifically in the final phase of the negotiations in Geneva on AP I.¹¹ Article 47, para. 2, AP I defines a mercenary as fulfilling six criteria: recruitment (locally or abroad) in order to fight in an armed conflict; actual and direct participation in hostilities; participation motivated by desire for private gain with payment which substantially exceeds that of normal combatants; lack of legal ties to the party to the conflict based on nationality or residency in a territory controlled by that party; lack of membership in the armed forces of the party to the conflict; and not being on official duty in the armed forces of a state not party to the conflict.¹²

The 1977 OAU Convention for the Elimination of Mercenarism in Africa and the 1989 MercenaryConv have adopted this definition, which is so narrow that even members of armed forces who are not nationals of the party to the conflict are not considered to be ‘mercenaries’ if they serve in special units consisting only or mainly of foreigners (e.g. the French Foreign Legion).

This particular point illustrates that the exclusion of mercenaries from combatant and prisoner-of-war status is essentially justified by the failure of such a person to be a member of the armed forces of a party to the conflict. First and foremost it is the person belonging to the armed forces of a party to the conflict who has the primary status of combatant. It is this assignment to an organ which constitutes authorization to carry out armed acts causing damage. A simple contract between an individual and a party to the conflict—fighting in exchange for payment—is not sufficient. Thus the rule regarding mercenaries does not amount to an exception but represents a logical consequence of the law: a person who is not a member of the armed forces is not (with the exception of participants in a *levée en masse*) a combatant either.

II. Combatants

The key rule for determining a person’s status as combatant is contained in Article 43 AP I, which defines armed forces and provides that members of the armed forces (not including the medical and religious personnel) are combatants.

5.04

The armed forces of a party to a conflict consist of all its organized armed forces, groups, and units. They also include militias and volunteer corps integrated in the armed forces. The armed forces shall be:

- **under a command responsible to that party for the conduct of its subordinates; and**
- **subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict (Article 43, para. 1, AP I).**

1. The definition of armed forces contained in the first sentence of this section is identical with the definition laid down by Article 43 AP I. The wording of this provision is (p. 100) clear and therefore requires no further interpretation; it provides that all armed forces of a party to the conflict have the legal status of an organ of that party. According to the broad legal definition of armed forces, these ‘consist of all organized armed forces, groups, and

units which are under a command responsible to that Party for the conduct of its subordinates’.

2. The definition is comprehensive: it refers expressly to ‘all’ organized armed forces of a party to a conflict. This comprehensivity puts an end to the long-standing controversy regarding the definition of ‘armed forces’ in international legal instruments pertaining to Geneva and Hague Law. The second sentence of this section should not be misconstrued to mean that only those militias and voluntary corps forming a component of the armed forces according to the relevant national law are part of the armed forces. Such an interpretation could lead to a false conclusion that the differentiation made in Article 1 HagueReg is being stressed. In this article, a distinction is made between states in which militias or volunteer corps constitute the army or a part of it, and those states which have militias or voluntary corps in addition to their army. This division is also reflected in Article 4 A, Nos 1 and 2, GC III. Section 5.04 is based only on the category of No. 1 (militias and volunteer corps forming part of the armed forces of a party to the conflict), thus neglecting No. 2 (other militias and volunteer corps). However, both organizational forms of militias and volunteer corps now fall within the term ‘armed forces’ of Article 43, para. 1, 1st sentence, AP I.

3. The construction of this key regulation is based on the following indispensable legal elements. Only states or other parties which are recognized as subjects of international law can be parties to an international armed conflict. However, a subject of international law can act only through its own organs. If it uses armed force, the subject can thus act only through the instruments organized for this purpose, that is through the armed forces. Militias or voluntary corps of which a party to an international armed conflict makes use are therefore part of its armed forces within the meaning of Article 43, para. 1, 1st sentence, AP I, regardless of whether they are incorporated into the regular armed forces, for example the army, or are separate.

The two express requirements—of a responsible command and an internal disciplinary system—contained in Article 43, para. 1, follow from the aforesaid construction of the term ‘armed forces’ contained in AP I. Each party to a conflict must in all circumstances observe the international law applicable in international armed conflict, as is stipulated for example with respect to AP I in its Article 1, para. 1.

A party to an international armed conflict acts through its armed forces as its organs. Given its fundamental duty to comply with the law, such a party is also bound to ensure that its organs’ behaviour is lawful. Article 3, 2nd sentence, HC IV expressly lays down this duty with the same words as Article 91, 2nd sentence, AP I. To secure that this duty is performed, a command of the armed forces which is responsible to the party to the conflict for the conduct of its subordinates is required. However, a breach of international law leads to responsibility in international law of the party to the conflict recognized as a subject of international law. It is in the general interest of the party to the conflict to prevent contraventions of international law, in order to avoid responsibility. Hence it is necessary to implement a system of sanctions, together with the internal disciplinary system, both of which are required by Article 43, para. 1, 2nd sentence, AP I (see below, Sections 21.10–21.18).

(p. 101) **4.** According to Article 43, para. 2, AP I, only members of the armed forces as defined above (with the exception of the medical and religious personnel specially protected by Article 33 GC III) are combatants, ‘that is to say, they have the right to participate directly in hostilities’. Thus membership of the armed forces is an indispensable prerequisite to combatant status; ‘armed forces’ in the meaning of international law, however, have the legal status of an organ of a party to the conflict. If persons participating directly in hostilities lack either of these two prerequisite elements of combatant status,

then they cannot have combatant status. Thus, if they fall into the hands of the enemy, they cannot acquire the secondary status of prisoner of war.

5. To sum up, it has to be established that Article 43, para. 1, AP I has created a standard international legal term of ‘armed forces’ covering all combatant forces (except participants in a *levée en masse*) which are listed in addition to the regular ‘armed forces’ in the older relevant conventions (HagueReg, GC); they are now included within the term ‘armed forces’.

It was the natural and legally logical consequence of this broad definition of armed forces to define the combatant as a member of the armed forces who is entitled to participate directly in hostilities. The fundamental structure of the term ‘combatant’ in international law which was established prior to AP I, however, has not been changed: it describes a person who is a member of the armed forces, being an organ of a party to a conflict which is a subject of international law.

The party to the conflict determines the type and size of its armed forces in accordance with its national laws. On the level of international law, the members of these armed forces are entitled to take part directly in hostilities (for the interpretation of the term ‘direct participation’ *see below*, commentary to Section 7.03). This point deserves emphasis. With regard to the direct participation in hostilities, combatants are privileged solely by that entitlement, the lack of which makes them criminals liable to prosecution. On the other hand, the duties of the combatant impose limits on that entitlement (*see* Sections 5.08, 5.09, and 5.11 below).

5.05

It shall be left to the discretion of the individual states to choose whether to admit women to their armed forces. Their combatant or non-combatant status is determined by the same principles as that of male members of armed forces.

1. Since the primary status of combatant is derived from membership in the armed forces of a party to the conflict, women and children also have this status if they are members of the armed forces. A party to the conflict may, however, be bound by international conventions prohibiting the recruitment of children below a certain age into their armed forces or may, by national law, exclude women from direct participation in hostilities or from military service altogether.

2. In so far as women are members of the armed forces they have the same authorization under Article 43, para. 2, AP I as male members. They are entitled—as long as they do not belong to medical or religious personnel—to participate directly in hostilities. It is left to the discretion of the states or other parties to a conflict recognized as subjects of international law whether or not to admit women to the armed forces.

5.06

The parties to the conflict shall take all feasible measures to ensure that children who have not attained the age of eighteen years do not take part in hostilities and, in (p. 102) particular, they shall refrain from recruiting them into their armed forces (Article 77, para. 2, AP I; Article 38 ChildConv, and ProtChildConv; *see below* Section 8.06).

1. This provision reproduces exactly the same duties as imposed upon the parties to AP I by Article 77, para. 2 and by Article 38, paras 2 and 3, 1st sentence, of the Convention on the Rights of the Child. The two provisions of AP I and of the Convention on the Rights of the Child cited above have identical contents. In addition, Article 38, para. 1, of the Convention on the Rights of the Child commits states parties to respect and to ensure

respect for the rules of international humanitarian law applicable in armed conflicts which are relevant to children. At the same time, this is a reference to the fundamental rule of Article 77, para. 1, AP I, according to which children in international armed conflicts have to be treated with special care.

2. Article 77, para. 3, AP I takes into account the circumstances arising from a breach of the duties laid down in para. 2. If a child who has not reached the age of eighteen and has participated directly in hostilities falls into the hands of the adversary, that child is nevertheless entitled to the special protection provided under Article 77 regardless of whether or not he or she is a prisoner of war. However, children protected under Article 77 can only be prisoners of war if they had previously attained the primary status of combatant by being unlawfully recruited into the armed forces of one of the parties to the conflict. This is particularly significant because the combatant status protects the child against being prosecuted upon capture for its direct participation in hostilities.

3. In conclusion: every party to a conflict bound by AP I and/or the Convention on the Rights of the Child is subject to the clear duty to keep children out of the armed forces and away from direct participation in hostilities. If a party to a conflict fails to carry out this duty then it breaches international law, but the children affected are nonetheless entitled to the maximum protection provided by Article 77 AP I and Article 38 of the Convention on the Rights of the Child.

5.07

Whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall notify the other parties to the conflict (Article 43, para. 3, AP I).

1. The task of armed law enforcement agencies of a state (e.g. the police), even if they are of a paramilitary nature, is as a rule only to protect and maintain the internal order of the state. The legal status of such armed, possibly paramilitary, law enforcement agencies in relation to the armed forces is regulated differently by different states: some states incorporate their police, or police units, into their armed forces in the event of an international armed conflict. Some states have police units permanently incorporated into their armed forces, even in peacetime. In other states there is a strict division between the armed forces and the police. The purpose of the following regulation is to establish a common denominator in international law for these different categories of national organization.

2. Section 5.07 confirms the finding described in connection with the definition of armed forces (Section 5.04 above) that the state or party to the conflict which is a subject of international law determines the type and size of its own armed forces through a national legal act. This also holds true in principle for the decision of whether or not to incorporate paramilitary or armed law enforcement agencies into the armed forces. The first half of the first sentence of Article 43, para. 3, AP I is based on the assumption that the question (p. 103) of whether or not paramilitary or armed law enforcement agencies will be incorporated into the armed forces and thus employed as fighting forces in the armed conflict is to be determined by the sovereign decision of each state or other party to the conflict. From the point of view of international law, this decision—just like any similar internal act with international legal relevance—only becomes effective through the international legal act of notification, that is either an ad hoc notification vis-à-vis the opposing party in a conflict, or vis-à-vis the depositary of the AP I. If such notification has been given then the combatant status under international law of the affected paramilitary or armed law enforcement agencies in the event of a conflict is clearly secured. The

effectiveness of combatant status in international law is established—and this is crucial—solely by the act of notification.

3. Furthermore, international law does not take national constitutions into consideration. Any doubts regarding the conformity of the notification with the constitution or other laws of the respective state are therefore irrelevant. This situation in international law is both clear and practical: it simply cannot be expected that the recipient of the notification regarding the combatant status of paramilitary or armed law enforcement agencies should become involved in a jurisprudential dispute about a foreign legal order.

Along with the combatant status attained through the incorporation into the armed forces, these (police) forces also become a military target (as defined by Article 52, para. 2, AP I) and are therefore subject to armed attacks by the opposing party to the conflict just like any other unit of the armed forces. This is also the inevitable consequence of notifying to the Swiss depositary: after this notification has been made, the forces so notified become part of the armed forces and thus also military objectives, regardless of whether or not they are restricted by a national order only to carry out police functions and defend themselves against a combatant enemy.

4. Armed law enforcement agencies, especially police forces without the aforementioned notified combatant status, are protected by international law as civilians—in particular by Part IV of AP I and by GC IV. International law applicable in international armed conflict does not provide for a special primary status of the police. The fact that members of the police receive the primary status of protected civilians creates a large number of practical and legal problems both in the theatre of operations of an armed conflict and in occupied territories (e.g. police intervention against persons whose primary status either as combatants or as civilians is not recognizable; intervention against commandos who conceal their combatant status; intervention against other armed units whose primary status is doubtful).

5. While membership of the armed forces of a party to a conflict is the basic and indispensable factor which determines the primary status as combatant, the distinction from civilians represents a duty deriving from the combatant status, the breach of which at worst leads to the forfeiture of the secondary status of prisoner of war. This is a further proof that it would be illogical to describe the generic meaning of the term ‘combatant’ as the absence of protection against attack (see Section 5.01 above). The following applies with respect to the duty of distinction.

5.08

Combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack (Article 44, para. 3, AP I). In accordance with the generally agreed practice of states, (p. 104) members of regular armed forces shall wear their uniform (Article 44, para. 7, AP I). Combatants who are not members of uniformed armed forces shall wear a permanent distinctive sign visible from a distance and carry their arms openly.

1. The first sentence of this regulation has the same content as Article 44, para. 3, 1st sentence AP I. In addition, this norm, which lays down the fundamental obligation of combatants to distinguish themselves from the civilian population during attacks or military activities in preparation for an attack, is expressly intended to promote the protection of the civilian population against the effects of hostilities. Interpreting this provision in the systematic context of AP I leads to the following observations. Part IV of AP I, which is dedicated to the protection of the civilian population, begins with the basic rule of Article 48 which obligates the parties to a conflict ‘at all times [to] distinguish between the civilian population and combatants ... [i]n order to ensure respect for and protection of the civilian

population'. Since the explicit reason, according to Article 44, para. 3, 1st sentence, AP I, for the fundamental obligation of the combatants to distinguish themselves from the civilian population is to increase the protection of the civilian population against the effects of hostilities, the compelling result is that this duty of the combatants to distinguish themselves is the basic rule.

2. Following this basic rule it would be systematically appropriate subsequently to stress next the generally agreed practice by states of the wearing of uniforms by regular armed forces, as is done in Section 5.08. Article 44 dedicates a later paragraph, para. 7, to this principle. This is acceptable because it expressly applies to the entire article and makes clear that none of the regulations of this article are intended 'to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict'. Article 44, para. 7, AP I refers to a rule of international customary law according to which regular armed forces shall wear the uniform of their party to the conflict when directly involved in hostilities.

This rule of international customary law had by the nineteenth century already become so well established that it was held to be generally accepted at the Conference in Brussels in 1874. The armed forces listed in Article 4, No. 1, GC III are undoubtedly regarded as 'regular' armed forces within the meaning of this rule. This is the meaning of 'armed forces' upon which the identical Articles 1 of the Hague Regulations of 1899 and 1907 were based. Both these conventions retained Article IX of the Brussels Declaration of 1874 without alteration.

Hence Article 4 A, No. 1, GA III is based on this historically evolved meaning of regular armed forces, which No. 3 of the said provision also relies on: it specifically mentions 'regular armed forces', which unequivocally means those described in No. 1.

3. The obligation to wear a uniform does not apply to the armed units listed in Article 4 A, No. 2, GC III. These do fall under the broad category of 'armed forces' covered by Article 43, para. 1, AP I, but they are not obliged to wear a uniform, although they must wear a permanent and distinctive sign which is visible from a distance, and carry their arms openly. It confirms, though, that the basic rules regarding the distinction of forces from the civilian population apply to them as well.

This category is dealt with in Section 5.08, which refers to '[c]ombatants who are not members of uniformed armed forces'. Thus, members of 'militias and ... other volunteer (p. 105) corps, including those of organized resistance movements, belonging to a Party to the conflict' (not incorporated into the armed forces) are mentioned. From Article 4 A, No. 2, lit. b and c, it follows that these armed groups must wear 'a fixed distinctive sign recognizable at a distance' and carry 'arms openly'. It should be noted that this category is also included in the definition of armed forces contained in Article 43, para. 1, AP I. The category is exempted from the obligation to wear a uniform, but the fundamental duty to distinguish themselves in the manner described still applies.

5.09

Recognizing that there are situations in occupied territories and in wars of national liberation where, owing to the nature of the hostilities, a combatant (especially a guerilla) cannot so distinguish himself from the civilian population, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

— **during each military engagement; and**

— during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate (Article 44, para. 3, sentence 2, AP I).

The term ‘military deployment’ refers to any movement towards the point from which an attack is to be launched.

1. Article 44, para. 3, 2nd sentence, AP I which is identical to this provision was one of the most controversial provisions at the 1977 Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. It is formulated as an unambiguous exception from the basic rule providing that combatants must distinguish themselves from the civilian population. States which acquired their independence by successful guerilla warfare or which supported guerilla liberation movements strongly advocated the elimination of criteria distinguishing such combatants from civilians. Other states were resolutely opposed to an exception for guerillas to the rule requiring distinction from the civilian population. Article 44, para. 3, 2nd sentence, AP I represents the compromise achieved after a long argument.

2. The delegation of the Federal Republic of Germany played an active role in the establishment of this compromise and even formulated some of the drafts. For this reason the Federal Republic of Germany’s interpretation, as contained in a declaration of interpretation submitted with the document of ratification, carries significant weight. According to this declaration, the criteria used to distinguish between combatants and civilians contained in the exceptional rule apply only in occupied territories and in armed conflicts of the kind described in Article 1, para. 4, of AP I. This is an interpretation which, in the light of the general rule of interpretation of Article 31 of the Vienna Convention on the Law of Treaties, is undoubtedly correct. According to the wording of Article 44, para. 3, 2nd sentence, the reason for the exceptional rule lies in the fact that ‘there are situations in armed conflicts where, owing to the nature of the hostilities, an armed combatant cannot so distinguish himself’ from the civilian population. However, such situations can in fact only arise if a people within the meaning of Article 1, para. 4 AP I is engaged in a ‘war of liberation’ as described therein, for this is one of two typical situations of guerilla warfare. The other is the situation in occupied territories which is repeatedly marked by guerilla fighting through organized resistance movements. This interpretation based on (p. 106) the object and purpose of the provision is supported by the historical development which has led to this exception.¹³ The protagonists of guerilla warfare were mainly concerned to include all wars of liberation as defined by Article 1, para. 4, whereas some Western states in particular sought to restrict such exceptional circumstances to occupied territories. By its restrictive interpretation, which has been made *lege artis*, Germany has taken into account both of these positions.

In addition, according to the declaration of interpretation submitted upon ratification, the Federal Republic of Germany understands ‘military deployment [as] any movement towards the point from which an attack is to be launched’. This interpretation is also contained in a number of declarations submitted by other member states of AP I, but it carries a special weight as the term ‘military deployment/*militärischer Aufmarsch*’ has been introduced into AP I by the Federal Republic of Germany. The German delegation had already given this explanation of the term at the Geneva Conference which had met with general approval. To date, no reasons have emerged for abandoning this object- and purpose-oriented interpretation aimed at a minimal distinction.

3. Thus, the exceptional rule consists of a narrowing of the scope of application and of a reduction of the distinctive criteria. It only applies in occupied territories and when a people fights for national liberation according to Article 1, para. 4, AP I; the requirement of distinction from the civilian population is already fulfilled if the combatants carry their arms

openly from the time of the initial deployment to the place of attack (at the latest), and of course during every military engagement.¹⁴

4. Paragraph 7 expressly indicates that Article 44 is not intended to change the generally accepted practice of states concerning the wearing of uniforms by combatants who are members of the regular armed forces. This might lead to the conclusion that the exceptional rule of para. 3, 2nd sentence, does not apply to members of the regular armed forces. This would, however, directly contradict the principle of equal participation which governs international humanitarian law and which is expressed for example in the Preamble to AP I.¹⁵ Despite this legal equality the exceptional rule will in practice only be applied to guerilla fighters.

5. If combatants within the scope of the exceptional rule do not meet the minimal requirements of the rule, then, according to Article 44, para. 4, 1st sentence, they forfeit their secondary status as prisoners of war in the event of capture by the enemy. Nevertheless, they shall be afforded protection equivalent to that of GC III and AP I, which includes protection in the case of criminal prosecution. This is expressly mentioned in the second sentence of Article 44, para. 4; the first sentence only takes into account the equivalence (p. 107) of protective provisions, not of criminal provisions (in particular Articles 82–88 GC III). Those combatants who have forfeited their prisoner-of-war status under Article 44, para. 3, 2nd sentence, in conjunction with para. 4 may thus be prosecuted and punished under the national criminal law of the detaining power. However, treatment equivalent to that of Articles 99–108 GC III shall be ensured.

6. If a combatant who is a member of the regular armed forces and is captured while participating directly in hostilities is not wearing the appropriate uniform, or if such a captured combatant who is a member of a militia, voluntary corps, or an organized resistance movement does not wear a permanent distinctive sign visible from a distance, then generally a breach of the duty of distinction and additionally a charge of perfidy according to Article 37, para. 1, AP I must be considered, unless an exception under Article 44, para. 3, 2nd sentence, AP I is applicable.

5.10

The inhabitants of a territory which has not yet been occupied who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to form themselves into armed units (so-called *levée en masse*) shall be combatants. They shall carry arms openly and respect the laws and customs of war in their military operations (Article 2, HagueReg; Article 4 A, No. 6, GC III).

1. The combatant status generally depends—as has been clearly shown in the comments to Section 5.04 above—upon the authorization by the state or party to the conflict recognized as a subject in international law, because the armed forces are, within the meaning of Article 43, para. 1, AP I, assigned to these entities as organs of the parties. Only in one situation does international law applicable in international armed conflict permit persons to participate directly in hostilities solely on the basis of their autonomous decision: this is the *levée en masse* defined by Article 2 HagueReg and Article 4 A, No. 6, GC III.

2. Such spontaneous resistance must therefore meet four requirements in order for the persons taking part to obtain the primary status of combatants:

a) Spontaneous armed resistance is permitted by international law only in ‘territory which is not occupied’. A territory is considered to be ‘not occupied’ if it is not (yet) under the factual control of the enemy as arises by *argumentum e contrario* from Article 42 HagueReg. It follows that resistance movements which are organized

autonomously by the population of an already occupied territory do not fall into the category of *levée en masse*.

b) The population of this unoccupied territory must take up arms 'spontaneously' on the approach of the enemy. This requires two conditions to be met: first, only a resistance initiated by the population itself, not one directed or organized in advance by organs of the state, fulfils this condition. Secondly, armed resistance is only permitted against 'invading troops' and therefore not in territory which is already occupied. These two conditions are obviously not met by organized resistance movements.

c) Furthermore, the civilians involved in armed resistance may not have had the time to organize themselves (within the meaning of Article 1 HagueReg) as militia or volunteer corps. This requirement clearly emphasizes the principle of authorization: only a state or another party to the conflict recognized as a subject of international law has the authority to decide on the use of armed force within the framework of international law. In every developed legal order, self-help is the exception.

(p. 108) International law, as a legal order, also in principle prohibits private individuals from deciding on the use of armed force, even if their motivation in a concrete case can be recognized as stemming from patriotism or other ethical reasons. The rule in Article 2 HagueReg is unambiguous: persons wanting to resist an attack must secure the authorization of their state by joining the armed forces, a militia, or a volunteer corps. Only if it is in fact impossible to join these armed units, and provided that the conditions of Article 2 are met, are civilians exceptionally permitted to take up arms by their own decision.

d) Finally, the participants in such a *levée en masse* must respect 'the laws and customs of war' and are thus bound by the basic duty which applies to all combatants.

3. If spontaneous resistance fighters fulfil these four conditions then they have the primary status of combatants. In the event of capture by the adverse party to the conflict they are granted the secondary status of prisoners of war. It should be noted, however, that in modern-day armed conflicts the *levée en masse* has become less significant because, as a rule, the regular armed forces of an attacking party are armed to a degree that simply cannot be countered with the weapons available to a spontaneous resistance (such as hunting weapons).

5.11

While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant (Article 44, para. 2, AP I).

1. Although the duty of all combatants to comply with the rules of international law applicable in armed conflict is only briefly mentioned in Article 44, para. 2, AP I, this constitutes a codification of a general principle of international humanitarian law which applies as customary law in addition to the respective international conventions. Article 1 HagueReg already binds the armed forces as well as (independent) militias and volunteer corps to '[t]he laws, rights, and duties of war', thereby reiterating the wording of Article IX of the Brussels Declaration of 1874. It is a basic rule already considered to be a customary norm of international law at that time. Thus, the first half of the sentence in Article 44, para. 2, AP I is a reaffirmation of a rule which has long been codified (and which was effective even before that).

In addition, the combatant's duty to comply with the law is the expression of another fundamental principle of international law: the principle of reciprocity. General practice can only arise through reciprocity; sanctions such as reprisals are a negative aspect of reciprocity. Consequently, privileges granted under international law, such as that of combatant status which, after all, privileges those persons who use force, can only be realized on the basis of reciprocity. This means, however, that combatants are also compelled by the principle of reciprocity to act within the restrictions and limitations imposed on them by international law applicable in international armed conflict.

Sporadic attempts have been made among legal scholars to develop a concept of international law of war which discriminates against the aggressor and whose restrictions apply only to the combatants of the aggressor, thus ruling out legal equality of treatment. This concept, however, has not found its way either into treaty law or into customary law. The same has to be stated with regard to terrorist means and methods of the use of force, which by their very nature cannot be included into the framework of permitted means and methods of warfare. Hence the duty of combatants to abide by the rules (p. 109) of international law applicable in armed conflicts is all-encompassing and incumbent equally upon the combatants of all parties to the conflict.

2. If combatants breach the rules of international law applicable in armed conflicts then it is the responsibility of the party to the conflict to which they belong to punish this behaviour through disciplinary measures or prosecution. This is an obligation attached to the party to the conflict concerned under Articles 85, 86 AP I.

If combatants fall into the hands of the adverse party after having breached international law then, according to Articles 82–88 GC III, they shall be called to account under the applicable legal regulations of the detaining power. In principle the breach of rules of international law applicable in armed conflicts does not result in the offenders forfeiting their primary status as combatants. Thus, if they fall into the hands of the adverse party to the conflict they do not forfeit the secondary status of prisoners of war. A breach of the obligation of minimal distinction according to Article 44, para. 3, 2nd sentence AP I (see Section 5.09 above) is an exception. Article 44, para. 4, AP I lays down that a breach of this duty results in forfeiture of prisoner-of-war-status.

5.12

Combatants who fall into the hands of the adversary shall be prisoners of war (Article 3, sentence 2, HagueReg; Article 44, para. 1, AP I). They shall not be called to account for their participation in lawful military operations. Violations of international law committed by them may be prosecuted under the laws of the detaining power and international law (Articles 82 *et seq.* GC III).

The status of prisoner of war is attached to the primary status of combatant as a secondary status (see above, Section 5.01). Article 44, para. 1, AP I simply confirms existing international law when it lays down that a combatant (as defined by Article 43, para. 2, AP I) 'who falls into the power of an adverse party shall be a prisoner of war'. This basic rule was already established in Article 3 HagueReg and Article 4 A, Nos 1–3 and 6, GC III. It has not been altered by AP I (for details regarding the status of prisoners of war and their protection, see below, Chapter 7).

5.13

Should any doubt arise as to whether a person who have taken part in hostilities and fallen into the hands of the adversary shall be deemed a combatant or civilian, that person shall continue to be treated as a prisoner of war until such time as his or her status has been determined by a competent tribunal (Article 5, para. 2, GC III; Article 45, para. 1, AP I).

Article 5, para. 2, GC III and Article 45, para. 1, AP I are intended to apply when persons directly involved in the hostilities are captured and there are doubts as to whether they are combatants or civilians (see below, Section 703). In particular, deserters and persons accompanying the armed forces who are unable to present their identity cards, but also the aforementioned cases of minimal distinction (cf. Section 5.09) could raise such doubts. Article 5, para. 2, GC III clearly indicates that the fundamental distinction between combatants and civilians does logically not tolerate a third category (i.e. unlawful enemy combatants) on the same legal level. Such legally equal category may neither be based on well-established customary law nor on treaty law.

III. Non-combatants

1. *The historical development of the division of members of the armed forces into combatants and non-combatants.* The autonomy to organize the internal structure of their (p. 110) armed forces is granted to states by Article 3 HagueReg, according to which the ‘armed forces ... may’ consist of combatants and non-combatants. It has its origin in a factual situation which had already been taken into account by the Brussels Declaration of 1874. In 1874, the Brussels Conference based the negotiations on a draft presented by the Russian delegation, which stated in section 10, 1st sentence: ‘The armed forces of the belligerents may be composed of combatants and non-combatants.’¹⁶ In a further provision (section 38) the Russian draft provided for the ‘neutralization’ of medical personnel, just as Articles I-III of the Geneva Red Cross Convention of 1864 had already stated. Consequently, the Russian draft included all persons who—being members of the armed forces—belonged to various branches of the military administration. They were categorized as ‘non-combatants’. Apart from medical and religious personnel they included quartermasters, members of the legal services, and other non-fighting personnel. Obviously, the actual composition of the armed forces at that time had been taken into account, with the explicit purpose of granting to all members of the armed forces the secondary status of prisoners of war in the event of capture. From this general category of ‘non-combatants’ the members of the medical and religious personnel were singled out again—in accordance with the Geneva Red Cross Convention signed ten years earlier—in order to grant them the ‘right of neutrality’ guaranteed by that Convention. Section 23 of the draft expressly repeated that combatants and non-combatants, with the exception of the neutralized medical and religious personnel, acquired prisoner-of-war status in the event of their capture.

As prisoner-of-war status was thus guaranteed twice, namely in sections 10 and 23 of the Russian draft, there was inevitably some criticism in the negotiations.¹⁷ It was suggested that section 10 (the division into combatants and non-combatants) be entirely omitted as this rule did not establish a new principle and could lead to misunderstandings in practice. It was argued that medical and religious personnel were already protected by the Geneva Convention of 1864. Combatants and non-combatants received prisoner-of-war status anyway upon being captured; yet this was also guaranteed by section 23 which said that all combatants and non-combatants are entitled to prisoner-of-war status. To the extent that it was desired to maintain section 10 (laying down that the armed forces may be composed of combatants and non-combatants), it was said that a clause should be inserted stipulating that non-combatants are exposed to the misfortunes and dangers of war in the same way as

the units to which they belong. The conference, however, was of the opinion that such a provision was already tacitly included in the rule.¹⁸

The documents cited lead to the following observation. It was obviously not the intention of the Brussels Conference to create a non-combatant status in international law determined by the fact that persons with this status are not entitled under international law to participate directly in hostilities. Nor was it intended to treat non-combatants belonging to the armed forces in the same way as civilians. Instead, the point of departure was the actual and widespread awareness that armed forces are composed both of persons who fight and of persons who (because of their function) do not take a direct part in the fighting.

(p. 111) The approach of the Brussels Conference was based on this finding, as illustrated by its discussion of the duty of non-combatants to wear uniform. The delegate of the German Reich raised the question of whether it would not be appropriate to require that the non-combatants mentioned in the draft should wear uniform during wartime. Without such a duty it would be difficult to distinguish between non-combatant members of the armed forces and civilians accompanying the armed forces (mentioned in section 24 of the Russian draft). Other delegates objected to this proposal, saying that the wearing of a uniform was anyway common practice for non-combatants. It would therefore be superfluous to lay down a special duty for them to wear uniforms.¹⁹ Immediately after this discussion, section 10 was put into the version which was then adopted as section 11 of the Brussels Declaration, and several decades later without further controversy as Article 3 of the Hague Regulations of 1899 and 1907: 'The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.'

Since then the non-combatant, within the meaning of Article 3 HagueReg, has not acquired a special status in international law entailing special rights or duties on this level. This explains why the comprehensive definition of armed forces given in Article 43, para. 1, AP I, and the related definition of members of the armed forces as combatants in para. 2, no longer refer to non-combatants. During the negotiations on the definition of armed forces at the Geneva Conference, only one delegation pointed out that the members of armed forces could comprise both combatants and non-combatants. Nobody objected. Therefore this comment was incorporated into the report of the Third Commission: 'It should, however, be noted that the term "members of armed forces" is all-inclusive and includes both combatants and non-combatants'.²⁰

In view of the wording and the historic origin of Article 43 AP I, one should agree with the opinions of legal scholars that international law does not afford the non-combatant any better protection than the combatant.²¹ Thus the non-combatant, as a member of the armed forces, is not protected from being the object of an attack. Furthermore, as non-combatants are not mentioned in Article 43 AP I, it was argued that the differentiation in Article 3 HagueReg between combatants and non-combatants in the armed forces is no longer useful.²²

2. No better protection under international law for non-combatants than for combatants. Even though the view stated above goes beyond that what can clearly be derived from the historical origin of the norm, one result remains certain: the non-combatant has never enjoyed a special status under international law, either before or after the entry into force of AP I. Before AP I, non-combatants belonged to the armed forces (according to Article 3 HagueReg or Article 4 A, No. 1, GC III) without this membership being linked to special protection under international law. Even the classification as an enemy *hors de combat* (p. 112) under Article 23 lit. c HagueReg did not provide any other protection than that afforded to combatants in the same situation. Since AP I entered into force, non-combatants are no longer even expressly included in the members of the armed forces, although the historic origin of Article 43, para. 1, AP I would justify their inclusion in that provision's

definition of armed forces. In any event, on the level of international law the only consequence of classifying members of the armed forces as non-combatants is that they acquire prisoner-of-war status if they fall into the hands of the adverse party.

3. *Non-legal use of the term 'non-combatant'.* The use of the term 'non-combatant' is sporadically to be found in state practice denoting an all-inclusive category comprising all persons not taking a direct part in hostilities.²³ This use corresponds to the Lieber Code of 1863 which included in this category without giving a precise definition all unarmed and inoffensive citizens of the hostile country (e.g. Articles 18 *et seq.*). Such an understanding, however, is incompatible either with the development or the content of treaty law. There is no criterion in treaty law that permits to define civilians whose protection is the basic object and purpose of international humanitarian law as a mere sub-category of non-combatants. Besides that the unification of civilians and non-combatant members of the armed forces in one sub-category on an equal footing with combatants would be counterproductive with regard to the fundamental principle of distinction between civilians and combatants. Finally, the sporadic practice just mentioned is not appropriate to derogate existing treaty law which confines the term 'non-combatant' to non-combatant members of the armed forces.

5.14

Persons who are members of the armed forces but who, by virtue of national regulations, have no combat mission, such as judges, government officials, and blue-collar workers, are non-combatants. If they fall into the power of the adversary, they will be prisoners of war as will combatants (Article 4 A, No. 1, GC III).

1. As a rule, persons who are members of the armed forces are combatants—as laid down in Article 43, para. 2, AP I—and are entitled, as such, to participate directly in hostilities. It remains in the discretion of the states and other parties to the conflict recognized as subjects of international law to restrict this entitlement of international law with respect to certain categories of the members of their armed forces and to prohibit them by legal act from direct participation in hostilities. Any such national legal act has no effect whatsoever in international law, since prisoner-of-war status is already attained by virtue of the fact that the non-combatant is a member of the armed forces and thus falls under Article 4 A, No. 1, GC III.

It follows from this that non-combatants are not nor could they under any circumstances be protected as civilians, for Article 50, para. 1, 1st sentence, AP I determines with a negative legal definition: 'A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3), and (6) of the Third Convention and in Article 43 of this Protocol.' However, non-combatant members of the armed forces clearly belong to the armed forces within the meaning of Article 4 A, No. 1, GC III or Article 43, para. 1, AP I, if these provisions are interpreted in the light of their object and purpose. This interpretation will have to take into account the stipulation's all-encompassing scope as well as its drafting history.

(p. 113) From the negative legal definition of civilians it also follows that members of the armed forces do *not* enjoy the 'general protection against dangers arising from military operations' which Article 51, para. 1, 1st sentence, affords to the civilian population and to individual civilians. The non-combatant members of the armed forces are not protected by the prohibition of attacks according to Article 51, para. 2, 1st sentence, AP I, since they do not enjoy the protection of Article 51. Therefore the non-combatant members of the armed forces are not merely subjected to the risk of collateral damage in the sense of Article 51, para. 5 lit. b. This Article concerns exclusively the 'protection of the civilian population', to which the non-combatant members of the armed forces do not belong. AP I and

international humanitarian law protect the civilian population but not the armed forces against dangers arising from military operations.

2. According to Article 52, para. 2, 1st sentence, AP I, 'attacks shall be limited strictly to military objectives'. The armed forces of the enemy are a military objective. This is a general principle of customary international law. The Russian draft convention negotiated at the Brussels Conference of 1874 had already taken this legal finding as a starting point. Furthermore, it is clarified by the regulations of the Brussels Declaration and by the prohibition of bombardment of undefended places included in the Hague Regulations.²⁴ Article 2 HC IX likewise makes clear that facilities of the armed forces also represent military objectives. Article 24, para. 1, of the HRAW 1923 (which did not enter into force as a treaty) contains a definition of military objectives as targets 'of which the destruction or injury would constitute a distinct military advantage to the belligerent'. Finally, Article 52, para. 2, 2nd sentence, AP I defines military objectives, in so far as they are objects, as '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'. With the exception of the term of 'definite military advantage', this legal definition essentially contains those characteristics which are required by customary law for the determination of a military objective. Members of the armed forces (with the exception of the specially protected medical and religious personnel) are, however, military objectives as they clearly have these features of military objectives under customary law. As the organization of armed forces—including and especially with regard to their non-combatant members—is concentrated on efficiency, it must be assumed that the main purpose of armed forces is effective participation in hostilities. This participation includes their non-combatant members which, therefore, effectively contribute to military operations.

3. The presence of non-combatant members of the armed forces in a mobile or immobile facility representing a military objective, therefore, does not even require the attacking forces of the adversary to take special precautionary measures. They do not have to differentiate during their attack between combatant and non-combatant members of the adverse armed forces, provided that no medical or religious personnel are present.

As an object of such attack, the—possibly unarmed—non combatant member of the armed forces can at best be entitled to protection as an enemy *hors de combat* within the meaning of Article 41 AP I. Of the variations of the legal definition provided in Article (p. 114) 41, para. 2, only lit. b or c come into consideration. In this respect, too, the position of the non-combatant member of the armed forces is not better than that of the combatant, to whom Article 41 AP I applies equally.²⁵

4. As members of the regular armed forces, which non-combatants undoubtedly are, they are required to wear a uniform by Article 44, para. 7, AP I. As mentioned above, this rule had already been accepted at the Brussels Conference of 1874 as also applying to non-combatants in customary law; it has not subsequently been changed through any contrary, generally recognized practice.

5. International law does not determine which state organ must decide upon the classification of persons as combatant or non-combatant members of the armed forces. International law accepts the national decision as a factual precondition, just as it accepts an organizational decision by state organs as to which of its armed agencies are to be qualified as 'armed forces' within the meaning of Article 4 A, No. 1, GC III or Article 43, para. 1, AP I in the event of an international armed conflict. The definition of armed forces in international law, therefore, follows the definition of, respectively, national armed forces

as laid down by acts of state and the definition of armed forces of non-state parties to a conflict being recognized as subjects of international law.

5.15

Members of the medical service and religious personnel (chaplains) attached to the armed forces enjoy special protection. Medical personnel and chaplains who have fallen into the hands of the adversary shall be detained only in so far as it is necessary for assisting prisoners of war. Although they shall not be deemed prisoners of war, they shall be granted the same legal protection (Articles 24, 28, and 30 GC I; Articles 36 and 37 GC II; Article 33 GC III).

1. The evolution over the last 140 years of the special position of medical and religious personnel in international law precludes their simply being listed, without any further qualification in the category of 'non-combatants'. It is true that the Russian draft convention, which formed the basis of the Brussels Conference of 1874, classified members of the religious and medical service (in addition to quartermasters, the military judiciary, and other branches of the military administration) as non-combatants. However, persons employed in hospitals and ambulances and chaplains were immediately differentiated in that they were acknowledged to be neutral when they fell into the hands of the adversary. The draft expressly reiterated in another context that chaplains and members of the medical service could not be made prisoners of war but instead would, in accordance with Articles I-III of the Geneva Red Cross Convention of 1864, enjoy the right of neutrality. As negotiations progressed, references to combatants and non-combatants were directed solely to the fact that both have prisoner-of-war status in the event of capture. Thus the wording of the later Article 3 HagueReg was laid down. It was, therefore, recognized by 1874 at the latest that the legal status of medical and religious personnel was determined by Geneva Law, that is by the Geneva Red Cross Convention of 1864. These regulations became more concrete through subsequent Red Cross Conventions. However, at the Brussels Conference, medical and religious personnel had already been excluded from the category of non-combatants defined by the later Article 3 HagueReg.

(p. 115) 2. It would be against the historical development of medical and religious personnel in international law as described above, to classify these persons simply as one of several categories of non-combatants. To avoid any erroneous impression medical and religious personnel should not simply be treated as a secondary group of non-combatants. The fact that medical and religious personnel have been expressly removed from the scope of regulation of Hague Law and left within the scope of Geneva law since 1874 and even earlier requires to differentiate between the personnel mentioned in Section 5.14 and 5.15.

3. The chain of provisions protecting medical and religious personnel laid down within the Red Cross Conventions since 1864 shows how inappropriate it is to include these personnel in the category of non-combatants. Article II of the Red Cross Convention of 1864 granted medical personnel and chaplains 'the benefit of ... neutrality'. Article IX of the subsequent Convention of 1906 determines that medical personnel and religious personnel assigned to the armed forces 'shall be respected and protected under all circumstances'; they were not to be considered as prisoners of war. Article IX of the Convention of 1929 included a similar regulation. Finally, the currently applicable Articles 24 and 28 GC I, 36 GC II, and 33 GC III all contain regulations with identical contents.

From this it can be concluded that medical personnel belonging to the armed forces enjoy an international legal status under Geneva Law which has been developed with rare consistency and continuity. This status has not been fundamentally altered since 1864. It has, decisively, never constituted a subcategory of 'non-combatants'. Religious personnel are often not even members of the armed forces, which is an indispensable requirement for

non-combatants. All of the aforementioned Geneva Conventions assume that protected religious personnel are 'attached' to the armed forces, but not necessarily members thereof.

While the first sentence of Section 5.14 classifies those persons who are members of the armed forces but do not have a combat mission as non-combatants, in the first sentence of Section 5.15 there is already a divergence from this basic definition, as medical and religious personnel are not necessarily members of but may be merely *attached to* the armed forces. Consequently, it should be emphasized that medical and religious personnel have a special primary status under Geneva Law which has been developed since 1864 through all of the Geneva Conventions to the status which is now set out in GC I-III.

4. The second sentence of Section 5.15, according to which medical personnel and chaplains who have fallen into the hands of the adversary may only be detained to assist prisoners of war of their own party to the conflict, is a rule of international law which was already contained in the Red Cross Convention of 1864. This Convention ensured that the medical and religious personnel who had fallen into the hands of the adversary could either continue their duties or return to the units to which they belonged (Article III).

According to the Geneva Convention of 1906 these personnel were permitted to continue carrying out their functions under the direction of the detaining power, but were to be returned to their own country or army when their assistance was no longer required (Article 12). The Convention of 1929 contained a regulation to the same effect (Article 12). Thus the regulations applicable today (Articles 28–30 GC I; Article 37 GC II; Article 33 GC III) are an uninterrupted continuation of the protection of the Geneva Law, although according to Article 33 GC III, the return of the protected persons to their state or army of origin does require an agreement between the parties to the conflict, an (p. 116) agreement which the parties are obliged to negotiate. The legal finding that members of the medical and religious personnel are not prisoners of war can also be found in all the Red Cross Conventions since 1864. As shown above (Section 5.14), this has led to the exclusion of medical and religious personnel from the provisions of Hague Law, which is logically correct.

It is consistent that Article 21 HagueReg in connection with this protection refers to the Geneva Law. This state of the law has remained unchanged. With regard to the protection of medical and religious personnel who have fallen into the hands of the adversary, the antecedents of the four Geneva Conventions of 1949 maintained the obligation upon the detaining power under all circumstances to respect and protect those personnel, even those who fell into their power.

Article 33 GC III specifies this obligation to protect by guaranteeing to the members of medical and religious personnel all the benefits and protections of this Convention as well as 'all facilities necessary' to provide for the medical care of, and religious ministrations to, prisoners of war. In this respect the legal position of medical and religious personnel exceeds the best possible treatment available under GC III.

5.16

Non-combatants, too, have the right to defend themselves or others against any attacks. Medical personnel and chaplains are allowed to bear and use small arms (pistols, rifles, or sub-machine-guns) for this purpose (Article 22 No. 1 GC I; Article 35 No. 1 GC II; Article 13, para. 2 lit. a, AP I). This presupposes a national authorization for the handling of firearms and ammunition.

Members of these categories are in different situations, from the point of view of international law, when they themselves are the object of an attack by combatants of the adverse party.

a) The first sentence of this section should not be misunderstood to mean that non-combatants as defined in Section 5.14 are as widely protected by international law against attacks by combatants of the adverse party as medical and religious personnel defined in Section 5.15; that such attacks are therefore contrary to international law; and that non-combatants must therefore only protect themselves against attacks contravening international law. However, as non-combatants are members of the armed forces, which represent a military objective against which international law permits armed acts, they can certainly be the object of attacks consistent with international law applicable in international armed conflict. In such a case, non-combatants, as members of the armed forces, are naturally authorized to defend themselves. Thus the non-combatants' right of self-defence is not restricted to those attacks which involve prohibited methods and means of warfare, such as a violation of the prohibition of perfidy (Article 37 AP I) or of the obligation to protect an enemy *hors de combat* (Article 41).

In contrast to the applicable rules of Geneva Law regarding self-defence of medical personnel, Hague Law contains no express regulation about the right of self-defence of non-combatants. However, since membership in the armed forces according to Article 43, para. 2, AP I generally leads to the authorization of combatants to take part in hostilities, the denial of this authorization to participate, which in any event is mere domestic law, should be regarded as obsolete if non-combatants created by a national legal act (and not by international law) themselves become the object of an attack. If they defend themselves against such an attack, they take a direct part in hostilities, which, by virtue of Article 43, para. 2, AP I, they are permitted to do as members of the armed forces.

(p. 117) In summary, this means: an attack against a member of the armed forces who is classified by a national legal act as a non-combatant activates the entitlement of every member of the armed forces (except medical and religious personnel) to take a direct part in hostilities. The attack activates their latent combatant status. The first sentence of Section 5.16 underlines therefore that non-combatants are authorized to defend themselves and others against any attack, irrespective of whether such attack is contravening international law or not.

b) The situation regarding medical personnel is different. They are protected by the absolute rule—continuously repeated by the Geneva Conventions—of respect and protection 'under all circumstances' against *every* attack. An attack against medical personnel is, therefore, always contrary to international law. Beginning with the Geneva Convention of 1906 (in Article 8 No. 1), it is expressly laid down that medical personnel may be armed and may use their weapons for their own defence or for the defence of the wounded and sick entrusted to them. Article 13, para. 2, lit. a, AP I, therefore, merely confirms the law which has already long been in force when it stipulates that medical personnel 'are to be equipped with small-arms for their own defence or for that of the wounded and sick in their charge'. The firearms listed in Section 5.16 (pistols, rifles, or sub-machine-guns) are clearly small-arms. At national level an authorization which puts the law into concrete terms will be required to implement the prerequisites of international law.

c) The legal situation concerning religious personnel is more complex. As far as their protection is concerned, the position is the same as for medical personnel; both must be respected and protected under all circumstances, which also means that every attack against religious personnel is contrary to international law. The reference in Section 5.16 to both medical and religious personnel and to the rules of Geneva Law applicable to the arming and authorization of self-defence for *medical* personnel should not be taken to mean that the treaty rules referred to here also authorize the arming and self-defence of *religious*

personnel. Since the Convention of 1906 provisions for arming and for self-defence apply exclusively to medical personnel, not to religious personnel. This is systematically confirmed by all relevant Conventions since 1906, all of which regulate the arming and the right of self-defence of medical personnel under the rubric of 'Medical Units and Establishments' and the protection of religious personnel under the rubric 'Personnel'. Finally, it must be noted that these Conventions generally classify medical personnel as *members* of the armed forces, but religious personnel as chaplains '*attached to the armed forces*'. According to the legal definition in Article 8, lit. d, AP I, religious personnel may include military and civilian persons. They must, however, be exclusively engaged in the work of their ministry and at least attached to the armed forces. Thus treaty provisions concerning arming and the right of self-defence applicable for medical personnel do not automatically apply to religious personnel (*see* below, commentary to Section 15.25, para. 2).

5.17

A detainee shall not be prosecuted for his participation in hostilities unless he or she has been positively identified as an unlawful combatant.

1. If during direct participation in hostilities, members of the armed forces (combatants or non-combatants) abide by the international law applicable in international armed conflicts then they cannot be punished, either by their own party to the conflict or by the competent tribunals of the adversary, in the event of their capture.

a) The context of the first phrase shows that this section refers solely to those prisoners of war who are either members of the armed forces (whether combatant or (p. 118) non-combatant) under Article 4 A, No. 1, or combatants under Article 4 A, Nos 2, 3, or 6, GC III, thereby falling under the new comprehensive notion of armed forces of Article 43, para. 1, AP I. The other two categories mentioned in Article 4 A as being entitled to prisoner-of-war status in the hands of the adversary (civilians accompanying the armed forces without actually being members thereof, and members of crews of the merchant navy and of civil aircraft) are *not* entitled to take a direct part in hostilities. In the event of such participation as unprivileged belligerents (*see* above, Section 5.02) they must expect to be prosecuted in the same manner as all other civilians who are prohibited from taking a direct part in hostilities.

b) Persons whose prisoner-of-war status is unquestionable because they belong to the categories listed in Article 4 A, Nos 1, 2, 3, or 6, GC III and who have engaged in any activity contrary to international law must also expect to be prosecuted while in the hands of the adversary. This follows from Article 85 GC III. That provision guarantees convicted prisoners of war the benefits listed in GC III, that is the right of appeal, notification of the judgment to the protecting power in accordance with Article 107, a (humane) enforcement procedure in accordance with Article 108, and—in the event of a death penalty—suspension of the execution for a period of six months following notification of the protecting power according to Article 101. If, however, it is clearly established by the courts that the person in question is not entitled to prisoner-of-war status according to Article 4 A, Nos 1, 2, 3, or 6, or Article 43 in conjunction with Article 44, para. 1, AP I, then his or her direct participation in the hostilities was also unauthorized. He or she is thus an unprivileged belligerent and responsible under criminal law for all acts committed against the adversary. The detaining power is obliged under international law to afford to every prosecuted person of the adverse party to a conflict the treatment which is more favourable either under GC III or under Article 75 AP I.

2. The punishment of criminal acts within the meaning of substantive criminal law is subject to special conditions imposed by international law (as for the punishment of disciplinary offences, *see* Sections 13.27–13.29 and 21.10–21.18 below).

5.18

No sentence may be passed and no penalty may be executed except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure (Article 84 GC III; Article 75, para. 4, AP I).

This section repeats word for word the main contents of Article 75, para. 4, 1st sentence, AP I, which in turn corresponds to the special regulation for prisoners of war contained in Article 84 GC III. Thus the principle of more favourable treatment laid down in Article 75, para. 1, AP I applies here as well. Article 75, para. 4, only applies—to fill in the gaps, as it were—in so far as it provides for more favourable treatment of prisoners of war than the applicable provisions of Chapter III of GC III in respect of the sentencing and execution of punishments.

In particular, in Articles 86 and 99 to 108, Chapter III of GC III sets down a standard of treatment not less favourable than that in Article 75, para. 4, AP I. Thus, according to the general rule of interpretation of Article 31, para. 3, lit. c, Vienna Convention on the Law of Treaties, this regulation, which to a large extent was modelled on the judicial guarantees in Articles 14 and 15 ICCPR, must be referred to in interpreting Chapter III of GC III. Therefore, the principle '*nulla poena sine lege*' contained in Article 99 GC III is specified by Article 75, para. 4, lit. c, just as the procedural guarantees of Article 105 GC III are put into concrete terms through lit. d (presumption (p. 119) of innocence until proven guilty according to the law), lit. e (the right of persons charged to be present at trial), and lit. f (no compulsion to confess guilt). With regard to the execution of a punishment, Article 108 GC III contains detailed rules which are not found in Article 75 AP I.

IV. Persons Accompanying the Armed Forces

5.19

Persons who accompany the armed forces without being members thereof, such as war correspondents, members of labour units, or of services responsible for the welfare of the soldiers, shall not be deemed combatants. If they fall into the power of the adversary, they shall become prisoners of war (Article 4 A, No. 4, GC III).

1. Civilians accompanying the armed forces are formally protected by the obligation of the armed forces which they accompany to provide them with identity cards, an example of which is contained in Annex IV A of GC III. Substantially, the members of this category are protected as civilians. The function for which they (as civilians) accompany the armed forces must be recorded on the identity card. Their function should be stated in such a manner that they cannot be suspected of having taken a direct part in the hostilities. Article 50, para. 1, 2nd sentence, AP I states clearly that 'in any case of doubt as to whether a person is a civilian, that person shall be considered to be a civilian'. However, if a person accompanying the armed forces is suspected of combatant behaviour, and if this suspicion is confirmed, then this regulation, which was intended as a protective provision, has adverse repercussions on the person in question. If persons accompanying the armed forces conduct themselves according to their status as civilians then they run the risk of collateral injury. Conversely, the responsible military leader who attacks a military objective containing civilians accompanying armed forces must carry out the precautionary measures

stipulated by Article 57 (especially in para. 2, lit. a) in order to keep collateral injuries to the civilians accompanying the armed forces to a minimum.

2. If civilians accompanying the armed forces fall into the hands of the adversary then they attain prisoner-of-war status in accordance with Article 4 A, No. 4, GC III (*see below* Section 707). Apart from merchant navy or civil aircraft crews, civilians accompanying the armed forces are therefore the only category of civilians without combatant status who attain the status of prisoner of war.

V. Civilian Contractors

5.20

Private contractors and civilian employees of the armed forces may not assume combatant functions. Their geographical and organizational closeness to the armed forces may increase the risk of incidental death or injury among such personnel (*see below* Section 7.04). If they directly participate in hostilities they will lose protection for the duration of each specific act amounting to direct participation (*see below*, Section 8.17).

Various factors led to a 'civilianization' of tasks which traditionally belonged to the military domain: shrunken defence budgets and the downsizing of military forces have required the outsourcing of certain tasks to cheaper and often more effective civilian enterprise; at the same time, technological demands have increased reliance on civilian (p. 120) expertise. While such developments have been perceived as a change of paradigms in international humanitarian law,²⁶ it is important to maintain that contractor personnel do not share the 'combatant privilege' in armed conflicts²⁷ and any manpower management must observe that certain activities are inherently governmental and remain military in nature.²⁸ 'Civilian contractors', as the clear-cut meaning of this term already denotes, are not and cannot be members of the armed forces of a party to the conflict, thus lacking the indispensable precondition for combatant status. Contractor personnel taking a direct part in hostilities are, therefore, running the risk of being treated as mercenaries, if they fall into the hands of the adversary and if Article 47 AP I or one of the mercenary conventions is applicable (*see* Section 5.03 above). In any case, the adverse party may qualify and treat them as unprivileged belligerents.

VI. Special Forces

5.21

It shall be lawful for combatants recognizable as such (by their uniform, insignia, etc.) to participate in raids, acts of sabotage, and other attacks carried out by special forces in the enemy's hinterland or in forward areas. Combatants who commit such acts wearing plain clothes or the uniform of the adversary are liable to be punished. They shall nevertheless have the right to a regular judicial procedure (Articles 82 *et seq.* GC III; Article 75, para. 4, AP I).

1. In past international armed conflicts, long-distance reconnaissance patrols (with or without combat tasks) and task forces on remote missions against military objectives located to the rear of the adversary have repeatedly raised the problem of whether members of armed forces involved in such actions could permissibly be camouflaged in plain clothes or in the uniform of the enemy, at least during the phase preceding military engagement.

2. Section 5.21 adopts a clear position towards a question which remains controversial even today. During the Second World War, the camouflaging of long-distance reconnaissance patrols or of task forces wearing plain clothes or the uniform of the adversary was regarded as perfidious and was universally accepted as being prohibited (the prohibition against the misuse of the adversary's uniform was already expressly contained in Article 23, lit. f, HagueReg).²⁹ After the Second World War, the acquittal in the *Skorzeny* case led to some legislation adopting a partial rather than a total prohibition against using the adversary's uniform as camouflage. The case concerned the deployment of commando forces of the German *Wehrmacht* in connection with the Ardennes offensive in December 1944 against military objectives to the rear of Western Allied forces, during which the advance was carried out in the enemy's uniform, the actual fighting being carried out in the uniform of the *Wehrmacht*.³⁰ The conclusion drawn from the case that such camouflaging (p. 121) is permitted under international law was, appropriately, countered with the argument that such generalization is incompatible with both the ordinary meaning and the historical origins of Article 23, lit. f, HagueReg.³¹ However, the same controversy arose again during the Geneva Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. Several states supported a clear and universal prohibition, allowing no exceptions, while other states were of the opinion that only the use of the enemy's uniform or other insignia for camouflage and to make operations easier should be prohibited. The compromise now contained in Article 39, para. 2, is—as can be seen—closer to this second position.

3. The meaning of this section, which should be interpreted in connection with Section 5.08, 2nd sentence, is unequivocal: participation in armed acts causing harm by special forces in the forward area or to the rear of the adversary is a permitted act provided that the members of the armed forces involved can be identified by their uniform (in so far as they are members of the regular armed forces) or by other clearly recognizable distinctive emblems. If this requirement, which derives from the basic rule of distinction contained in Article 44, para. 3, 1st sentence, AP I, is not fulfilled, then the following alternative legal consequences apply, depending on the type of camouflage used. If the members of special command units wear plain clothes and if the other conditions are fulfilled, then there is a violation of the prohibition of perfidy under Article 37, para. 1, lit. c, AP I, unless all the conditions of the special situation envisaged in Article 44, para. 3, 2nd sentence, AP I, that is the ordered minimum degree of distinction (*see* the comments to Section 5.09 above), are met. It is, therefore, possible that the legal result will be the forfeiture of the combatant status provided by Article 44, para. 4, 1st sentence, AP I.

If, on the other hand, members of armed forces involved in special units wear the uniform of the adverse party to the conflict, then they violate the prohibition under Article 39, para. 2, AP I. The alternative contained in this norm (as a result of the compromise described above) will normally be present cumulatively: members of commando forces wear the uniform of the enemy above all in order to 'shield, favour, [and] protect ... military operations'. If they fall into the hands of the adversary prior to their attack against the chosen military objective, then as a rule the wearing of the enemy's uniform provides the intended prohibited purpose.

This result is supported by a further consideration: Article 44, para. 3, 2nd sentence, lit. b, AP I describes the special situation wherein arms are required to be carried openly during 'a military deployment preceding the launching of an attack' and thus clearly equates this phase with an act of military operations. As many states have formally declared upon ratification, such acts include any movement towards a place from which an attack is to be launched. This legal position clearly falls within the scope of interpretation of the applicable provision of the Protocol. Consequently, a military deployment preceding an attack or an advance of commando forces *as a whole* is deemed to be an act of military operations within the meaning of Article 39, para. 2, AP I, and thus invariably the wearing of the enemy's

uniform will be deemed to be for the prohibited purpose of shielding, favouring, or protecting that military operation. If members of the armed forces involved in special units are caught wearing the uniform of the adverse party to (p. 122) the conflict 'while engaging in attacks', then the violation of the prohibition contained in Article 39, para. 2, AP I is evident.

Undoubtedly, therefore, camouflage in plain clothes or the enemy's uniform by members of special units of armed forces is a violation of the applicable norms of international law, for which legally permissible sanctions may be imposed. The framework set out in international law for such sanctions has been dealt with in detail above (*see* Section 5.18).

VII. Spies

5.22

Spies are persons who clandestinely, or under false pretences, for example not wearing the uniform of their armed forces, gather information in the territory controlled by the adversary. Even if they are members of armed forces, they do not have the right to prisoner-of-war status. Persons who fall into the hands of the adversary while engaged in espionage shall be liable to punishment (Articles 29-31 HagueReg).

1. In the light of the sophistication of modern-day reconnaissance with electronic instruments, especially satellite-supported reconnaissance, it may come as a surprise that 'spies' are dealt with under a rubric comparable to that dedicated to combatants. Apart from the fact that most states do not (as yet) have at their disposal the highest standard of reconnaissance technology, international law applicable in international armed conflict must take a position on the issues of who is a spy, and how spies may be treated.

2. The definition of spies in the first sentence of this regulation stems from Article 29, para. 1, HagueReg and Article 46, para. 2, AP I. For this reason the individual elements of this definition must be determined according to the HagueReg or AP I. In so far as the definition speaks of 'persons', these can have the primary status of either civilians or combatants.

Article 46 AP I, contained in the section 'Combatant and Prisoner-of-War Status', only applies to persons who are members of the armed forces; it says nothing about spies whose primary status is that of civilians. In contrast the definition contained in Article 29, para. 1, HagueReg applies to both civilians and members of the armed forces who do not wear the uniform of their party to the conflict.

The first sentence of Section 5.22 makes use of the definition of the HagueReg. However, it would be an unacceptably narrow interpretation of this sentence to define spies simply as members of the armed forces who clandestinely or under false pretences gather information in the territory controlled by the adversary. For one thing, spies can—as stated above—also have the primary status of civilians, which means that, as a rule, they are in any event not entitled to prisoner-of-war status if they fall into the hands of the adversary. On the other hand, persons within the meaning of Article 29 HagueReg could have the primary status of civilians and, at the same time, of persons accompanying the armed forces (*see* Section 5.19 above). As such they are certainly entitled to prisoner-of-war status.

Properly understood, therefore, three groups of persons are involved: persons who have the primary status of civilians and who do not become prisoners of war even if they fall into the hands of the adversary; civilians who have the primary status of civilians but who, in the event of their capture by the enemy, attain prisoner-of-war status in accordance (p. 123)

with Article 4 A GC III; and finally, persons who are members of armed forces but who engage in espionage without wearing the uniform of their party to the conflict.

3. As for the requirement regarding location, the section's phrase 'in the territory controlled by the adversary' makes use of the further requirement of Article 46, para. 2, AP I (Article 29, para. 1, HagueReg: zone of operations of a belligerent). This location requirement, therefore, refers to the entire territory held by the party being spied upon, either under sovereign power as state territory or under occupational force as occupied territory.

4. As for espionage activity, this relates to information gathering which occurs 'clandestinely or under false pretences'. This is the literal formulation used in Article 29, para. 1, HagueReg, which incidentally is also contained in the Lieber Code (Article 88) and in the Brussels Declaration of 1874 (Article 19).

The fact that Article 46, para. 2, AP I does not specify the gathering of information in the same way should not obscure the fact that AP I has left the old law unaltered in this respect. Instead, it follows from the connection between para. 2 (definition) and para. 3 (information gathering on territory occupied by the adversary), where espionage is understood to be an activity carried out under false pretences or deliberately in a clandestine manner, that in this respect the Hague Law has not been altered.

Following these comments it can be stated that espionage activity, that is the gathering of information clandestinely or under false pretences, has been construed in the same way from the time of the Lieber Code until the date of AP I.

5. Spies are not entitled to prisoner-of-war status even if they are members of the armed forces, persons accompanying the armed forces, or members of merchant navy or civil aircraft crews, and notwithstanding that these categories of persons do without exception acquire prisoner-of-war status in the hands of the enemy (according to Article 43, para. 1, AP I in conjunction with Article 4 A, Nos 1-5, GC III) when they are not involved in espionage. As far as members of the armed forces are concerned, this follows explicitly from Article 46, para. 1, AP I. With regard to the aforementioned civilians who are entitled to prisoner-of-war status, this derives from Article 29, para. 1, in connection with the *argumentum e contrario* drawn from Article 31 HagueReg.

The fundamental permissibility of punishing spies who have fallen into the hands of the adversary arises from Article 46, para. 1, AP I and Article 29, para. 1, HagueReg in conjunction with Article 30 HagueReg.

5.23

Even if captured while engaged in espionage, a spy shall not be punished without prior conviction pursuant to regular judicial proceedings (Article 30 HagueReg; Article 75, para. 4, AP I).

The Brussels Declaration of 1874 already contained the rule that a spy who is caught in the act of spying is treated and prosecuted in accordance with the detaining power's applicable laws (Article 20). The HagueReg has put this into more concrete terms by prohibiting the punishment of spies caught in the act of spying without prior conviction (Article 30). This judicial guarantee is again made concrete by Article 75, para. 4, AP I as set out above (Section 5.18).

5.24

A spy who, after rejoining his own or allied armed forces upon completion of his mission, is subsequently captured by the adversary, shall be treated as a prisoner of war (p. 124) and incur no responsibility for his previous acts of espionage (Article 31 HagueReg; Article 46, para. 4, AP I).

This regulation represents a rule already contained in the Brussels Declaration of 1874 (Article 21) which was adopted almost literally by the two Hague Regulations (HagueReg 1907: Article 31). This traditional rule has been specified in relation to members of the armed forces who have been engaged in espionage on the territory of the adversary, although not residing there, and who have then returned to a unit or a formation of their own armed forces. This could be the case, for example, if a member of the armed forces who has been active as a spy in an occupied territory joins a long-distance reconnaissance patrol or a commando unit of his own party to the conflict. If he is captured, he shall be deemed to have returned to his armed forces and is entitled to prisoner-of-war status.

5.25

Combatants, such as reconnaissance patrols, who, marked as such, reconnoitre the adversary's area of operations shall not be deemed engaged in espionage (Article 29, para. 2, HagueReg; Article 46, para. 2 AP I). The same applies to military aircraft on overt missions of information gathering (Rule 123 *HPCR Manual*).

1. The substance of this regulation corresponds to Article 29, para. 2, HagueReg and, furthermore, is a logical legal consequence of the rule contained in the first sentence of Section 5.21. This section repeats the broad territorial criteria of AP I (territory controlled by an adverse party) while Section 5.25 uses the narrower formulation of the HagueReg (area of operations of the hostile army). This does not mean that long-distance reconnaissance is only permitted within the zone of operation of the hostile army. Rather, Section 5.25 must be understood as also permitting members of the armed forces (within the meaning of Article 43, para. 1, AP I) who can be identified as such (as members of the regular armed forces: by their uniform), to gather information in the entire territory controlled by an adverse party to the extent that this is efficient and feasible from a military and tactical point of view. This is expressly confirmed by Article 46, para. 2, AP I. A similar provision for air warfare is contained in Rule 123 *HPCR Manual* stating that 'military aircraft on mission to gather, intercept or otherwise gain information are not to be regarded as carrying out acts of espionage'.³²

2. A special rule worth noting in this context results from Article 46, para. 3, AP I, which recognizes the loyalty of a member of armed forces to his own party to the conflict. If a member of armed forces who is a resident of territory occupied by an adverse party gathers information of military value in that territory, then this is not regarded as espionage, unless he gathers information clandestinely or through an act of false pretences. If those characteristics of espionage are met by a member of armed forces who is caught in the act, he may be treated as a spy, as has been the case since the Brussels Declaration.

VIII. Special Aspects of Aerial and Naval Warfare, Cyber Warfare, and Military Operations in Outer Space

Since the Second Geneva Convention of 1949 there have been no universal international treaties on the law of naval warfare. The same applies to air warfare. However, as shown (p. 125) by the 1954 CultPropConv, and by Article 49, para. 3, AP I—which makes Section I,

Part IV of AP I applicable to any land, air, or sea warfare—these dimensions of armed conflicts have not been disregarded.

Sections 5.26–5.31 deal only with a limited aspect of air and sea warfare, namely that which concerns combatant and prisoner-of-war status.

5.26

Unlike military ground vehicles, manned military aircraft and ships are required to bear external marks indicating their nationality and military character. Non-uniformed members of armed forces who take part in hostilities using correctly marked military aircraft or ships shall remain combatants. When captured by the adversary they shall prove their military status by an identity card.

1. A warship is a ship belonging to the naval forces of a state and bearing external marks which distinguish the warship and its nationality (*see* below, Section 17.02). Likewise, a military aircraft is defined as an aircraft belonging to the air forces of a state and bearing external military marks distinguishing its nationality. Apart from the controversial issue of warships displaying false flags and emblems during their approach and the obligation to display their own flag before opening fire (*see* below, Section 17.18),³³ warships and military aircraft shall be clearly and unambiguously recognizable as military objectives by their external marks. This accords with the requirement of distinction which in the case of ground forces is met by the obligation of the individual combatant to wear uniform or other distinguishing emblems in order to protect the civilian population. Consequently, members of armed forces not wearing uniforms on board a properly marked warship or military aircraft and taking part in hostilities are and remain combatants regardless of this circumstance. Naturally, the same applies to armed forces members on board of such warships or military aircraft who are, according to national decision, non-combatants. As proved and explained in detail above (Sections 5.01 and 5.14), both combatants and non-combatants are members of armed forces. If combatants and non-combatants find themselves on board a military aircraft or warship, then the aircraft or ship in question becomes a military objective which the adversary is allowed to attack with the permitted methods and means of warfare. The adversary cannot—and is not required to—take into consideration the fact that there are non-combatants on board in addition to the combatant crew (with the exception, of course, of the specially protected medical and religious personnel). Combatants and non-combatants (excluding medical and religious personnel) as armed forces members are military objectives who according to international law may be attacked. There is clearly *no* duty to distinguish between combatants and non-combatants, for instance during a use of arms against a military aircraft or warship.

2. If crew members of a military aircraft or warship not in uniform fall into the hands of the adversary, they must prove their membership of the armed forces by displaying an identity card (if necessary with an identification tag).

(p. 126) **5.27**

No aircraft other than military aircraft of the parties to an international armed conflict shall engage in any form of hostilities (Article 16, para. 1, HRAW 1923; Rule 17 *HPCR Manual*).

The prohibition contained in Article 16, para. 1, HRAW 1923, that no aircraft other than belligerent military aircraft shall engage in hostilities in any form, never entered into force as a provision of international treaty law, but is regarded as a rule of customary international law (*see* Section 17.16 below). This principle corresponds with Article 44, para. 3, 1st sentence, AP I: 'In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the

civilian population while they are engaged in an attack or in a military operation preparatory to an attack.’ The civilian aircraft is a civilian object which is fully protected in international law by Article 52, para. 1, AP I. The military aircraft, on the other hand, is a military objective according to Article 52, para. 2, AP I, must be identifiable, and is permitted to take part directly in military operations, but may also be the object of armed attacks by the adversary. As stated in Rule 17 *HPCR Manual*, only military aircraft are entitled to engage in attacks and in the exercise of other belligerent rights, such as interception.

5.28

A military aircraft shall be under the command of a duly commissioned soldier. The crew must be subject to military discipline (Article 14 HRAW 1923; Rule 1, lit. x, *HPCR Manual*).

This provision reiterates the contents of Article 14 HRAW 1923. This requirement of international law, which must be met by the internal organization of the party to the conflict, has been applied to ground forces in various respects (Article 1, No. 1, HagueReg, Article 13, No. 2, lit. a, GC II; Article 4 A, No. 2, lit. a, GC III; Article 43, para. 1, AP I). It is based upon a principle of customary law and takes into account the principle of authorization, which is an essential prerequisite for classification as a combatant (*see* above, Section 5.04). If a party to a conflict acts in accordance with international law applicable in international armed conflict through its armed forces as the organ provided for this purpose, then the connection between the armed forces and the state party to the conflict must be guaranteed. This requirement is fulfilled by the chain of command and by a system of military discipline. Thus, Rule 1(x) *HPCR Manual* requires military aircraft being commanded by a member of the armed forces and manned (or preprogrammed) by a crew subject to regular armed forces discipline.

5.29

No civilian aircraft shall be armed (Article 16, para. 3, HRAW 1923).

The definition of civilian aircraft as an object which is neither a military nor a public aircraft and ‘exclusively’ serves the civilian transport of passengers or cargo (*see* below, Section 17.09) excludes any arming of such aircraft during an international armed conflict even within its own state. The arming of a civilian aircraft for the purpose of direct participation in military operations (for purposes of attack) can therefore be ruled out from the outset. If one wishes to arm a civilian aircraft within the jurisdiction of its own country for the purpose of countering an attack (i.e. in self-defence) then under the present state of technological development this purpose would be better served by equipping the aircraft with electronic defence systems against radar target detection, missile attacks, and so on, than by arming it.

5.30

Public non-military aircraft shall be treated as civilian objects (Articles 5 and 6 HRAW 1923; Rules 17, 22 *HPCR Manual*). Public aircraft employed for jurisdictional purposes (customs, police) shall also carry papers and bear marks evidencing their non-military character (Article 4 HRAW 1923; Rule 17 *HPCR Manual*). Public aircraft are subject to confiscation, unless specially protected (Article 32 HRAW 1923; Rule (p. 127) 136(a) *HPCR Manual*). Enemy private aircraft are liable to capture and adjudication by a

prize court in order that any neutral claim may be duly heard and determined (Articles 52, 55 HRAW 1923; Rule 134 HPCR Manual).

1. This provision deals with the same problem in international law as has occurred in connection with paramilitary or armed law enforcement agencies of a party to a conflict; a problem which has been regulated by Article 43, para. 3, AP I (see Section 5.07 above). It follows particularly from Article 43, para. 3, AP I that members of armed law enforcement agencies of a party to a conflict always have the primary status of civilians unless the party incorporates them into its armed forces and properly notifies the adversary thereof. The logical legal result is that the aircraft of armed law enforcement agencies which are not incorporated into the armed forces are civilian objects, just as their members are civilians. Furthermore, it follows that a public non-military aircraft must be marked in order to distinguish it from military aircraft belonging to armed forces.

2. HRAW 1923, which is not treaty law, lays down in Article 32 that public non-military aircraft are subject to confiscation 'without prize proceedings', which actually means they may be captured. It would be incorrect to conclude *a contrario*, that prize proceedings are required in the case of civilian aircraft. HRAW 1923, Chapter VII, clearly differentiates between enemy and neutral private aircraft. Enemy private aircraft 'are liable to capture in all circumstances' (Article 52 HRAW 1923). As far as the legal act and legal consequences of capturing are concerned, Rule 136 (a) *HPCR Manual* puts military aircraft and all other public aircraft on the same footing by the statement that 'enemy military, law enforcement and customs aircraft are booty of war. Prize procedures do not apply to captured enemy military aircraft and other State aircraft, inasmuch as their ownership immediately passes to the captor government by virtue of capture.'

A neutral private aircraft, by contrast, is only liable to capture under certain preconditions (Article 53). The capture of an aircraft or of the goods on board shall only be brought before a prize court in so far as neutral claims must be heard and determined (Article 55). If a private aircraft is proven to belong to the adverse party to the conflict, it may even be destroyed after any persons on board have been placed in safety. However, the rules of HRAW 1923 may be put aside, for the nine decades following its formulation have not evolved a corresponding state practice and *opinio iuris*.

For the most part in international armed conflicts, in particular during the Second World War, public non-military aircraft and private aircraft that had fallen into the power of the adversary have been treated by the adversary power as booty and have been confiscated, without prize proceedings regularly being carried out for civilian aircraft. Rule 136(a) *HPCR Manual* apparently has formulated the restatement of customary law on the basis of these historical facts.

3. With regard to the law of AP I, public non-military aircraft are usually, and civilian aircraft always, civilian objects in the sense of Article 52, para. 1, 1st sentence, AP I and therefore they may neither be attacked nor made the object of reprisals. It could prove difficult to differentiate in cases where public non-military aircraft are used for military purposes, especially as airborne headquarters of the state leaders; in such a case it would be impossible to exclude such an aircraft from the definition of military objectives in Article 52, para. 2, AP I, or in Rule 22 *HPCR Manual*.

(p. 128) **5.31**

Special provisions relating to naval warfare are contained in Chapter 17.

For more detailed provisions concerning military, public non-military, and civilian aircraft, see the 'Definitions' in Chapter 17.

5.32

Sections 5.26-5.30 in principle also apply to military operations in outer space (see Sections 2.04 and 3.16 above and 18.56 below).

5.33

For the application of international humanitarian law to military operations in cyberspace see below Section 6.29 and Subchapter 7 V.

Footnotes:

¹ The ICJ in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* qualifies this distinction as the 'cardinal principle' (*ICJ Reports* 1996, 257). Y. Dinstein denotes it as the 'very bedrock' of international humanitarian law. See 'The System of Status Groups in International Humanitarian Law', in W. H. v. Heinegg and V. Epping (eds), *International Humanitarian Law Facing New Challenges* (Berlin/Heidelberg/New York: Springer, 2007), 145-56, at 146.

² See for this already the Russian Draft '*Projet d'une Convention Internationale concernant les lois et Coutumes de la Guerre*', Actes de la Conférence de Bruxelles 1874, Bruxelles 1899, and, taken from this Draft, Article XI of the Declaration of Brussels 1874: 'The armed forces of the belligerents may be composed of combatants and non-combatants.'

³ *CIHL*, Vol. I, 3.

⁴ A party to a conflict to which rights and duties under international humanitarian law are attributed has consequently to be qualified at least as a partial subject of international law. The *ICRC Commentary to the Additional Protocols*, Art. 43, para. 1661, does not sufficiently clarify this logical legal consequence. The fundamental and, therefore, indispensable structure both of customary and treaty law with regard to combatant status, that is the legitimizing chain between a state or at least a partial subject of international law, the armed forces as an organ of this legal entity, and the combatant as the constituent part of this organ is diametrically opposed to a universal combatant status for international and non-international armed conflicts as proposed by some groups and authors, see e.g. E. Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (OUP, 2010), 153 *et seq.*

⁵ The authors of the ICRC Customary Law Study have not been well advised to formulate Rule 1 CIHL including the notion 'combatant' as to be open for use in non-international conflicts. This openness has perhaps led Nils Melzer to quote combatant in its generic meaning as to be applicable in non-international armed conflicts; see N. Melzer, in: A. Clapham and P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Chapter 12 (OUP, 2014), p. 307.

⁶ See R. R. Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerillas and Saboteurs' (1951) XXVIII *BYIL* 325-45; K. Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85 No. 849 *IRRC* 45-74; K. Dörmann, 'Combatants, Unlawful', *MPEPIL*; J. Callen, 'Unlawful Combatants and the Geneva Conventions' (2004) 44 *VaJIntL* 1025 *et seq.*; K. W. Watkin, 'Combatants, Unprivileged Belligerents and Conflicts in the 21st Century', Harvard International Humanitarian Law Research Initiative Working Paper (June 2003), < <https://hhi.harvard.edu/publications/combatants-unprivileged->

belligerents-and-conflicts-21st-century >. For a discussion of the notion 'direct participation in hostilities' see below, Sections 8.02 and 8.16.

⁷ 10 USC § 948a-949u.

⁸ *Lakhdar Boumediene et al. v George W. Bush, President of the US et al.*, decision of 12 June 2008, 553 US 723; 128 S. Ct. 2229.

⁹ See Dinstein, above (n. 1), 151.

¹⁰ D. Fleck, 'International Humanitarian Law After September 11: Challenges and the Need to Respond' (2006) 6-2003 *YIHL* 41-77, at 56-9.

¹¹ SC Res 239 (1967); SC Res 405 (1977).

¹² For a detailed assessment of these criteria see *ICRC Commentary to the Additional Protocols*, Article 47, paras 1801 *et seq.*

¹³ See M. Bothe, K. Ipsen, and K.J. Partsch, 'Die Konferenz über humanitäres Völkerrecht—Verlauf und Ergebnisse' (1978) 38 *ZaöRV* 34 *et seq.*

¹⁴ The ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (Geneva: ICRC, 2009) which restates the principle of distinction also in modern armed conflicts holds it as lawful to regard 'fighters' in a non-international armed conflict having a continuous combat function as military objectives. These persons may be attacked if clearly identified, even if they are not carrying arms, whether openly or not. For further details see below, Section 19.03, and R. Geiß, 'The Conduct of Hostilities in Asymmetric Conflicts—Reciprocity, Distinction, Proportionality, Precautions' (2010-13) *HuV-I* 122-32, at 124-6. The same applies for, fighters of a non-state party to a conflict in the meaning of Article 1, para. 4, AP I, having a continuous combat function.

¹⁵ Likewise, although based on different reasoning, J. de Preux, *ICRC Commentary to the Additional Protocols*, Art. 44 AP I, para. 1723.

¹⁶ See in this connection, *Projet d'une déclaration internationale concernant les lois et coutumes de la guerre adoptés par la Conférence de Bruxelles, Actes de la Conférence, Bruxelles 1874 (juillet-août 1874)*, translated by the author.

¹⁷ See *Actes de la Conférence de Bruxelles, Prot. XIII*, session of 17 August 1874, 183 *et seq.*

¹⁸ *Ibid.*, 184.

¹⁹ *Ibid.*, 185.

²⁰ Official records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-77), Vol. XV, 390.

²¹ As stated correctly by Solf in M. Bothe, K. J. Partsch, and W. Solf, *New Rules for Victims of Armed Conflicts* (Nijhoff, 1982), 240.

²² See *ICRC Commentary to the Additional Protocols*, para. 1676. This position, however, is not compatible with the *travaux préparatoires* of the Diplomatic Conference, for the Conference accepted the Report of the III. Commission expressly stating that the term members of the armed forces is all-inclusive and includes both combatants and non-combatants (CDDH/236/Rev. 1).

²³ *CIHL*, Vol. I, 6, n. 27 and accompanying text.

²⁴ See K. Ipsen, in D. Fleck (ed.), *Beiträge zur Weiterentwicklung des humanitären Völkerrechts für bewaffnete Konflikte*, 71 Veröffentlichungen des Instituts für

Internationales Recht an der Universität Kiel (Hamburg: Hansischer Gildenverlag, 1973), 153 *et seq.*

²⁵ M. N. Schmitt, ‘“Direct Participation in Hostilities” and 21st Century Armed Conflicts’, in H. Fischer, U. Froissart, W. Heintschel von Heinegg, and C. Raap (eds), *Krisensicherung und Humanitärer Schutz—Crisis Management and Humanitarian Protection* (Berliner Wissenschafts-Verlag, 2004), 505–29, at 512–19.

²⁶ Schmitt, *id.*

²⁷ See US Department of Defense Instruction 3020.41 USD (AT&L) of 3 October 2005 ‘Contractor Personnel Authorized to Accompany the US Armed Forces’; US Department of Defense Instruction 1100.22 USC (P&R) of 7 September 2006 ‘Guidance for Determining Workforce Mix’.

²⁸ See Montreux Document on Private Military and Security Companies (17 September 2008); International Code of Conduct for Private Security Service Providers—ICoC—(9 November 2010).

²⁹ In this connection see the detailed remarks in D. Fleck, ‘Ruses of War and Prohibition of Perfidy’ (1974) XIII *RDMilG* 269–314.

³⁰ *Trial of Otto Skorzeny and Others*, General Military Government Court of the US Zone of Germany, 18 August–9 September 1947, in *Law Reports of Trials of War Criminals*, Vol. IX, 90–4.

³¹ As Fleck, above (n. 29) has stated correctly.

³² Harvard Program on Humanitarian Policy and Conflict Research/*HPCR Manual on International Law Applicable to Air and Missile Warfare* (intended to be a restatement of existing law).

³³ Cf. Fleck, above (n. 29); W. Fenrick, ‘Military Objectives, in the Law of Naval Warfare’, in W. Heintschel v. Heinegg (ed.), *The Military Objective and the Principle of Distinction in the Law of Naval Warfare*, 7 *Bochumer Schriften zur Friedenssicherung und zum humanitären Völkerrecht* (Bochum: Universitätsverlag N. Brockmeyer, 1991), 1–44, at 38; G. J. F. van Hegelsom, ‘Methods and Means of Combat in Naval Warfare’, in W. Heintschel v. Heinegg (ed.), *Methods and Means of Combat in Naval Warfare*, 8 *Bochumer Schriften zur Friedenssicherung und zum humanitären Völkerrecht* (Bochum: Brockmeyer, 1992), 1–59, at 16 *et seq.*

(p. 296) Chapter 12 The Principle of Distinction Between Civilians and Combatants

1 Basic Outline and Contemporary Challenges

THE primary aim of the law of armed conflict, here referred to as international humanitarian law (IHL), is to protect the victims of armed conflict and to regulate the conduct of hostilities based on a balance between military necessity and humanity. The undisputed cornerstone of IHL is the principle of distinction between civilians and combatants, which obliges belligerents to distinguish at all times between persons who may be lawfully attacked, and persons who must be spared and protected from the effects of the hostilities. In order to avoid any ambiguity, these two categories of persons must be mutually exclusive and absolutely complementary. In other words, in a situation of armed conflict, every person is either a legitimate (p. 297) military target (military objective)¹ or a protected person²—*tertium non datur*. The principle of distinction reflects the idea that belligerent hostilities constitute limited confrontations between organized armed forces, and not between entire populations, and that their sole legitimate aim is to weaken and defeat the military forces of the enemy.³ The cardinal importance of this principle was confirmed in the *Nuclear Weapons Opinion* of the International Court of Justice, where the Court held that a number of basic principles of humanitarian law, including the principle of distinction between combatants and non-combatants, are ‘intransgressible principles of international customary law’ and are so fundamental to the respect of the human person that they can be derived directly from a general principle of law, namely ‘elementary considerations of humanity’.⁴ In view of the Court’s statements, the International Law Commission considered it justified to regard the principle of distinction as part of *jus cogens*.⁵ Although the principle of distinction may appear to be simple and straightforward at first sight, the transformation of warfare in the past century has put considerable strain on its practical application. In the nineteenth century, when most of the concepts and principles underlying modern IHL were conceived and formulated, the dividing line between civilians and combatants was still comparatively clear. At that time, war generally involved large-scale military confrontations between uniformed formations of regular state armies on battlefields distant from the civilian population. This pattern has changed fundamentally.

Today, the majority of armed conflicts are of a non-international character, that is to say, they involve at least one belligerent party composed entirely of non-state actors, whose organization, equipment, training, and discipline rarely match those of state armed forces. At the same time, there has been a continuous shift of military operations into civilian population centres. The ensuing intermingling of armed (p. 298) actors with the civilian population has not only exposed the latter to increased collateral dangers, but has also facilitated the involvement of civilians themselves in activities more closely related to military operations, from providing food, shelter, equipment, and intelligence to combatants, up to direct participation in combat. Even more recently, the increased outsourcing of traditionally military functions has inserted numerous private contractors and civilian intelligence personnel or other civilian government employees into the modern battlefield. Moreover, contemporary military operations often attain an unprecedented level of complexity, involving the coordination of a great variety of interdependent human and technical resources in different locations.

All of these factors have caused confusion and uncertainty as to the distinction between legitimate military targets and persons protected against direct attacks. These difficulties are further aggravated where combatants do not distinguish themselves from the civilian population, for example during undercover military operations or when acting as farmers by day and fighters by night. As a result, civilians are more likely to fall victim to erroneous or

arbitrary targeting, while armed forces—unable to properly identify their adversary—bear an increased risk of being attacked by persons they cannot distinguish from the civilian population. This trend, which threatens to undermine some of the most fundamental achievements made in ‘humanizing’ warfare, calls for a careful analysis of the legal concepts and rationale underlying the principle of distinction with a view to clarifying its meaning in light of the circumstances prevailing in contemporary armed conflicts.

2 International Armed Conflict

A. The rule of distinction in international armed conflict

For situations of international armed conflict, the principle of distinction is expressed in the following provision:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the *civilian population* and *combatants* and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.⁶

(p. 299)

The most common formulation of the principle in terms of distinction between ‘civilians’ and ‘combatants’ does not cover all categories of persons which may be present in a context of hostilities and, therefore, does not constitute a sufficiently precise basis for targeting decisions. In fact, treaty and customary IHL prohibits direct attacks not only against civilians,⁷ but also against medical, religious and civil defence personnel of the armed forces⁸ and, more generally, all persons *hors de combat*.⁹ The underlying rationale is that, since the concerned persons do not directly participate in hostilities, considerations of humanity require their immunity against direct attack regardless of any potential military advantage that could be achieved. The protection of persons against direct attack also includes the protection against belligerent reprisals. Treaty IHL governing international armed conflict generally prohibits reprisals against the wounded, sick and shipwrecked, against medical and religious personnel,¹⁰ against prisoners of war¹¹ and persons protected under the Fourth Geneva Convention,¹² as well as against civilians and the civilian population in general.¹³ The prohibition of reprisals against persons protected by the Geneva Conventions has become part of customary IHL applicable in international armed conflict.¹⁴

With regard to legitimate military targets, IHL provides an express definition of military objectives only as far as objects are concerned.¹⁵ While Article 48 of Additional Protocol I implies that combatants are military objectives, this basic rule is not completely accurate in view of the fact that not only, and not all, combatants may be lawfully attacked. A more comprehensive overview of persons constituting legitimate military targets results from identifying those categories of persons which IHL does not protect against direct attack. This includes, first of all, combatants provided they are not *hors de combat*. Moreover, persons normally entitled to immunity from direct attack may lose their protection due to their personal conduct. Civilians lose their protection for such time as they ‘take a direct part in hostilities’.¹⁶ Similarly, medical, religious, and civil defence personnel lose (p. 300) their protection if they carry out, outside of their humanitarian or civil defence function, ‘acts harmful’ to the adversary,¹⁷ and persons *hors de combat* when they commit ‘hostile acts’ or try to escape.¹⁸

In sum, in situations of international armed conflict, the category of persons protected from direct attack includes ‘peaceful civilians’,¹⁹ medical, religious, and civil defence personnel of the armed forces, and all persons *hors de combat*. Persons constituting legitimate military targets, on the other hand, include combatants, civilians directly participating in hostilities, as well as individuals carrying out hostile or harmful acts despite the special

protection afforded to them as medical, religious, and civil defence personnel of the armed forces or as persons *hors de combat*.

B. Armed forces, combatants and civilians

(i) Treaty law pre-dating the Additional Protocol I of 1977

(a) Hague Regulations of 1907

In Chapter I on 'The Qualifications of Belligerents', the 1907 Hague Regulations declare the laws, rights, and duties of war applicable to 'armies' and to 'militia and volunteer corps' fulfilling the four conditions of: (a) responsible command, (b) fixed and recognizable distinctive emblem, (c) carrying arms openly, and (d) compliance with the laws and customs of war.²⁰ Included in the notion of 'belligerents' are not only regular and irregular armed forces, but also participants in a *levée en masse*, if they carry arms openly and respect the laws and customs of war.²¹

It is obvious that these regulations were a model for the corresponding provisions in the Geneva Conventions of 1949.²² The Hague Regulations further clarify that the armed forces of the belligerent parties may consist of both combatants and non-combatants and that both are entitled to the status of prisoner of war (POW) upon capture.²³ While the Hague Regulations determine the basic categories of persons that may legitimately represent a belligerent sovereign on the battlefield, and while they provide a fairly precise description of participants in a *levée en masse*, (p. 301) they do not sufficiently elucidate the criteria upon which a person can be objectively identified as belonging to the combatant or non-combatant armed forces of a belligerent or, respectively, to the civilian population.

(b) Geneva Conventions of 1949

The four Geneva Conventions of 1949 contain few rules concerning the conduct of hostilities and, instead, focus on distinguishing and protecting various categories of persons who have fallen into the power of the adversary, namely the wounded, sick and shipwrecked members of the armed forces (GC I and II), prisoners of war (GC III), and essentially all other persons who find themselves in the hands of a party to the conflict of which they are not nationals (GC IV). Although the Geneva Conventions do not define the terms 'armed forces', 'combatant', or 'civilian', there are sometimes attempts to derive such definitions by implication from the description of the Conventions' personal scopes of application. Strictly speaking, however, despite the reference to 'armed forces' (GC I, GC II) and 'civilians' (GC IV) in their titles, none of the four Conventions has a personal scope of protection that would even approximately match the categories of 'armed forces', 'combatant', or 'civilian'.

Accurately understood, the first three Geneva Conventions afford protection and/or POW-status not only to combatants *hors de combat*, but also to medical and religious personnel of the armed forces, to certain categories of civilians accompanying the armed forces without being part thereof, and to participants in a *levée en masse*.²⁴ Therefore, the remark made in the ICRC's Commentary that the entitlement to POW-status under Article 4 of GC III 'implies' combatant status must be read with appropriate caution and cannot be generalized.²⁵ Particularly states that have not ratified Additional Protocol I of 1977 often inaccurately refer to Article 4A(1) and (2) of GC III in order to define armed forces or combatants under IHL. Apart from the fact that this provision deals with the entitlement of persons to POW-status after capture and not with the operation of the principle of distinction during the conduct of hostilities, its text does not even mention the notion of combatant and refers to armed forces only as a notion of domestic law.²⁶ Under domestic law, however, the notion of armed forces is not necessarily defined for the same purposes as under IHL, and membership in the armed forces may have a series of implications unrelated to the conduct of hostilities.²⁷ Therefore, when defining (p. 302) armed forces for the

purposes of the principle of distinction, the analysis should be conducted based on universally recognized principles of IHL and not based on domestic legislation.

Similarly, GC IV, although entitled 'Geneva Convention relative to the Protection of Civilian Persons in Time of War', does not prove very useful in clarifying the definition of categories of persons for the purpose of the conduct of hostilities. Not only does the Convention fail to provide a definition of 'civilian person', but Article 4 GC IV also leaves no doubt that the Convention does not protect all civilians, and not only civilians, but also members of the armed forces who, for whatever reason, have lost their entitlement to POW-status.²⁸ In the final analysis, therefore, the Geneva Conventions do not provide definitions of 'armed forces', 'combatants', or 'civilians', which would be sufficiently precise for the purposes of the principle of distinction.

(ii) Armed forces

The first treaty definition of armed forces for situations of international armed conflict is provided in Article 43(1) of AP I:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.²⁹

This definition was adopted by consensus at the Diplomatic Conference of 1974 to 1977 and has become part of customary international law.³⁰ According to its text, the armed forces of a belligerent party are composed of all organized armed personnel fighting on its behalf, including those which previous treaties listed separately and in addition to the regular armed forces. Thus, even members of irregular armed forces, such as organized resistance movements and other militia or volunteer corps are considered part of the armed forces, as long as they operate under a command responsible to that party.³¹ The underlying assumption is that all organized armed actors who engage in hostilities on behalf of a belligerent state do so as organs of a subject of (p. 303) international law, thus entailing that state's international responsibility for their conduct.³² Whether the government or authority representing that state has been recognized as legitimate by the adversary is irrelevant.³³

While the entitlement of irregular forces to combatant privilege and POW-status depends on their collective fulfilment of the four requirements listed in Article 1 of HC IV Regulations and Article 4 of GC III (ie responsible command, fixed and recognizable distinctive emblem, carrying arms openly, and compliance with IHL), Article 43 of AP I makes clear that their qualification as 'armed forces' distinct from the civilian population depends on two pre-requisites only: (1) the existence of an organized armed force, unit or group, which is (2) under a command responsible to a party to the conflict.³⁴ Thus, although visibility and respect for IHL are legal obligations which may be relevant for individual and collective entitlement to POW-status or combatant privilege, they are not *defining elements* of armed forces within the meaning of IHL.³⁵ Also, failure of a party to a conflict to notify the other parties when it incorporates a paramilitary or armed law enforcement agency into its armed forces constitutes a violation of its legal duties but does not prevent the incorporated forces from becoming part of the armed forces within the meaning of IHL.³⁶(p. 304)

Three particular categories of persons deserve separate mention here, namely participants in a *levée en masse*, mercenaries, and other private contractors. Participants in a *levée en masse*, are inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect IHL. According to a longstanding rule of customary and treaty IHL, participants in a *levée en masse* are entitled to combatant privilege and POW-status.³⁷ They are the only armed actors

who are not regarded as civilians although, by definition, they operate spontaneously and lack sufficient organization and command to qualify as members of the armed forces. All other persons who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis must be regarded as civilians.

Mercenaries, on the other hand, are presumably both organized and under a command responsible to a belligerent party. Admittedly, Article 47(2) of AP I defines a 'mercenary' as a person who, *inter alia*, 'is not a member of the armed forces of a Party to the conflict'. If this definition were to be based on the definition of 'armed forces' in Article 43(1) of AP I, then only persons who are either (a) not *organized*, or (b) not *armed* or (c) not *under a command responsible to a party to the conflict* may qualify as mercenaries. In operational reality, however, each of these elements must necessarily be given in the case of mercenaries, as their very *raison d'être* is to directly participate in hostilities on behalf of a party to the conflict. The only reasonable conclusion is that Article 47(2)(e) of AP I, similar to Article 4A(1) of GC III, refers to membership in the armed forces as defined in national law only and that mercenaries, despite confusing treaty terminology which may suggest the contrary, do qualify as members of the armed forces within the meaning of Article 43 of AP I, albeit without entitlement to POW-status and combatant privilege.

Finally, private contractors whose function it is to directly participate in hostilities on behalf of a state but who, nevertheless, do not qualify as mercenaries (eg because they are nationals of the contracting state), not only qualify as members of its irregular armed forces but, in principle, are also entitled to POW-status and combatant privilege in case of capture. Private contractors whose function does not involve direct participation in hostilities, on the other hand, remain civilians and lack combatant privilege but, if formally authorized to accompany the armed forces, may still be entitled to POW-status after capture.³⁸ In sum, in contemporary IHL, the notion of armed forces refers not only to regular state armed forces, but (p. 305) essentially to all organized armed actors whose function it is to conduct hostilities on behalf of a belligerent party.

(iii) Combatants

Building on the preceding definition of armed forces, Additional Protocol I then goes on to define the notion of combatant. Article 43(2) of AP I states:

Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.³⁹

Thus, in international armed conflict, combatants are those members of the armed forces who have a 'right' to directly participate in hostilities on behalf of a party to the conflict. They are 'privileged combatants'. Expressly excluded are religious and medical personnel who, as non-combatant members of the armed forces, and in accordance with the special protection against direct attack afforded to them, do not have a 'right' to directly participate in hostilities.⁴⁰ Additionally, Article 2 of the 1907 Hague Regulations and customary law dating back to the Lieber Code and the Brussels Declaration require that combatant status be given to participants in a *levée en masse*, provided they carry their arms openly and respect the laws and customs of war. According to a long-standing treaty definition, participants in a *levée en masse* are inhabitants of unoccupied territory who spontaneously take up arms to resist invading armed forces without having time to organize themselves into an armed force.⁴¹

It is important not to misconstrue the implications of the 'right' of combatants to participate directly in hostilities. This so-called 'combatant privilege' provides combatants with immunity from prosecution for lawful acts of war, but not for conduct contrary to IHL or international criminal law. This has been expressed with skillful precision in the following words: "Those who are entitled to the juridical status of "privileged combatants" are

immune from criminal prosecution for those warlike acts that do not violate the laws and customs of war but that might otherwise be common crimes under municipal law'.⁴² Consequently, lack of combatant privilege (p. 306) does not mean that 'unprivileged' participation in hostilities, as such, constitutes a war crime or otherwise a violation of IHL, but it simply exposes the concerned persons to the full force of domestic criminal law for death, injury, destruction or other harm caused during their direct participation in hostilities.⁴³

(iv) Civilians

Additional Protocol I also provides the first codified definition of 'civilian'. Article 50(1) of AP I reads:

A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.⁴⁴

The term 'civilian' is negatively defined and, in essence, includes all persons who are neither members of the armed forces within the meaning of IHL, nor participants in a *levée en masse*.⁴⁵ It follows that, in principle, the law of hostilities governing international armed conflict assigns each individual to one of two mutually exclusive categories, namely 'members of the armed forces' or 'civilians'. In case of doubt, a person shall be presumed to be a civilian.⁴⁶ The negative definition of civilians as all persons who are not members of the armed forces has become part of customary law.⁴⁷ The only exception to this basic dichotomy are participants in a *levée en masse*, which both treaty and customary IHL recognizes as combatants, but which neither qualify as members of the armed forces nor as civilians.⁴⁸ Apart from participation in a *levée en masse*, however, civilians cannot become combatants unless they (p. 307) become members of the armed forces of a party to the conflict. Therefore, as far as situations of international armed conflict are concerned, civilians taking a direct part in the hostilities without becoming members of armed forces must remain civilians, even though they temporarily lose their protection against direct attack.⁴⁹

3 Non-International Armed Conflict

A. The rule of distinction in non-international armed conflict

While treaty IHL governing non-international armed conflict contains a few provisions on the conduct of hostilities, the most important rules and principles applicable in situations of international armed conflict are today recognized as having attained customary status with respect to non-international armed conflict as well. The customary rule of distinction applicable in situations of non-international armed conflict has been formulated as follows:

The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.⁵⁰

The term 'combatant' is used in its generic meaning, that is to say, as describing persons who do not enjoy civilian protection against attack but it does not imply a right to combatant privilege or POW-status.⁵¹ Just like the corresponding rule applicable in international armed conflict, this general rule does not cover all categories of persons which may be present in a context of hostilities and, therefore, does not provide sufficiently precise guidance for targeting decisions.

In fact, during the conduct of hostilities in non-international armed conflict, treaty and customary IHL protects the same basic categories of persons as in international armed conflict, namely civilians,⁵² medical, and religious personnel⁵³ and, (p. 308) more generally, all persons *hors de combat*.⁵⁴ Treaties governing non-international armed conflict are silent with regard to civil defence personnel but, to the extent that their assignment to civil defence duties is permanent and involves a prohibition of direct participation in hostilities just as in international armed conflict,⁵⁵ permitting direct attacks against these individuals would run counter to the fundamental rationale of the principle of distinction. Of course, where civil defence functions are carried out by civilians, they remain entitled, at the very least, to the general protection afforded to civilians. The protection of persons against direct attack also includes the protection against belligerent reprisals by way of direct attack. Although not expressly mentioned in treaty IHL governing non-international armed conflict, the prohibition of belligerent reprisals against persons protected against direct attack has attained customary status in situations of non-international armed conflict as well.⁵⁶

As in the case of international armed conflicts, the category of individuals constituting legitimate military targets in non-international armed conflict includes all persons which IHL does not protect against direct attack. Common Article 3 affords protection to all persons 'taking no active part in the hostilities' against arbitrary exercise of power by the parties to the conflict including violence to life and person, murder and extra-judicial execution. 'Members of armed forces' benefit from such protection only once they have 'laid down their arms' or are 'placed *hors de combat*'.⁵⁷

Common Article 3 therefore implies, *a contrario*, that members of the armed forces are not regarded as 'taking no active part in the hostilities' and, therefore, are not entitled to protection until they have laid down their arms or are placed *hors de combat*. This view is supported by Article 4(1) of AP II, which provides essentially the same scope of protection to '[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been (p. 309) restricted'. The ICRC's Commentary on this matter specifies that: '*Ratione temporis* combatants are protected as soon as they are *hors de combat*'.⁵⁸ While treaty IHL applicable in non-international armed conflict does not use the term 'combatant', the principle of distinction operates based on the same criteria which define that category in international armed conflict.⁵⁹ Thus, in non-international armed conflict, members of armed forces are not protected against direct attack, unless they serve as medical and religious personnel or have been placed *hors de combat*. This also applies to the armed forces of non-states parties to the conflict, whether they are referred to as 'armed forces' (Common Article 3) or as 'dissident armed forces' and other 'organized armed groups' (Article 1(1) of AP II). As the ICRC's Commentary unambiguously declares: 'Those who belong to armed forces or armed groups may be attacked at any time'.⁶⁰ Moreover, just as in international armed conflict, persons normally benefiting from protection against direct attack may lose such immunity due to their individual conduct. Thus, civilians lose their protection for such time as they take a direct part in hostilities,⁶¹ medical and religious personnel if they carry out, outside of their humanitarian function, hostile acts or acts harmful to the adversary,⁶² and persons *hors de combat* when they commit hostile acts or try to escape.⁶³

In sum, for the purposes of the principle of distinction, the pertinent rules of international humanitarian law distinguish essentially the same categories of persons in international and non-international armed conflict. In both cases, persons protected against direct attack includes peaceful civilians, medical and religious personnel, as well as persons *hors de combat*. Persons not entitled to immunity against direct attack includes members of the armed forces—that is to say: state armed forces, dissident armed forces, and other organized armed groups—of a belligerent party, civilians directly participating in hostilities,

as well as medical, religious, and civil defence personnel or persons *hors de combat* who commit hostile or harmful acts despite the special protection afforded to them.

b. Armed forces, organized armed groups, civilians, and combatants

Treaty IHL governing non-international armed conflict uses the terms 'armed forces', 'organized armed groups', and 'civilians' without defining them. The meaning of these terms must therefore be determined based on a comprehensive reading (p. 310) of IHL applicable in non-international armed conflict and in light of current state practice. It should also be determined to what extent the notion of 'combatant' has any legal relevance in non-international armed conflict.

(i) Armed forces

Treaty IHL governing non-international armed conflict uses the term 'armed forces' with different meanings. A preliminary source of confusion is the question of whether the notion of armed forces in non-international armed conflict covers only state armed forces or also the fighting forces of non-state parties to the conflict.

Common Article 3 to the Geneva Conventions extends protection against arbitrary exercise of power to 'members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause'. Thus, 'members of armed forces' are to be considered as 'persons taking no active part in the hostilities' only once they have definitely disengaged or have been placed *hors de combat*. Mere suspension of combat is insufficient. Since it was considered necessary to make this clarification with regard to the obligations of 'each' party to the conflict, these special provisions could not have been intended to apply exclusively to state armed forces but must also extend to the armed forces of non-states parties to the conflict.⁶⁴ This interpretation becomes even more compelling in view of the fact that a non-international armed conflict within the meaning of this provision does not require the involvement of a state but can also take place exclusively between opposing non-states parties. Hence, the notion of 'armed forces' in Common Article 3 must be interpreted as referring to the fighting forces of both state and non-state belligerents.⁶⁵

Article 1(1) of AP II

The clarity and simplicity of Common Article 3 was unnecessarily blurred by Article 1(1) of AP II, which refers to non-international armed conflicts between the 'armed forces' of the High Contracting Party on the one hand, and 'dissident armed forces' or 'other organized armed groups' on the other. Unfortunately, this provision fails to properly distinguish between the 'parties' to the conflict and their respective 'armed forces'. Of course, contrary to the wording of Article 1(1) of AP (p. 311) II, the state party to the conflict cannot be the governmental armed forces, but only the state itself. Thus, the provision leaves unclear whether 'organized armed groups' and 'dissident armed forces' are referred to as 'parties' to the conflict or as 'armed forces' conducting the hostilities for the respective parties.

However conflated the non-governmental party to the conflict and its 'armed forces' may be as a matter of fact, it is imperative to keep these concepts separate as a matter of law. For example, if the notion of 'organized armed group' were to be equated with a 'party' to the conflict as a whole, the functional distinction between that party and its armed forces would have to be made by distinguishing the 'armed' and 'political' wings or, on the level of individual membership, 'combatant' and 'non-combatant' members of the organized armed group in question. Although the result may be the same, equating the notion of 'organized armed groups' in Article 1(1) of AP II with the fighting forces of a non-state party to the conflict better reflects the terminological and conceptual approach of treaty and customary IHL.⁶⁶ The described confusion is further compounded by the juxtaposition of armed forces, dissident armed forces, and other organized armed groups, which seems to exclude organized armed groups not qualifying as dissident armed forces from the concept of

‘armed forces’ altogether. This has led to the suggestion that such organized armed groups in non-international armed conflict should be regarded as ‘civilians’ who may only be directly attacked when they directly participate in hostilities.⁶⁷ As will become apparent, this view is a misconception of major proportions, which necessarily entails a distortion of the fundamental concepts of ‘civilian’, ‘armed forces’, and ‘direct participation in hostilities’ and, ultimately, leads to irreconcilable contradictions in the interpretation of these terms.

(a) Status of organized armed groups in state practice

While the ICRC’s study on customary IHL comes to the conclusion that state armed forces are not considered civilians,⁶⁸ it finds that ‘practice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians’ and asserts that ‘most manuals define civilians negatively with respect to combatants and armed forces and are silent on the status of armed opposition groups’.⁶⁹ It is here submitted that this purported ambiguity is not, in (p. 312) fact, reflected in state practice. As it is quite common for states to carefully avoid statements or actions that could be interpreted as giving a direct recognition of any kind to armed opposition groups, it is not surprising that military manuals—just as treaty IHL—generally do not expressly regulate their status. The lack of formal regulation on this sensitive issue does not necessarily indicate ambiguous state practice. Rather, it suggests that qualifying organized armed groups as civilians is a matter where relevant state practice and *opinio juris* are more reliably deduced from operational conduct, conclusive indirect statements and the absence of condemnation than from formal statements prone to political misinterpretation.

Treaty IHL and state practice are very clear as to the rule that, in any armed conflict, civilians may not be directly attacked unless and for such time as they directly participate in hostilities.⁷⁰ Consequently, if states viewed organized armed groups as civilians, they would have to express through statements and general conduct that members of such groups cannot be attacked unless and for such time as they directly participate in hostilities. Contrary practice would either have to be denied or, alternatively, would have to be regarded as unlawful by other states. However, even a cursory glance at almost any non-international armed conflict—be it in South East Asia in the 1960s and 1970s, in Central America in the 1980s, or in Colombia, Sri Lanka, Uganda, Chechnya or the Sudan today—is sufficient to conclude that governmental armed forces do not hesitate to attack insurgents even while they are not engaged in a particular military operation. In practice, such attacks generally are neither denied by the operating state nor internationally condemned as long as they do not cause excessive incidental harm to protected persons or objects. Where there has been condemnation of a state’s direct attack against individuals supporting an insurgency, it has been in relation to doubts concerning whether the targeted persons belonged to the military wing of the insurgency rather than doubts as to the lawfulness of direct attacks against members of such fighting forces. In sum, state practice suggests that, as far as the principle of distinction is concerned, organized armed groups belonging to a non-state belligerent are not regarded as civilians but, instead, are seen as being functionally equivalent to state armed forces.⁷¹

(b) Reconciliation of Common Article 3 and Article 1 of AP II

In order to restore clarity and reconcile potential conflicts between Common Article 3 and Article 1(1) of AP II, it must be recognized that the two provisions refer to ‘armed forces’ from different perspectives, but without contradiction in terms of concept. Common Article 3, similar to Article 43 of AP I, adopts a wide and (p. 313) functional notion of armed forces which distinguishes the organized fighting forces of all parties to the conflict from the civilian population. Conversely, the notion of ‘armed forces’ in Article 1(1) of AP II refers exclusively to forces which have at some point and in some form been drafted into service by the governmental side of the conflict, whether they remain loyal or turn against the government as dissident armed forces.⁷² Nevertheless, similar to Article 43 of AP I, the notion of ‘armed forces’ in Article 1(1) of AP II remains functionally broad enough to include

police forces, intelligence agents, and border guards assuming combat function for the state without formally qualifying as members of its armed forces under domestic law.⁷³ Moreover, it has rightly been argued that the description of 'dissident armed forces' and 'other organized armed groups' in Article 1(1) of AP II 'inferentially' recognizes the essential conditions prescribed under Article 43 of AP I, namely 'that the armed force be linked to one of the parties to the conflict; that they be organized; and that they be under responsible command'.⁷⁴ Accordingly, in the final analysis, the functional notion of 'armed forces' employed in Common Article 3 includes all three categories juxtaposed in Article 1(1) of AP II, namely 'armed forces' of a High Contracting Party, 'dissident armed forces' and 'organized armed groups'. It is here submitted that the functional interpretation of the notion of 'armed forces' expressed in Common Article 3 best corresponds to the concepts underlying the principle of distinction and, therefore, is tailor-made for the conduct of hostilities.

(c) Resulting concept

The ICRC's study on customary IHL comes to the conclusion that, for the purposes of the principle of distinction in situations of non-international armed conflict, the following definition of state armed forces has attained customary nature:

The armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.⁷⁵

In the conduct of hostilities, the generic functions of the armed forces of a party to the conflict are essentially the same irrespective of whether they belong to a state or a non-state party and irrespective of whether the conflict is of international or non-international character. It therefore seems reasonable to apply the same functional definition of armed forces also to the organized fighting forces of a non-state party to the conflict. Whether such forces are categorized as 'state armed forces', 'dissident (p. 314) armed forces', and other 'organized armed groups' (Article 1(1) of AP II), or whether they are simply described as 'armed forces' of a party to the conflict (Common Article 3) is irrelevant, as long as there is clarity as to the functional purpose of the definition as part of the principle of distinction.

(ii) Organized armed groups

(a) Distinction from civilians directly participating in hostilities

In functional terms, organized armed groups (including dissident armed forces) constitute the armed forces of a non-state party to an armed conflict.⁷⁶ As such they are no longer part of the civilian population and must also be distinguished from civilians who may be directly participating in hostilities on a merely unorganized, sporadic, or spontaneous basis. In line with the generic concept of 'armed forces' outlined above, the qualification of armed actors as an organized armed group requires that they be armed, organized, and under a command responsible to one of the parties to the conflict. This does not imply that the structure and organization of such groups must be as sophisticated as that of state armed forces. As pointed out in the ICRC's Commentary:

The existence of a responsible command implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a *de facto* authority.⁷⁷

Admittedly, the requirement of *de facto* authority is a condition of applicability of Additional Protocol II rather than a generic defining element of an organized armed group engaged in a non-international armed conflict. More accurate with respect to the minimal constitutive elements of any organized armed group are probably the requirements which have been accepted with regard to irregularly constituted resistance movements in international armed conflict, namely that they should form 'a body having a military organization',⁷⁸ must be commanded by a 'person responsible for his subordinates'⁷⁹ and that they must 'belong to' a party to the conflict.⁸⁰ The concept of 'belonging to' denotes a *de facto* relationship between an armed force and a party to the conflict, which may be officially declared, but may also be expressed through tacit agreement or conclusive behaviour.⁸¹(p. 315)

In conjunction with the functional definition of armed forces, these elements provide margins which are flexible enough to take into account organizational, structural, cultural, political, and other contextual diversities while maintaining the core content of what constitutes the armed forces of a belligerent party in distinction to the civilian population. Where armed actors fulfil these criteria, they are no longer civilians but can be regarded as an 'organized armed group' or as 'armed forces' of a party to the conflict within the meaning of IHL. Where armed non-state actors do not meet these criteria, on the other hand, they remain civilians even for such time as they directly participate in hostilities on an unorganized, sporadic or spontaneous basis.⁸²

(b) Individual membership

In the case of organized armed groups, it may be particularly difficult to distinguish the 'party' to the conflict as a whole from its 'armed forces', a distinction that is of paramount importance for the protection of civilians supporting a party to the conflict without engaging in organized hostilities on its behalf. For example, such civilians would include political and religious leaders, instigators, or militants making up the 'political wing' of a non-state belligerent. In addition, financial contributors, informants, collaborators, and other service providers without fighting function may support or belong to an opposition movement or an insurgency as a whole. These individuals can hardly be regarded as members of its 'armed forces' in a functional sense.⁸³ For the purposes of the principle of distinction, such persons remain civilians and, as such, may be attacked only for such time as they directly participate in hostilities.

Membership in state armed forces is normally regulated in domestic law and expressed through uniforms, distinctive signs, emblems and identity cards or disks. Membership in state armed forces is of a formal nature and not necessarily tied to the actual exercise of a fighting function. For example, armed forces can include cooks, secretaries, and administrative personnel unlikely to take a direct part in hostilities. Due to the formal nature of their membership, such non-combatant personnel cannot be regarded as civilians and, with the sole exception of medical and religious personnel, are subject to direct attack regardless of the individual function assumed. (p. 316) Similarly, where dissident armed forces remain organized according to structures that are comparable to those of state armed forces, these structures should continue to determine individual membership in these forces. After all, there is no reason to assume that a member of the armed forces becomes a civilian simply by turning against his government.⁸⁴

Much more difficult is the determination of membership in irregularly constituted organized armed groups. Such groups operate in a wide variety of cultural, political, and military contexts, and membership may depend on a range of factors including individual choice, involuntary recruitment, or more traditional notions, such as membership in a clan, tribe, or family. The actual beginning and end of membership in such organized armed groups will largely depend on the particular context and will not necessarily be recognizable to the adversary. Also, in reality, organized armed groups rarely operate in isolated, exclusively military surroundings but are often accompanied by civilians, which provide them with a

wide variety of essential services, comparable to private contractors accompanying state armed forces.⁸⁵

In the absence of a formal concept of 'membership' in irregularly constituted armed groups, subjective or overly flexible criteria of distinction are prone to lead to erroneous and arbitrary targeting. This can only be avoided where membership in such groups remains closely tied to the actual function assumed. More specifically, irregularly constituted organized armed groups should be construed as comprising only persons who assume a continuous fighting function on behalf of a party to the conflict, that is to say, a continuous function which involves, at least potentially, direct participation in hostilities.⁸⁶ Whether this is the case will in practice have to be deduced from the concrete circumstances. In case of doubt, the concerned individual is presumed to be a civilian.⁸⁷ While this interpretation may be criticized, as it results in a narrower (more protective) concept of membership for organized armed groups than for state armed forces, the practical relevance of this perceived imbalance should not be overestimated. In reality, personnel assuming non-combat functions for state armed forces (other than medical and religious personnel) are almost always armed, trained, and expected to directly participate in hostilities should the need arise and, therefore, must be regarded as assuming a combat function.⁸⁸(p. 317)

(iii) Civilians

Treaty IHL governing non-international armed conflict does not define the concept of civilian. While Common Article 3 makes no express reference to this category, Additional Protocol II seems to use the notion of 'civilian' to describe any person not belonging to one of the categories mentioned in Article 1(1) of AP II. Thus, Article 1(1) of AP II describes armed forces, dissident armed forces and other organized armed groups as able 'to carry out sustained and concerted military operations', whereas Article 13(1) of AP II emphasizes that the civilian population and individual civilians 'shall enjoy general protection against the dangers arising from military operations' conducted by these forces.

Draft Article 25(1) of AP II adopted by consensus in Committee III of the Diplomatic Conference of 1974 to 1977 provided the following definition: 'A civilian is anyone who is not a member of the armed forces or of an organized armed group'. The category of persons qualifying as civilians for the purposes of the principle of distinction in non-international armed conflict has been aptly described in the following terms:

The following persons generally should be considered civilians and, thus, not subjected to individualized attack:

1. The *peaceful population not directly participating in hostilities*, even though their activities may contribute to the war effort.
2. (a) *Persons providing only indirect support* to a party to the conflict by, inter alia, working in defence plants, distributing or storing military supplies outside of combat areas, supplying labour and food, serving as messengers, or disseminating propaganda. These persons may not be subject to direct individualized attack because they pose no immediate threat to the adversary. However, if they are present in or near military targets, they implicitly assume the risk of death or injury incidental to direct attacks against such military targets. (b) Persons providing such indirect support to dissident forces are clearly subject to prosecution by the government for giving aid and comfort to the enemy. Such prosecutions must conform to the obligatory fair trial guarantees set forth in Common Article 3 and, where applicable, Article 6 of Protocol II.

3. Persons, other than members of a party to the conflict's armed forces, who take a direct part in the hostilities. They, however, temporarily lose their immunity from attack while they assume a combatant's role.⁸⁹

In sum, as in the case of international armed conflict, a civilian in non-international armed conflict is anyone not belonging to the 'armed forces' of a party to the conflict (Common Article 3) or, respectively, to state 'armed forces', 'dissident armed forces' or other 'organized armed groups' of a party to the conflict (Article 1(1) of (p. 318) AP II).⁹⁰ Where persons directly participate in hostilities without being integrated into such organized armed forces or groups, even if they intend to support one of the parties to the conflict, they remain civilians and lose protection against direct attack only for such time as their direct participation lasts.⁹¹

(iv) Combatants

(a) Combatant privilege

Treaty IHL governing non-international armed conflict does not use the notion of combatant, nor does it provide for combatant privilege (ie immunity from prosecution for lawful acts of war). While domestic legislation in most countries provides members of state armed forces with protection from prosecution for lawful acts of state (ie a status equivalent to combatant privilege), members of organized armed groups remain subject to prosecution for violations of domestic law even if they comply with IHL. Although states can hardly be expected to provide insurgents with immunity from prosecution for death, injury, and destruction caused in rebellion against their government, the lack of any form of combatant privilege for non-state belligerents is not unproblematic.

Most importantly, apart from the general encouragement to afford the 'broadest possible amnesty to persons who have participated in the armed conflict' at the end of hostilities,⁹² IHL does not provide members of organized armed groups with any incentive to respect IHL and to distinguish themselves from the civilian population. This may contribute to a destructive downward spiral, with non-state belligerents distancing themselves from their obligations under IHL and, in turn, states stigmatizing non-state belligerents with blanket labels such as 'terrorists' and 'unlawful combatants' and increasingly questioning the appropriateness of the rights and protections afforded to them under IHL.

(b) Functional combatancy

The combatant privilege, which separates persons who are entitled to immunity from domestic prosecution for lawful acts of war from persons who are not, must not be confused with our discussion of the principle of distinction between civilians and combatants, which separates persons who may lawfully be attacked from those who may not. Indeed, the concept of combatancy in a strictly functional sense is anything but alien to IHL governing non-international armed conflicts. Already the (p. 319) draft of Additional Protocol II proposed by the ICRC in 1973 and the amended draft Protocol adopted by consensus in Committee III of the Diplomatic Conference of 1974 to 1977 used the term combatant without implying the existence of *privileged* combatancy in non-international armed conflict. Draft Article 24(1) of AP II reads as follows:

In order to ensure respect for the civilian population, the parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary and shall make a distinction between the civilian population and combatants, and between civilian objects and military objectives.⁹³

When, in the last moment, this draft Article was discarded along with 23 others, the reason was not that the contracting states wanted to dispense with the principle of distinction between civilians and combatants in non-international armed conflict but, rather, their fear that the use of the term combatant in the treaty text could be misconstrued as indicating the legitimacy of an insurgency or would otherwise encourage insurrection.

(c) International jurisprudence

The concept of combatancy has also been used in international jurisprudence dealing with situations of non-international armed conflict. In the *Tadić Case*, for instance, the ICTY referred to 'an individual who cannot be considered a traditional "non-combatant" because he is actively involved in the conduct of hostilities *by membership* in some kind of resistance group',⁹⁴ thus permitting no other conclusion than that the individual in question is a combatant. Significantly, in the view of the Tribunal, the decisive element for combatancy appears to be 'membership' in some kind of an organized armed force or group. Further, in its Country Report on Colombia (1999), the Inter-American Commission on Human Rights made clear that combatants must be distinguished from civilians directly participating in hostilities. Thus, according to the Commission, '[i]t is important to understand that while these persons forfeit their immunity from direct attack while participating in hostilities, they, nonetheless, retain their status as civilians. *Unlike ordinary combatants*, once they cease their hostile acts, they can no longer be attacked, although they may be tried and punished for all their belligerent acts'.⁹⁵

(d) State practice

As far as state practice is concerned, many military manuals use the term 'combatant', but most were drafted with a view to international armed conflicts and (p. 320) do not necessarily provide for the formal applicability of the same categories in non-international armed conflicts. An instructive example of national practice referring specifically to non-international armed conflicts is the 2009 US Field Manual on 'Tactics in Counterinsurgency' (FM 3-24.2) which 'establishes doctrine [...] for tactical counterinsurgency (COIN) operations' and is based 'on lessons learned from historic counterinsurgencies and current operations'.⁹⁶ According to the manual, an insurgent organization normally consists of five elements, namely leaders, guerrillas, underground, auxiliaries, and mass base.⁹⁷ The four non-combatant categories are defined as follows:

Leaders provide direction to the insurgency. They are the 'idea people' and the planners. [...] Generally, they convey the ideology of the insurgency into objectives and direct the military efforts of the guerrillas.⁹⁸

The underground is a cellular organization of active supporters of the insurgency [...]. They are more engaged than the auxiliaries are and may at times be guerrillas, if they use weapons or conduct combat operations. [...] Members of the underground often continue in their normal positions in society, but lead second, clandestine lives for the insurgent movement. [...] The underground may: Spread propaganda; Support sabotage, assassination and subversion; Support intelligence and counterintelligence operations; Run safe houses; Provide transportation; Manufacture and maintain arms and explosives.⁹⁹

[...] Auxiliaries are active sympathizers who provide important logistical services but do not directly participate in combat operations. If they participate in guerrilla activities, they become guerrillas. [...] Examples of support that auxiliaries provide include: Store weapons and supplies; perform courier operations; provide passive intelligence collection; give early warning of counterinsurgent movements; acquire funds from lawful and unlawful sources; provide forged or stolen documents; promote and facilitate desertion of security forces; recruit and screen new

members; create and spread propaganda; provide medical support; manufacture and maintain equipment.¹⁰⁰

The mass base consists of the population of the state who are sympathetic to the insurgent movement. [...] This mass base, by default, passively supports the insurgency. As occasions arise, they may provide active support. [...]¹⁰¹

Most relevant for the present discussion, however, is the description of guerillas (combatants) and of certain activities associated with combatant function:

A guerrilla is any insurgent who uses a weapon of any sort and does the actual fighting for the insurgency. They may conduct acts of terror, guerrilla warfare, criminal activities, or conventional operations. They are often mistaken for the movement or insurgency itself; but they are merely the foot soldiers of the movement or insurgency [...].¹⁰²(p. 321)

Guerrillas may continue in their normal positions in society and lead clandestine lives for the insurgent movement. Guerrillas tend to organize themselves based upon the activity they will be conducting. Those focused on using terrorism usually operate individually or in small cells and are often armed with explosives instead of weapons.¹⁰³

In sum, the Field Manual on Tactics in Counterinsurgency makes clear that there are several levels of support for an insurgent party to the conflict, which range from general and political support to movement leadership, and that only persons assuming actual fighting function are regarded as combatants (guerrillas).

(e) Generic use of the term ‘combatant’ for all persons subject to lawful attack

As has been shown above, the ICRC’s study on customary IHL comes to the conclusion that, even in situations of non-international armed conflict, ‘[t]he parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians’.¹⁰⁴ The study emphasizes that the term combatant in this rule is used in its generic meaning, that is to say, that it does not imply an entitlement to combatant privilege or POW-status but describes persons who do not enjoy civilian protection against attack.¹⁰⁵ According to this interpretation, the notion of combatant would not only include members of state armed forces and organized armed groups (regular and functional combatants), but also civilians directly participating in hostilities. While the terminology chosen by the ICRC is perfectly justified in the generic context in which it is used, it should not be misunderstood as a technical definition of combatancy. The danger of using the term ‘combatant’ in this expansive sense is that it implies a continuous status or function. Describing civilians directly participating in hostilities as ‘combatants’, therefore, is likely to lead to their targeting not only while they are actually carrying out an act amounting to direct participation in hostilities, but even in the interval between specific hostile acts. This would be contrary to customary and treaty IHL, according to which civilians lose protection against direct attack only ‘for such time as they take a direct part in hostilities’.¹⁰⁶ The description of civilians directly participating in hostilities as combatants also contradicts the very formulation of the principle of distinction, according to which civilians and combatants must be mutually exclusive categories. It (p. 322) is therefore generally preferable to restrict the use of the term ‘combatant’ to state armed forces and organized armed groups and exclude civilians directly participating in hostilities.

(f) Expansive use of the term 'combatant' as a legal basis for detention

In the wake of the 9/11-attacks (2001) and the second Palestinian uprising (2000), particularly the United States and Israel have used terms such as 'unlawful combatant' or 'enemy combatant' to create categories of persons in their domestic law, which are not entitled to combatant privilege, but are subject to preventive or administrative detention or internment for security reasons (security detention).¹⁰⁷ This category of persons includes not only the fighting personnel of a belligerent party and civilians directly participating in hostilities, but also a wider circle of persons whose function or conduct poses a security threat without necessarily entailing loss of protection against direct attack. The use of the term 'combatant' for all persons liable to security detention is particularly dangerous because, in the conduct of hostilities, the term 'combatant' also suggests lack of protection against direct attack. The category of persons for which IHL permits detention for security reasons, however, is significantly wider than the category of persons for which IHL allows attacks. The risk associated with the misguided use of the term 'combatant' is that, in practice, it may invite the blanket use of 'capture or kill' operations or even the method of 'targeted killing' against any person perceived to pose a security risk, both of which would clearly be unlawful under IHL.

In sum, in non-international armed conflict, the category of combatant is best interpreted to include those persons whose continuous function it is to conduct hostilities on behalf of the belligerent parties, namely members (except for medical and religious personnel) of state armed forces, dissident armed forces, and other organized armed groups. Civilians, including those directly participating in hostilities, are (p. 323) not combatants. In terms of legal consequences, in contrast to *privileged* combatancy in international armed conflict, *functional* combatancy in non-international armed conflict does not imply immunity from prosecution for lawful acts of war. Lastly, in contrast to civilians directly participating in hostilities, functional combatants do not regain protection against direct attack between specific military engagements, but instead remain subject to direct attack for as long as they assume combatant function within the organized forces of a belligerent party.

4 Direct Participation in Hostilities

A. Basic rule and absence of definition

The principle of distinction is based on the assumption that civilians do not pose a military threat and, therefore, are to be protected against direct attacks. Hostile activities by civilians run counter to this assumption and, depending on the circumstances, may require a military response. Therefore, customary and treaty IHL provide that civilians shall be protected against the effects of military operations 'unless and for such time as they directly participate in hostilities'.¹⁰⁸ In other words, for such time as civilians directly participate in hostilities, they may be directly attacked as if they were combatants. Contrary to combatants, however, civilians regain protection against direct attack as soon as their individual conduct no longer amounts to direct participation in hostilities. Furthermore, just like combatants, civilians directly participating in hostilities must comply with IHL and, if they fail to do so, may be liable to prosecution for war crimes.¹⁰⁹ Direct participation in hostilities by civilians is not, as such, prohibited under international law.¹¹⁰ However, since (p. 324) civilians lack combatant privilege, they remain subject to prosecution not only for war crimes, but also for acts which, although not prohibited under IHL, amount to crimes under domestic law.¹¹¹

Despite the significant consequences of direct participation in hostilities for the protection of the involved civilians, treaty IHL provides no express definition of the notion, nor can a clear interpretation be derived from state practice, international jurisprudence, or the *travaux préparatoires*.¹¹² It is therefore important that the meaning of the notion of direct participation in hostilities be clarified in good faith and in accordance with the ordinary meaning to be given to the terms in their context and in the light of the object and purpose

of the notion within IHL.¹¹³ This was the aim of an informal clarification process conducted by the ICRC, which involved 50 distinguished international legal experts from academic, military, governmental, and humanitarian circles, as well as from international and non-governmental organizations, and led to five expert meetings from 2003 to 2008. The process concluded in June 2009 with the publication by the ICRC of an 'Interpretive Guidance' which provides the organization's recommendations as to how IHL relating to the notion of direct participation in hostilities should be interpreted in light of the circumstances prevailing in contemporary armed conflict.¹¹⁴ While the conclusions reached by the ICRC have given rise to a certain amount of academic controversy,¹¹⁵ no theoretically coherent and practically viable alternative has been proposed, and even the (p. 325) sharpest critics admit that the ICRC's defining elements of direct participation in hostilities 'represent a useful step forward in understanding the notion'.¹¹⁶

B. The ICRC's interpretation

In essence, the notion of direct participation in hostilities comprises two basic components; that of 'hostilities' and that of 'direct participation' therein. While the concept of 'hostilities' refers to the collective resort by parties to an armed conflict to means and methods of warfare,¹¹⁷ 'participation' refers to the individual involvement of a person in these hostilities.¹¹⁸ Depending on the quality and degree of such involvement, individual participation in hostilities may be described as 'direct' or 'indirect'.¹¹⁹ Direct participation refers to hostile acts carried out as part of the conduct of hostilities between parties to an armed conflict and leads to loss of protection against direct attack. Indirect participation, by contrast, may contribute to the general war effort, but does not directly harm the enemy and, therefore, does not entail loss of protection against direct attacks.

In its Interpretive Guidance, the ICRC interprets the notion of direct participation in hostilities as referring to specific acts designed to support a belligerent party by harming its enemy, either by directly causing military harm or, alternatively, by directly inflicting death, injury or destruction on protected persons or objects. More precisely, according to the ICRC's Interpretive Guidance, in order to qualify as direct participation in hostilities, a specific act must meet three cumulative requirements. First, the harm likely to result from the act must reach a certain threshold (p. 326) (threshold of harm). Secondly, there must be a direct causal relation between the act and the expected harm (direct causation). Thirdly, there must be close relation between the act and the hostilities occurring between parties to an armed conflict (belligerent nexus).¹²⁰

(i) Threshold of harm

For a specific act to qualify as direct participation in hostilities, the harm likely to result must attain a certain threshold. This threshold is reached, most notably, whenever the military operations or capacity of a party to an armed conflict are adversely affected, for example through the use of weapons against the armed forces, or by impeding their operations, deployments, or supplies.¹²¹ Where no military harm is caused, the required threshold of harm can also be reached by inflicting death, injury, or destruction on persons or objects protected against direct attack.¹²² For example, the shelling or bombardment of civilian residential areas, sniping against civilians, or armed raids against refugee camps may constitute participation in hostilities even though they would not necessarily cause an immediate military harm to the enemy. It should be noted that direct participation in hostilities does not require the actual materialization of harm but merely the objective likelihood that the conduct in question will result in such harm. Therefore, the relevant threshold determination must be based on 'likely' harm, that is to say, harm which may reasonably be expected to result from an act in the prevailing circumstances.¹²³

(ii) Direct causation

Not all conduct likely to cause the required threshold of harm necessarily amounts to direct participation in hostilities. Throughout history, civilian populations have contributed to the general war effort, whether through the production and supply of weapons, equipment, food, and shelter, or through financial, administrative, and political support.¹²⁴ In order to qualify as 'direct' rather than 'indirect' participation in hostilities, however, there must be a direct causal relation between the act in question and the resulting harm.¹²⁵ In this context, direct causation should be interpreted to mean that the harm is brought about in one causal step.¹²⁶ Accordingly, acts that merely build or maintain the capacity of a party to harm its adversary in unspecified future operations do not amount to 'direct' participation in hostilities, even if they are connected to the resulting harm through an uninterrupted chain of events, and may even be indispensable to its causation, such as the production (p. 327) of weapons and ammunition or general recruiting and training of personnel.¹²⁷ The notion of direct participation in hostilities can also include acts which cause harm only in conjunction with other acts, namely where the act in question is an integral part of a coordinated tactical operation that directly causes the required threshold of harm.¹²⁸ In addition, measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to, and the return from, the location of its execution, constitute an integral part of that act.¹²⁹

(iii) Belligerent nexus

In order to amount to direct participation in hostilities, the conduct of a civilian must not only be objectively likely to inflict harm that meets the first two criteria, but it must also be specifically designed to do so in support of a party to an armed conflict and to the detriment of another party (belligerent nexus).¹³⁰ Belligerent nexus relates to the objective purpose and design of an act or operation as part of the conduct of hostilities and does not necessarily have to reflect the subjective desires or intent of every participating individual.¹³¹ Quite obviously, armed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party, cannot amount to 'participation' in hostilities taking place between these parties.¹³² For example, as a general rule, civilian violence remains of a non-belligerent nature if it is used: (a) in exercise of authority over persons or territory having fallen into the power of a party to the conflict (eg the use of force against prisoners),¹³³ (b) as part of civil unrest against such authority (eg violent demonstrations or riots),¹³⁴ (c) in individual self-defence against violence prohibited by IHL (eg civilians defending themselves against marauding soldiers),¹³⁵ (d) during inter-civilian violence (eg uncontrolled looting due to breakdown of law and order),¹³⁶ or (e) for reasons otherwise unrelated to the conduct of hostilities (eg murder, arson or other violent crimes carried out for private motives).¹³⁷ Where armed violence lacks belligerent nexus, it remains an issue of law and order, even if it occurs in the wider context of an armed conflict. Therefore, any resort to force in (p. 328) response to such violence must comply with international standards governing law enforcement operations.¹³⁸

In the ICRC's view, the above-described requirements of threshold of harm, direct causation, and belligerent nexus, when applied in conjunction, permit a reliable distinction between activities amounting to direct participation in hostilities and activities which, although occurring in the context of an armed conflict, are not part of the conduct of hostilities between parties to that conflict and, therefore, do not entail loss of protection against direct attack within the meaning of IHL.¹³⁹

C. Temporal scope of loss of protection

Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities.¹⁴⁰ Where preparatory measures and geographical deployments or withdrawals constitute an integral part of a specific hostile act, they extend the beginning and end of such an act beyond the phase of its immediate execution. This temporary loss of protection, which is designed to respond to spontaneous, sporadic, or unorganized hostile acts carried out by civilians, must be distinguished from the continuous loss of protection entailed by membership in state armed forces or organized armed groups belonging to the parties to an armed conflict. Members of such forces or groups lose protection for as long as their membership lasts, regardless of whether membership must be determined based on formal (regular state armed forces) or functional (organized armed groups) criteria.¹⁴¹

5 Use of Force in Attack Against Legitimate Targets

In regulating the use of force against legitimate military targets, IHL neither provides an express 'right to kill', nor does it impose a general obligation to 'capture rather than kill'. Instead, it simply refrains from providing certain categories of persons with protection against attacks, that is to say, against 'acts of violence against the adversary, whether in offence or in defence'.¹⁴² The fact alone that a person is not protected against acts of violence, however, is not equivalent to a legal entitlement (p. 329) of the adversary to kill that person without any further considerations. As will be seen, even in the conduct of hostilities, elementary considerations of humanity require that no more death, injury, or destruction be caused than is actually necessary to accomplish a legitimate purpose.¹⁴³

From a theoretical perspective, the restrictive function of considerations of humanity can be based on three distinct legal arguments. First, in situations where operating forces exercise sufficient territorial control to carry out an arrest, the parallel applicability of human rights law arguably imposes additional restraints on the use of force even against legitimate military targets.¹⁴⁴ Secondly, a similar argument can be made based on a wider proportionality requirement, which constitutes a general principle of international law.¹⁴⁵ In contrast to the specific proportionality test stipulated by IHL for the conduct of hostilities, this general principle of proportionality balances the military advantage expected to result from an attack not only against expected incidental harm, but also against the harm likely to be inflicted on the targeted persons themselves.¹⁴⁶ The third approach is to derive the restrictive function of considerations of humanity directly from the fundamental principles of military necessity and humanity underlying and informing the entire normative framework of IHL.¹⁴⁷(p. 330)

In the conduct of hostilities, the requirement of 'strict necessity' developed in human rights jurisprudence for the use of force in law enforcement operations is replaced by the requirement of 'military necessity', which no longer refers to the removal of an imminent threat, but to the achievement of a legitimate military purpose. Today, the principle of military necessity is generally recognized to permit 'only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources'.¹⁴⁸ Complementing the principle of military necessity is the principle of humanity, which 'forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes'.¹⁴⁹ In conjunction, the principles of military necessity and of humanity could be said to reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually

necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.¹⁵⁰

The kind and degree of force to be used against legitimate military targets obviously cannot be pre-determined for all conceivable military operations, but must be determined by the operating forces based on the circumstances prevailing at the relevant time and place. As a general rule, circumstances which would allow an attempt at capture, or the issuing of a warning prior to the use of military force, are (p. 331) more likely to arise in territory over which the operating forces exercise effective control.¹⁵¹ This may be the case, for example, where an unarmed adversary or civilian is observed while transmitting targeting information, marking targets on the ground, transporting ammunition to a firing position, or sabotaging military installations, always provided that the circumstances are such that the persons in question could be confronted and arrested without additional risk to the operating forces or the surrounding civilian population.¹⁵² In sum, while military forces certainly cannot be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to shoot to kill an adversary or to refrain from giving him or her an opportunity to surrender where the circumstances are such that there manifestly is no necessity for the application of lethal force.¹⁵³

6 Concluding Observations

Although the principle of distinction between civilians and combatants remains the undisputed cornerstone of IHL, its practical application in contemporary armed conflicts has become increasingly difficult. Factors such as the growing asymmetry of military confrontations, the intermingling of armed actors with the civilian population, the privatization of military and security functions, and the increasing involvement of civilians in the conduct of hostilities put considerable strain on the ability of belligerents to properly distinguish between legitimate military targets and protected persons. Despite the resulting confusion and uncertainty, however, the military rationale and the humanitarian imperative underlying the principle of distinction have not lost their validity. To ensure the principle's continued operability in the face of current challenges, care must be taken not to seek refuge in one-sided simplifications. Instead, what is needed is a sober and disciplined analysis of the circumstances prevailing in contemporary armed conflicts in conjunction with a careful interpretation of longstanding legal concepts in line with the delicate balance between military necessity and humanity underlying and informing IHL as a whole.

Footnotes:

¹ The term 'military objective' is most commonly used for objects but, as the text of Art 52(2) AP I illustrates ('Attack shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are [...]'), is the accurate *technical term* (*terminus technicus*) also for persons subject to lawful attack. Nevertheless, for the sake of clarity, the term 'legitimate military target' will here be preferred.

² For the sake of simplicity, the term 'protected person' will here be used as referring to persons entitled to protection against direct attack. This terminology should not be confused with the specific meaning given to the concept of 'protected persons' in the context of the Fourth Geneva Convention (Art 4 of GC IV), which has only limited relevance for the conduct of hostilities.

³ St Petersburg Declaration (1868). See also J.S. Pictet, *Development and Principles of International Humanitarian Law* (Geneva: Martinus Nijhoff Publishers, 1985), 62.

⁴ ICJ, *Legality of the Threat or Use of Nuclear Weapons Opinion*, Advisory Opinion (8 July 1996) § 78, where the ‘cardinal principles’ of IHL are said to include the principle of ‘distinction between combatants and non-combatants’, the prohibition ‘to cause unnecessary suffering to combatants’ and the Martens Clause. Affirmative with regard to the customary nature of the principle of distinction in both international and non-international armed conflicts. See also J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (Cambridge: Cambridge University Press, 2005), Commentary Rule 1 at 3ff (hereinafter: Customary Law Study).

⁵ International Law Commission, Report on State Responsibility, *Yearbook of the International Law Commission*, 2001, vol II, Part Two, Draft Article 40, Commentary, 112.

⁶ Article 48 AP I.

⁷ Article 51 AP I. See also Customary Law Study, vol I, Rule 1.

⁸ With regard to medical and religious personnel, see Art 24 of GC I (on land), Art 36 of GC II (on hospital ships), and Customary Law Study, vol I, Rules 25 (medical) and 27 (religious). See further Art 12(1) of AP I for medical units, and Art 8(2)(b)(xxiv) of the Rome Statute, which lists as a war crime in international armed conflict ‘intentionally directing attacks against [...] personnel using the distinctive emblems of the Geneva Conventions in conformity with international law’. Both medical and religious personnel are entitled to use the distinctive emblems. For definitions of medical and religious personnel see Art 8 of AP I. With regard to civil defence personnel, see Art 67(1) of AP I.

⁹ Article 41(1) and (2) of AP I, and Customary Law Study, vol I, Rule 47. See also the prohibition of killing or wounding an ‘enemy who [...] has surrendered at discretion’ in Art 23(c) of the 1907 Hague Regulations. Of course, persons *hors de combat* also benefit from extensive protection under the Geneva Conventions. However, the Geneva Conventions focus primarily on the prevention of arbitrary exercise of power and less on protection from direct attack.

¹⁰ Article 46 of GC I; Art 47 of GC II; Art 20 of AP I.

¹¹ Article 13(3) of GC III.

¹² Article 33(3) of GC IV.

¹³ Article 51(6) of AP I.

¹⁴ Customary Law Study, vol I, Rule 146.

¹⁵ Article 52(1) and (2) of AP I.

¹⁶ Article 51(3) of AP I, and Customary Law Study, vol I, Rule 6.

¹⁷ With regard to medical and religious personnel, see Art 21 of GC I, and Customary Law Study, vol I, Rules 25 (medical) and 27 (religious). Although, strictly speaking, Art 21 of GC I is limited to medical *units*, this rule can be applied by analogy also to medical personnel of the armed forces and, *mutatis mutandis*, to religious personnel. Customary Law Study, vol I, Commentary Rule 25, 85; Commentary AP I and II, para 520. With regard to civil defence personnel of the armed forces, see Art 67(1)(e) of AP I.

¹⁸ Article 41(2) of AP I.

¹⁹ The phrase ‘peaceful civilians’ is here used to refer to civilians who are not, at the time, directly participating in hostilities.

²⁰ Article 1 of the 1907 Hague Regulations.

²¹ Article 2 of the 1907 Hague Regulations.

- ²² See Arts 13 of GC I and GC II and Art 4 of GC III.
- ²³ Article 3 of the 1907 Hague Regulations.
- ²⁴ Articles 13 of GC I and GC II, Art 4A of GC III.
- ²⁵ See Commentary AP I and II, para 1677. For example, civilians accompanying the armed forces within the meaning of Art 4A(4) and (5) of GC III may be entitled to POW-status, but do not have combatant privilege and, by definition, are not members of the armed forces.
- ²⁶ Article 4A(1) of GC III refers to militias that are ‘part of the armed forces’ and Art 4A(2) of GC III to ‘other’ militias, ie that are not part of the armed forces. As both categories of persons are generally recognized as members of the armed forces and combatants within the meaning of IHL, the notion of ‘armed forces’ used in Art 4 of GC III must refer to the armed forces as defined by national law.
- ²⁷ For example, factors likely to influence the definition of ‘armed forces’ in domestic law are national policies with regard to the subjection of individuals to military jurisdiction, or with regard to coverage of military insurance and pension systems.
- ²⁸ For civilians who are not protected by GC IV, see Art 4A(4) and (5) of GC III and, respectively, Art 13(4) and (5) of GC I and GC II, as well as Art 4(2) of GC IV. For the possibility of members of the armed forces coming within the protection of GC IV, see Art 4 of GC IV (generalized personal scope of application), Arts 46(1) of AP I and 5 of GC IV (spies captured in the act), Art 44(4) of AP I (combatants failing to distinguish themselves). See also Commentary of GC IV (Art 4), 50.
- ²⁹ Article 43(1) of AP I.
- ³⁰ Customary Law Study, vol 1, Commentary Rule 4, 14.
- ³¹ See the reference to militia and volunteer corps in Art 1 of the 1907 Hague Regulations and, additionally, to organized resistance movements in Arts 13 of GC I, 13 of GC II, and 4A of GC III. See also K. Ipsen, ‘Combatants and Non-Combatants’, in D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), § 304.
- ³² See Ipsen (n 31).
- ³³ Provisions of the Geneva Conventions dealing with the protection of members of the armed forces in the hands of an adversary (Art 13(3) of GC I, Art 13(3) of GC II, and Art 4A(3) of GC III) are similar in this respect. This principle was relevant, for instance, for the accurate determination of the status of members of the Taliban forces captured by the United States during the international armed conflict with Afghanistan after 7 October 2001.
- ³⁴ Customary Law Study, vol 1, Commentary Rule 4, 15.
- ³⁵ Articles 43(1) and 44 of AP I. See also Commentary AP I and II, paras 1672–3; Customary Law Study, vol 1, Commentary Rule 4, 15–16. At the Diplomatic Conference of 1974 to 1977, the Israeli delegation held that this solution modified existing law. When the Article was adopted by consensus at a final plenary meeting, the delegation made the following statement: ‘With regard to Article 41 (43), paragraph 1, of draft Additional Protocol I, the delegation of Israel wishes to declare that the enforcement of compliance with the rules of international law applicable in armed conflict is a “conditio sine qua non” for qualification as armed forces. Moreover, it is not sufficient that the armed forces be subject to an internal disciplinary system which can enforce compliance with the laws of war, but—as the expression “shall enforce” indicates—there has to be effective compliance with this system in the field’ (CDDH 1974–77, Official Records, vol VI, 116, CDDH/SR.39). As violations of IHL invariably occur on all sides participating in an armed conflict, such an absolute requirement would introduce unacceptable uncertainty regarding the status of all

armed actors involved in the hostilities, including uniformed governmental soldiers. Therefore, the status of armed forces must depend on factual 'organship' for a belligerent party and not on compliance with IHL while exercising this function. Consequently, while non-compliance with IHL exposes members of armed forces to prosecution under international criminal law, it generally does not terminate the combatant privilege (but see exceptions according to Art 44(2) of AP I).

³⁶ Article 43(3) of AP I and see Customary Law Study, vol 1, Commentary Rule 4, 14.

³⁷ Article 2 of the 1907 Hague Regulations; Art 4(6) of GC III. See also the reference to Art 4(6) of GC III in Art 50(1) of AP I.

³⁸ Article 4(4) of GC III. See also the discussion of private contractors and civilian employees in: ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009) (hereafter: DPH Interpretive Guidance), 37–40.

³⁹ As the notion of 'combatant' has not been previously defined in international law, it is difficult (and therefore not meaningful) to determine how far Art 43(2) of AP I actually expands the personal scope of this notion. As far as POW-status is concerned, Art 43(1) and (2) of AP I, in conjunction with Art 44 of AP I, expands the category of 'beneficiaries' compared to Art 4 of GC III by reducing the 'four requirements' listed in Art 4A(2) of GC III to those inherent in the definition of 'armed forces', and by loosening the requirements of distinction in Art 44(3) of AP I.

⁴⁰ See Customary Law Study, vol 1, Commentary Rule 3, 13, according to whom this definition of combatants has become part of customary international law.

⁴¹ See the virtually synonymous definition of a *levée en masse* in Art 4A(6) of GC III and Art 2 of the 1907 Hague Regulations.

⁴² W.A. Solf, 'The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice', 33 *American University Law Review* (1983) 58–9 at 57.

⁴³ For the same reasons, the term 'unlawful' combatant—in contrast to 'unprivileged' combatant—belongs to the realm of domestic law and not of IHL.

⁴⁴ Article 50(1) of AP I.

⁴⁵ The categories of persons referred to in Art 4(A)(1), (2), (3) are already included in the definition of armed forces of Art 43 of AP I. This definition of civilian is affirmed by the ICTY, *Trial Chamber, Prosecutor v Tihomir Blaškić, Judgment of 3 March 2000*, § 180: 'Civilians [...] are persons who are not, or no longer, members of the armed forces', and DPH Interpretive Guidance, 20–6: 'For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities'.

⁴⁶ Article 50(1) of AP I. Upon ratification of Additional Protocol I, the United Kingdom and France expressed their understanding that this presumption does not override the commanders' duty to protect the safety of troops under their command or to preserve their military situation, in conformity with other provisions of Additional Protocol I. See: France, Reservations and declarations made upon ratification of AP I, 11 April 2001, para 9; United Kingdom, Reservations and declarations made upon ratification of AP I, 28 January 1998, para h.

- ⁴⁷ Customary Law Study, vol 1, Commentary Rule 5, 17f.
- ⁴⁸ While a comparison of the definition of ‘armed forces’ in Art 43 of AP I and the definition of ‘civilians’ in Art 50(1) of AP I shows that participants in a *levée en masse* belong to neither category, Art 2 of the 1907 Hague Regulations expressly recognizes their ‘belligerent’ status. The customary nature of this exception to the absolute complementarity between ‘civilians’ and ‘armed forces’ is confirmed in Customary Law Study, vol 1, Commentary Rule 5, 18.
- ⁴⁹ Article 51(3) of AP I; Customary Law Study, vol 1, Commentary Rule 6, 19f; DPH Interpretive Guidance, 70. See also Israeli High Court of Justice, *The Public Committee Against Torture et al v The Government of Israel et al* (HCJ 769/02), Judgment of 13 December 2006 (hereinafter: Israel HCJ, *PCATI v Israel*), § 39.
- ⁵⁰ Customary Law Study, vol 1, Rule 1.
- ⁵¹ Customary Law Study, vol 1, Commentary Rule 1, 3.
- ⁵² Article 13 of AP II. See also Customary Law Study, vol 1, Rule 1. See also Art 8(2)(e)(i) of the Rome Statute, according to which ‘intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities’ constitutes a war crime in non-international armed conflicts.
- ⁵³ Article 9(1) of AP II; Customary Law Study, vol 1, Rules 25 (medical) and 27 (religious). With regard to the wording of Art 9(1) of AP II it has been held that ‘[t]he concept of respect implies a duty not to attack’ and ‘[t]he scope of the protection granted by Articles 9 and 11 (*Protection of medical units and transports*) is in fact the same. Thus, the reference to attacks in the latter article, and not in the former, is an error of methodology which is regrettable. It would have been better to be consistent’ (Commentary AP I and II, para 4674). See also Art 8(2)(e)(ii) of the Rome Statute, which includes into the notion of ‘war crime’ for non-international armed conflicts ‘intentionally directing attacks against [...] personnel using the distinctive emblems of the Geneva Conventions in conformity with international law’. Article 12 of AP II entitles both medical and religious personnel to use the distinctive emblem.
- ⁵⁴ Article 7(1) of AP II; Customary Law Study, vol 1, Rule 47. According to the Commentary AP I and II, para 4635, the obligation ‘to respect’ means ‘to spare, not to attack’ or ‘to abstain from any hostile act’, which is additional to the duty to protect. See also the protection afforded to all persons ‘taking no active part in hostilities’, including, inter alia, ‘those placed *hors de combat* by sickness, wounds, detention, or any other cause’ by Common Art 3, as well as by Art 4(1) of AP II, which refers to all persons ‘who do not take a direct part or who have ceased to take part in hostilities’.
- ⁵⁵ Article 67(1)(e) of AP I.
- ⁵⁶ Customary Law Study, vol 1, Rule 148.
- ⁵⁷ Article 41 of AP I, ‘*hors de combat*’: ‘A person is *hors de combat* if: (a) He is in the power of the adverse party; (b) He clearly expresses an intention to surrender; or (c) He has been rendered unconscious or otherwise incapable by wounds or sickness, and is therefore incapable of defending himself provided that in any of the cases he abstains from hostilities and does not escape.’
- ⁵⁸ Commentary AP I and II, para 4520 and note 5.
- ⁵⁹ See also *infra*, at 23ff.
- ⁶⁰ Commentary AP I and II, para 4789.

- ⁶¹ Article 13(3) of AP I. Customary Law Study, vol 1, Rule 6.
- ⁶² Article 11(2) of AP II; Customary Law Study, vol 1, Rules 25 and 27. Although limited to medical *units*, Art 11(2) of AP II can by analogy be applied also to medical personnel of the armed forces and, *mutatis mutandis*, to religious personnel. Affirmative: Customary Law Study, vol 1, Commentary Rule 25, 85; Customary Law Study, vol 1, Commentary Rule 28, 91.
- ⁶³ Customary Law Study, vol 1, Rule 47.
- ⁶⁴ According to the ICRC's Commentary 'it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with "armed forces" on either side engaged in "hostilities"—conflicts, in short, which are in many respects similar to an international war [...] Commentary GC III, Art 3, 37). Similarly also Commentary GC II, Art 3, 33; Commentary GC IV, Art 3, 36. See also R.K. Goldman, 'International Humanitarian Law: American Watch's Experience in Monitoring Internal Armed Conflicts, 9(1) *American University Journal of International Law and Policy* (1993) 49–94 at 60; ICRC, *Report Expert Meeting 'Direct Participation in Hostilities'* (2005), 43f.
- ⁶⁵ See also DPH Interpretive Guidance, 28–30.
- ⁶⁶ Where IHL otherwise refers to the concept of an organized armed group, it appears to use it as an equivalent of 'armed forces' rather than of 'party to the conflict'. For example, Art 4(3)(c) of AP II provides that children under 15 years of age shall not be recruited into 'armed forces or groups'. See also the terminology used in Customary Law Study, vol 1, Rule 4 and in IHL applicable to international armed conflict, where 'organized armed groups' or 'organized resistance movements' are referred to as a functional part of the armed forces of a party to the conflict (Art 43(1) of AP I; Art 4A(2) of GC III).
- ⁶⁷ See eg *Moodrick-Even Khen, Can We Now Tell What 'Direct Participation in Hostilities' Is?*, 12, Report of Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation, 1–2 September 2005, University Centre for International Humanitarian Law, available at <<http://www.adh-geneva.ch/events/expert-meetings.php>>, 35.
- ⁶⁸ Customary Law Study, vol 1, Commentary Rule 5, 19.
- ⁶⁹ Customary Law Study, vol 1, Commentary Rule 5, 17, and 19.
- ⁷⁰ Article 51(3) of AP I; Art 13(3) of AP II; Customary Law Study, vol 1, Rule 6 and Commentary Rule 6, 19ff; Customary Law Study, vol 1, 107ff.
- ⁷¹ With regard to slight differences in the conception of membership, see below.
- ⁷² According to Commentary AP I and II, para 4460, the notion of 'dissident armed forces' in Art 1(1) of AP II simply refers to part of the state armed forces, which have become a non-state party to the conflict by turning against the government.
- ⁷³ See also also Commentary AP I and II, para 4462.
- ⁷⁴ M. Bothe, K.J. Partsch, and W.A. Solf, *New Rules for Victims of Armed Conflicts* (The Netherlands: Martinus Nijhoff Publishers, 1982), 672. See also Goldman (n 64), 49–94 at 66.
- ⁷⁵ Customary Law Study, vol 1, Rule 4.
- ⁷⁶ DPH Interpretive Guidance, 32.
- ⁷⁷ Commentary AP I and II, para 4463.
- ⁷⁸ Commentary GC III (Art 4), 58.

- ⁷⁹ Commentary GC III (Art 4), 59. Interestingly, according to the Commentary, ‘the leader may be either civilian or military’.
- ⁸⁰ Article 4A(2) of GC III.
- ⁸¹ In international armed conflict, the notion of ‘belonging to’ is best expressed in terms of state responsibility, so that an armed group can be said to ‘belong to’ a state to the extent that its conduct is legally attributable to that state. Based on the experience of World War II, the ICRC’s Commentary interprets the notion of ‘belonging to’ as follows: ‘It is essential that there should be a “de facto” relationship between the resistance organization and the party to international law which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting. But affiliation with a Party to the conflict may also follow an official declaration, for instance by a Government in exile, confirmed by official recognition by the High Command of the forces which are at war with the Occupying Power’. See Commentary GC III (Art 4), 57.
- ⁸² On the meaning of ‘direct participation in hostilities’, see Section 4 below.
- ⁸³ See also DPH Interpretive Guidance, 32.
- ⁸⁴ DPH Interpretive Guidance, 31–2.
- ⁸⁵ Article 4A(4) and (5) of GC III.
- ⁸⁶ DPH Interpretive Guidance, 32–5.
- ⁸⁷ See DPH Interpretive Guidance, 74–6; L. Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press: 2002), 59.
- ⁸⁸ For a detailed discussion of the functional membership approach proposed by the ICRC, see K. Watkin, ‘Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance’, 42 *NYU Journal of International Law and Politics* (2010) 641–95 (critique), and N. Melzer, ‘Keeping the Balance between Military Necessity and Humanity’, 42 *NYU Journal of International Law and Politics* (2010) 833–916 (response).
- ⁸⁹ Goldman (n 64), 84.
- ⁹⁰ Affirmative also: *DPH Interpretive Guidance*, 27–36; Bothe et al. (n 74), 672.
- ⁹¹ Article 13(3) of AP II. See DPH Interpretive Guidance, 70–1. See also IACtHR, *Report Colombia 1999*, Ch IV, § 55 (n 96 and accompanying citation); Customary Law Study, vol 1, Commentary Rule 6, 19f; Goldman (n 64), 67; D. Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?’, 16 *EJIL* (2005) 171–212 at 199. On the meaning of ‘direct participation in hostilities’, see below.
- ⁹² Article 6(5) of AP II.
- ⁹³ ICRC, Draft Additional Protocols to the Geneva Conventions of 12 August 1949 (Geneva, June 1973), Draft Art 24(1) of AP II, printed in CDDH 1974–77, Official Records, vol I, Part III, 40.
- ⁹⁴ ICTY, *Tadić Case* (Judgment of 7 May 1997), § 639 (emphasis added).
- ⁹⁵ IACtHR, *Report Colombia 1999*, Ch IV, § 55 (emphasis added).
- ⁹⁶ US FMI 3-24.2: *Tactics in Counterinsurgency*, Preface.
- ⁹⁷ US FMI 3-24.2: *Tactics in Counterinsurgency*, Chapter 2.II.
- ⁹⁸ US FMI 3-24.2: *Tactics in Counterinsurgency*, Chapters 2–4.

- 99** US FMI 3-24.2: *Tactics in Counterinsurgency*, Chapters 2-9.
- 100** US FMI 3-24.2: *Tactics in Counterinsurgency*, Chapters 2-10.
- 101** US FMI 3-24.2: *Tactics in Counterinsurgency*, Chapters 2-11.
- 102** US FMI 3-24.2: *Tactics in Counterinsurgency*, Chapters 2-7.
- 103** US FMI 3-24.2: *Tactics in Counterinsurgency*, Chapters 2-8.
- 104** Customary Law Study, vol 1, Rule 1.
- 105** Customary Law Study, vol 1, Commentary Rule 1, 3. See also the definitions of 'fighters' and 'civilians' in Section 1.1 of the International Institute of Humanitarian Law, Manual on the Law of Non-International Armed Conflict (San Remo Manual), 2006: 1.1.2. Fighters: 'a. [...] fighters are members of armed forces and dissident armed forces or other organized armed groups, or taking an active (direct) part in hostilities. b. Medical and religious personnel of armed forces or groups, however, are not regarded as fighters and are subject to special protection unless they take an active (direct) part in hostilities'. 1.1.3. Civilians: 'Civilians are all those who are not fighters'.
- 106** Article 51(3) of AP I; Art 13(3) of AP II; Customary Law Study, vol 1, Rule 6.
- 107** See eg the US Government's position taken in: *Adel Hamlily v George W. Bush et al*, Memorandum in Support of the Government's Definition of Enemy Combatant, filed on 7 January 2009 in the US District Court for the District of Columbia, Case 1:05-cv-00763-JDB: 'At a minimum, the President's power to detain includes the ability to detain as *enemy combatants* those individuals who were part of, or supporting, forces engaged in hostilities against the United States or its coalition partners and allies. This includes individuals who were *part of or directly supporting Taliban, al-Qaida, or associated forces*, that are engaged in hostilities against the United States, its coalition partners or allies. This also includes any persons who have *committed a belligerent act or supported hostilities* in aid of enemy forces' (emphasis added). See also Israel's Law on the Internment of Unlawful Combatants (2002), which defines the term as 'a person who *has taken part in acts of hostilities* against the State of Israel, *directly or indirectly*, or who *belongs to a force* which carries out acts of hostility against the State of Israel in relation to whom the conditions bestowing the status of Prisoner of War according to International Humanitarian Law, and in particular Article 4 of the Third Geneva Convention of 12 August 1949 regarding the treatment of detainees of war are not met' (non-official translation, emphasis added).
- 108** Article 51(3) of AP I; Art 13(3) of AP II; Customary Law Study, vol 1, Rule 6. As the Israeli Supreme Court unambiguously stated: 'As mentioned, our position is that all of the parts of article 51(3) of The First Protocol express customary international law' (Israel HCJ, *PCATI v Israel*, § 30).
- 109** This follows from the case law of the Nuremberg IMT, the ICTY and the ICTR, which established that even individual civilians could commit war crimes by violating provisions of IHL applicable to international armed conflicts. It is not the *status of the perpetrator*, but the *character of the acts* and their '*nexus to the conflict*', which are decisive in making them relevant under IHL. Nevertheless, in *Rutaganda* (Judgment of 26 May 2003), § 569f, the ICTR pointed out that, in determination whether individual conduct has a nexus to the armed conflict, '(p)articular care is needed when the accused is a non-combatant'. For a discussion of the nexus criterion see eg ICTY, *Appeals Chamber, Prosecutor v. Dragoljub Kunarac et al Judgment of 12 June 2002*, §§ 57ff; ICTY, *Trial Chamber, Prosecutor v Mitar Vasiljević Judgment 29 November 2002*, §§ 24ff.

110 See DPH Interpretive Guidance, 83–5; R.W Gehring, ‘Loss of Civilian Protections under the Forth Geneva Convention and Protocol I’, XIX(1)–(2) *Military Law and Law of War Review* (1980) 11–48 at 13; J. Quéguiner, ‘Direct Participation in Hostilities under International Humanitarian Law’, *International Law Research Initiative Working Paper* (2003), 11; K. Watkin, ‘Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict’, in D. Wippman and M. Evangelista (eds), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (New York: Transnational Publishers, Inc, 2005), 137–80 at 177. None of the previous or current statutes of international criminal tribunals and courts (ie IMT, IMTFE, ICTY, ICTR, ICC, and SCSL) lists civilian direct participation in hostilities as a war crime. However, as correctly pointed out by Customary Law Study, vol 1, Commentary Rule 6, 23, ‘international law does not prohibit States from adopting (i.e. domestic) legislation that makes it a punishable offence for anyone to participate in hostilities, whether directly or indirectly’.

111 Clearly, this does not mean that such persons fall outside the law. Treaty IHL expressly establishes minimum guarantees for the protection and treatment of all persons, regardless of status, who are captured by the adversary after having directly participated in hostilities. See Art 45 of AP I and, if the nationality requirements of Art 4 GC IV are fulfilled, GC IV. Certain civilians may also be protected by GC I to III (see Arts 13 of GC I, 13 of GC II and 4 of GC III).

112 See DPH Interpretive Guidance, 41; Customary Law Study, vol 1, Commentary Rule 6, 22; Quéguiner (n 111), 2; Gehring (n 111), 17f; M.N. Schmitt, ‘The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis’, 1 *Harvard National Security Journal* (2010) 5–44; Watkin (n 110), 140; W.H. Parks, *Memorandum EO 12333*, 6.

113 Article 31(1) of the Vienna Convention on the Law of Treaties (1961). See also the unanimous opinion of the experts as to the need for a clarification of the notion of direct participation in hostilities in ICRC, ‘Expert Meeting, Summary Report Direct Participation in Hostilities under International Humanitarian Law’ (2003), 10f.

114 DPH Interpretive Guidance, 9–11. The present author, in his function as legal adviser for the ICRC, was directly responsible for this clarification process and authored the ‘Interpretive Guidance’ on behalf of the ICRC. For further information and documentation concerning the ICRC’s clarification process, see <<http://www.icrc.org>>.

115 For supportive views see eg D. Fleck, ‘Direct Participation in Hostilities by Non-state Actors and the Challenge of Compliance with International Humanitarian Law’ (2010) 4 *Public Diplomacy Magazine* 40–51; D. Akande, ‘Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities’, 59 *International and Comparative Law Quarterly* (2010) 180–92; and, despite certain concerns, UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Study on Targeted Killings, 28 May 2010 (A/HRC/14/24/Add.6), 62–9. For four detailed critiques of the Interpretive Guidance and the ICRC’s response thereto, see Watkin (n 88); M.N. Schmitt, ‘Deconstructing Direct Participation in Hostilities: The Constitutive Elements’, 42 *NYU Journal of International Law and Politics* (2010) 697–739; B. Boothby, ‘“And For Such Time As”: The Time Dimension to Direct Participation in Hostilities’, 42 *NYU Journal of International Law and Politics* (2010) 741–68; W. Hays Parks, ‘Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect’, 42 *NYU Journal of International Law and Politics* (2010) 770–830; N. Melzer, ‘Keeping the Balance between Military Necessity and Humanity, a Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’, 42 *NYU Journal of International Law and Politics* (2010) 833–916.

- 116** Schmitt (n 112), 43.
- 117** See Art 35(1) of AP I and, similarly, Art 22 of the 1907 Hague Regulations.
- 118** See Arts 43(2) of AP I; 45(1) and (3) of AP I; 51(3) of AP I; 67(1)(e) of AP I; 13(3) of AP II.
- 119** As evidenced by the consistent use of the term '*participent directement*' in the equally authentic French versions of the relevant treaty texts, the terms 'active' (Art 3 of GC I-IV) and 'direct' (Arts 51(3), 43(2), 67(1)(e) of AP I; 13(3) of AP II) used in the English treaty texts refer to the same quality and degree of individual participation in hostilities. See also ICTR, *Prosecutor v Akayesu*, Judgment of 2 September 1998, 629.
- 120** DPH Interpretive Guidance, 46.
- 121** DPH Interpretive Guidance, 47-9.
- 122** DPH Interpretive Guidance, 49-50.
- 123** DPH Interpretive Guidance, 47.
- 124** See also Commentary AP I and II, paras 1679 and 1945; also ICTY Appeals Chamber, *Prosecutor v Strugar*, Judgment of 17 July 2008, §§ 175-6.
- 125** DPH Interpretive Guidance, 51-8. See also Commentary AP I and II, paras 1679, 1944, 4787.
- 126** DPH Interpretive Guidance, 53.
- 127** DPH Interpretive Guidance, 52-4.
- 128** DPH Interpretive Guidance, 54-5.
- 129** DPH Interpretive Guidance, 65-8.
- 130** DPH Interpretive Guidance, 58. The requirement of belligerent nexus refers to the relation between an act and the conduct of hostilities between the parties to an armed conflict and, therefore, is conceived more narrowly than the general nexus requirement developed in the jurisprudence of the ICTY and the ICTR as a precondition for the qualification of an act as a war crime, which refers to the relation between an act and a situation of armed conflict as a whole.
- 131** DPH Interpretive Guidance, 59-60.
- 132** DPH Interpretive Guidance, 59.
- 133** DPH Interpretive Guidance, 61-2.
- 134** DPH Interpretive Guidance, 63.
- 135** DPH Interpretive Guidance, 61. Direct attacks against persons and objects protected against attack are prohibited under IHL. The use of force by civilians not exceeding what is necessary and proportionate to defend themselves or others against such unlawful attacks lacks belligerent nexus and, therefore, does not amount to direct participation in hostilities.
- 136** DPH Interpretive Guidance, 63.
- 137** DPH Interpretive Guidance, 60-1.
- 138** DPH Interpretive Guidance, 59.
- 139** DPH Interpretive Guidance, 64.
- 140** DPH Interpretive Guidance, 70-1.
- 141** DPH Interpretive Guidance, 71-3.

142 Article 41(1) of AP I.

143 According to the famous Martens clause, in cases not regulated by the law in force, both civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience (eg Art 1(2) of AP I; Preamble Additional Protocol II). According to the International Court of Justice, this rule constitutes an ‘intransgressible’ principle of customary international law, which is so fundamental to the respect of the human person that it can be derived directly from a general principle of law, namely, ‘elementary considerations of humanity’ (ICJ, *Nuclear Weapons Opinion*, n 4, § 78). See also the Chapter by Y. Sandoz in this volume.

144 See eg the expert discussions recorded in: ICRC, Report DPH Expert Meeting (2006), 78ff.

145 This argument has most recently been made by the Israeli High Court of Justice in its judgments on a particular section of the West Bank Barrier (2004) and on the Israeli policy of targeted killing (2006). In *Beit Sourik Village Council v The Government of Israel et al* (HCJ 2056/04), Judgment of 30 June 2004, § 37 the Court held: ‘Proportionality is recognized today as a general principle of international law [...] From the foregoing principle springs the Principle of Humanitarian Law (or that of the law of war): Belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the strength of the enemy’. Furthermore, in Israeli High Court of Justice, *The Public Committee Against Torture et al v The Government of Israel et al* (HCJ 769/02), Judgment of 13 December 2006, § 40, the Court held that ‘a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed [...]. Trial is preferable to use of force. A rule-of-law State employs, to the extent possible, procedures of law and not procedures of force’.

146 For a more detailed discussion of this approach, see N. Melzer, ‘Targeted Killing or Less Harmful Means?—Israel’s High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity’, 9 *Yearbook of International Humanitarian Law* (2006) 87–113.

147 This is the view taken in DPH Interpretive Guidance, 77–82.

148 United Kingdom: Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), Section 2.2 (Military Necessity). Similar interpretations are provided in numerous other contemporary military manuals and glossaries. See eg NATO: *Glossary of Terms and Definitions* (AAP-6V), 2-M-5; United States: Department of the Army, *Field Manual 27-10* (1956), § 3; US Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP 5-12-1/COMDTPUB P5800.7A (2007), § 5.3.1, 5-2; France: Ministry of Defence, *Manuel de Droit des Conflits Armés* (2001), 86f; Germany: Federal Ministry of Defence, *Triservice Manual ZDv 15/2: Humanitarian Law in Armed Conflicts* (August 1992), § 130; Switzerland: Swiss Army, *Regulations 51.007/IV, Bases légales du comportement à l’engagement* (2005), § 160. Historically, the modern notion of ‘military necessity’ has been strongly influenced by the definition provided in Art 14 of the Lieber Code (United States: *Adjutant General’s Office, General Orders No 100*, 24 April 1863).

149 United Kingdom, *Manual of the Law of Armed Conflict* (n 148), Section 2.4 (Humanity). Although no longer in force, see also the formulation provided in: United States: Department of the Air Force, *Air Force Pamphlet, AFP 110-31* (1976), §§ 1-3(2), 1-6. Thus, as far as they aim to limit death, injury, or destruction to what is actually necessary for legitimate military purposes, the principles of military necessity and of humanity do not oppose, but mutually reinforce, each other. Only once military action can reasonably be regarded as necessary for the accomplishment of a legitimate military purpose, do the principles of military necessity and humanity become opposing considerations which must be balanced against each other as expressed in the specific provisions of IHL.

150 DPH Interpretive Guidance (n 39), 79. See also the determination of the International Court of Justice that the prohibition on the use of means and methods of warfare of a nature to cause unnecessary suffering to combatants constitutes an intransgressible principle of international customary law and a cardinal principle of IHL, which outlaws the causation of 'harm greater than that unavoidable to achieve legitimate military objectives' (ICJ, *Nuclear Weapons Opinion*, n 4, § 78). Further: Commentary AP I and II, para 1395.

151 DPH Interpretive Guidance, 80-1.

152 See also the expert discussions recorded in: ICRC, Report DPH Expert Meeting (2006), 65.

153 DPH Interpretive Guidance (n 39), 82. During a series of expert meetings conducted by the ICRC, the proposition that the force permissible against legitimate targets is subject not only to express restrictions imposed on specific means and method of warfare, but also to a general requirement of military necessity, remained highly controversial. For an overview of the relevant discussions, see ICRC, Report DPH Expert Meeting (2004), 17ff; ICRC, Report DPH Expert Meeting (2005), 31f, 44ff, 50, 56f, 67; ICRC, Report DPH Expert Meeting (2006), 74-9; ICRC, Report DPH Expert Meeting (2008), 7-32.

(p. 332) Chapter 13 Proportionality in the Law of Armed Conflict

1 Introduction

PROPORTIONALITY has long been a mysterious topic in international law. Its critics have tended to highlight its inherent indeterminacy and the subjective character of its assessment. They argue that this indeterminacy undermines the capacity of rules based on proportionality to define a predictable frame of reference for state conduct. Nonetheless, proportionality is over time becoming a constant presence in the international legal landscape. It is frequently referred to in legal scholarship and case law as a useful legal device, capable of explaining the functioning of an ever-increasing number of international rules.

The reasons for this success are manifold. First, proportionality offers an alternative model of law-making. In the classical model, general and abstract rules are based on a predetermined balance of values and interests that are presumed to remain stable over time. These rules consequently determine the conduct to be pursued, or the result to be achieved, and they distribute rights and duties accordingly. The change of the predetermined balance of interests entails the need to change the rule.

A different model is the one based on proportionality. This alternative model applies to situations in which a number of different interests entitled to legal (p. 333) protection can be identified but cannot be *a priori* composed in a predetermined behavioural scheme. Rather, the various interests and values at stake can be combined according to a potentially infinite range of possible combinations, each for the potentially infinite range of concrete situations in which the legal rule can apply. It is from this combination, to be applied on a case-by-case basis, that concrete rules of conduct will ultimately emerge.

This changing balance of interests requires unusual capacities for a legal rule, in particular the capacity to adapt its content to the specific features of every single case: a property at odds with the structured theoretical character of legal rules. Whereas in the classical model the normative content is determined directly by the rule, in the case of proportionality the normative content emerges, rather, from a secondary process of law-making based on the assessment of proportionality.

A further reason that accounts for the extraordinary success of proportionality probably lies in the structural deficiencies of the process of change to international rules. Rules based on proportionality incorporate a mechanism that adapts their content to the evolving legal environment. By referring to a plurality of values and interests to be conveniently composed as each new case arises, rules based on proportionality are therefore not immutable over time. Rather, they change their content in correspondence with the changing content of the values and interests they refer to, and in correspondence with changes in their respective importance in the international community. In other words, proportionality can be seen as a law-making process that continuously adapts the content of the rule to changing social needs, circumventing the complexities of the rules of change in the international legal order.¹

2 Proportionality as a Form of Legal Control of Armed Conflicts

These virtues of proportionality make it a normative device particularly appropriate to the law of armed force.² This is a highly politically sensitive field where states are particularly reluctant to accept strict rules imposing objective forms of control. (p. 334) Moreover, this field presents itself as a permanent ground of confrontation among competing interests and values: the interests of states to pursue their military objectives free from restraint, on the

one hand; and humanitarian and other individual, collective and even universal interests, on the other hand. The precise identification of permitted conduct can therefore hardly be determined in the abstract. It emerges from the combination of a plurality of competing interests whose respective weight must be determined with specific reference to facts and circumstances existing on a given moment.³ To determine the rules governing the conduct of military hostilities thus becomes an impossible exercise of law-making. It might thus prove to be impossible to encapsulate, in detailed legal rules, all the infinite situations in which states employ armed force. Recourse to rules based on proportionality thus makes it possible to cover an ample spectrum of conduct in a relatively small number of quite simple rules, which, moreover, evolve over time in correspondence to the development of social custom.

The purpose of this Chapter is to reappraise legally the notion of proportionality in humanitarian law (*ius in bello*), by itself and in its relations with the law governing the resort to the use of armed force (*ius ad bellum*). The relationship between the rules that determine the legality of the use of force and those which tend to impose restraints on military action, presents an interesting object of analysis and a litmus test for assessing the future development of the law of armed conflict.

This purpose also dictates the structure of the Chapter and explains the unequal space devoted respectively to *ius in bello* and *ius ad bellum*. The following two sections will separately analyse the structure and content of proportionality in *ius in bello*, and in *ius ad bellum*. The final section will be devoted to the role of proportionality in the relationship between the two regimes.(p. 335)

3 Proportionality in *Ius in Bello*

A. Proportionality in symmetrical legal relations

The basic reference for proportionality in *ius in bello* is given by Articles 51(5)(b), and 57(2) of Additional Protocol I to the four Geneva Conventions of 1949.⁴

The first provision tends to complete the rules established in the other provisions contained in Article 51, which prohibit indiscriminate attacks against civilians. Article 51(5)(b) regards as 'indiscriminate' not only attacks directed against civilians and attacks that do not distinguish between military and civilian objectives, but also attacks directed against military objectives which cause disproportionate collateral damage. These are 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'.⁵

Article 57(2)(a)(iii) and (b) lay down a detailed regime for belligerents in their decision to launch attacks likely to produce disproportionate collateral damage to civilians or civilian objects. The first makes it necessary to consider the proportionality between military advantage expected and prospective collateral damage in making the decision to launch an attack. The second imposes an obligation to consider proportionality also in the successive phase in which the decision has already been taken or the attack has already been launched. Attacks planned or being carried out must be respectively cancelled or suspended if they might be expected to cause excessive loss or damage.

From these two provisions, commonly considered part of customary law,⁶ we can gather important information on the structure of the rule and, therefore, on the standard of proportionality.

First, they draw a link between interests equally entitled to legal protection: the need of the combatants to perform military action and the need of non-combatants to remain unaffected by the pursuit of hostilities. Since neither of them takes clear priority over the other, the balance must be struck among interests of equal rank. Belligerents do not enjoy complete freedom to determine the goal of their action and the means to attain it. Nor are humanitarian interests entitled to claim absolute immunity from damages arising from military operations. The degree and forms of (p. 336) the protection accorded to either interest strictly depend on the prejudice that this protection might inflict upon the other.

This observation is theoretically interesting, as it shows that proportionality in *ius in bello* does not include a previous assessment of necessity.⁷ This is easily explained. In the classical *ius in bello* conception, belligerents do have an unfettered discretion to use force to overcome the defence of their respective enemy. In other words, in *ius in bello*, unlike in *ius ad bellum*, the use of force is not functionally linked to the achievement of a pre-determined goal. Belligerents do not possess a functional power to use force, but a fully-fledged right. This right is only curtailed by the competing rights of civilians to remain distinct from military objectives. Proportionality is thus a tool that determines the conditions of exercise of two competing and equally ranking rights.

In practical terms, the right to pursue a military attack depends upon the tolerability of the rights of the civilians to remain unaffected by military operation, namely upon proportionality, to be assessed prospectively, on the basis of the prognostic military advantage to be gained with the attack and the presumed damage it might cause.⁸

A second observation, of a systemic character, is that the duty to balance military gains expected with prospective collateral damage is also subjectively symmetrical since it is equally incumbent upon both sides, regardless of any inquiry upon the legality of their ultimate goal. As explained above, proportionality in *ius in bello* has no regard for the reasons which led a state to use force but only concerns the specific objective of each military action. None of the actors involved can claim to be exempted from this balance of interests on the basis of any alleged moral or legal superiority.(p. 337)

B. Objective vs. subjective proportionality

By nature, proportionality is an objective standard. There would be no use in requiring a state to consider humanitarian interests in the pursuit of its military objectives if the balance of interests could be struck according to the state's subjective perception.

There are obvious difficulties, however, in determining which standards apply for measuring the relative weight of highly heterogeneous interests such as, on the one hand, the military advantage expected from an attack and, on the other hand, prospective damages to humanitarian values. This is quite a complex logical operation, which entails the need to determine in advance what can be objectively considered a reasonable cost for the achievement of a military goal.

Protocol I provides some methodological guidance. Both Article 51(5) and 57(2) refer to the objectives of each individual attack. The idea that a higher humanitarian toll is more acceptable in the light of the overall strategic goals of military campaign is at odds with the conceptual structure of the proportionality assessment since the degree of protection of humanitarian values would vary—and indeed, considerably—in relation to the long-term objective of a military campaign.

But even confined to an assessment in the context of each military action, proportionality still remains a difficult exercise of combining competing interests. Under which conditions is an attack against a military installation located within an inhabited area to be regarded

as proportionate? How can the military importance of the installation and the likely humanitarian damage be weighed against each other?

Neither international practice nor case law provides definite answers. The logic of proportionality seems to entail that relatively minor and indirect expected military advantages cannot justify massive casualties among civilians. However, in its decision of 20 December 2006, the Supreme Court of Israel, while identifying proportionality as the proper standard for measuring on a case-by-case basis the legality of targeted killings in the light of the military importance of the killing and of the likely collateral damage,⁹ abstained from identifying appropriate tests.(p. 338)

Absent substantive quantitative tests, an important role must be assigned to the procedure to be followed for measuring the relative importance of the diverse values at stake. In this regard, two issues emerge from recent practice.

The first concerns the perspective from which the various interests at stake must be evaluated and balanced against each other. Is that a subjective assessment, to be conducted by the acting agent with the best means at his disposal in the factual conditions in which the assessment is performed, or is it rather an objective assessment, entailing the use of best practices and the gathering of all the pertinent information?

The difference between the two options reveals different conceptions of proportionality. The best example comes from so-called aerial war. On a number of occasions, belligerents tended to justify excessive collateral damages caused by high altitude bombing with the difficulty of the agent, acting from a height adequate to ensure his safety, to assess the situation on the ground. A different assessment could have been made by the agent only at the cost of exposing himself to a higher risk: an impossible condition in the opinion of the supporters of the subjective test.¹⁰

This example clearly shows the philosophical dilemma between the underlying options: does the safety of the agent enter into account in the balancing of interests, and can it make the attack proportionate? In other words, is the agent entitled to minimize his own risk, and therefore to assess the proportionality of the attack from a perspective which guarantees to his person the highest degree of safety, or is the agent rather compelled to expose himself to a reasonable amount of risk in order to objectively assess the proportionality of the risk incumbent upon civilians and civilian objects?

This theoretical dichotomy has considerable implications in practice. What is the amount of information necessary to decide to launch an attack against a dual use building suspected of hosting a military unit? Is the agent justified to act on the basis of summary information on the presumed absence of civilians, or should he endanger himself, and also the success of the operation, with an effort to gather more accurate information on the ground? Which is to be preferred in such a situation: the safety of civilians, or the life of the agent and the success of the operation?

The scant available evidence of practice does not definitively uphold either of these two options. On the one hand, a certain indulgence emerges for the agents who minimized the risk for their own safety, even at the cost of increasing the imprecision of the calculation of prospective damage for civilians and, therefore, of transferring the higher risk on to them.¹¹ (p. 339)

The subjective approach seems to have been further stretched, becoming infused with a radical relativism, by the Eritrea-Ethiopia Claims Commission in its Partial Award, Central Front, with regard to Ethiopia's Claim 2, handed down within the context of a wider dispute between Ethiopia and Eritrea on 28 April 2004. The decision is pervaded by the idea that

proportionality must be assessed in the light of the personal conditions of the acting agent, even if these conditions relate to inexperience or, perhaps, even ineptitude.¹²

A different course has been taken in other circumstances. There is a certain agreement that proportionality must be assessed from the perspective of the 'reasonable commander', a notion which on the one hand tends to locate the assessment of proportionality with the subjective situation of the agent, but on the other hand seems to require an objective degree of diligence.¹³ The standard of the reasonable commander was also adopted by the Israeli Supreme Court in its decision of the lawfulness of targeted killings mentioned earlier. Whereas in some passages the idea seems to emerge that proportionality must be assessed (p. 340) under the given conditions of time and place, the opinion of the Court and the individual opinions of its members made frequent recourse to the notion of the 'responsible agent'.¹⁴ The same standard was adopted in the Goldstone report, from which the implication seems to be drawn that proportionality prevents shifting the entire risk onto the civilian population, but requires a reasonable share of risk to be assumed by the actors involved.¹⁵

The subjective approach seems to be logically at odds with the basic premise on which the proportionality assessment rests. Proportionality does not require the agent simply to be prudent and charitable. It requires his or her actions to be based on a careful apprehension of facts and on an objective balance of interests. This character would be illusory if the agent were allowed to conduct the assessment on the basis of his subjective situation. If an agent does not possess sufficient information objectively necessary to proceed to the balance of interests, he or she cannot but abstain from acting. A different conclusion would run overtly against the logic of proportionality, which is based precisely on the objective character of the balancing of interests, which entails that all the interests at stake must be properly appreciated in their factual dimension.¹⁶

However, the objective standard is not completely free from inconvenience. A standard which requires states to adopt the best available practice is more easily complied with by states which possess the necessary technology. Yet it might seem inappropriate to assume that proportionality imposes conditions that cannot be complied with symmetrically by all belligerents.¹⁷ In order to be realistic, proportionality must impose requirements that can be met by every state engaged in military action, and it should be based on a reasonable balance between the aim (p. 341) to protect civilians and the need to avoid exposure to excessive risk of military personnel.

The standard of the reasonable agent can appropriately balance the diverse needs respectively underlying the subjective and objective options. It does not impose excessive or impossible conditions. It also avoids the incongruence of making proportionality, and therefore the standard of security of civilians, dependent on the standard of security subjectively chosen by the military commanders or their troops. It certainly avoids the incongruence of making the standard of safety of civilians dependent upon the degree of experience or the degree of training of the military personnel.

C. Proportionality and the treatment of civilians

Asymmetric forms of warfare pose new challenges to the classical paradigm of proportionality in *ius in bello*. As seen above, this paradigm was developed with regard to conventional forms of conflict and presupposes the existence of two distinct entities, the belligerents and the civilians, each of which has a distinctive set of interests.

One may wonder whether this paradigm, and in particular the distinction between belligerents and civilians, still makes sense in new forms of conflict, erupting between

military armies and irregular groups and which see an ever more active involvement of civilians.

These difficulties are epitomized by the illegitimate tactic of using civilians as human shields. This is a strategy mostly adopted by irregular militias, which consist of locating military operations in densely inhabited areas, thus making it highly problematic for the military response to comply with the principles of distinction and proportionality. The adoption of this strategy has the effect of deeply altering the symmetry in the legal position of the belligerents. Compliance with the principle of distinction and proportionality by one of the belligerents has the effect of limiting significantly the choice of the military strategies, whilst the other belligerents, namely the irregular militias, take advantage of these rules, careless of the possible harm to their own population (not to mention others). (p. 342)

Not surprisingly, therefore, the idea has been put forward that, with regard to these forms of conflict, the distinction between belligerents and civilians is an obsolescent one and must be set aside.¹⁸ Instead, the protection of civilians should be graduated according to the degree of their involvement in the conflict.

The assumption that the distinction between belligerents and civilians tends to be fuzzy in asymmetric conflicts appears correct and deserves attention. From this premise, however, the consequence can hardly be drawn that this basic paradigm of humanitarian law has lost its function and must be abandoned. Indeed, humanitarian law has developed a tool that can be employed in order to cope with the involvement of civilians in warfare. Article 51(3) reads: 'Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities'.

Admittedly, the protection of civilians under this provision is an all-or-nothing notion lacking the flexibility necessary to follow the nuances of various forms of partial involvement in hostilities. However, the strictness of this approach is offset by the flexibility of the standard measuring the direct involvement in hostilities, which can be conveniently adapted in order to cope with different situations on the ground. It seems to require, as a minimum, active conduct entailing military benefits, performed with a certain degree of wilful participation to the pursuit of military objectives. This standard can be reasonably deemed to meet situations in which civilians, albeit not performing activities typically conducted by military troops, are nonetheless voluntarily contributing to the military operations. It is met, for example, by civilians who voluntarily consent to act as human shields in the awareness that their presence will constitute a deterrent for military attacks. Voluntary consent, however, must be ascertainable by the other belligerent party before they take action on this basis.

To go beyond this assumption, and to conclude that the protection of civilians which do not meet the standard of direct involvement in hostilities can nonetheless be graduated in relation to their conduct appears highly controversial and potentially unsound. From this suggestion one could infer that civilians, who are or must be aware of being utilized as human shields and do not actively avoid it, must bear an additional amount of risk in consequence of their indirect support for the military operations. In order to avoid this additional amount of risk, which would make collateral damage 'more acceptable' as a consequence of their 'indirect part' in hostilities, there would need to be a new rule that civilians must refuse to be used as human shields, abandoning the zone of operations or even actively resisting the presence of the militias in inhabited areas.¹⁹(p. 343)

Although suggestively fashioned, the question cannot be answered but in the negative. The idea that civilians have a positive obligation to act in order to prevent belligerents from using them as human shields has two significant setbacks.

First, it has the effect of inverting the *onus probandi* in regard to the distinction between belligerents and civilians, which is incumbent upon the former. It appears unacceptable that the burden of proof concerning the principle of distinction should rest on the person used as human shield.

Secondly, and perhaps more importantly, it has the further effect of subverting the logic of the system of protection of civilians established by *ius in bello*. To presume that civilians who remain idle are taking 'indirect' part in hostilities and must therefore accept a higher risk of collateral damage has the effect of circumventing the principle of distinction and to make them indistinguishable from military personnel. The principle of proportionality, incorporated into humanitarian law in order to enhance the protection of civilians, would be used in order to attain the inverse objective, that is, to grant belligerents the right to demand from civilians of the other party a positive action and to punish their idleness.

4 Proportionality in *Ius ad Bellum*

A. The structure of the proportionality assessment in asymmetrical legal relations

A different structure applies to the assessment of proportionality in *ius ad bellum*. The basic premise of this assessment is that the aggression is unlawful conduct, which justifies an armed response. In other words, international law establishes a clear hierarchy between the interests of the two classes of actors: whilst the victim (p. 344) of aggression is entitled to legal protection, the aggressor is protected only against excessive defensive measures.

It follows that proportionality is not a technique designed to combine conflicting interests and values entitled to the same level of protection. In *ius ad bellum*, proportionality is traditionally conceived as a means to establish a relation of appropriateness between asymmetrically protected interests: the paramount interest of the attacked state to repel the armed attack, on the one hand; and an open set of other interests which might be affected by the defensive action, be they individual, collective, or universal, on the other hand.

The different function of proportionality also explains its different logical structure. In *ius ad bellum*, proportionality traditionally limits the power conferred on a state to use force unilaterally for the achievement of a predetermined end. It therefore presents the classical three-step structure that typically defines the proportionality assessment in the context of functional powers: the military response must be suitable and necessary to achieve its goal, and must not entail an excessive sacrifice of other legally protected interests.

However, there is no unanimous view in legal scholarship or in the case law on the identification of the goal of a forcible response to an armed attack. Quite the contrary: this issue was addressed by a heated scholarly debate whose terms can be broadly grouped in two major streams. A restrictive view tends to regard the need to repel the attack as the only goal of a unilateral forcible response to an armed attack.²⁰ According to this view, the power to use unilaterally defensive force is an exception to the general prohibition on the use of force designed to give to the attacked state the means to resist the aggression, to avoid defeat and to restore its territorial sovereignty. The definitive removal of the threat, and the permanent restoration of conditions of peace and security, is a function to be discharged through collective action. From the opposite perspective, the objectives and the scope of unilateral resort to force are broader and include aims of prevention and deterrence or, more broadly, the aim to create a safe environment for the attacked state.²¹

Although the former view seems to the current author more in accordance with practice and the logic of the system, there is no need, for the limited purposes of the present contribution, to engage in a thorough analysis of this issue. We will see that the analysis of

the structure and functioning of proportionality can also contribute, to an extent, to the identification of the ultimate goal of self-defence.(p. 345)

B. Applicable standards: quantitative proportionality and qualitative proportionality

The idea that proportionality is measured by quantitative standards stems from a primitive view of proportionality as a requirement of rough quantitative equivalence between attack and defence. Equivalence, in turn, could be measured in terms of the means employed or the damage inflicted by each.

Although quite simplistic, the tendency to anchor proportionality to quantitative terms of measurement nonetheless has deep roots in the international legal thought.²² Its success is probably due to the belief that quantitative standards are easily measurable and therefore bestow a certain degree of objectivity on the highly indeterminate standard of proportionality. In other words, objective standards might prove to limit better unilateral use of force and to reduce arbitrariness.²³

Other reasons, however, plead for the adoption of a different standard. The most obvious is that the primary objective of the rules of *ius ad bellum* is not so much to give to the states the power to punish unlawful conduct, but rather to repel the attack or even, according to some, to prevent or deter it. If the use of lawful force were determined by recourse to a standard of equivalence, that primary goal might remain unattained.

This consideration might prompt the adoption of qualitative standards of measurement of proportionality. A qualitative approach tends to measure proportionality not by reference to equivalence between material goods, but rather by reference to the appropriateness of the means to achieve their ends. In the case of *ius ad bellum*, force is lawfully employed if it proves to be necessary and appropriate and does not unduly interfere with other interests and values.

The adoption of a qualitative standard highlights the exceptional function attributed to the unilateral use of force in contemporary international law. The use of force does not have the function of inflicting retribution on the counterpart, which could in principle be governed by a standard of equivalence. Rather, it is a means necessary to discharge the essential function of self-defence. In international law, self-defence is therefore conceived as a temporary remedy for responding to an aggressive use of force, thus complementing the function of the institutional (p. 346) mechanism of collective security. It follows that a state acting in self-defence must have at its disposal all the means necessary to respond to an armed attack. To impose a quantitative limit of equivalence on the means employed by the attacker or on the damage inflicted would be tantamount to denying the essence of the function that the armed response is designed to serve.

This explains why proportionality in *ius ad bellum* must be measured in purely qualitative terms,²⁴ thus allowing the use of the means necessary and proportionate to the strategic goal of self-defence. Unlike proportionality in *ius in bello*, which looks only to the short-term goal of each military action, proportionality in *ius ad bellum* is measured against the strategic objective of self-defence.

The adoption of qualitative standards, however, does create additional questions. Beyond the rhetoric of self-defence, determining the long-term goal of military actions is a difficult exercise. States would then have an ample degree of discretion at their disposal. This degree of discretion would further increase if self-defence were considered not to be necessarily limited to create security within one's border, but as extending to the means

necessary to create overall conditions of security and to remove permanently the source of threat even beyond borders.

Furthermore, a qualitative standard establishes a direct relationship between the purported objective and the means appropriate to achieve it. The appropriateness of the armed action must be measured by reference to the interest that the acting state is entitled to pursue. It follows that the level of protection of that interest, and not only the interest itself, must be determined objectively. Otherwise a paradoxical situation would arise: by setting unilaterally the level of protection of its own interest, the defending state could circumvent the limits set up by reference to a standard of proportionality. This proposition is valid whatever the ultimate objective of self-defence might be. The higher the level of protection which a state tends to secure for its defensive interest, the more extensive the set of means employed and the damage that constitutes a fair 'price' for its attainment.

This observation also seems to highlight the different functions of necessity and proportionality in *ius ad bellum*. Whereas the former tends to secure the existence of a functional link between military action and the defensive purpose, the latter has a wider scope and includes a comparison of the benefits and the costs entailed by the full achievement of that purpose. In particular, the adoption of a qualitative standard implies that not only the means of the action, but also ultimate strategic goals must be determined through a 'balance of interests' analysis.

We are thus led, through a logical analysis of proportionality, to conclude that the strategies of the state acting in self-defence cannot be determined on the basis (p. 347) of the state's subjective perception of the level of security needed but must be rather based on a cost-benefit analysis which must take into account, beyond the interest of the attacked state, other interests and values prospectively affected by the action in self-defence.²⁵ Since these interests and values are primarily, even if not exclusively, expressed by *ius in bello*, we now proceed to an analysis of the relationship between *ius ad bellum* and *ius in bello*. This analysis epitomizes the complex interplay between the security and non-security based interests that underlie the assessment of proportionality.

5 The Relationship between Proportionality in *Ius in Bello* and Proportionality in *Ius ad Bellum*

A. The independence paradigm

As noted at the beginning of this Chapter, *ius in bello* and *ius ad bellum* are traditionally regarded as two set of limits which apply fully independently of each other. Both must be complied with by belligerents, since they pertain to different situations. The victim of aggression must comply with proportionality in choosing the means to respond to the attack; both belligerents must ensure that performance of a single military action does not entail excessive collateral damage.²⁶

The idea that *ius ad bellum* and *ius in bello* apply independently of each other is probably due to the historical vicissitudes of the two notions. It is common knowledge that *ius in bello* developed at a time in which, supposedly, no legal restraint was deemed to curtail the discretion of states to use force unilaterally. A further argument militating in favour of the independence of the two legal regimes derives from their antithetical logic. *Ius ad bellum* is pervaded by the idea of the moral and legal superiority of the interest of the attacked state, whereas *ius in bello* is based (p. 348) on the opposite premise of equal moral and equal legal legitimacy of the various interests at stake.

However, this premise is fallacious. As observed in previous sections, far from being two separate and distinct legal regimes, *ius in bello* and *ius ad bellum* continuously overlap. Proportionate action according to one sub-system might prove to be disproportionate according to the other.²⁷ The full achievement of the aims of one might even make more difficult, and even impossible, the achievement of the aims of the other. It might prove difficult to determine the standard to measure the proportionality of a military action aimed at destroying a missile base located in densely inhabited area. Yet, according to the standard chosen, the conclusion could drastically change. The action could appear indispensable to respond to an actual or prospective armed attack but disproportionate against the more stringent standard of protection of civilians from the perspective of *ius in bello*.

Not surprisingly, therefore, in international practice it is not uncommon for these two conceptually very different techniques of proportionality to be used interchangeably and even, in the grey area of overlap, for them to be conflated in a sort of global assessment of proportionality.²⁸ A word of clarification might thus be opportune.

B. Expansive vs restrictive view

According to a first option, proportionality in *ius ad bellum*, and the need to give to the attacked state the power necessary to respond to the aggression, has the effect of enlarging its discretion in determining the expected advantage of the military (p. 349) action. The second, and logically antithetical option is rather to use proportionality in *ius in bello* as a limit to the discretion conferred by *ius ad bellum* to the attacked state to determine its strategy of reaction.

The first option tends to highlight the impact of *ius ad bellum*, a deeply asymmetrical legal regime establishing a clear hierarchy among the belligerents, on the egalitarian legal regime of *ius in bello*. This perspective is grounded on the premise that the need to repel the attack represents the essential yardstick against which the lawfulness of every military action must be assessed. If the only means to repel the attack consists in using means or methods entailing a high number of casualties, this should be nonetheless acceptable because the only alternative would be defeat. *Salus rei publicae suprema lex esto!*

The supporters of this perspective would have at their disposal a wide range of arguments. The most insidious is a systematic argument; namely that the two sub-systems, *ius in bello* and *ius ad bellum*, must be construed consistently. Compliance with one cannot entail disregarding the other. Moreover, a logical and practical argument should also be considered. To require a state to forgo its indispensable means of defence and to submit to inexorable defeat in order to avoid excessive civilian damage might seem a morally and legally untenable proposition. No damage is excessive if the ultimate end is self-preservation.

These arguments, very seductive indeed, seem however to highlight the limits of legal analysis in situations of extreme danger. The idea that law imposes upon states confronted with an armed attack the obligation not to use disproportionate force when they have no other means to avoid the defeat is an extreme and somewhat artificial position. Indeed, it presents a situation that even the ICJ was unprepared to prejudge.²⁹(p. 350)

Much more frequent is the situation in which a self-defending state has at its disposal a number of strategies of defence which combine, in different measures, humanitarian and security interests: from those giving paramount or exclusive importance to security objectives to those which accept that the level of security sought by a state acting in self-defence also depends upon humanitarian needs.

The difference is easily understood. In the first option, humanitarian values are protected only incidentally, to the extent that might prove possible without impairing the full attainment of the primary goal of self-defence. Thus, for example, a state can use all the means at its disposal to remove a source of insecurity, such as a group of irregulars performing raids across its borders, even if the attainment of this goal entails a high number of casualties. In the second option, the requirement of self-defence and humanitarian interests must be balanced against each other in order to determine their appropriate combination. In the example referred to above, the primary goal of permanently removing this source of threat becomes legally unattainable, and the state must tolerate a certain degree of instability across its borders if the full attainment of security entails excessive collateral damage to civilians.

The first solution, which corresponds to the expansive option, has the effect of giving the defending state the power to determine unilaterally the degree of protection of its security. By elevating the standard of its own security, that state can correspondingly diminish the standard of security imposed by humanitarian law. The effectiveness of humanitarian law would be sacrificed on the altar of the protection accorded by *ius ad bellum* to the attacked state.

The second perspective is one that tends to include the assessment of proportionality in *ius in bello* as part of the assessment of proportionality in *ius ad bellum*. This would imply that proportionality is not only a technique curtailing the discretion of a state in the choice of the means designed to achieve the objective of military action. Its primary function seems, rather, to limit the appropriate standard of protection of the interest of the attacked state to act in self-defence.³⁰

By nature, proportionality can offer a suitable means to reconcile the apparently disparate requirements of *ius in bello* and *ius ad bellum*. More precisely, the proportionality in *ius in bello* can be regarded as part of proportionality in *ius ad bellum* insofar as it helps to determine the appropriate balance of interests underlying the adoption of a defensive strategy by the attacked state. If the achievement of that standard subjectively sought by the defender prospectively entails too many casualties, it must be abandoned and a new standard, guaranteeing a lower level (p. 351) of security at a much lesser humanitarian cost, must be adopted. *Salusreipublicae* must be balanced with humanitarian values and other collective values that have emerged in contemporary international law.

6 Conclusions: Towards a Common Standard of Proportionality in the Law of Armed Conflict?

The analysis undertaken in the previous sections seems to suggest a unitary notion of proportionality in the law of armed conflict. Proportionality rules out measures which are unnecessary or unsuitable to achieve the legitimate aim of forcible action, or which entail excessive or inappropriate sacrifice to other competing values and interests. Measures which do not pursue a legitimate end, such as those involving use of force short of self-defence, or measures which, while pursuing a legitimate end, nonetheless entail excessive collateral damages, are unlawful, albeit for different reasons and to different degrees.

Proportionality not only represents a flexible tool capable of establishing an objective standard of measurement of unilateral use of force. It also serves as a tool that connects *ius in bello* and *ius ad bellum*. Each of these regimes has its own scope and has developed a substantive and procedural test for assessing the proportionality of armed actions. However, experience has proven that neither regime is self-contained. It is common to find that the one refers to the other in order to provide for a comprehensive evaluation of proportionality. Thus, far from constituting fully independent legal regimes, *ius in bello* and

ius ad bellum may be regarded as constituting sub-systems of a basic but comprehensive system of rules governing the use of force.

This assumption confirms the prevailing opinion that the proportionality of the use of force under one of the two regimes does not condone disproportionality under the other.³¹ Thus, compliance with humanitarian law does not condone the illegality of aggressive action and, vice versa, the defensive character of forcible action does not grant immunity under *ius in bello*. (p. 352)

Beyond these obvious conclusions, however, there are other implications. This contribution has dealt mainly with the impact of *ius in bello* on the balancing of values underlying the assessment of proportionality in *ius ad bellum*. The conclusion has been drawn that *ius in bello* requires a state acting in self-defence to consider the humanitarian cost of the prospective actions before adopting a defensive strategy. This strategy should balance the various interests at stake: the interest in responding effectively to armed attacks, on the one hand, and other individual, collective, or universal interests presumably to be affected by the defensive action, on the other hand.

A different line of research could be undertaken with a view to examining the potential impact of *ius ad bellum* on the assessment of proportionality in *ius in bello*. In particular, a comprehensive assessment of proportionality might bridge the gap consisting in the absence of a requirement of necessity in *ius in bello*. This makes it possible for belligerents to decide to launch attacks causing unnecessary loss among military personnel of the other party, the sole limit being the need to respect other rules of humanitarian law, including those prohibiting the employment of means and methods of warfare that cause unnecessary suffering.³² If and to what extent such a development has already taken place, and if it might be likely to further develop in the future, is left to other scholarly inquiries.

Footnotes:

¹ See E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Milan: Giuffrè, 2000), 429ff; T.M. Franck, 'On Proportionality of Countermeasures in International Law', 102 *American Journal of International Law* (2008) 715–67.

² For a specific study on the role and contents of proportionality in the law of armed conflict, see J. Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004). For detailed reference to proportionality in the frame of recent overall analysis on the law governing the use of force, see Y. Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge: Cambridge University Press, 2011); C. Gray, *International Law and the Use of Force by States* (3rd edn, Oxford: Oxford University Press, 2008); O. Corten, *The Law Against Force: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart, 2010).

³ Although sometimes referred to as a unitary normative tool, proportionality seems rather to be a general scheme, which includes a number of different techniques having as a common denominator the power of a state to determine the appropriate balance among a plurality of competing interests. In particular, a distinction must be drawn between two categories of rules: on the one hand, those rules which predetermine a dominant interest, which takes priority over other competing interests upon condition that this does not entail excessive damages to other competing values and interests and, on the other hand, those rules which refer to a plurality of competing interests, none of which taking priority over the other, which must be conveniently composed taking into account the circumstances of each specific situation.

⁴ There are also other rules of *ius in bello* incorporating reference to a technique of proportionality. See Additional Protocol I, Arts 35 and 51(5).

⁵ Additional Protocol I, Art 57(2)(a)(iii).

⁶ For a detailed analysis of international practice, see J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law*, vol II, part 1 (Cambridge: Cambridge University Press, 2005), 297ff.

⁷ For a discussion on the role of necessity in *ius in bello* and for its distinction from necessity as part of the proportionality equation, see Gardam (n 2), 7ff.

⁸ The idea that the assessment of proportionality only requires the military commander to minimize the collateral damage deriving from the attack is inconsistent with the balancing philosophy of Arts 57(2)(a)(iii) and (b). The idea that a military commander has unfettered power to achieve a military objective has the effect of radically transforming proportionality into a standard of necessity. Instead of accommodating equally ranking competing interests, proportionality would have the more limited function to prohibit unnecessary collateral damage. See the decision of the ICTY, *Prosecutor v Galić*, IT-98-29-T, Appeal Judgment, 30 November 2006, § 190: ‘One of the fundamental principles of international humanitarian law is that civilians and civilian objects shall be spared as much as possible from the effects of hostilities. This principle stems from the principles of distinction and the principle of protection of the civilian population, “the cardinal principles contained in the text constituting the fabric of humanitarian law”, constituting “intransgressible principles of international customary law”. According to the principle of distinction, warring parties must at all times distinguish between the civilian population and combatants, between civilian and military objectives, and accordingly must direct attacks only against military objectives. These principles establish an absolute prohibition on the targeting of civilians in customary international law, but they do not exclude the possibility of legitimate civilian casualties incidental to the conduct of military operations. However, those casualties must not be disproportionate to the concrete and direct military advantage anticipated before the attack (the principle of proportionality)’. For a different view, see S. Estreicher, ‘Privileging Asymmetric Warfare (Part II)?: The “Proportionality” Principle under International Humanitarian Law’, forthcoming in the *Chicago Journal of International Law* 11.

⁹ Supreme Court of Israel sitting as the High Court of Justice, *The Public Committee against Torture in Israel and Others v The Government of Israel and Others*, HCJ 769/02, Judgment of 13 December 2006, § 46: ‘Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed’. In the same paragraph, the Court went on to say: ‘The state’s duty to protect the lives of its soldiers and civilians must be balanced against its duty to protect the lives of innocent civilians harmed during attacks on terrorists’. In spite of the intuitiveness of this statement, it does seem fully correct. The proper test for measuring the proportionality of collateral damages to civilians under Protocol I, indeed, is the ‘military advantage’ test. Whereas belligerents tend comprehensibly to minimize the risk for their own soldiers, this element does not come into consideration as a balancing factor and it cannot justify a higher level of casualties among ‘innocent civilians’. This issue will be further discussed below in the text.

¹⁰ See the Report of the United Nations Fact-Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories* (Goldstone Report), UN Doc A/HRC/12/48, 25 September 2009, § 1888.

11 This view emerges from certain conclusions adopted by the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia subsequently endorsed by the ICTY Prosecutor in 1998. The Committee was set up to review the consistency with humanitarian law of the actions carried out in the course of the NATO bombing campaigns in the former Yugoslavia. From the report, the idea seems to emerge that that proportionality of targeting a military objective from a bomber flying from a high altitude must be assessed from the viewpoint of the acting agent. The report also seems to support the idea that casualties caused by high-altitude bombers flying above the range of air-defence systems on the ground were proportionate inasmuch as the resulting damage could not, precisely because of the high altitude, be envisaged by the aircrew. The suggestion seems to rest on the premise that the decision to maximize the security of the military personnel aboard is beyond the reach of proportionality. Consequently, proportionality is not violated even if it were proven that a different strategy of attack would have allowed a better calculation of the ratio between the humanitarian cost and military benefits of the action.

12 Partial Award, Central Front, Ethiopia's Claim 2, The Hague, 28 April 2004, § 110: 'the Commission believes that the governing legal standard for this claim is best set forth in Article 57 of Protocol I, the essence of which is that all feasible precautions to prevent unintended injury to protected persons must be taken in choosing targets, in the choice of means and methods of attack and in the actual conduct of operations. The Commission does not question either the Eritrean Air Force's choice of Mekele airport as a target, or its choice of weapons. Nor does the Commission question the validity of Eritrea's argument that it had to use some inexperienced pilots and ground crew, as it did not have more than a very few experienced personnel. The law requires all "feasible" precautions, not precautions that are practically impossible'.

13 See *Prosecutor v Galić* (n 8), § 58: 'One type of indiscriminate attack violates the principle of proportionality. The practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible. Once the military character of a target has been ascertained, commanders must consider whether striking this target is "expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." If such casualties are expected to result, the attack should not be pursued. The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack. In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack'.

14 In *Prosecutor v Galić* (n 8), § 57, dealing with the scope of judicial review, the Court stated that the scope of judicial review does not extend to the executive decisions of military command provided that this is a decision made by a reasonable commander: 'the question is [...] whether the decision which the military commander made is a decision that a reasonable military commander was permitted to make'. Also the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (see n 11) refers to the standard of the 'reasonable commander'. See, in particular, § 50.

15 See n 10: 'The Mission recognizes fully that the Israeli armed forces, like any army attempting to act within the parameters of international law, must avoid taking undue risks with their soldiers' lives, but neither can they transfer that risk onto the lives of civilian men, women and children. The fundamental principles of distinction and proportionality

apply on the battlefield, whether that battlefield is a built up urban area or an open field' (at § 1888).

16 See, albeit in a different context, *Prosecutor v Galić* (n 8), § 51: 'In case of doubt as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used. The Trial Chamber understands that such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action'.

17 One might wonder whether the objective nature of the assessment of proportionality ends up favouring developed states, who possess sophisticated means of information, to the detriment of states which do not possess the necessary technology and which therefore must necessarily act on the basis of summary information or, alternatively, must give up the attack. However, the dichotomy between developed states, who can avail themselves of strategies which are out of the reach of developing states, appears misplaced. Proportionality does not require states to endow themselves with the most sophisticated technological equipment. It simply requires states not to launch an attack without collecting convincing evidence that the collateral damage will be proportionate to the military advantage. Thus, international law does not impose impossible requirements on states, but only requirements which can be complied with by every state which behaves in accordance with normal practice.

18 See eg M. Galchinsky, 'Quaint and Obsolete: The "War on Terror" and the Right to Legal Personality', 14 in *International Studies Perspectives* (2013) 255-68.

19 The presumption that the civilians which do not follow the warning of belligerents are exposing themselves voluntarily to risk and, consequently, are entitled to a lesser degree of protection is a *caveat canem* argument which, as such, has no place in contemporary humanitarian law. In *Public Committee Against Torture v Israel*, its decision on targeted killings (see n 9), the Supreme Court of Israel reasoned in the following way: 'what is the law regarding civilians serving as a "human shield" for terrorists taking a direct part in the hostilities? Certainly, if they are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking a direct part in the hostilities. They themselves are victims of terrorism. However, if they do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities' (§ 36). Yet the problem is precisely to determine the fate of those who neither are forced to serve as human shields nor do so with the specific intent intent to contributing to the military strategies of one of the belligerents.

20 See also for further reference, Corten (n 2), 480ff.

21 A thorough presentation of the theoretical foundations of this thesis is contained in Dinstein (n 2), esp 185ff.

22 See Art 51 of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83, UN Doc A/RES/56/83, 12 December 2001, Art 51, according to which 'Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.'

23 A mixed approach was taken by the International Court of Justice in *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161, 6 November 2003. At §§ 75 and 76 the Court seems to point out that necessity and proportionality must be measured by different standards: a qualitative standard will measure the necessity of the response, whereas its proportionality should be assessed by a quantitative standard. This reasoning appears at § 77, where the Court compared the relatively minor scale of the

Iranian attack alleged with the large scale of the response adopted by the United States and concluded that the response was disproportionate.

²⁴ See R. Higgins, *Problems and Process. International Law and How We Use It* (Oxford: Clarendon Press, 1994), 231: 'What marks the transition from the *ius in bello* to the *ius ad bellum* is that, in the former, the hostile act should be proportionate to the specific injury received, while in the latter the use of force should be proportionate to the legitimate objective to be achieved'.

²⁵ On this point, see the critical remarks by D. Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in *Jus Ad Bellum*', in 24 *European Journal of International Law* (2013) 235-82.

²⁶ See *Prosecutor v Boškoski and Tarculovski*, IT-04-82-A, Appeal Judgment, 19 May 2010, esp at §§ 31, 44 and 51. At § 31, the Court said: 'The fact that a State resorted to force in self-defence in an internal armed conflict against an armed group does not, in and of itself, prevent the qualification of crimes committed therein as serious violations of international humanitarian law'. To make it even more explicit, at § 51 the Court added: 'The fact that a State is acting in lawful self-defence (*jus ad bellum*) is irrelevant for a determination as to whether a representative of this state has committed a serious violation of international humanitarian law during the exercise of the state's right to self-defence which constituted part of an armed conflict (*jus in bello*).' See also ICTY, *Prosecutor v Kordic and Cerkez*, IT-95-14/2-A, Appeal Judgment, 17 December 2004.

²⁷ See the Final Award on Ethiopia's Damages adopted by the Ethiopia-Eritrea Claims Commission (2009). At § 316, the Commission addressed the issue of the compensation to be awarded for violations of *ius ad bellum* which did not amount to violations of *ius in bello* and found that 'if [...] a State initiating a conflict through a breach of the *jus ad bellum* is liable under international law for a wide range of ensuing consequences, the initiating State will bear extensive liability whether or not its actions respect the *jus in bello*. Indeed, much of the damage for which Ethiopia claims *jus ad bellum* compensation involves conduct that the Commission previously found to be consistent with the *jus in bello*. Imposing extensive liability for conduct that does not violate the *jus in bello* risks eroding the weight and authority of that law and the incentive to comply with it, to the injury of those it aims to protect. The Commission believes that, while appropriate compensation to a claiming State is required to reflect the severity of damage caused to that State by the violation of the *jus ad bellum*, it is not the same as that required for violations of the *jus in bello*.'

²⁸ In the course of the second Lebanon war, many states argued that the violation of proportionality under *ius in bello* also entailed the illegality of the intervention under *ius ad bellum*. For more specific reference, see A. Zimmermann, 'Jus ad bellum, jus in bello and the Issue of proportionality', 11 *MaxPlanck Yearbook of United Nations Law* (2007) 99-141. I refer to my writing 'Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War', 88 *International Review of the Red Cross* (2006) 779-92. An interesting case of conceptual overlap might be found in *Public Committee Against Torture v Israel* before the Israeli Supreme Court. At § 40 the Court said: 'Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest'. The Court did not unveil the source of this rule, which, interestingly, seems to apply only to civilians taking direct part in the hostilities and not to military personnel. It might be argued that such a rule derives from human rights law, which, unlike humanitarian law, requires that any deprivation of life must be based on necessity. This view was suggested in M. Milanovic, 'Norm Conflicts, International Humanitarian Law and Human Rights Law', in O. Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford: Oxford

University Press, 2011), 95. This view seems to be upheld by a short reference to human rights law contained in the decision a few lines below. However, it is interesting to note that a similar structure also inspires the rule of proportionality in *ius ad bellum*, where a state can use force only insofar as it is necessary to repel the attack. One might plausibly assume that the notion of proportionality in *ius in bello* employed by the Supreme Court was also, if not even pre-eminently, inspired by *ius ad bellum*. This would be a case in which a standard of proportionality in *ius ad bellum* also has the effect of limiting proportionality in *ius in bello*. Indeed, classical humanitarian law seems to accord to the belligerents a full-blown right to kill the enemy, be it a regular soldier or a civilian actively involved in the conduct of hostilities, only limited by an obligation to avoid unnecessary suffering.

²⁹ See the famous finding of the International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 8 July 1996: 'In view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake' (*Dispositif*, § 2E).

³⁰ The consideration that lack of proportionality of *ius in bello* can also affect the proportionality of the action under *ius ad bellum* also seems to emerge from the Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011), concerning the legality of the attack carried out by the Israeli navy on certain neutral vessels which attempted to reach Gaza past the sea blockade. See, in particular, §§ 69ff and 77ff. See also Appendix I to the Report: The Applicable International Legal Principles.

³¹ See C.J. Tams and J.G. Devaney, 'Applying Necessity and Proportionality to Anti-Terrorist Self-Defence', 45 *Israel Law Review* (2012) 91-106.

³² Compare Ch 11 in this volume.

(p. 99) 5 Persons Covered by International Humanitarian Law: Main Categories

1. Introduction

Many of the rules of international humanitarian law (IHL) are structured according to particular categories of persons deemed to be in need of protection in situations of armed conflict. The two principal categories of persons under the law of international armed conflict (IAC) are combatants/prisoners of war (POWs) and civilians. Indeed, this categorization lies at the heart of one of the key principles of IHL, that of the distinction between combatants (being, generally, lawful targets) and civilians (being, generally, not lawful targets). These two principal categories are then further divided, with special (additional) rules applying to certain persons falling within each sub-category, including the wounded, sick, and shipwrecked; women; children; the elderly, disabled, and infirm; refugees and internally displaced persons (IDPs); mercenaries and spies; journalists; and the missing and the dead.

The purpose of this chapter is to offer a taxonomy of these different categories of persons under IHL, elaborating on the distinct features of each. It begins by elaborating on the two principal categories of combatant and civilian. It then moves on to an examination of those sub-categories of persons subject to special rules. For each category examined, we will look in turn at their applicability in the context of IACs and non-international armed conflicts (NIACs).

2. Combatants/POWs

A. International Armed Conflicts

The rules regulating the status and treatment of combatants and POWs in IACs are found principally in the Third Geneva Convention (II) and Additional Protocol I (API).¹ There is considerable overlap between the statuses of combatant and POW. As Knut Ipsen explains, the primary status of combatant gives rise to the secondary status of POW when the (p. 100) combatant falls into the power of the enemy.² Thus, article 44(1) of API states clearly that '[a]ny combatant ... who falls into the power of an adverse Party shall be a prisoner of war'.

Article 4 of GCIII specifies upon whom POW status, and thus the protections of GCIII, is conferred. According to this provision, POWs are persons that have fallen into the power of the enemy and belong to one of the following:

- i. The armed forces and the militias and volunteer corps forming part of the forces of a party to the conflict (article 4A(1));
- ii. Other militias or volunteer corps that belong to a party to the conflict and are commanded by a person responsible for subordinates, wear a fixed, distinctive emblem, carry arms openly, and adhere to IHL (article 4A(2));
- iii. Regular forces professing allegiance to an authority not recognised by the detaining power (article 4A(3));
- iv. Non-members authorised to accompany the armed forces (article 4A(4));
- v. Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the parties to the conflict

where no greater protection is offered under international law (article 4A(5)); and

vi. Members of a *levée en masse* (that is, a spontaneous civilian uprising) (article 4A(6)).

Article 4B of GCIII specifies two further categories of persons to be *treated as* POWs:

vii. Demobilised members of the armed forces of occupied territory, if the occupier considers it necessary to intern them, for example, where they have attempted to rejoin the enemy forces, or where they do not comply with a summons for internment, so long as hostilities continue outside the occupied territory (article 4B(1)); and

viii. Those falling in one of the above categories who are in neutral or non-belligerent states and whom such states are obligated under international law to intern (article 4B(2)).

Persons falling into the above categories are thus entitled to the status of POW should they be captured by enemy armed forces. Though there is considerable overlap between the statuses of combatant and POW, they are not fully coterminous. Thus, whilst all combatants are entitled to POW status upon capture, not all those entitled to POW status are necessarily combatants. This is illustrated by the definition of 'civilian' for the purposes of the rules on the conduct of hostilities in article 50(1) of API:

A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third [Geneva] Convention and in Article 43 of this Protocol [ie combatants].

Persons falling within articles 4A(4) and (5) of GCIII (non-members accompanying the armed forces and members of crews of the merchant marine and civil aircraft) are thus entitled to POW status when captured, yet are civilians rather than combatants. This distinction is an important one, for it is only those entitled to combatant status that have a 'right' to participate in hostilities.³ By this is meant that such persons are cloaked with (p. 101) an immunity from domestic prosecution for their 'ordinary', IHL-compliant acts of war.⁴

For those states that have ratified API, some of the rules on combatant/POW status have controversially been altered.⁵ Thus, article 44(1) of API states that, '[a]ny combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war', with article 43(1) of API defining combatants as:

... all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

API thus brings regular armed forces, as well as organized groups and units, previously dealt with separately under articles 4A(1) and (2) of GCIII, under this single paragraph. The requirements for *all* such forces are now simply that they be organized, operate under a

command responsible to a party to the conflict, and have an internal disciplinary system to enforce IHL.⁶

More controversially, article 44(3) of API, after confirming that 'combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack', states that a combatant shall, nevertheless, retain his combatant status if he cannot so distinguish himself, as long as he carries his arms openly during each military engagement and when visible to the enemy whilst deploying for an attack. Article 44(4) then states that failure to honour these requirements shall lead to a forfeiture of POW status, although such persons 'shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war'. The requirement of a fixed, distinctive emblem for combatant/POW status, originally in article 4A(2)(b) of GCIII, has thus been relaxed by article 44(3).⁷ Yoram Dinstein argues that this change is to the detriment of the civilian population, for whom the principle of distinction is so essential.⁸ That said, article 44(3)'s purpose was to bring the increasingly common phenomenon of guerilla warfare within the POW framework,⁹ rather than to change the tradition of the wearing of uniforms by regular state forces.¹⁰

It was this controversy regarding article 44 of API which was invoked by certain states, including the United States, as a reason for not ratifying API.¹¹ The ICRC has noted how controversial this provision continues to be, undermining its ability to crystallize as (p. 102) customary international law.¹² This controversy is confirmed in doctrine, with a number of commentators considering article 44 of API as binding only on states parties to API.¹³ If accurate, this has important consequences for the applicable law in particular conflicts, since, unlike the 1949 Geneva Conventions, the Additional Protocols do not enjoy universal ratification.¹⁴ Indeed, these consequences would be especially pronounced in IACs involving multinational forces, for a captured person may well be entitled to combatant/POW status vis-à-vis one participating state but not vis-à-vis another participating state. It is of course true that API remains widely ratified, even if not by certain states that regularly participate in overseas military operations.¹⁵ Such widespread ratification of treaties has in other contexts been suggested as being capable of contributing to the formation of customary international law.¹⁶ However, some practice of non-state parties in conformity with the conventional rule would ordinarily also be required for that rule to crystallize in custom, unless one were to consider such states to be persistent objectors to the rule.¹⁷

The treaty law of IAC has thus been developed so as progressively to expand the scope of persons entitled to the status of POW. Indeed, alongside this broadening of the definition of POW has been a desire to ensure persons rightfully entitled to the status are not arbitrarily deprived thereof. Thus, article 5 of GCIII contains the following rule:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

There has been some controversy in the practical application of this provision, and it is unclear at what point doubt can be said to have arisen so as to bring into effect the presumption of POW status.¹⁸ Following the 2001 invasion of Afghanistan, for example, the United States did not extend POW status to captured members of the Taliban and al-Qaeda, controversially stating that they had no doubt that such persons were not entitled to that status, thus purporting to exclude the obligation of presumption of POW status under article 5 of GCIII.¹⁹ This position was, however, criticized, for seeking to escape the

international (p. 103) obligation to presume entitlement to POW status in a situation in which doubt could reasonably be said to have existed.²⁰

API sought to prevent the kinds of claims made by the United States in the above case by extending the presumption to a greater number of situations. Thus, article 45(1) of API states:

A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

The consequence of the above provision is that states parties to API must now extend the presumption of POW status to anyone who is captured that has taken part in hostilities, where they claim POW status, they appear to be entitled to such status, or their national state claims it on their behalf.

It is clear from the above provisions that it is assumed that persons will want to be granted POW status. Indeed, the presumptions in articles 5 of GCIII and 45 of API apply, respectively, to persons that have committed a belligerent act and taken part in hostilities. It is especially for such persons that being labelled a POW protected by GCIII (as opposed to a civilian protected by GCIV) would be advantageous, as combatant immunity would apply to ensure that they were not prosecuted for their 'ordinary', IHL-compliant acts of war. In other circumstances, however, this presumption that persons wish to assert POW status may be ill-founded, and certain persons that are detained as POWs solely on the ground of their presumed combatant status may wish to challenge that status; GCIII does not appear to provide any such mechanism. Problems have arisen in this regard in practice, where the detaining authority claims that a person's administrative detention for the duration of hostilities is justified on the basis that they are assumed to be a combatant/POW and thus are detained in accordance with article 21 of GCIII, yet the detainee purports to be a civilian and thus not subject to automatic administrative detention for the duration of the hostilities.²¹ Such situations have arisen with respect to United Kingdom and US detentions in the 1990–91 Gulf War and following the 2003 Iraq invasion; in these cases, both states applied the tribunals under article 5 of GCIII to hear challenges by detainees as to their assumed combatant/POW status.²²

(p. 104) A similar situation was faced by the International Criminal Tribunal for the former Yugoslavia (ICTY), in a case in which the defendants claimed that persons whom they were said to have arbitrarily detained were in fact lawfully held as combatants/POWs. The ICTY held that persons are to be presumed to be civilians, and cannot be arrested as combatants/POWs, *unless clear evidence to the contrary exists*. In *Krnjelac*, the Trial Chamber held that possession of weapons at the time of their arrest did not 'create a reasonable doubt as to the civilian status of most of the Muslim detainees'.²³ Similarly, in *Simić et al*, the Trial Chamber did not accept that:

... allegations about weapons possession, in itself, creates a reasonable doubt as to the civilian status of the persons arrested and detained for possession of weapons ... The fact that most of them were arrested from their homes, combined with a lack of evidence that they participated in an armed conflict, clearly shows that they were

not combatants, but rather, civilians, and consequently were not taken as prisoners of war.²⁴

It seems that, in cases where a person has not clearly taken part in hostilities (in which case a presumption of combatant status and its immunizing of belligerent acts would benefit the individual), the presumption should be of civilian status, such that they can only be detained where the procedures governing detention of civilians are followed.²⁵

B. Non-International Armed Conflicts

The issue of status is especially controversial in the context of NIACs, where persons are not clearly categorized under the applicable rules. Thus, whilst Common Article 3 refers to 'members of the armed forces' and APII refers to 'civilians', suggesting some distinction between categories of persons, no elaborated legal categories of combatant and civilian apply under the treaty law of NIAC. Indeed, there is no combatant or POW status in NIACs, at least in the form in which it exists in IACs, with the consequence that those participating in hostilities on either the state or non-state side are not entitled to combatant immunity under international law; states have consistently rejected the claim that armed opposition groups, even if fighting in compliance with IHL, cannot be prosecuted under domestic criminal law for their actions, which would be the consequence of extending combatant immunity to NIACs.²⁶ Instead, the current *lex lata*, by laying down no rule of combatant immunity in NIACs, leaves states free to immunize (under their domestic law) their own armed forces from domestic prosecution whilst prosecuting armed opposition groups even for IHL-compliant acts. Indeed, the ICRC in its Customary International Humanitarian Law Study (CIHL Study) makes clear that, under both treaty and customary law, combatant status does not apply in NIACs, though sometimes the term 'combatant' is applied in such situations in a lay manner.²⁷

(p. 105) It is thus clear that there is no status of combatant/POW under the law of NIAC in the sense of individuals enjoying combatant immunity and POW status. More controversial, however, is whether IHL draws a distinction between civilians and persons participating in hostilities (whether state or non-state) for the purposes of targeting. Thus:

While it is generally recognized that members of State armed forces in non-international armed conflict do not qualify as civilians, treaty law, State practice, and international jurisprudence have not unequivocally settled whether the same applies to members of organized armed groups (i.e. the armed forces of non-State parties to an armed conflict).²⁸

The question thus remains open as to whether members of non-state armed groups (NSAGs) may be targeted on the basis of their status alone, as is the case for combatants in IACs, or whether they are to be treated as civilians, targetable only if and for so long as they directly participate in hostilities.

There is significant debate on this point.²⁹ In its CIHL Study, for example, the ICRC notes that 'practice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians'.³⁰ On the other hand, in its *Guidance on Direct Participation in Hostilities*, the ICRC states that, given the reference to 'civilians' in APII and their general protection from attack, it might reasonably be presumed that there is a category of 'non-civilians' that are not entitled to such immunity from targeting under IHL.³¹ Indeed, this has been recognized by the ICTY Appeals Chamber.³²

However, the question then arises as to what the parameters of such a category are; that is, who constitutes 'non-civilians' for the purposes of conduct of hostilities. There is no guidance in the treaty rules applicable in NIACs on this point. A number of different approaches have been proffered. The ICRC's *Guidance on Direct Participation in Hostilities*, for example, takes the view that, to comply with IHL, only members of the state armed

forces and members of armed opposition groups who have a 'continuous combat function' may be targeted *ipso facto*, that is, on the same status-based grounds as combatants in IACs.³³ In pertinent part, 'individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function'.³⁴ Others, however, have criticized this definition of 'non-civilians' in NIACs on the grounds that it is too narrow, defining those members of armed opposition groups that can be targeted on the basis of their status more restrictively than those members of the state armed forces that are so targetable; this, so the argument goes, undermines IHL's important principle of the equality of obligations between belligerents.³⁵ (p. 106) Sandesh Sivakumaran, for example, proposes instead a model that contains both a *de jure* notion of membership, based on the membership rules of the NSAG, and a *de facto* notion, based on 'ongoing direct participation in hostilities by persons who are not *de jure* members'.³⁶ By including *de jure* membership, which itself includes members of armed groups not performing a combat function, a broader definition of membership than the ICRC's *Direct Participation Guidance* is endorsed by Sivakumaran's approach.

Though it might be argued that it is now accepted that the law of NIAC does not prohibit the targeting of members of armed opposition groups on the basis of that status alone, it is clear that there is considerable disagreement over the appropriate definition of membership of such groups. Moreover, it must be emphasized that the above only considers the legality of targeting non-state fighters *under IHL*; other bodies of international law, such as international human rights law, may well place additional legal restrictions on whom state forces may lethally target in a NIAC.³⁷

3. Civilians

A. International Armed Conflicts

When the four Geneva Conventions were adopted in 1949, the first three all 'updated' pre-existing treaties, thus furthering the protections granted to combatants rendered *hors de combat*, either as a result of being wounded, sick, or shipwrecked (in the case of GC I and GC II), or as a result of being taken as a prisoner of war (in the case of GC III). GC IV, however, in extending protections to *civilians*, represented a novel development, for it was the first treaty that sought to protect this particular category of persons in armed conflict. Prior to 1949, civilians were in a precarious position, regulated (at the international level) principally by custom, which was prone to change in light of state practice. Indeed, such changes in customary law were clearly visible in the first half of the twentieth century. The preceding centuries had seen the gradual development of the notion that war represented a conflict between states and not between entire populations, enabling enemy civilian populations increasingly to be respected during wartime.³⁸ In contrast, state practice during the First and Second World Wars undermined this considerably:

There was a tendency in the nineteenth century to draw a dividing line between civilians and the armed forces and to leave the former as much as possible undisturbed. The development, however, since the First World War tends to revert to the original practice of identifying the individual with his home State ... Civilians who are resident in the country of a belligerent and are of enemy nationality may, therefore, be interned like prisoners of war, or be subjected to other restrictions, as may be required in the interest of national security.³⁹

(p. 107) The incorporation of civilians as a protected category of persons into the treaty regime governing IACs was thus an important milestone in 1949.

GCIV does not, as such, define the category of 'civilians'. Instead, it defines the category of persons protected by the Convention in article 4, which, with a view to minimizing gaps in the protections accorded to persons in armed conflict, states this in negative terms. Thus, persons protected by GCIV are those that are in the hands of the enemy and are not protected by the first three Geneva Conventions.⁴⁰ Further limitations, however, are placed on GCIV's application. First, with some exceptions in the Convention, it generally only applies where the individual is in the hands of a party to the conflict of which they are not a national.⁴¹ Second, it only applies where the individual's national state is bound by the Convention.⁴² Third, it does not apply to nationals of neutral states in the territory of a belligerent state, and nationals of co-belligerent states, as long as their states maintain normal diplomatic relations with the state in whose hands they are.⁴³ The consequence of the way in which article 4 of GCIV is drafted is that the Convention protects only a subset of what might normally be referred to as 'civilians'. GCIV then goes on to specify a range of protections for such persons, including general protections for all civilian populations, as well as specific protections for civilians in enemy territory and occupied territory.

Whereas GCIV focuses on the so-called 'Geneva rules', that is, protection of civilians that are in the hands of an enemy state (such as those interned by that state), API provides further 'Hague' rules on the protection of civilians from attack, such as a prohibition on the direct targeting of peaceful civilians and the obligation not to carry out attacks that may be expected to cause disproportionate harm to civilian persons or objects. In so doing, API specifically defines the category of 'civilians' that are entitled to such immunity from attack as 'any person who does not belong to one of the categories of persons referred to in article 4 A (1), (2), (3) and (6) of the Third Convention and in article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.'⁴⁴ The category of 'civilians' protected under API from attack is thus framed more broadly than the general category of persons protected under GCIV. In particular, the rules on attacks under API apply with respect to a state's actions on its own territory and towards its own civilian population, whereas the majority of the rules in GCIV, as noted above, apply only with respect to civilians of enemy nationality.⁴⁵

B. Non-International Armed Conflicts

As noted above, whilst the combatant/civilian distinction lies at the heart of the law of IAC, such categories are far less elaborated in NIACs. Indeed, Common Article 3 itself does not refer to civilians, but rather lays down basic protections for all persons *hors de combat*, which (p. 108) includes civilians (as ordinarily understood), as well as members of the armed forces that have laid down their arms or been detained. Furthermore, as has already been discussed, though APII does refer to 'civilians' as being entitled to immunity from attack until and for such time as they directly participate in hostilities, this term is not defined, and there is some disagreement over whether members of armed opposition groups are considered civilians for these purposes, targetable only where they directly participate in hostilities.

4. A Third Category?

In addition to the basic categories of combatant and civilian, there is a debate regarding a possible third category of persons under the law of IAC—so-called 'unlawful combatants' or 'unprivileged belligerents'—who, it is claimed, directly participate in hostilities without being entitled to POW status under GCIII or protected person status under GCIV. This debate was revived in light of the so-called 'war on terror' and resulting detentions at Guantánamo Bay, Cuba, by the US Department of Defence of those it considered 'unlawful enemy combatants' (including members of the Taliban and al-Qaeda).⁴⁶ In examining the status of the Taliban and al-Qaeda, Christopher Greenwood, for example, implied that they fall outside both GCIII and GCIV.⁴⁷ Dinstein, similarly, argues that, '[a] person who engages

in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant.⁴⁸

Such arguments, however, are difficult to reconcile with the text of the Geneva Conventions. As Knut Dörmann argues, the text makes it clear that no third category of person exists, since the scope of GCIV is defined negatively, as protecting those not protected by the other Conventions.⁴⁹ Moreover, given that article 5 of GCIV was designed as a derogation provision for those individuals who may be characterized as unlawful combatants, it is clear that GCIV was intended to cover such persons.⁵⁰ Indeed, state practice, much of which has been in response to post-9/11 US detention practices, similarly confirms the non-existence of this alleged third category.⁵¹ Thus, Emily Crawford notes that, '[g]iven the almost uniform resistance to US attempts to proclaim a "Geneva" status of "unlawful enemy combatant", it is doubtful such a legal category exists'.⁵² Consequently, where not entitled to POW status, if its article 4 conditions are met, an individual is protected by GCIV, albeit subject to article 5 of GCIV.⁵³ Moreover, for the purposes of targeting, persons not lawfully (p. 109) entitled to combatant status are civilians, targetable only if and for so long as they directly participate in hostilities.

5. Persons Entitled to Special Protections

The two fundamental categories of combatant/POW and civilian are further sub-divided into certain categories of persons that are subject to further special protections due to their particularly vulnerable situation. The following sections will explore some of the key sub-categories of special protection, including the wounded, sick, and shipwrecked; women; children; the elderly, disabled, and infirm; refugees and IDPs; journalists; and the missing and the dead.

A. Wounded, Sick, and Shipwrecked

1. International armed conflicts

The category of wounded, sick, and shipwrecked persons has an important place in the history of IHL. Indeed, it was his witnessing of the terrible suffering and fate of the wounded following the Battle of Solferino in 1859 that led Henry Dunant to call for the establishment of relief societies and the adoption of binding standards at the international level on the protection of the wounded and sick in battle.⁵⁴ The consequence was the establishment of what later became the ICRC and the adoption of the first multilateral treaty on the laws of war, the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.⁵⁵ This was subsequently updated and extended to wounded, sick, and shipwrecked members of the armed forces at sea⁵⁶ and, later, wounded and sick members of the civilian population.⁵⁷ These various codifications sought to extend special protections to these categories of persons. For example, GCI prescribes not only the humane treatment of wounded, sick, and shipwrecked members of the armed forces by whatever power in whose hands they fall,⁵⁸ but also the more onerous obligation of searching for and collecting wounded and sick combatants.⁵⁹

The categories of persons entitled to protection under this heading have, in line with the other categories of protected persons under IHL, been expanded over time. With respect (p. 110) to wounded, sick, and shipwrecked members of the armed forces, whilst the 1864 Geneva Convention applied only to 'combatants',⁶⁰ GCI and GCII now extend the relevant protections to all such persons who would otherwise qualify for POW status under article 4 of GCIII (which, as noted in section 2 'Combatants/POWs' above, is a broader category than that of 'combatants').⁶¹ GCI and GCII thus provide additional protections to a specific category of those persons otherwise covered by GCIII; 'the applicability of the latter Convention, will, as a matter of fact rather than law, only materialize in full once wounded

and sick military personnel are brought back behind the lines and are on the way to convalescence and cure'.⁶²

Though the protective category of wounded and sick civilians is subject to the general scope of application of GCIV (on which see section 3 'Civilians' above), certain general rules on search and protection of wounded and sick civilians, as well as on protection of the infirm and expectant mothers, are laid down that bind all states party to an IAC, even with respect to their own nationals.⁶³ There are also other specific protections for wounded and sick civilians of enemy nationality when in the territory of a party to the conflict and in occupied territory (including when interned).⁶⁴

These parallel developments in the protection of wounded, sick, and shipwrecked combatants and wounded and sick civilians were brought together under API, which applies the same protective regime to wounded, sick, and shipwrecked persons of combatant and civilian status.⁶⁵ This protective regime also does not distinguish between nationals of the relevant state and enemy nationals.⁶⁶ These API rules on the protection of wounded, sick, and shipwrecked persons, unlike the API rules noted above on combatant/POW status, are generally accepted as reflecting customary international law; they therefore apply equally to states that are party and states that are not party to API.⁶⁷

Importantly, API, unlike the treaties preceding it, defined what was meant by the term 'wounded', 'sick' and 'shipwrecked'. Thus, article 8(a) of API defines 'wounded' and 'sick' to mean:

... persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostilities. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility.

Article 8(b) then defines 'shipwrecked' to mean:

... persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain (p. 111) from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol.

API thus helped to clarify and consolidate the existing categories and rules on the protection of wounded, sick, and shipwrecked persons.

2. Non-international armed conflicts

From the first codification of the rules applicable in NIACs in 1949, IHL incorporated basic protections on wounded and sick persons. Thus, Common Article 3(1) requires that persons placed *hors de combat* by, inter alia, sickness or wounds, be humanely treated, and Common Article 3(2) requires that '[t]he wounded and sick shall be collected and cared for'. As the ICRC Commentary explains, 'Article 3 here reaffirms, in generalized form, the fundamental principle underlying the original Geneva Convention of 1864.'⁶⁸

More detailed rules on the protection of the wounded, sick, and shipwrecked in NIACs were incorporated in APII.⁶⁹ Though these treaty provisions as such only apply in a sub-set of

NIACs,⁷⁰ the ICRC takes the view that the rules on these particular categories of persons found in the law of IAC also apply as custom in NIACs.⁷¹

B. Women

1. International armed conflicts

A number of provisions in both GCIV and API extend special protections to female civilians. GCIV, for example, requires that women internees that are protected persons under that Convention have separate sleeping quarters and sanitary facilities to male internees.⁷² Moreover, article 27, after setting forth the basic requirement of humane treatment of all persons protected by GCIV, states in paragraph 2 that, '[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'. Article 76 of API repeats this rule,⁷³ adding to it a requirement that pregnant women and mothers with dependent children that are arrested or detained as a result of the conflict 'shall have their cases considered with the utmost priority' and, '[t]o the maximum extent feasible', shall not be sentenced to death.⁷⁴ Importantly, as noted above, the protections for civilians under API, including these specific protections for women, apply to a broader group of persons than the rules in GCIV, including to the nationals of the state in whose hands they find themselves.⁷⁵

(p. 112) These brief provisions on the protection of women in armed conflict appear wholly inadequate when viewed against the background of actual practice. Indeed, practice demonstrates that '[s]exual violence against women in armed conflict is structural, part of the instrumentality of conflict and often inherent to its very aims' (as opposed to being a rare by-product, which these IHL provisions imply).⁷⁶ Practice also shows that gender-based discrimination against women in armed conflict goes far beyond sexual violence, such as in the burdensome domestic and bread-winning responsibilities that fall on them.⁷⁷

To a certain extent, international criminal law has helped to address some of these silences in IHL. The ad hoc international criminal tribunals established in the 1990s recognized a number of gender-based violations, including forced labour and forced marriage, as the crimes underlying certain war crimes, certain crimes against humanity, and genocide.⁷⁸ Yet many problems remain here, such as the failure to engage with the underlying causes of gender-based crimes and the fact that sexual violence is often a core aspect of the manner in which armed conflict is conducted.⁷⁹ There is also the concern that the legal developments in this field have been slow to respond to sexual violence committed against men and boys in armed conflict.⁸⁰

Finally, though the above has focused on protections for civilian women, special treaty provisions also exist for female members of the armed forces. For example, GCIII requires that female prisoners of war are granted treatment as favourable as that of male POWs and are given separate dormitories and bathrooms.⁸¹ Both female civilians and female combatants/POWs are thus the subject of special (albeit limited) rules under IHL.

2. Non-international armed conflicts

As with the law of IAC, the basic treaty rules applicable in NIACs on the protection of civilians apply equally to both women and men.⁸² With respect to specific rules for the protection of women in armed conflict, Common Article 3 is silent. APII, however, does contain certain rules specific to women, such as a requirement to hold women internees separately from men and under the immediate supervision of women,⁸³ and a prohibition of carrying out the death sentence on pregnant women or mothers of young children.⁸⁴ An absolute prohibition of rape and enforced prostitution also applies under APII and protects both male and female victims.⁸⁵ Customary IHL also contains a general rule applicable in

all armed conflicts that '[t]he specific protection, health and assistance needs of women affected by armed conflict must be respected'.⁸⁶

(p. 113) As with the law of IAC, these limited rules applicable in NIACs leave a number of gaps. More generally, the different roles of women in armed conflict have traditionally been under-explored. This is true, for example, regarding the position of female members of NSAGs in NIACs, which has received little research.⁸⁷ Indeed, it has been reported that certain women join such groups in order to prevent further sexual violence against them.⁸⁸ The limited rules in IHL specifically addressing women demonstrate this historical lack of research into their differing roles in armed conflict.

C. Children

1. International armed conflicts

Children are also a specially protected category of person under IHL. GCIV, for example, contains provisions on evacuation of civilian children from besieged areas and care for children under fifteen years of age that are orphaned or separated from their families.⁸⁹ Article 77(1) of API contains the basic rule that '[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.' Other rules include the requirement that children, where detained, shall be held in quarters separate from adults (except where held as a family), and that no person under eighteen years of age shall be executed for committing an offence related to the conflict.⁹⁰

Further rules specific to children focus, inter alia, on recruitment of child soldiers. The upper age limit of this particular category of persons is, however, contentious. Thus, whereas API prohibits recruitment of children under fifteen years of age and requires states to take all feasible measures to ensure that children under fifteen years of age do not take a direct part in hostilities,⁹¹ the Optional Protocol to the 1989 Convention on the Rights of the Child prohibits the *compulsory* recruitment of children under eighteen years of age and requires states to take all feasible measures to ensure that children below that higher age threshold do not take a direct part in hostilities.⁹² Under custom, the ICRC has argued that, though there is no 'uniform practice with respect to the minimum age for recruitment, there is agreement that it should not be below 15 years of age'.⁹³

Special rules on the protection of children thus exist under both of the two principal categories of persons in IHL, those of combatants/POWs and civilians. This is true also of many of the other categories of special protection explored in this chapter, such as women or wounded and sick persons. However, what is especially interesting here is that these rules on recruitment into the armed forces of children do not focus on the protection of children (p. 114) vis-à-vis the enemy state (as is the case with many of the other categories of special protection), but rather on their protection vis-à-vis any state (including their state of nationality).

2. Non-international armed conflicts

With respect to children in NIACs, Common Article 3 is silent regarding special rules of protection. APII remedied this gap to a certain extent (at least for those NIACs to which APII applies), setting out specific rules on protection of children, requiring that children 'be provided with the care and aid they require'.⁹⁴ More specific rules concern, inter alia, education, evacuation, the inapplicability of the death penalty, and a prohibition on the recruitment of children under fifteen years of age into the state or non-state armed forces

and their participation in hostilities.⁹⁵ These are considered to reflect customary international law.⁹⁶

The same lack of a general definition of 'child' for the purposes of these protective rules exists in NIACs as exists in IACs. This has resulted in a lack of clarity on the point at which a child becomes an adult and thus no longer benefits from this specialized regime of protection, though there is a trend towards eighteen years of age as a general standard.⁹⁷ Like API, APII prohibits recruitment and participation in hostilities by states and NSAGs of children under fifteen years of age.⁹⁸ As noted, however, the Optional Protocol to the 1989 Convention on the Rights of the Child adopts the higher age limit of eighteen with respect to compulsory recruitment by the state and the obligation of the state to take all feasible measures to ensure that children below that higher age threshold do not take a direct part in hostilities. Interestingly, the Protocol also states that armed groups 'should not, under any circumstances' recruit persons under eighteen years of age, whether it is through compulsory or voluntary recruitment.⁹⁹

D. Elderly, Disabled, and Infirm

1. International armed conflicts

A number of provisions of IHL specifically refer to elderly, disabled, and infirm persons as sub-categories requiring special protection over and above the ordinary rules applicable to all civilian persons.¹⁰⁰ These include, for example, rules on the conclusion of agreements on the evacuation of certain vulnerable persons, including the infirm and elderly, from besieged areas.¹⁰¹ Other rules provide more generally that a person's age and health must be taken into account in applying the ordinary standards applicable to all protected persons.¹⁰² Importantly, API extended the protections it contains for wounded and sick persons to the infirm and to persons with disabilities.¹⁰³

(p. 115) 2. Non-international armed conflicts

The treaty law of NIAC does not provide specific protections for the elderly, disabled, or infirm. However, importantly, the definition of wounded, sick, and shipwrecked persons under API, which was noted above as extending the protections granted to such persons to the infirm and disabled, is also considered to apply in NIACs.¹⁰⁴ As such, the infirm and disabled are entitled to those same protections for wounded, sick, and shipwrecked persons in NIACs that were outlined above. Moreover, the ICRC Study avers that it is a customary rule applicable in both IACs and NIACs that '[t]he elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection'.¹⁰⁵

E. Refugees and Internally Displaced Persons

1. International armed conflicts

IHL does not deal in detail with the specific category of refugees and internally displaced persons (IDPs). Instead, it merely refers to them in passing in a few specific provisions and, for the most part, only where they otherwise fall within one of the categories of protected person under IHL (as with the other special categories of protection). It has been noted that:

On the one hand, its [IHL's] primary function in the field of forced migration is a preventive one. The explicit prohibition of forced displacement aims to prevent civilians from becoming refugees. On the other hand, international humanitarian law is relatively indifferent to the specific needs of refugees who are in the territory of a party to an armed conflict.¹⁰⁶

Refugees are specifically referred to in only a few provisions of the IHL treaties. First, article 44 of GCIV states that refugees that have the nationality of the enemy state, but do not as a matter of fact enjoy the protection of any state, must not be treated as enemy aliens for the purposes of the various measures of control and security that GCIV permits states to take against enemy aliens. It should be noted that the ICRC Commentary notes that article 44 of GCIV does not require a person to qualify for refugee status as a matter of international or national law; the term rather is used in a factual sense, and is, therefore, broader than it might otherwise be.¹⁰⁷

Second, article 70(2) of GCIV requires that any nationals of an occupying state that sought refuge in the occupied territory before the outbreak of hostilities:

(p. 116)

... shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

It is noteworthy that this provision only prohibits certain measures of control being taken against refugees with the nationality of the occupying state, apparently leaving the occupying power free to introduce measures not explicitly prohibited.¹⁰⁸ The provision also applies only to persons that fled their home state before the outbreak of hostilities, but does not cover persons that fled as a result of the conflict.¹⁰⁹

Finally, article 73 of API requires that persons that were considered stateless or refugees under international or national law before the outbreak of hostilities are to be considered to be protected persons under GCIV. This was an important clarification, as the nationality requirements in article 4 of GCIV, noted above, mean that many persons entitled to refugee status would not be protected under GCIV at the outbreak of hostilities in the territory in which they sought refuge (other than by the general rules on protection of civilian populations in GCIV).¹¹⁰ However, entitlement is restricted under article 73 to persons that qualify as stateless or refugees under international or domestic law; determining the application of article 73 thus requires a *renvoi* to the definition of 'refugee' in, for example, the 1951 Geneva Convention Relating to the Status of Refugees. Moreover, only persons considered stateless or refugees before the outbreak of hostilities are to be protected persons under GCIV. If seeking refuge as a result of the conflict, on the other hand, a person is not entitled to protected person status under that Convention. This has been heavily criticized for undermining the protection of refugees in armed conflict.¹¹¹

As noted above, the only way in which IHL deals explicitly with displacement arising from the armed conflict itself is in a preventive sense, with article 49(1) of GCIV prohibiting 'individual or mass forcible transfers, as well as deportations of protected persons from occupied territory', albeit subject, in paragraph 2, to 'the security of the population or imperative military reasons'. This, however, only applies in the case of occupied territory and where the individuals in question are protected persons under GCIV.

2. Non-international armed conflicts

Like the law of IAC, the law of NIAC addresses this category of persons principally in a preventative sense.¹¹² Thus, article 17(1) of APII contains a prohibition on ordering the displacement of the civilian population 'unless the security of the civilians involved or imperative military reasons so demand'; paragraph 2 then contains an absolute prohibition

of forced deportation of civilians. The ICRC CIHL Study considers this to reflect customary international law in all NIACs (ie not only those meeting the higher threshold in APII).¹¹³

(p. 117) However, the law of NIAC does not generally set out specific rules on addressing the particular vulnerabilities of refugees and displaced persons in armed conflict. There are only a few exceptions, such as the requirement that, where displacement of civilians does take place, 'all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition'.¹¹⁴ Of course, refugees and internally displaced persons will be protected by the general rules in NIAC relating to civilians and, more generally, persons *hors de combat* (assuming they do not join the armed wing of the NSAG or the state's armed forces). This is because there are no nationality requirements attached to these rules, such requirements being, as shown above, problematic for refugees in the context of IACs. Furthermore, other bodies of international law may become relevant in laying down more specific protections for these categories of persons.¹¹⁵

F. Journalists

1. International armed conflicts

Journalists, who 'encompass all members of the general media (as distinct from those media that are run by the armed forces of a Belligerent Party)', are civilians at least for the purposes of the Hague rules on the conduct of hostilities (including immunity from direct attack).¹¹⁶ Journalists reporting from conflict zones are, of course, exposed to significant dangers. The rule that such persons nonetheless must not be considered to have waived their immunity from attack is specifically reiterated in article 79(1) of API.

Slightly more complicated is the position of journalists under the Geneva rules on the protection of war victims. For the purpose of these rules, journalists are divided into two categories: war correspondents, who are entitled to protection as POWs under GCIII in the event that they fall into the hands of the enemy; and all other journalists, who are protected persons under GCIV (assuming they meet the criteria for the application of that Convention). The category of 'war correspondents' under GCIII is defined strictly, referring to journalists that accompany the armed forces without actually being members thereof and who 'have received authorisation from the armed forces which they accompany, who shall provide them for that purpose with an identity card'.¹¹⁷ Only where these conditions are met can a journalist reporting from a conflict zone fall under GCIII rather than GCIV should they fall into the hands of the enemy state.¹¹⁸

Other than these few provisions, the treaty law of IAC does not provide for a special regime of protection for journalists in armed conflict. The ICRC CIHL Study suggests that custom requires not merely that journalists, as civilians, not be attacked, but also that they be respected and protected in carrying out their professional duties. This includes a prohibition on harassment and intimidation of journalists and assaults upon freedom of the (p. 118) press.¹¹⁹ It is unclear, however, whether such protections follow from a special customary status for journalists in armed conflict or simply the ordinary rules applicable to all civilians, including that of humane treatment.¹²⁰

2. Non-international armed conflicts

The IHL treaty provisions applicable in NIAC do not provide specific rules on the protection of journalists. Nonetheless, as in IACs, journalists are civilians for the purposes of the Hague rules on the conduct of hostilities and are thus immune from attack.¹²¹

Unfortunately, this rule is not infrequently violated.¹²² Moreover, since the law of NIAC does not provide for POW status, all journalists, whether embedded within the armed forces or independent, are treated as persons *hors de combat* and are subject to the protective rules applicable thereto, including the basic requirement of humane treatment. Finally, though the ICRC CIHL Study takes the view that the requirement of respect and protection

of journalists applies in all armed conflicts, it is not clear, as noted above, that this adds to the existing treaty and customary framework applicable to civilians generally.

G. The Missing and the Dead

1. International armed conflicts

IHL also provides certain special rules for missing and dead persons (whether civilian or combatant) in armed conflict. With respect to deceased members of the armed forces, GCI, GCII and GCIII require, for example, states party to an IAC to search for, collect, record, and respectfully inter them, as well as respect and maintain their graves and prevent their bodies from being despoiled.¹²³ Concerning civilians, GCIV requires more basically that parties to the conflict 'facilitate the steps taken to search for the killed' and respectfully bury and maintain the graves of dead civilian internees.¹²⁴

API sets down general rules on the missing and the dead, whether civilian or combatant. Article 33 of API introduces a new obligation on parties to an IAC to 'endeavour to agree on arrangements to search for, identify and recover the dead from battlefield areas'. Article 34 of API then, *inter alia*, expands the scope of the GCIV rules on respectful interment and maintenance of graves (which only applied to interned protected persons that had died) to include more generally persons that die for reasons related to occupation and non-nationals of the territory in which they die as a result of hostilities.

With respect to missing persons, GCIII and GCIV contain basic rules on the establishment, by agreement between the parties to the conflict, of commissions to search for (p. 119) 'dispersed' POWs and civilians. Article 33(1) of API introduced the general rule requiring that, '[a]s soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party'. This new general rule was an important addition to the rules in the Geneva Conventions.¹²⁵ Though framed in broad terms, the ICRC Commentary to this article makes clear that:

The request [for information from the adverse party] must relate to persons who are either nationals of that Party, or in some other way are linked to it—such as, in particular, persons who had been admitted to its territory as refugees or persons who had enlisted in its armed forces—or generally persons in whom it has a genuine interest based on the general principle of Article 32 (General principle), such as members of the family of a person belonging to the two former categories.¹²⁶

Nonetheless, the drafters of this provision rejected the notion of adopting a definition of 'missing persons', lest it be invoked as a basis for refusing a request from an adverse party for information about a person they deem to be missing.¹²⁷

2. Non-international armed conflicts

APII introduced the first treaty provisions on the dead in NIACs, setting out the basic obligations to 'search for the dead, prevent their being despoiled, and decently dispose of them'.¹²⁸ No treaty provisions applicable in NIACs specifically detail rules relating to missing persons. However, the ICRC considers many of the rules on missing and dead persons in the context of IACs to be of a customary character applicable in both IACs and NIACs.¹²⁹ On the one hand, this suggests that these two categories of persons entitled to special protection also exist under IHL applicable in NIACs. On the other hand, the ICRC refers in part to the jurisprudence of human rights treaty bodies in establishing some of these customary rules, such as that on missing persons. As such, one might argue that this obligation in NIACs is not *per se* one applicable under IHL, but rather one applicable under human rights law.¹³⁰ Sandesh Sivakumaran argues that, '[i]n light of the close relationship between this rule [on missing persons] and other customary rules, and the link between

norms in various bodies of law, if it is not already a rule of customary international law, it is on its way to becoming one'.¹³¹

(p. 120) 6. Mercenaries and Private Military/Security Companies

A. International Armed Conflicts

The Geneva Conventions make no mention of mercenaries as a specific category of persons in IAC. The assumption, rather, was that they would simply fall within the existing categories of persons established under IHL without the need for further rules. API, however, changed this, with article 47(1) stating that '[a] mercenary shall not have the right to be a combatant or a prisoner of war', with 'mercenary' for these purposes being defined in paragraph 2. It is worth emphasizing that having a provision specifically excluding a particular category of persons from one of the protected statuses is unusual in IHL.¹³² Article 47 must be seen in light of the significant use of mercenaries in many of the conflicts in the period between the adoption of the Geneva Conventions and the Additional Protocols.¹³³ Finally, there is some disagreement over the degree to which article 47 of API represents customary international law. Whereas the ICRC takes the view that this provision reflects custom in IACs,¹³⁴ others take the view that article 47 reflects a departure from customary international law.¹³⁵

Where a person is subject to article 47 of API, the consequence is that they are entitled neither to combatant status, thereby preventing them from benefitting from combatant immunity, nor to POW status, thereby preventing them from benefitting from the protections under GCIII. As was made clear in section 4 'A Third Category' above with respect to so-called unlawful combatants, however, persons who, to varying degrees, participate in hostilities but fail to qualify for combatant/POW status are not unprotected by IHL. Thus, mercenaries could, where its conditions are met, be protected by GCIV.¹³⁶ The nationality conditions under which article 47 applies, however, do mean that, where persons do fall within that provision, they are unlikely to meet the nationality conditions to be considered protected persons under GCIV—thus also preventing them from benefiting from many of the protections under that Convention. Nonetheless, such persons at a minimum are protected by the fundamental guarantees laid down in article 75 of API, widely considered to reflect customary international law.¹³⁷ Furthermore, they would be entitled, as civilians, to protection under the Hague rules on the conduct of hostilities, according to which, *inter alia*, civilians may not be the object of attack unless and for such time as they directly participate in hostilities.

In reality, '[i]t is virtually impossible to find an individual who falls within the Article 47.2 definition' of mercenary.¹³⁸ Moreover, it has been pointed out elsewhere that those (p. 121) falling within the definition of article 47(2) would not be entitled to combatant/POW status in the first place, as the definition excludes members of the armed forces of a party to the conflict, in relation to which API defines combatant status.¹³⁹

With respect to the more modern phenomenon of private military/security companies, while a generalized approach is not possible to determine whether article 47 applies, it seems unlikely that their employees would fall within the strict definition of a mercenary in that provision.¹⁴⁰ Instead, their status as either combatants or civilians would need to be determined on a case-by-case basis. In this respect, it has been noted elsewhere that most employees of private military/security companies would not satisfy the conditions for combatant/POW status under GCIII or API.¹⁴¹ Instead, so the argument goes, the majority are more likely to be considered civilians, entitled to protection from direct attack unless and for so long as they directly participate in hostilities, and entitled to protection under GCIV should they meet the conditions for that Convention's application.¹⁴² Others have taken the view that, where a private military/security company *de facto* performs a combat

function on behalf of the state, they are no longer civilians and become targetable on the same basis as members of the state armed forces.¹⁴³

B. Non-International Armed Conflicts

Given the absence of combatant status in NIAC, there is no equivalent of article 47 of API for such conflicts, though there are mercenary-specific conventions that criminalize mercenaries in all situations, including NIACs (in contrast to IHL, which does not speak to the legality under international law of mercenarism as such, but rather regulates the status of mercenaries).¹⁴⁴ Thus, mercenaries and employees of private military/security companies operating in a NIAC are entitled to the ordinary protections that apply to all persons in such situations where they are *hors de combat*.

The question does arise in such circumstances, however, as to whether employees of private military/security companies operating in a NIAC should be considered as members of the state or non-state armed forces, or whether they should be considered civilians, for the purposes of the rules on targeting. This is related to the controversy, noted above, about the degree to which different statuses of persons exist under the law of NIAC. The ICRC in its Guidance on Direct Participation in Hostilities takes the view that such private contractors can become members of the state armed forces for the purposes of targeting where they are engaged by the state either *de jure* or *de facto* in a combat function.¹⁴⁵ Similarly, the ICRC also takes the view that they could be considered members of the armed opposition group where they perform a continuous combat function on behalf of that group.¹⁴⁶ Indeed, it has (p. 122) also been noted that private contractors could constitute an NSAG party to a NIAC in and of themselves.¹⁴⁷

7. Spies

A. International Armed Conflicts

Like mercenaries, spies fall into the unusual category of persons singled out as *not* being entitled to certain protections. Article 29 of the 1907 Hague Regulations provides the customary definition of a spy for these purposes: '[a] person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party'. In principle, this could include not only members of the armed forces of a party to the conflict, but also civilians.¹⁴⁸

The two principal consequences of falling within this definition are set out in article 46 of API: first, that the person is not entitled to POW status even if they otherwise would be (eg because they are members of the opposing armed forces or civilians accompanying the armed forces in accordance with article 4A(4) of GCIII); and second, that they may be prosecuted for their acts of espionage.¹⁴⁹ Again, the position is thus the same as with mercenaries: espionage in itself is not prohibited by IHL; rather, IHL leaves states free to prosecute those engaging in this act.¹⁵⁰ Again, this is not to say that spies are then left unprotected by IHL, for anyone falling within the scope of these provisions could qualify for protected person status under GCIV, should the conditions for that Convention's applicability be met. It should be noted, however, that article 5 of GCIV does permit derogation from certain of the rules in that Convention for persons engaging in, *inter alia*, espionage.¹⁵¹

B. Non-International Armed Conflicts

Given that POW status does not exist under the law of NIAC, there is no equivalent rule relating to spies in such situations. Rather, all persons *hors de combat* are entitled to the protections granted by the rules of IHL applicable in NIAC, whilst continuing to be subject to the domestic laws of the state(s) concerned. However, were a member of the state armed forces or a member of the armed group performing a continuous combat function (should

one accept the ICRC's approach) to engage in espionage, they would not be entitled to immunity from direct attack under IHL, as discussed in detail above.

(p. 123) 8. Concluding Remarks

This chapter has explored the key categories of persons in both IACs and NIACs according to which the rules of IHL are structured. It has been shown that the two principal categories are those of combatant/POW and civilian; indeed, this basic framework lies at the heart of the fundamental principle of distinction in the rules on the conduct of hostilities under IHL. Notwithstanding this long-established basic framework, a number of practical and doctrinal debates were shown to continue to exist in determining combatant/POW and civilian status. Indeed, this is especially the case under the more embryonic law of NIAC, to which these categories are not quite so easily transposed.

Furthermore, within each of these categories, a number of sub-categories of specially protected persons were shown to exist, recognizing the vulnerability of particular persons in armed conflict. For some of these categories of persons, such as women and displaced persons, the rules remain very basic and inadequate for the contemporary challenges faced in armed conflicts. What is more, many of these categories are even less clearly defined under the law of NIAC. It is to be remembered, however, that the focus of this chapter has been on the applicable rules under IHL; other bodies of international law, including international human rights law and refugee law, continue to apply in parallel, which may well offer more robust protections for certain persons in armed conflict.(p. 124)

Footnotes:

* Some of the content of this chapter has been taken from Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict*, Oxford Monographs in International Humanitarian and Criminal Law (OUP 2016).

1 Geneva Convention (III) Relative to the Treatment of Prisoners of War (12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GCIII); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API).

2 Knut Ipsen, 'Combatants and Non-Combatants', in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 79.

3 Article 43(2) of API.

4 Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP 2010) 52-3.

5 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn, CUP 2010) 51.

6 Ipsen (above n 2) 85.

7 Leslie Green, *The Contemporary Law of Armed Conflict* (3rd edn, Manchester University Press 2008) 135.

8 Dinstein, *The Conduct of Hostilities* (above n 5) 53-4. Similarly, see Guy B Roberts, 'The New Rules for Waging War: The Case against Ratification of Additional Protocol I' (1985-86) 26 *VaJ Int'l L* 109, 129; Abraham D Sofaer, 'The Rationale for the United States Decision' (1988) 82 *AJIL* 784, 786.

- 9** Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff 1987) (AP Commentary) 520–1.
- 10** Article 44(7) of API.
- 11** Sofaer (above n 8) 786.
- 12** Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol 1: Rules* (CUP 2005) (CIHL) 387–9.
- 13** Dinstein, *The Conduct of Hostilities* (above n 5) 54–5; Christopher Greenwood, ‘The Law of War (International Humanitarian Law)’, in Malcolm D Evans (ed), *International Law* (2nd edn, OUP 2006) 790.
- 14** As of 28 January 2020, 196 states are party to the 1949 Geneva Conventions, 174 are party to API, and 169 are party to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII): http://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodes/domino/OpenAttachment/applic/ihl/ihl.nsf/9EE82DA65960019EC12581E7002F91D2/%24File/IHL_and_other_related_Treaties.pdf?Open.
- 15** *ibid.*
- 16** *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3 para 73. Though see the caution noted in Peter Tomka, ‘Custom and the International Court of Justice’ (2013) 12 *Law & Prac Int’l Courts and Tribunals* 195, 207.
- 17** *North Sea Continental Shelf cases* (above n 16) para 76.
- 18** See eg Yasmin Naqvi, ‘Doubtful Prisoner-of-War Status’ (2002) 84 *IRRC* 571.
- 19** Marie-Louise Tougas, ‘Determination of Prisoner of War Status’, in Andrew Clapham, Paolo Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 950.
- 20** See eg Inter-American Commission on Human Rights (IACommHR), *Detainees in Guantanamo Bay, Cuba* (Request for Precautionary Measures) (2002) 41 *ILM* 532.
- 21** On the rules governing detention of civilians in IACs, see Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV) articles 41–43 and 78.
- 22** Nils Mercer, ‘The Future of Article 5 Tribunals in the Light of Experiences in the Iraq War, 2003’, in Caroline Harvey, James Summers, and Nigel D White (eds), *Contemporary Challenges to the Laws of War* (CUP 2014) (on UK practice in Iraq following the 2003 invasion); Naqvi (above n 18) at 586 (on US policy during the Gulf War) and 588 (on UK practice during the Gulf War); Gordon Risius, ‘Prisoners of War and the United Kingdom’, in Peter Rowe (ed), *The Gulf War 1990–91 in International and English Law* (Routledge, 1993) 296 (also on UK practice during the Gulf War).
- 23** *Prosecutor v Krnojelac* (Trial Judgment) ICTY-97-25, Trial Judgment, 15 March 2002 para 117.
- 24** *Prosecutor v Simić et al* (Trial Judgment) ICTY-95-9-T (17 October 2003) para 659.
- 25** See above n 21.

- 26** Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 71; Crawford (above n 4) 104; Yoram Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2014) 219.
- 27** CIHL 12-13.
- 28** Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) (DPH Guidance) 27.
- 29** For an overview of this debate, see Sivakumaran, *Law of Non-International Armed Conflict* (above n 26) 359-63.
- 30** CIHL 17.
- 31** DPH Guidance, 28 ('As the wording and logic of Article 3 GCI-IV and Additional Protocol II (APII) reveals, civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict').
- 32** *Prosecutor v Martić* (Appeals Judgment) ICTY-95-11-A (8 October 2008) paras 300-302.
- 33** DPH Guidance, 27.
- 34** *ibid* 34.
- 35** Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 *NYU J Int'l L & Pol'y* 641, 675-8; Sivakumaran, *Law of Non-International Armed Conflict* (above n 26) 360-2.
- 36** Sivakumaran, *Law of Non-International Armed Conflict* (above n 26) 360.
- 37** Marco Sassòli and Laura M Olson, 'The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 *IRRC* 599, 613-16.
- 38** John Westlake, *International Law Part II: War* (CUP 1907) 32-8; Norman Bentwich, 'International Law as Applied by England in the War: The Treatment of Alien Enemies' (1915) 9 *AJIL* 642, 646.
- 39** Georg Schwarzenberger, *A Manual of International Law* (Stevens 1947) 80.
- 40** GCIV article 4(4).
- 41** *ibid* article 4(1). The ICTY Appeals Chamber in *Prosecutor v Tadić* (Appeals Judgment) ICTY-94-1-A (15 July 1999) paras 166-169, however, took the view that the drafting history and object and purpose of GCIV, together with the trend in modern warfare that now sees conflicts as being inter-ethnic rather than primarily inter-state, necessitate a reading of the test for the applicability of GCIV as being based not on nationality but allegiance.
- 42** GCIV article 4(2).
- 43** *ibid*.
- 44** API article 50(1).
- 45** *ibid* article 49(2); AP Commentary 604-5.
- 46** Crawford (above n 4) 56-61; Ipsen (above n 2) 83.
- 47** Christopher Greenwood, 'International Law and the "War Against Terrorism"' (2002) 78 *Int'l Affairs* 301, 316.
- 48** Dinstein, *The Conduct of Hostilities* (above n 5) 36. For a slightly different approach, see Jason Callen, 'Unlawful Combatants and the Geneva Conventions' (2004) 44 *Va J Int'l L* 1025 (arguing that GCIV applies to spies/saboteurs in enemy territory but not to 'unlawful

combatants' on the battlefield, invoking the distinction drawn in Richard R Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs' (1951) 28 *BYBIL* 323).

49 Knut Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85 *IRRC* 45, 49.

50 *ibid* 50.

51 See eg Peter Tange, 'Netherlands State Practice for the Parliamentary Year 2007-2008' (2007) 38 *NYIL* 263, 290; HCJ 769/02, *Public Committee against Torture in Israel et al v The Government of Israel et al*, 57(6) PD 285 (Israeli Supreme Court) paras [26]-[28]; *A v State of Israel*, CrimA 3261/08, 11 June 2008 (Israeli Supreme Court) para 12; UK Ministry of Defence, *Joint Doctrine Publication 1-10: Captured Persons (CPERS)* (3rd edn, Ministry of Defence 2015) 1-16 para 141.

52 Crawford (above n 4) 60.

53 Similarly, see Jean Pictet (ed), *Commentary: Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) (GCIV Commentary) 51; Dörmann (above n 49) 49; Derek Jinks, 'The Declining Significance of POW Status' (2004) 45 *Harvard Int'l LJ* 367, 381-6; Marco Sassòli, 'The Status of Persons Held in Guantánamo under International Humanitarian Law' (2004) 2 *JICJ* 96, 100-2; Crawford (above n 4) 60-1.

54 Henry Dunant, *The Battle of Solferino* (ICRC 1986).

55 (22 August 1864, entered into force 22 June 1965) 129 CTS 361.

56 See eg Hague Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864 (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 443; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 6 July 1906, entered into force 9 August 1907) 11 LNTS 440; Geneva Convention (I) for the Amelioration of the Wounded and Sick in the Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GCI), and Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 12 October 1949) 75 UNTS 85 (GCII).

57 GCIV articles 16-22; API Part II.

58 GCI article 12; GCII article 12.

59 GCI article 15; GCII article 18.

60 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted 22 August 1864, entered into force 22 June 1865) article 6.

61 GCI article 13, and GCII article 13.

62 Jann Kleffner, 'Protection of the Wounded, Sick, and Shipwrecked', in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 323.

63 GCIV article 16.

64 See eg *ibid* articles 38(2) and 57.

65 API articles 8(a) and (b).

66 *ibid* article 9(1).

67 Kleffner (above n 62) 324; CIHL rules 109, 110, and 111.

68 GCIV Commentary 40.

69 APII articles 7-12.

- 70** On this, and on the various categories of armed conflict more generally, see Marko Milanovic and Vidan Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict', in Nigel White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013).
- 71** Kleffner (above n 62) 322. Though cf James Benoit, 'Mistreatment of the Wounded, Sick and Shipwrecked by the ICRC Study on Customary International Humanitarian Law' (2008) 11 *YIHL* 175, 199-203, 210-12, 214-15.
- 72** GCIV article 85(4).
- 73** API article 76(1).
- 74** *ibid* articles 76(2) and (3).
- 75** Dinstein, *The Conduct of Hostilities* (above n 5) 156.
- 76** Christine Chinkin, 'Gender and Armed Conflict', in Andrew Clapham and Paolo Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 680.
- 77** *ibid*.
- 78** *ibid* 687.
- 79** See also the alternative critique in Karen Engle, 'Feminism and Its (Dis)contents: Criminalizing Wartime Rape' (2005) 99 *AJIL* 778.
- 80** Sandesh Sivakumaran, 'Sexual Violence against Men in Armed Conflict' (2007) 18 *EJIL* 253.
- 81** See GCIII articles 14, 25 and 29, respectively.
- 82** Françoise Krill, 'The Protection of Women in International Humanitarian Law' (1985) 25 *IRRC* 337.
- 83** APII article 5(2)(a); CIHL rule 119.
- 84** APII article 6(4).
- 85** *ibid* article 4(2)(e); CIHL rule 93.
- 86** CIHL rule 134.
- 87** Geneva Call, 'Women in Armed Opposition Groups in Africa and the Promotion of International Humanitarian Law and Human Rights: Report of a Workshop organized in Addis Ababa by Geneva Call and the Program for the Study of International organization(s) (23-26 November 2005)', cited in Sivakumaran, *Law of Non-International Armed Conflict* (above n 26) 314.
- 88** Sivakumaran, *Law of Non-International Armed Conflict* (above n 26) 314.
- 89** See GCIV articles 17 and 24, respectively.
- 90** API articles 77(4) and (5), respectively.
- 91** See eg API article 77(2).
- 92** Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) A-27531 (2173), articles 1 and 2.
- 93** CIHL 485.
- 94** APII article 4(3).
- 95** APII articles 4(3) and 6(4).

96 CIHL rules 135, 136 and 137; Sivakumaran, *Law of Non-International Armed Conflict* (above n 26) 315–24.

97 Sivakumaran, *Law of Non-International Armed Conflict* (above n 26) 315; CIHL 481–2.

98 APII article 4(3)(c).

99 Optional Protocol (above n 92) article 4(1).

100 See eg GCIV article 16: ‘The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.’

101 *ibid* article 17.

102 See eg *ibid* article 85 (on sufficient bedding for internees) and article 119 (on disciplinary punishments).

103 API article 8(a).

104 Sivakumaran, *Law of Non-International Armed Conflict* (above n 26) 274.

105 CIHL rule 138.

106 Vincent Chetail, ‘Armed Conflict and Forced Migration: A Systemic Approach to International Humanitarian Law, Refugee Law, and Human Rights Law’, in Clapham and Gaeta (eds (above n 76) 704 (footnotes omitted). The prohibition of forced displacement referred to is that in GCIV article 49 and APII article 17.

107 GCIV Commentary 264:

The Convention does not define the term refugee. It merely notes the fact that certain persons do not “enjoy the protection of any government”: if a protected person who is in law a national of an enemy State is in actual fact without any diplomatic protection (whether because he has broken with his country’s government or because he does not wish to claim its protection), this provision applies to that person. The clause should be interpreted in this broad sense, in accordance with the spirit of the Convention.

Similarly, see Chetail (above n 106) 707.

108 Yoram Dinstein, ‘Refugees and the Law of Armed Conflict’ (1982) 12 *Israel YB HR* 94, 104.

109 Chetail (above n 106) 709.

110 *ibid* 708.

111 See eg *ibid* 706; Mélanie Jacques, *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law* (CUP 2012) 162.

112 Emanuela-Chiara Gillard, ‘The Role of International Humanitarian Law in the Protection of Internally Displaced Persons’ (2005) 24 *Refugee Survey Q* 37, 39–41.

113 CIHL rule 129B.

114 APII article 17(1); CIHL rule 131. Other purported exceptions under custom include the right of return for displaced persons and the requirement that the property rights of displaced persons be respected: see, respectively, CIHL rule 133 and rule 132.

115 Sivakumaran, *Law of Non-International Armed Conflict* (above n 26) 289 (referring to international human rights law and the Guiding Principles on Internal Displacement, the latter of which codifies both hard and soft law).

116 Dinstein, *The Conduct of Hostilities* (above n 5) 166.

117 GCIII article 4A(4).

118 Robin Geiss, 'The Protection of Journalists in Armed Conflicts' (2008) 51 *GYIL* 289, 310.

119 CIHL rule 34.

120 On the question of a potential special regime of protection for journalists in armed conflict, see eg Ben Saul, 'The International Protection of Journalists in Armed Conflict and other Violent Situations' (2008) 13 *AJHR* 99; Isabel Düsterhöft, 'The Protection of Journalists in Armed Conflicts: How Can They Be Better Safeguarded?' (2013) 29 *Utrecht J Int'l Eur L* 4. See also Draft United Nations Convention on the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict UN Doc A/10147 (1 August 1975).

121 Sivakumaran, *Law of Non-International Armed Conflict* (above n 26) 311.

122 *ibid* 312.

123 GCI articles 15(1), 16, and 17; GCII articles 18(1), 19, and 20; GCIII article 120.

124 GCIV articles 16(2) and 130.

125 Kleffner (above n 62) 334; AP Commentary 350.

126 AP Commentary 350.

127 *ibid* 351.

128 APII article 8.

129 Regarding the dead, see CIHL rules 112 (search for the dead), 113 (prohibition of despoliation of the dead), 115 (respectful burial and maintenance of graves), and 116 (record-keeping of the dead). Though cf CIHL rule 114 (return of the remains of the deceased to their next of kin), for which the ICRC states that it is not clear that this has crystallized yet as a rule of custom in non-international armed conflict. Regarding missing persons, see CIHL rule 117 (take all feasible measures to account for persons reported missing as a result of a conflict).

130 CIHL 425.

131 Sivakumaran, *Law of Non-International Armed Conflict* (above n 26) 285. See also Susan Breau and Marie Aronsson, 'Drone Attacks, International Law, and the Recording of Civilian Casualties in Armed Conflict' (2012) 35 *Suffolk Transnat'l L Rev* 255.

132 Lindsey Cameron, 'Private Military Companies: Their Status under International Humanitarian Law and Its Impact on their Regulation' (2006) 88 *IRRC* 573, 580.

133 AP Commentary 572-4.

134 CIHL rule 108.

135 Michael Matheson, 'The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions' (1987) 4 *Am U J Int'l L & Pol'y* 426; Dinstein, *The Conduct of Hostilities* (n 5) 67; HC Burmester, 'The Recruitment and Use of Mercenaries in Armed Conflicts' (1978) 72 *AJIL* 37.

136 Emanuela-Chiara Gillard, 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) 88 *IRRC* 525, 562-4.

137 See eg Sandra Krähenmann, 'Protection of Prisoners in Armed Conflict', in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 368.

138 Katherine Fallah, 'Corporate Actors: The Legal Status of Mercenaries in Armed Conflict' (2006) 88 *IRRC* 599, 605.

139 *ibid* 606.

140 See eg Cameron (above n 132) 581-2 (on companies operating in Iraq).

141 Gillard, 'Business Goes to War' (above n 136) 531-6; Cameron (above n 132) 582-7. Though note Gillard, 'Business Goes to War' (above n 136) at 536-9 (stating that some may be entitled to POW status, though not combatant status, under GCIII article 4A(4) as civilian contractors accompanying the armed forces).

142 Gillard, 'Business Goes to War' (above n 136) 539; Cameron (above n 132) 587.

143 *DPH Guidance* 39, n 71.

144 Cameron (above n 132) 578.

145 *DPH Guidance* 39, n 71.

146 *ibid* 39.

147 *ibid* 39-40.

148 Ipsen (above n 2) 108. Though API article 46 only applies as such to members of the armed forces, Hague Convention (IV) Respecting the Customs of War on Land and Its Annex: Regulations concerning the Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227 (Hague Regulations) article 29 applies to any person engaging in espionage.

149 API article 46(1); Ipsen (above n 2) 109.

150 AP Commentary 562.

151 *ibid* 563-4.

(p. 175) 8 Specifically Protected Persons and Objects

1. Introduction

Probably the most fundamental rule in international humanitarian law (IHL) is that a distinction must be made between civilians and combatants and between civilian objects and military objectives (see also chapter 7 'International Humanitarian Law and the Conduct of Hostilities'). In addition to this general notion, certain categories of persons and objects receive specific protection, typically because they are seen as particularly vulnerable. These categories of specifically protected persons and objects are the focus of this chapter. The aim is to provide a tour d'horizon of the various categories. Some of them—namely the wounded and sick, as well as the protection accorded to cultural property—are addressed in detail in order to illustrate the legal mechanisms used to implement special protection; some are discussed cursorily, and others are mentioned only briefly, with the reader being directed to the relevant parts elsewhere in this book.

2. Historical Development

There are various documents pre-dating the 1949 Geneva Conventions and 1977 Additional Protocols containing provisions dealing with special protection. The oldest example, albeit on the national level, is the 1863 *Lieber Instructions* (better known as the *Lieber Code*), the first attempt to codify the laws of war (see also chapter 1 'History and Sources' in this book).¹ For instance, article 35 of the *Lieber Code*² states that '[c]lassical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained (p. 176) in fortified places whilst besieged or bombarded'.³ Also nowadays, special protection is offered to cultural property and hospitals; see below. Another example can be found in article 71 of the *Lieber Code*, which clarifies:

Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.⁴

This can be seen as an ancestor of modern provisions—such as article 41(1) Additional Protocol I (API)—which provide special protection to persons *hors de combat*. A third is article 79 of the *Lieber Code*, which stipulates that '[e]very captured wounded enemy shall be medically treated, according to the ability of the medical staff.' Indeed, the protection of the wounded and sick 'has been at the heart of humanitarian law since its modern inception'.⁵ With respect to the international level, wounded and sick military personnel—and the medical staff assigned to their care—were the first category of 'protected persons' who benefitted from legal protection laid out in the 1864 First Geneva Convention, which was henceforth revised in 1906, 1929, 1949, and again in 1977, with the aim of gradually completing and adapting this legal regime of special protection to the changing nature of armed conflict.⁶ For example, whereas initially the legal protections applied only to wounded and sick military personnel, API extended these protections also to wounded and sick civilians. Over time various other categories of persons and objects have been identified as being in need of special protection and specific regulation, and international treaty law as well as customary international law have developed accordingly. Thus, in addition to the legal protection granted to the wounded and sick, contemporary IHL specifically regulates religious personnel, medical units and transports, persons and objects displaying the distinctive emblem, humanitarian relief personnel and objects, personnel and

objects involved in peacekeeping missions, journalists, women, children, missing persons, hospital and safety zones, cultural property, and the environment.

3. Categories of Persons and Objects

In the following pages, various categories of persons and objects receiving specific protection are addressed. The main categorization is naturally in categories of ‘persons’ (section A) and ‘objects’ (section B).

(p. 177) A. Categories of Persons

1. *Wounded and sick*

A. Definition

The wounded and sick are specifically protected in both international armed conflicts (IACs) and non-international armed conflicts (NIACs). Legally speaking there is no difference between being either ‘wounded’ or ‘sick’. The same legal protections apply. With regard to IACs—the same definition can, however, be used also for the purposes of NIACs⁷—article 8(a) API⁸ defines ‘wounded’ and ‘sick’ as:

... persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility.

It follows that unlike the colloquial understanding of the terms ‘wounded’ and ‘sick’, the legal definition requires the cumulative fulfilment of two distinct elements: a person must be in need of medical care and must refrain from any act of hostility.⁹ As the listing in article 8(a) API makes clear, a person may be in medical need for a variety of reasons, without—in the strict sense—being wounded or sick (eg in the case of maternity cases).

B. Protection granted

Various protections apply to the wounded and sick. The analysis below focuses on three central sets of obligations.

(i) *The obligation to respect and protect*

The obligations to ‘respect and protect’ the wounded and sick can be found in various provisions.¹⁰ These obligations are complementary. They entail that there is not only a *negative* obligation, hence that one must *abstain/refrain* from conduct harming the wounded and sick, that is sparing, not attacking the wounded and sick—an obligation of result (‘to respect’), but also that there is a *positive* obligation, namely that one must (*pro*)actively take measures to ensure the protection of the wounded and sick, that is helping, supporting the wounded and sick—an obligation of (p. 178) conduct (‘to protect’).¹¹ The various more detailed obligations applicable to the wounded and sick can be regarded as specifications of the general obligation to ‘respect and protect’.

The complementary obligations to respect and protect—a phrase that first appeared in the 1906 Geneva Convention—are a recurrent feature of the legal regimes according special protection to different categories of persons and objects throughout the Geneva Conventions (GCs) and their Additional Protocols (APs). Thus, in Resolution 2286 the UN Security Council recalled the obligations ‘to respect and protect, in situations of armed conflict, medical personnel and humanitarian personnel exclusively engaged in medical

duties, their means of transport and equipment, and hospitals and other medical facilities, which must not be attacked'.¹²

(ii) *Humane treatment and medical care*

In various provisions dealing with both IACs and NIACs, it is clarified that the wounded and sick shall be treated humanely and cared for by the party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria.¹³ In more detail:

Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not willfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.¹⁴

Novak, referring to Pictet, has noted that '[w]hile the exact meaning of "humane treatment" depends on the respective context, it is at least considered as "a minimum to be reserved for the individual to enable him to lead an acceptable existence in as normal a manner as possible"'.¹⁵ The obligation of humane treatment imposes an obligation of result. Treatment must never fall below this minimum standard. The obligation aims to protect the inherent human dignity of the wounded and sick and therefore 'pervades all aspects of treatment of the wounded and sick'.¹⁶

The obligation to provide medical care for the wounded and sick imposes an obligation of conduct; that is, it is an obligation of means that is to be carried out with due diligence. As such the obligation is context dependent. What exactly is required depends on what kind of medical care can reasonably be expected under the given circumstances of each case. Factors to be taken into consideration when assessing the required forms of medical (p. 179) care include the type and severity of the medical condition, and the available medical expertise and resources, as well as the level of risk (eg if medical care is to be administered on the battlefield). As a general rule, the wounded and sick should receive the medical care required by their condition: severe injuries will require more than minor injuries and skilled medical personnel can be expected to do more than ordinary soldiers. Although no 'adverse' distinction is to be made, urgent medical reasons can in fact justify prioritization in the order of treatment to be administered.¹⁷ Moreover, the law recognizes that sometimes a party may be compelled to abandon the wounded or sick to the enemy.¹⁸ In such a case, and as far as military considerations permit, they must be left with a part of the party's medical personnel and material who can assist in their care.¹⁹

(iii) *Search, collect, and evacuate*

Parties to both IACs and NIACs are also under an obligation to search for, collect, and evacuate the wounded and sick. These obligations are complementary and should be understood as a single obligation to carry out search-and-rescue activities whenever there is reason to believe that wounded and sick may be in the area. This is an obligation of conduct. As such it is relative and dependent on the circumstances of each particular case. The relevant point of reference is which kinds of measures and activities could reasonably be expected under the given circumstances.

2. *Shipwrecked*

Article 8(b) API defines 'shipwrecked' as 'persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility'.²⁰ Similar to the status of the wounded and sick, the status of being shipwrecked requires the cumulative fulfilment of two distinct criteria, namely that of being in a perilous situation in a specific context and of abstaining from any act of hostility. The protective regime applicable to the shipwrecked in

both IAC and NIAC is by and large identical to the regime applicable to the wounded and sick.

3. Medical personnel and medical activities

Article 8(c) API defines medical personnel as ‘those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under sub-paragraph e)²¹ or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary.’ This category includes:

- i) [M]edical personnel of a Party to the conflict, whether military or civilian,^[22] including those described in the First and Second Conventions, and those assigned to civil defence (p. 180) organizations; ii) medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict [this includes the ICRC]; iii) medical personnel of medical units or medical transports described in Article 9, paragraph 2^[23].²⁴

Although APII does not contain a definition of medical personnel, the term, as used in NIACs, may be understood in the same sense as that defined in API.²⁵ The ICRC’s Customary International Humanitarian Law Study (CIHL Study) explains that ‘[o]nly medical personnel assigned to medical duties by a party to the conflict enjoy protected status. Other persons performing medical duties ... are not medical personnel and as a result ... have no right to display the distinctive emblems’²⁶ (see also below).

The category of medical personnel is obviously highly inter-related to the category of wounded and sick (and shipwrecked) already discussed. For instance, article 24 GCI states that:

Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.

In the same vein, the protection of medical personnel in NIACs can be retrieved from article 3 common to the GCs, which stipulates in its paragraph 2 that ‘The wounded and sick shall be collected and cared for.’ After all, if medical personnel cannot be protected in the first place to do their job, then the wounded and sick can also not be collected and cared for.²⁷ A more explicit protective provision—not only for medical, but also for religious personnel—can be found in article 9(1) APII.²⁸

The special protection of medical personnel, whether military or civilian, is, however, not absolute, as is the case with so many of the categories under discussion in this chapter. Indeed, when they perpetrate, outside of their humanitarian function, acts harmful to the enemy, they lose their protection from direct attack.²⁹ Also here, it becomes clear that the protection of medical personnel ‘is not a personal privilege but rather a corollary of the respect and protection due to the wounded and sick, who must be treated humanely in all (p. 181) circumstances’.³⁰ An act is considered harmful to the enemy when, for instance, medical teams are incorporated into combat units and their medical personnel bear arms and take a direct part in hostilities.³¹ However, the mere caring for enemy wounded and sick military personnel or the sole wearing of enemy military uniforms is not considered to amount to a hostile act. In addition, medical personnel can be equipped with small arms to

defend themselves or their patients and even their use, for that purpose, is allowed (see also section 3.B.1.B 'Hospital ships' below).³²

When they are incorporated in the armed forces, medical personnel are not combatants, and thus cannot be taken as prisoners of war (POWs).³³ As a general rule, medical personnel shall be returned to the party to the conflict to whom they belong (article 30 GCI).

Even though the special protection for medical personnel seems obvious, in August 2014, Human Rights Watch (HRW) accused insurgents in eastern Ukraine of having 'threatened medical staff, stolen and destroyed medical equipment and hospital furniture, and compromised the ability of civilian patients to receive treatment'.³⁴ HRW also alleged that they had 'expropriated ambulances and used them to transport active fighters'.³⁵ Such attacks are clearly prohibited by IHL. Nevertheless, such attacks are on the increase and the UN Security Council recently felt the need to adopt a resolution in which it 'strongly condemns acts of violence, attacks and threats against the wounded and sick, medical personnel and humanitarian personnel' and the prevailing impunity for such violations of IHL.³⁶

4. Religious personnel

Article 8(d) API defines religious personnel as:

... military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached: i) to the armed forces of a Party to the conflict; ii) to medical units or medical transports of a Party to the conflict; iii) to medical units or medical transports described in Article 9, paragraph 2^[37]; or iv) to civil defence organizations of a Party to the conflict. The attachment of religious personnel may be either permanent or temporary, and the relevant provisions mentioned under subparagraph k)^[38] apply to them.

The protection of religious personnel was mentioned in the previous category, section 3.A.3 'Medical personnel and medical activities', when discussing article 24 GCI (see the (p. 182) reference to chaplains in that provision), as well as article 9(1) APII. Religious personnel, whether military or civilian, receive the same respect as medical personnel.³⁹ Although APII does not contain a definition of religious personnel, this term may be understood as applying in the same sense in NIACs.⁴⁰ When they are incorporated in the armed forces, religious personnel—just like medical personnel (see above)—are not combatants, and thus cannot be taken POWs.⁴¹

5. Women

The participation of women in armed conflict has grown significantly over time. As either combatants or civilians, women are subject to the general regulations. But in addition to these general protections, IHL also mentions women—whether as combatants or as civilians—specifically. This is done not because women are seen to be inherently (more) vulnerable but to emphasize that women have specific needs and may face specific physical and psychological risks in the context of armed conflicts 'including the increased risk of sexual violence'.⁴²

Historically, armies even considered rape one of the legitimate spoils of war, although the atrocities in the former Yugoslavia and Rwanda led to recognition of sexual violence as an international crime, with the International Criminal Tribunal for Rwanda (ICTR) being the first international court to find an accused person—Jean-Paul Akayesu—guilty of rape as a crime of genocide in 1998.⁴³ Regardless of these positive steps, recent history teaches that

sexual violence remains extremely problematic. For instance, the organization that calls itself Islamic State (IS) has admitted to and even 'justified' sex slavery.⁴⁴

Returning to the rules of IHL and the two categories mentioned above: as to the first category (combatants), article 12 of both GCI and GCII explains that women shall be treated with all consideration due to their sex and article 14 of GCIII likewise stipulates that women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men. More detailed provisions can be found in, for example, article 76 API, clarifying that '[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault,' and articles 97 and 108 GCIII, which explain that female POWs shall undergo their disciplinary punishment or be confined (after their sentence) in separate quarters and be (p. 183) supervised by women. However, if possible, families must stay together.⁴⁵ Such a rule is also applicable to internees in the context of NIACs.⁴⁶ Moreover, the dormitories⁴⁷ and hygienic conveniences⁴⁸ of female POWs shall be separated from those of male POWs, and there are also specific protective provisions on the execution of penalties.⁴⁹

As to the second category (civilians), an example of special protection can be found in article 27 GCIV, which makes clear that women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.⁵⁰ As with the first category (see above), women shall be confined in separate quarters and supervised by women,⁵¹ but families must, if possible, be accommodated together.⁵² As with the previous category (combatants), this rule is also valid in NIACs, for internees.⁵³ Moreover, women can only be searched by other women.⁵⁴ Finally, there are also specific protective provisions on non-repatriated persons⁵⁵ and accommodation and hygiene.⁵⁶

In addition, it should be clarified that IHL has specific regulations for a special category of women, namely pregnant and nursing women, as well as mothers of dependent children. Examples can be found in article 16 GCIV (mentioned in section 3.A.1. 'Wounded and sick' above); in article 70(1) API (distribution of relief consignments); article 76(2) API, which explains that pregnant women and mothers having dependent infants who are arrested, detained, or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority; and article 76(3) API (death penalty).⁵⁷ That the death penalty shall not be carried out on pregnant women or mothers of young/dependent children can also be found in NIACs; see article 6(4) APII.

6. Children

Children are also a category of persons that are specifically mentioned—and protected—in IHL. The basis of the special protection for children in IHL is formed by their 'physical weakness and the importance of their preservation to future generations'.⁵⁸ Unfortunately and sadly, there are too many examples showing that special protection for this vulnerable group remains absolutely necessary. One can only think of the repugnant practices by IS, which is preparing an entire new generation of jihadi killers by training and brainwashing boys, the 'Cubs of the Caliphate', in how to manufacture bombs, fight in combat, and execute people.⁵⁹

(p. 184) A few of the special protections that IHL has in place for children have already been mentioned, such as the provision on distribution of relief consignments (article 70 (1) API),⁶⁰ food (article 89 GCIV),⁶¹ and with regard to the death penalty (article 6(4) APII).⁶² Also the previously discussed category of 'mothers of dependent children' brings special protection, not only for those mothers, but obviously also for those dependent children.

After all, executing a mother with dependent infants⁶³ will undoubtedly create many additional problems for the motherless children as well.⁶⁴

A provision specifically dedicated to the protection of children is article 77(1) API, which states that '[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.' The same article also addresses recruitment and participation in hostilities (to be discussed in more detail below).⁶⁵ It clarifies, moreover, that arrested/detained/interned children shall be held in separate quarters (except where families are accommodated as family units)⁶⁶ and shall not be executed if at the time the offence was committed they had not attained the age of eighteen⁶⁷ (see also the rule for NIACs mentioned in section 3.A.5. 'Women' above).

In the context of NIACs, a broadly formulated protection can be found in article 4(3) of APII, which states that '[c]hildren shall be provided with the care and aid they require', followed by more specific rules on education,⁶⁸ family reunion,⁶⁹ recruitment and participation in hostilities (to be discussed in more detail below),⁷⁰ and evacuation.⁷¹

IHL has specific regulations for special categories of children, such as article 24 GCIV, which is aimed at children under fifteen, who are orphaned or are separated from their families as a result of the war. The same article also explains that the parties to the conflict 'shall, furthermore, endeavour to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means'. This is yet again an illustration of the fact that there exist various categories of children under IHL: children as such, young (p. 185) children, dependent children, children under twelve, children under fifteen,⁷² as well as children under eighteen.⁷³

This is also clearly visible in the regulations on child soldiers; the previously mentioned article 77(2) API clarifies that:

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.⁷⁴

The rule that children under fifteen cannot be recruited in the armed forces or take (a direct) part in hostilities is also applicable in NIACs; see the previously mentioned article 4(3)(c) of APII. This minimum age of fifteen can, moreover, be found in the Statute of the International Criminal Court,⁷⁵ the Statute of the (now defunct) Special Court for Sierra Leone,⁷⁶ and the Convention on the Rights of the Child, which contains provisions from both international human rights law (IHRL) and IHL.⁷⁷ At the same time, there has been discussion about whether this minimum age should not be eighteen.⁷⁸ The CIHL Study therefore concludes that '[a]lthough there is not, as yet, a uniform practice with respect to the minimum age for recruitment, there is agreement that it should not be below 15 years of age'.⁷⁹

Children must not be recruited into the armed forces or armed groups and must not be allowed to take part in hostilities. Regarding the question which kinds of activities would amount to such a participation in hostilities in the context of child soldiers, the ICC Trial Chamber in Lubanga held that:

Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants ... The decisive factor in deciding, therefore, if an 'indirect' role is to be treated as active participation in hostilities is whether the (p. 186) support provided by the child to the combatants exposed him or her to real danger as a *potential target*.⁸⁰

7. Disabled persons

In armed conflict (as in natural disasters, for that matter), people with disabilities are often faced with severe obstacles when normal networks and support mechanism are disrupted.⁸¹ IHL does not single out disabled persons as a specific category of protected persons, but nevertheless acknowledges their specific needs, with different treaty instruments containing provisions to ensure respect and protection for the disabled. These rules generally impose obligations on states regarding the medical treatment and physical protection of persons with disabilities.⁸² The Convention on the Rights of Persons with Disabilities (CRPD),⁸³ while affirming many of the traditional IHL obligations regarding persons with disabilities, establishes a regime based on persons with disabilities as rights-bearing agents.⁸⁴

Thus, while also imposing duties on states regarding the protection of persons with disabilities, the CRPD vests rights in individuals, who are capable of asserting, and to some extent, enforcing these rights.⁸⁵ It includes rights beyond physical security and health, such as the right to access to justice and equality before the law.⁸⁶ Furthermore, the CRPD recognizes disabilities as context-dependent problems; in armed conflicts, otherwise minor disabilities may become major impediments.⁸⁷ Therefore, article 11 of the CRPD requires states parties to take 'all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters', essentially establishing that the rights in the Convention also apply in times of armed conflict.

8. Parachutists from aircraft in distress

On 24 November 2015, a Russian jet was downed by Turkish warplanes near the border with Turkey and Syria.⁸⁸ The pilot and navigator ejected but were fired upon by rebels from (p. 187) Syria's ethnic Turkmen community as the two descended by parachute.⁸⁹ According to the rebels, one of them (the pilot) was dead when he landed on the ground.⁹⁰

According to the CIHL Study, state practice establishes the rule—that making persons parachuting from an aircraft in distress the object of attack during their descent is prohibited—as a norm of customary international law applicable in both IACs and NIACs.⁹¹ Persons bailing out of an aircraft in distress have been referred to as 'shipwrecked in the air'. They are considered *hors de combat* (see below) during their descent.

Article 42 API explains that the moment these persons reach the ground in territory controlled by an adverse party, they shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that they are engaging in a hostile act,⁹² and that airborne troops are not protected by the article.⁹³ With regard to NIACs, article 3 common to the GCs, while not specifically referring to parachutists, states more generally that persons *hors de combat*, 'by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely'.⁹⁴ The CIHL Study (Rule 170) explains that:

During the negotiation of the elements of war crimes against common Article 3 in the framework of the Statute of the International Criminal Court, the drafters

understood that the term *hors de combat* should not be interpreted in a narrow sense, and made reference to Article 42 of Additional Protocol I.

9. Persons hors de combat

In the CIHL Study, a person *hors de combat* is defined as:

(a) anyone who is in the power of an adverse party; (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or (c) anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape.⁹⁵

According to the ICRC Study, state practice establishes the rule—that attacking persons who are recognized as *hors de combat* is prohibited—as a norm of customary international law, applicable in both IACs and NIACs.⁹⁶

A clear example of persons that fall within the first category mentioned in the extract above are POWs, who are usually⁹⁷ members of the armed forces of one of the parties to (p. 188) an IAC (the status of POW only applies in IACs) who fall into the hands of the adverse party. The topic of POWs is addressed in more detail in chapter 5 ‘Persons Covered by International Humanitarian Law: Main Categories’.

Several examples have already been mentioned of persons who would typically fall within the second category (b) mentioned above, such as the shipwrecked (including the shipwrecked in the air, namely persons bailing out from an aircraft in distress), and the wounded and sick.

As to persons clearly expressing an intention to surrender, in land warfare,⁹⁸ this can be done by laying down one’s weapons and raising one’s hands, or through the display of a white flag when emerging from one’s position.⁹⁹ Under the Rome Statute, killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion,¹⁰⁰ is considered a war crime.

10. Parlementaires

The French term *parlementaire* stands for ‘a person belonging to a party to the conflict who has been authorized to enter into communication [*entrer en pourparlers* in the original French]¹⁰¹ with another party to the conflict’.¹⁰² The main protective rule is that *parlementaires*, who need to be able to ‘arrive at terms of surrender, effect a cease-fire, collect casualties from the battlefield, etc.’ are inviolable.¹⁰³ However, commanders may take the necessary precautions to prevent the presence of a *parlementaire* from being prejudicial¹⁰⁴ and ‘[p]arlementaires taking advantage of their privileged position to commit an act contrary to international law and detrimental to the adversary lose their inviolability’.¹⁰⁵

11. Persons displaying the distinctive emblem

The distinctive emblem refers to ‘the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground when used for the protection of medical units and transports, or medical and religious personnel, equipment or supplies’.¹⁰⁶ Since 2007, when the 2005 Additional Protocol III (APIII) entered in force, the new emblem—the red crystal—can also be used.¹⁰⁷ Persons entitled to wear the distinctive emblem, such as medical personnel,¹⁰⁸ (p. 189) must not be attacked.¹⁰⁹ However, as mentioned earlier in section 3.A.3 ‘Medical personnel and medical activities’, only medical personnel assigned to medical duties by a party to the conflict—and not other persons performing medical duties—can be qualified as medical personnel and have the right to display the distinctive emblem. Hence, *the symbols* used by organizations such as *Médecins Sans Frontières* do not benefit from international legal protection, ‘although their work in favour of the victims

of armed conflict must be respected. Upon recognition that they are providing care to the sick and wounded, NGOs are also to be respected.¹¹⁰

Under the Rome Statute, intentionally directing attacks against buildings, material, medical units, and transport,¹¹¹ and personnel using the distinctive emblems of the GCs in conformity with international law constitutes a war crime in both IACs¹¹² and NIACs.¹¹³ At the same time, making *improper* use of the distinctive emblem of the GCs, resulting in death or serious personal injury, also constitutes a war crime under the Rome Statute, albeit only in the context of IACs.¹¹⁴

12. Personnel involved in a peacekeeping mission

Directing an attack against personnel involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians under IHL, is prohibited—as a norm of customary international law applicable in both IACs and NIACs.¹¹⁵ Hence, peacekeeping forces, even though they often consist of professional soldiers, are seen as civilians, with the same protection civilians enjoy.¹¹⁶ Therefore, intentionally directing attacks against personnel in a peacekeeping mission, under the rule above, constitutes a war crime under the Rome Statute in both IACs¹¹⁷ and NIACs.¹¹⁸

A clear distinction should, however, be made between *peacekeeping* forces on the one hand and forces engaged in peace *enforcement* operations on the other. These latter are considered combatants bound to respect IHL, and do not enjoy the protection under the rule above.¹¹⁹

13. Civil defence personnel

Civil defence means:

... the performance of some or all of the undermentioned humanitarian tasks^[120] intended to protect the civilian population against the dangers, and to help it to recover from the (p. 190) immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival.¹²¹

The personnel of organizations involved in civil defence, in turn, refer to ‘those persons assigned by a Party to the conflict exclusively to the performance of the tasks mentioned under sub-paragraph (a), including personnel assigned by the competent authority of that Party exclusively to the administration of these organizations’.¹²²

Although it does not always happen,¹²³ civil defence personnel, as well as their organizations,¹²⁴ shall be respected and protected.¹²⁵ Hence, they must be able to perform their civil defence tasks except in case of imperative military necessity.¹²⁶

Protection is also available to personnel of civilian civil defence organizations of neutral or other states not parties to the conflict which perform civil defence tasks in the territory of a party to the conflict, with the consent and under the control of that party.¹²⁷

Also here, protection will cease once acts are committed by these persons, outside their proper tasks, which are harmful to the enemy (after due warning).¹²⁸ Some characteristics/situations will, however, *not* lead to loss of protection, including the fact that they may carry light individual weapons for the purpose of maintaining order or for self-defence.¹²⁹ The fact that some military personnel are attached to civilian civil defence organizations,¹³⁰ or that the performance of civil defence tasks may incidentally benefit military victims, particularly those who are *hors de combat*,¹³¹ will also not lead to loss of protection.

Article 66(1) API explains that each party to the conflict shall endeavour to ensure that its civil defence organizations, their personnel, buildings, and *matériel*, are identifiable while they are exclusively devoted to the performance of civil defence tasks. This can be done through the display of the international distinctive sign of civil defence, which is an equilateral blue triangle on an orange ground.¹³²

14. Journalists

There are two types of journalists in IHL; the first are war correspondents. But importantly not every journalist who reports from a conflict zone falls within this category.¹³³ Indeed, the category of 'war correspondents' refers to a specific group of journalists who accompany the armed forces without actually being members thereof¹³⁴ and who have received (p. 191) authorization from the armed forces which they accompany.¹³⁵ Although these war correspondents accredited to the armed forces enjoy POW status once captured by the enemy,¹³⁶ they are not combatants, but civilians.

The second type, to be found in article 79(1) API, '[j]ournalists engaged in dangerous professional missions in areas of armed conflict',¹³⁷ are also civilians. In fact, it has rightly been argued that this 'plainly non-innovative'¹³⁸ provision does not create a special status, but merely stresses 'that these journalists enjoy exactly the same protection as ordinary civilians who are placed in similar circumstances'.¹³⁹ An infamous example of the latter category is US journalist James Foley, who was tortured and beheaded by IS in August 2014.¹⁴⁰

15. Displaced persons: refugees and IDPs

Civilians may be (forcibly) displaced for reasons related to an armed conflict, both within a national territory—as so-called internally displaced persons (IDPs)—and across an international border—as refugees.

From the humanitarian crisis in Syria alone, one can see the enormous numbers of people involved; as of April 2015, almost 4 million people had fled Syria, whereas as of July 2015, at least 7.6 million people were internally displaced in Syria itself.¹⁴¹

According to the ICRC CIHL Study, in IACs, parties may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand.¹⁴² A similar rule can be found in NIACs.¹⁴³ However, when such transfers and displacements take place, the necessary measures must be taken in terms of providing accommodation/shelter, hygiene, health, safety, and nutrition.¹⁴⁴

Regarding the Syria conflict, Amnesty International has alleged that civilians in northern Syria under the de facto control of the Autonomous Administration are being subjected to serious abuses that include forced displacement.¹⁴⁵ The Autonomous Administration claimed that its forced displacement of civilians was not arbitrary because it was necessary on military grounds or for the security or protection of local residents (see the exception above), but Amnesty International asserted that there are cases where there was no such justification (but that civilians were displaced in retaliation for people's perceived sympathies with, or family ties to, suspected members of IS or other armed groups), leading it to conclude that war crimes had been committed.¹⁴⁶

(p. 192) B. Categories of Objects

1. Medical units

Article 8(e) API defines medical units as:

... establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment—including first-aid treatment—of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary.

They shall be respected and protected at all times and shall not be the object of attack,¹⁴⁷ but this protection is lost in case they are used to commit, outside their humanitarian duties/function, hostile acts/acts harmful to the enemy (after due warning),¹⁴⁸ language that is reminiscent of the category of medical personnel addressed above. Alas, the already-mentioned allegations of HRW towards the Ukrainian insurgents illustrate that protection of medical personnel and units in contemporary conflicts is not always respected.

A. Medical units on land

The protection of medical units on land—such as hospitals—from attack can be found in article 19 GCI. This provision also clarifies that such units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety.

B. Hospital ships

Hospital ships are defined as ‘ships built or equipped by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them’.¹⁴⁹ These ships may in no circumstances be attacked or captured, but shall at all times be respected and protected.¹⁵⁰ One important condition for protection, though, is that their names and descriptions have been notified to the parties to the conflict ten days before those ships are employed.¹⁵¹ Not only military hospital ships, but also hospital ships utilized by National Red Cross Societies, by officially recognized relief societies, or by private persons enjoy this protection, if the party to the conflict on which they depend has given them an official commission¹⁵² and if the just-mentioned notification requirement has been complied with.¹⁵³

Relief shall be afforded without distinction of nationality and the High Contracting Parties ‘undertake’ not to use these vessels for any military purpose.¹⁵⁴ The parties to the (p. 193) conflict shall have the right to control and search the vessels and they can even be detained for a period not exceeding seven days from the time of interception, if the gravity of the circumstances so requires.¹⁵⁵

As with the previous categories, protection for hospital ships shall cease when they are used to commit, outside their humanitarian duties, acts harmful to the enemy (after due warning has been given).¹⁵⁶ However, there are a few conditions which shall *not* deprive hospital ships of their protection, such as the fact that the crews are armed for the maintenance of order, for their own defence or that of the sick and wounded (see also the category of medical personnel in section 3.A.3 ‘Medical personnel and medical activities’ above).¹⁵⁷

In addition to the provisions from GCII, article 20 GCI stipulates that hospital ships entitled to the protection of GCII shall not be attacked from the land.

C. Medical aircraft

Medical aircraft refers to any medical transports by air.¹⁵⁸ In principle, they must be respected and protected when performing their humanitarian functions.¹⁵⁹ In the context of API, this is even the case if there is no special agreement governing the flight.¹⁶⁰

2. Medical transports

A subcategory of medical units is formed by medical transports, which article 8(g) API defines as ‘any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation¹⁶¹ and under the control of a competent authority of a Party to the conflict’. Hence, *transportation* refers to the process, whereas the *transports* refer to the means; that is, to the objects which enable that process of transportation, such as for instance an ambulance.¹⁶² The transports can be divided into medical transports by land (medical vehicles),¹⁶³ by water (medical ships and craft),¹⁶⁴ and by air (medical aircraft).¹⁶⁵

Since medical transports are a subcategory of medical units, their protection is the same as mobile medical units.¹⁶⁶ Therefore, they arguably cannot be attacked or their passage arbitrarily obstructed.¹⁶⁷ However, just like medical units, they lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy.¹⁶⁸ For instance, medical aircraft cannot carry equipment intended for the collection or transmission of intelligence.¹⁶⁹

(p. 194) Although APII does not contain a definition of medical transports, this term may be understood as applying in the same sense in NIACs.¹⁷⁰

3. Objects displaying the distinctive emblem

As with persons displaying the distinctive emblem (see section 3.A.11 ‘Persons displaying the distinctive emblem’ above), under the Rome Statute, intentionally directing attacks against buildings, material, medical units, and transport using the distinctive emblems of the GCs in conformity with international law constitutes a war crime (in both IACs¹⁷¹ and NIACs¹⁷²). At the same time, making *improper* use of the distinctive emblem of the Geneva Conventions, resulting in death or serious personal injury, constitutes a war crime (but this time only in IACs¹⁷³) under the Rome Statute as well.

It should be noted that the distinctive emblem as such does not confer protected status; it is merely used to better identify a group such as medical objects, which, because of their function, already receive special protection.¹⁷⁴ This also means that a failure to display the emblem does not mean, of itself, that an attack is justified, if the medical object is still recognized as such.¹⁷⁵

4. Objects involved in a peacekeeping mission

As with personnel involved in a peacekeeping mission (see section 3.A.12 ‘Personnel involved in a peacekeeping mission’ above), the CIHL Study finds that state practice establishes the rule—that directing an attack against objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilian objects under international humanitarian law, is prohibited—as a norm of customary international law applicable in both IACs and NIACs.¹⁷⁶ Hence, objects in a peacekeeping operation are seen as civilian objects, which cannot be attacked.¹⁷⁷ Unfortunately, such attacks still happen on a regular base.¹⁷⁸

Intentionally directing attacks against objects in a peacekeeping mission, under the rule above, constitutes a war crime under the Rome Statute in both IACs¹⁷⁹ and NIACs.¹⁸⁰

5. Hospital and safety zones and neutralized zones

Article 23 GCI states that hospital zones and localities may be established in a party’s own territory or, if needed, in occupied areas so as ‘to protect the wounded and sick from the effects of war, as well as the personnel entrusted with the organization and administration of these zones and localities and with the care of the persons therein assembled’. A similar rule, but targeting another group (wounded, sick, and aged persons, children under fifteen, expectant mothers, and mothers of children under seven), and explicitly adding the term (p. 195) ‘safety zones’, can be found in article 14 GCIV. The next article of GCIV stipulates,

moreover, that neutralized zones may be established for the same reason. The difference is that 'hospital and safety zones are meant to be far removed from military operations, whereas neutralized zones are intended for areas in which military operations are taking place'.¹⁸¹

Regardless, it is forbidden to attack a zone established to shelter the wounded, the sick, and civilians—whether a hospital and safety zone or a neutralized zone—from the effects of hostilities.¹⁸² Obviously, this will be more of a challenge for neutralized zones, given their vicinity to the military operations.

6. Demilitarized zones

Yet another but somewhat related concept is that of 'demilitarized zones'. Such a zone 'is generally understood to be an area, agreed upon between the parties to the conflict, which cannot be occupied or used for military purposes by any party to the conflict'.¹⁸³ It is prohibited to direct an attack against a demilitarized zone.¹⁸⁴ The zone's special protection ceases if one of the parties commits a material breach of the agreement,¹⁸⁵ but the agreement 'may authorize the presence of peacekeeping forces or police personnel for the sole purpose of maintaining law and order without the zone losing its demilitarized character'.¹⁸⁶

An infamous example is the 'Agreement on the Demilitarization of Srebrenica and Zepa Concluded between Lt Gen Ratko Mladic and Gen Sefer Halilovic on 8 May 1993 in the Presence of Lt Gen Philippe Morillon'.¹⁸⁷ As is known, this agreement was violated and Srebrenica was overrun by the Bosnian-Serb army led by Mladić in July 1995, leading to 'the worst crime on European soil since the Second World War',¹⁸⁸ namely the genocidal killing of more than 7,000 Bosnian Muslim men and boys.

7. Open towns and non-defended localities

Non-defended localities, a modern term for 'open towns',¹⁸⁹ are regulated in article 59 API. A non-defended locality may be declared by the appropriate authorities of a party to the conflict (hence unilaterally) at 'any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party'.¹⁹⁰ These localities cannot be attacked, by any means whatsoever,¹⁹¹ if the conditions under paragraph 2 are fulfilled, namely:

- (a) [A]ll combatants, as well as mobile weapons and mobile military equipment must have been evacuated; (b) no hostile use shall be made of fixed military installations or (p. 196) establishments; (c) no acts of hostility shall be committed by the authorities or by the population; and (d) no activities in support of military operations shall be undertaken.¹⁹²

The unilateral declaration must define and describe, as precisely as possible, the limits of the locality,¹⁹³ and this must also be done in case the parties to the conflict conclude an agreement on the establishment of a locality even if it does not fulfil the conditions of paragraph 2.¹⁹⁴

The special protection under this provision is lost when the locality ceases to fulfil the conditions of paragraph 2 or when it ceases to fulfil the conditions of the above-mentioned agreement.¹⁹⁵ However, that does not mean that the locality will lose its general protection pursuant to other IHL rules.

8. Cultural property

A definition of cultural property can be found in article 1 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Convention),¹⁹⁶ where the term is defined as covering, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centres containing monuments'.

That cultural property should be protected has been eloquently clarified in the Preamble of the 1954 Convention, which states that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world'.

Unfortunately though, cultural heritage has suffered great damage during recent armed conflicts, as may be exemplified by the destruction of the Buddhas of Bamiyan (Afghanistan) in 2001,¹⁹⁷ the 2012 attacks against historic monuments and buildings dedicated to (p. 197) religion in Timbuktu (Mali),¹⁹⁸ and the 2015 piece-by-piece destruction of Palmyra (Syria).¹⁹⁹

IHL makes clear that cultural property objects are civilian objects and as such enjoy general protection under IHL and must not be attacked unless (of course) they are subjected to military use, in which case they may become military objectives.²⁰⁰ However, when not subjected to military use, they are entitled to special protection.²⁰¹

A. Before and after 1954

Already prior to the 1954 Convention, the protection of cultural property was stressed in several instruments. The very first provision discussed in this chapter, article 35 of the *Lieber Code*, is a good example in that respect. However, protective provisions can also be found back in, for example, regulations 27 and 56 of the 1899²⁰² and 1907²⁰³ Hague Regulations (in the context of land warfare), in article 5 of Hague Convention (IX) of 1907²⁰⁴ and article 4 of Hague Convention (XI) of 1907²⁰⁵ (in the context of sea warfare), and in articles 25 and 26 of the 1923 Hague Rules of Air Warfare²⁰⁶ (in the context of air warfare).²⁰⁷ These protections were far from absolute, with formulations indicating that measures had to be taken 'as far as possible', and with protection not being valid for moveable property and for objects that were used for military purposes.²⁰⁸

The Pan-American Union's Roerich Pact of 1935²⁰⁹ constituted the first international convention 'exclusively dedicated to the legal protection, in both war and peace, of certain cultural property',²¹⁰ with the movement based on the Roerich Pact (*Pax Cultura*) even sometimes called the 'Red Cross of Culture'.²¹¹ The Pact is still in force for some (ten) American States.²¹² Dinstein argues that on the one hand, the Pact has some clear flaws, (p. 198) including the fact that '[i]t does not concretize the scope of respect and protection enjoyed by cultural property. Specifically, it does not mention immunity from attack as such,²¹³ but that it also has some marked advantages over the 1954 Convention, such as the fact that '[i]t endows cultural property with protection that is not subject to considerations

of imperative military necessity (although protection is lost when the monuments are used for military purposes)'.²¹⁴

As a result of the horrors of the Second World War, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 'the first international treaty with a world-wide vocation focusing exclusively on the protection of cultural heritage in the event of armed conflict [IACs and NIACs]',²¹⁵ was adopted under the auspices of UNESCO, including a separate optional protocol (the First Protocol),²¹⁶ whose purpose it is to prevent the exportation of cultural property and to provide for the restitution of illegally exported objects.²¹⁷ At the time of writing this chapter, the Convention had 127, and the First Protocol 104, state parties.

As explained above, the 1954 Convention contains a definition (in fact the first)²¹⁸ of cultural property,²¹⁹ which seems very broad in that it protects 'movable or immovable property'—something which was not mentioned before.²²⁰ However, at the same time, it only protects 'property of great importance to the cultural heritage of every people'.²²¹ Dinstein is right when he writes that this is quite subjective, there being no objective criteria to measure cultural importance (except in outstanding cases).²²² Also the phrase 'of every people' is puzzling, as it can mean both 'of all peoples jointly' or 'of each respective people'.²²³ Preference should be given to the latter meaning.²²⁴ Hence, '[t]he Convention ... has a universalist message that is worthy of emphasis, inasmuch as some Belligerent Parties are disposed to view the enemy's cultural property from a narrow ethnic or religious perspective, attempting to erase alien monuments and other memorabilia'.²²⁵

The general protective provision of the 1954 Convention can be found in its article 4(1) which stipulates:

The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining (p. 199) from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

Nevertheless, and as already mentioned above when discussing the advantage of the Roerich Pact of 1935, the Convention also allows for a waiver of these obligations, namely (and only) in cases where military necessity imperatively requires such a waiver.²²⁶ Dinstein convincingly argues that:

... if imperative requirements of military necessity can trump the protection of cultural property, no real progress has been achieved since the days of the 'as far as possible' exhortation. After all, the value added of the adverb 'imperatively' is far from self-evident ... and the attacking force is prone to regard almost any military necessity as satisfying the requirement.²²⁷

In addition to the general protection under article 4, more specific protection can be found in article 8(1) of the 1954 Convention for certain cultural property, namely a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments, and other immovable cultural property of very great importance. There are a few conditions though, namely that they are situated at an adequate distance from any important military objective constituting a vulnerable point and are not used for military purposes.²²⁸ Also, it must be entered in the International Register of Cultural Property under Special Protection.²²⁹

Once these conditions are fulfilled, the special protection of article 9 1954 Convention applies (immunity from any act of hostility). However, also here, an exception is possible, namely (and only) 'in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues'.²³⁰ It has rightly been argued that even though the terms 'exceptional' and 'unavoidable' seem stricter than the word 'imperatively' from article 4 1954 Convention discussed above, 'the stark fact is that the status of special protection does not guarantee to any cultural property—not even of the greatest importance—full immunity from attack and destruction'.²³¹ Thus, the special protection regime of the 1954 Convention 'secures only marginally better safeguards'²³² than its general protection regime.

(p. 200) **B.** The Additional Protocols of 1977

Both API and APII contain provisions relating to the protection of cultural property. The most notable examples are article 53 API²³³ and article 16 APII.²³⁴ Although they depart from the 1954 Convention through the non-acceptance of the military necessity exception, both provisions also clarify that they are '[w]ithout prejudice' to the provisions of the 1954 Convention, meaning that 'High Contracting Parties to both are not prevented from availing themselves of the waiver in respect of military necessity embodied in article 4(2) of the Convention.'²³⁵

However, O'Keefe argues that API remedies, at least in theory, three important reasons for the past destruction of cultural property in bombardment, namely through (i) prohibiting attacks on the civilian population and civilian objects; (ii) narrowing the definition of a military objective; and (iii) outlawing excessive incidental harm to the civilian population and civilian objects during attacks on military objectives.²³⁶ As for APII, this Protocol constitutes 'an attenuated, impressionistic version of Protocol I'.²³⁷ When explaining this correlation, between the protection of civilian objects and the protection of cultural property (a specific category of civilian objects), O'Keefe notes that:

In terms of attack ... whereas other civilian objects may be targeted pursuant to article 52(2) [API²³⁸] on account of their nature, location, purpose *or use*, the practical effect of the additional protection afforded by article 53 is that historic monuments, works of art and places of worship which constitute the cultural spiritual heritage of peoples may be attacked *only on account of their use*.²³⁹

C. 1999 Second Protocol to the Hague Convention

Because of (i) the 'increased awareness regarding cultural property protection'²⁴⁰ stemming from the APs; (ii) the fact that destruction of cultural monuments had become a tactic of war;²⁴¹ and (iii) the fact that 'military necessity' still left far too much discretion,²⁴² revision (p. 201) of the 1954 Convention, which had failed to provide sufficient protection, was deemed necessary.²⁴³ The 1999 Second Protocol²⁴⁴ 'was intended to strengthen the existing regulations, and make their application more effective'.²⁴⁵

The 1999 Second Protocol, which incidentally applies to both IACs and NIACs, formally harmonized the 1954 Convention with API, 'by pronouncing that an attack against cultural property cannot be launched unless the site has been converted into a military objective'.²⁴⁶ Moreover, it clarified the meaning of the waiver of article 4(2) 1954 Convention (imperative military necessity), by stating that it may only be invoked:

... to direct an act of hostility against cultural property when and for as long as: i. that cultural property has, by its function,^[247] been made into a military objective;

and ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.²⁴⁸

In addition, the waiver may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage.²⁴⁹

The 1999 Second Protocol also expands the system of precautions in attack,²⁵⁰ and introduced a new system of enhanced protection for cultural property if:

a. it is cultural heritage of the greatest importance for humanity; b. it is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection; c. it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.²⁵¹

If that is the case, and after placement under enhanced protection has been requested and approved,²⁵² immunity from attack is guaranteed,²⁵³ although also here, there are a few exceptions, including if, and for as long as, the property has, by its use, become a military objective.²⁵⁴ In that case, additional conditions apply before the property can be the object of attack.²⁵⁵ As to the correlation between the 1954 Convention special protection regime and the enhanced protection system of the 1999 Second Protocol, article 4(b) (p. 202) of the latter instrument clarifies that where cultural property has been granted both special protection and enhanced protection, only the provisions of enhanced protection shall apply.

A final feature about the 1999 Second Protocol that needs to be mentioned is its increased focus on penal sanction, given that '[t]he process of the Convention's review revealed dissatisfaction with the penal sanction prescribed by article 28, a provision seen as too weak'.²⁵⁶ For instance, the Protocol defines five serious violations, which will lead to individual criminal responsibility.²⁵⁷

To conclude the category of cultural property, and tying into the point about criminal responsibility and prosecution: to ensure respect for IHL, it is promising that the ICC has recently started a case against a suspect, Ahmad Al Faqi Al Mahdi, for war crimes of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali, committed between about 30 June 2012 and 10 July 2012.²⁵⁸ On 26 September 2015, Al Faqi Al Mahdi was transferred to The Hague.²⁵⁹ Although Al Faqi Al Mahdi 'will not be the first accused in The Hague facing charges of destroying cultural property ... [i]t is the first time that war crimes against cultural heritage constitute the main charge of an international criminal proceeding'.²⁶⁰

4. Conclusion

From the discussions in this chapter, it becomes clear that IHL—in a generally sufficient, and oftentimes very detailed way—deals with the protection of certain persons and objects. However, current practice also shows that these categories continue to be vulnerable and that respect for the implementation of IHL is often lacking, with the repugnant practices of IS as the new nadir. In the words of Rachel Bryson: '[ISIS] is destroying the past, present and future in one; century-old historical artefacts are being obliterated, present day minorities are being wiped out, and the next generation is dispossessed of childhood and dropped headlong into a world of terror'.²⁶¹ Therefore, the enforcement of IHL, through the application of international criminal law, either at the national or international level, is of the utmost importance to show that conduct violating IHL will not be tolerated. An

interesting and hopeful sign in that respect is the prosecution of Al Faqi Al Mahdi before the ICC.

However, when again looking at *the* conflict of our times, the conflict in Syria/Iraq, it is quite remarkable to see that almost all the prosecutions against (potential) Syria/Iraq travellers are based on terrorism, and not on IHL charges. One of the exceptions in this context is (p. 203) the Swedish case of Mouhannad Droubi, who was sentenced in February 2015 to five years' imprisonment for the war crime of attacking an enemy who was *hors de combat*, as well as of particularly grave assault.²⁶² Many more of such cases are needed to show, on a constant basis, that IHL must not be violated and to emphasize the special protection granted to protected persons and objects.(p. 204)

Footnotes:

* The authors would like to thank Wim Zimmermann, intern at the TMC Asser Instituut, for his helpful assistance in the preparation of this chapter. Developments have been taken into account until July 2016.

1 *Instructions for the Government of Armies of the United States in the Field*, General Orders No 100 (24 April 1863) (*Lieber Code*). The International Committee of the Red Cross (ICRC) notes about these instructions:

Although they were binding only on the forces of the United States, they correspond to a great extent [*sic*] to the laws and customs of war existing at that time. The "Lieber Instructions" strongly influenced the further codification of the laws of war and the adoption of similar regulations by other states. They formed the origin of the project of an international convention on the laws of war presented to the Brussels Conference in 1874 and stimulated the adoption of the Hague Conventions on land warfare of 1899 and 1907 (www.icrc.org/ihl/INTRO/110).

2 Susan Breau, 'Protected Persons and Objects', in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 170.

3 *Lieber Code* www.icrc.org/ihl/INTRO/110.

4 *ibid* article 71.

5 Robin Geiss and Helen Durham, 'ICRC Commentary on Article 12 Geneva Convention'(GCI) (2016) para 1321 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=CECD58D1E2A2AF30C1257F15004A7CB9>.

6 *ibid*.

7 Robin Geiss, 'ICRC Commentary on Common Article 3 GC I-IV' (2016) para 738 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDDA490736C1C1257F7D004BA0EC>.

8 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API).

9 Geiss and Durham, 'Commentary on Article 12' (above n 5) para 1341.

10 See eg Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GCI) article 12: 'Members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances.' See also Geneva Convention (II) for the Amelioration of the

Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GCII) article 12.

11 See also Gregor Novak, 'Wounded, Sick, and Shipwrecked', *Max Planck Encyclop Pub Intern'l L* (2013) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e448>. For a more detailed analysis, see eg Geiss and Durham, 'Commentary on Article 12' (above n 5).

12 UN Security Council Resolution 2286 (3 May 2016) UN Doc S/RES/2286 para 8.

13 See eg GCI article 12. See for an (almost) identical version GCII article 12. cf also Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GCIII) article 3 (applicable to NIACs), Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV) article 16, API article 10, and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII) (applicable to NIACs).

14 See GCI article 12.

15 See Novak (above n 11).

16 Geiss and Durham, 'Commentary on Article 12' (above n 5) para 1373.

17 See GCI article 12.

18 *ibid* article 12.

19 *ibid* article 12.

20 cf also GCII article 12.

21 'Namely the search for, collection, transportation, diagnosis or treatment—including first-aid treatment—of the wounded, sick and shipwrecked, or for the prevention of disease.' See also the category 'medical units' in section 3.B.1 below.

22 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules* (CUP 2005) (CIHL) 82: 'The term "military medical personnel" refers to medical personnel who are members of the armed forces. The term "civilian medical personnel" refers to medical personnel who are not members of the armed forces but who have been assigned by a party to the conflict exclusively to medical tasks.'

23 This para states that:

[t]he relevant provisions of Articles 27 and 32 of the First Convention shall apply to permanent medical units and transports (other than hospital ships, to which Article 25 of the Second Convention applies) and their personnel made available to a Party to the conflict for humanitarian purposes: (a) by a neutral or other State which is not a Party to that conflict; (b) by a recognized and authorized aid society of such a State; (c) by an impartial international humanitarian organization.

24 API article 8(c).

25 CIHL 82.

26 *ibid* 82.

27 *ibid* 80.

28 This para explains:

1. Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission. 2. In the performance of their duties medical personnel may not be required to give priority to any person except on medical grounds.

29 CIHL 79.

30 CIHL 84, referring to the Spanish LOAC (Law of Armed Conflict) Manual.

31 CIHL 85.

32 *ibid* 85.

33 API article 43 para 2.

34 Human Rights Watch, 'Ukraine: Insurgents Disrupt Medical Services' (5 August 2014) www.hrw.org/news/2014/08/05/ukraine-insurgents-disrupt-medical-services.

35 *ibid*.

36 UNSC Resolution 2286 paras 1 and 8.

37 See n 23.

38 This sub-para states:

'permanent medical personnel', 'permanent medical units' and 'permanent medical transports' mean those assigned exclusively to medical purposes for an indeterminate period. 'Temporary medical personnel', 'temporary medical units' and 'temporary medical transports' mean those devoted exclusively to medical purposes for limited periods during the whole of such periods. Unless otherwise specified, the terms 'medical personnel', 'medical units' and 'medical transports' cover both permanent and temporary categories.

39 CIHL 595.

40 *ibid* 90.

41 API article 43(2).

42 See ICRC, 'Women and War: Women and Armed Conflicts and the Issue of Sexual Violence' (Report, Colloquium ICRC—EUISS, 30 September 2014) 5 www.icrc.org/en/download/file/8598/icrc_report_women_and_war.pdf. Geiss and Durham, 'Commentary on Article 12' (above n 5) para 1427.

43 See Outreach Programme on the Rwanda Genocide and the United Nations, 'Background Information on Sexual Violence used as a Tool of War' (March 2014) <https://www.un.org/en/preventgenocide/rwanda/assets/pdf/Backgrounder%20Sexual%20Violence%202014.pdf>.

44 See the ninth issue of IS' glossy magazine *Dabiq*, 'The Islamic State's (ISIS, ISIL) Magazine' *The Clarion Project* (10 September 2014) www.clarionproject.org/news/islamic-state-isis-isil-propaganda-magazine-dabiq#. See also Simon Tomlinson, 'ISIS "Rape Handbook" Reveals 15 Rules for Slaves' "Owners"—from Banning Sons and Fathers from Sharing the Same Woman to Outlawing Sex with a Mother and Daughter', *Daily Mail* (London, 29 December 2015) www.dailymail.co.uk/news/article-3377086/Islamic-State-ruling-ams-settle-sex-female-slaves.html, and Ludovica Iaccino, 'Isis Iraq News: Pregnant Women among 150 "Executed for Refusing to be Insurgents' Sex Slaves"' *International*

Business Times (London, 17 December 2014) www.ibtimes.co.uk/isis-iraq-news-pregnant-women-among-150-executed-refusing-be-insurgents-sex-slaves-1479959.

45 See API article 75(5).

46 See APII article 5(2)(a).

47 See GCIII article 25.

48 See *ibid* article 29.

49 See *ibid* article 88.

50 See for a comparable provision API article 76.

51 See GCIV article 76. Also as regards disciplinary punishments, see GCIV article 124.

52 See again (see also n 45) API article 75(5).

53 See again (see also n 46) APII article 5(2)(a).

54 See GCIV article 97.

55 See *ibid* article 38.

56 See *ibid* article 85.

57 For other provisions, see eg *ibid* articles 17 (evacuation), 23 (consignment of medical supplies, food and clothing), 89 (food), 91V (medical attention), and 127 (conditions of transfer).

58 See Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar 2013) 91.

59 See eg Jessica Stern and J Berger, ‘“Raising Tomorrow’s Mujahideen”: The Horrific World of Isis’s Child Soldiers’ *The Guardian* (Sydney, 10 March 2015) www.theguardian.com/world/2015/mar/10/horror-of-isis-child-soldiers-state-of-terror and Rachel Bryson, ‘This is Why Isis Uses Children Like the So-Called “Jihadi Junior” in their Propaganda Videos’ *The Independent* (London, 4 January 2016) www.independent.co.uk/voices/this-is-why-isis-use-children-like-jihadi-junior-in-propaganda-videos-a6796191.html. See also the eighth issue of IS’ glossy magazine *Dabiq*, glorifying its child soldier programme: *Dabiq*, ‘The Islamic State’s (ISIS, ISIL) Magazine’ *The Clarion Project* (10 September 2014) www.clarionproject.org/news/islamic-state-isis-isil-propaganda-magazine-dabiq#.

60 Which states that ‘In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.’

61 Which states that ‘Expectant and nursing mothers and children under fifteen years of age, shall be given additional food, in proportion to their physiological needs.’

62 Which states that ‘The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.’ See also GCIV articles 17, 23, and 68 (see n 57).

63 See API article 76(3).

64 See also *ibid* article 76(2).

65 *ibid* article 77(2)–(3).

- 66** *ibid* article 77(4).
- 67** *ibid* article 77(5).
- 68** APII article 4(3)(a).
- 69** *ibid* article 4(3)(b).
- 70** *ibid* article 4(3)(c)–(d).
- 71** *ibid* article 4(3)(e).
- 72** See also GCIV article 38.
- 73** See for the latter group for instance n 62 but also GCIV article 51 (on labour).
- 74** Note that API article 77(3) explains that if ‘children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war’.
- 75** Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) article 8(2)(b)(xxvi)—for IACs—and (2)(e) (vii)—for NIACs. Note that the very first suspect of the ICC, Thomas Lubanga Dyilo, was found guilty, on 14 March 2012, of the war crimes of enlisting and conscripting of children under the age of fifteen years and using them to participate actively in hostilities. He was sentenced, on 10 July 2012, to a total of fourteen years’ imprisonment. The verdict and sentence were confirmed by the ICC’s Appeals Chamber on 1 December 2014.
- 76** Statute of the Special Court of Sierra Leone (adopted 16 January 2002) article 4(c).
- 77** Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 article 38(2)–(3). cf the Convention on the Rights of Persons with Disabilities (discussed below at text to n 83), which also contains elements of both IHL and IHRL.
- 78** See CIHL 484–5.
- 79** See *ibid* 485.
- 80** *Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v Thomas Lubanga Dyilo* (Case No ICC-01/04-01/06) ICC Trial Chamber 1, ‘Judgment pursuant to Article 74 of the Statute’ para 628 (emphasis added). Judge Benito in her separate and dissenting opinion argued in favour of an even broader interpretation of the notion ‘to participate actively in hostilities’; see *The Prosecutor v Thomas Lubanga Dyilo*, ‘Separate and Dissenting Opinion of Judge Odio Benito’ para 15.
- 81** See Naomi Hart, Mary Crock, Ron McCallum, and Ben Saul, ‘Making Every Life Count: Ensuring Equality and Protection for Persons with Disabilities in Armed Conflicts’ (2014) 40(1) *Mon LR* 148–9 www.monash.edu/_data/assets/pdf_file/0011/139835/mccallum.pdf.
- 82** *ibid* 153. See eg GCIV article 30: ‘Special facilities shall be afforded for the care to be given to the disabled, in particular to the blind, and for their rehabilitation, pending repatriation.’ See also the already-mentioned API article 8(a), which explains that wounded and sick refer to ‘persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility’ (emphasis added).
- 83** Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).
- 84** Hart et al (above n 82) 153.

85 *ibid* 156. This is based on a ‘machinery of dialogue with states through progress reports and concluding observations and—under the CRPD Optional Protocol—individual complaints and investigations’.

86 *ibid* 155.

87 *ibid* 153.

88 ‘Turkey’s Downing of Russian Warplane—What We Know’ *BBC News* (London, 1 December 2015) www.bbc.com/news/world-middle-east-34912581.

89 *ibid*.

90 *ibid*.

91 CIHL 170.

92 API article 42(2). As mentioned before, persons parachuting from an aircraft in distress have been called ‘shipwrecked in the air’, as shipwrecked are also considered *hors de combat*, but may swim ashore or be collected by a friendly ship and resume fighting. See CIHL 171.

93 API article 42(3). In the same way, and looking at shipwrecked in sea, these latter persons must be in distress, thus excluding ‘combatants who are in the water because they are engaged in amphibious or underwater operations’: Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn CUP 2010) 161.

94 Emphasis added.

95 CIHL 164.

96 *ibid* 164.

97 GCIII—which is specifically designed to address the topic of POWs—also classifies other categories of persons who have the right to POW status or may be treated as POWs. See ICRC, ‘Prisoners of War and Detainees Protected under International humanitarian Law’ (29 October 2010) www.icrc.org/eng/war-and-law/protected-persons/prisoners-war/overview-detainees-protected-persons.htm.

98 Dinstein (above n 93) 161:

At sea, surrender generally requires that the vessel will haul down its flag and, in the case of a submarine, surface. But if the fighting takes place beyond-visual-range, these modes of surrender will not suffice. Radio communication will then become indispensable ... In the air, there is no accepted mode of surrender, even by a disabled aircraft within visual range, except through radio communication.

99 CIHL 168.

100 Rome Statute article 8(2)(b)(vi).

101 See Dinstein (above n 93) 163.

102 CIHL 228.

103 *ibid* 229. For an example of a case where this rule was violated, see the (unlawful) detention of Mehmed Hajric, the mayor of Zepa, in late July 1995 by the forces of General Mladić.

104 CIHL 231.

105 *ibid* 232.

- 106** API article 8(1).
- 107** Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (adopted 8 December 2005, entered into force 14 January 2007) 2404 UNTS 261 (APIII).
- 108** CIHL 80.
- 109** *ibid* 102.
- 110** *ibid* 82 (referring to Canada's *Code of Conduct*).
- 111** See also below under section B 'Categories of Objects'.
- 112** Rome Statute article 8(2)(b)(xxiv).
- 113** *ibid* article 8(2)(e)(ii).
- 114** *ibid* article 8(2)(b)(vii).
- 115** CIHL 112. See, however, Breau, who notes that very little state practice is outlined in the Study, and who concludes: 'this rule may be reflective of *developing* customary practice': Breau (above n 2) 183 (emphasis added).
- 116** CIHL 112.
- 117** Rome Statute article 8(2)(b)(iii).
- 118** *ibid* article 8(2)(e)(iii).
- 119** CIHL 114.
- 120** These include warning, evacuation, rescue, medical services, including first aid, and religious assistance, firefighting, and assistance in the preservation of objects essential for survival. See API article 61(a).
- 121** *ibid* article 61(a).
- 122** *ibid* article 61(c).
- 123** HRW, 'Fatal Strikes: Israel's Indiscriminate Attacks against Civilians in Lebanon' (2 August 2006) www.hrw.org/report/2006/08/02/fatal-strikes/israels-indiscriminate-attacks-against-civilians-lebanon.
- 124** See API article 61(b).
- 125** *ibid* article 62(1). This is also valid for 'civilians who, although not members of civilian civil defence organizations, respond to an appeal from the competent authorities and perform civil defence tasks under their control': *ibid* article 62(2).
- 126** *ibid* article 62(1).
- 127** *ibid* article 64.
- 128** *ibid* article 65(1).
- 129** *ibid* article 65(3).
- 130** *ibid* article 65(2). See in more detail *ibid* article 67.
- 131** *ibid* article 65(2).
- 132** *ibid* article 66(4).
- 133** Robin Geiss, 'The Protection of Journalists in Armed Conflicts' (2008) 51 *German YB Int'l L* 310.
- 134** GCIII article 4(A)(4).

- 135** *ibid* article 4(A)(4).
- 136** *ibid* article 4(A)(4).
- 137** API article 79(1).
- 138** Dinstein (above n 93) 167.
- 139** *ibid*.
- 140** Rukmini Callimachi, 'The Horror before the Beheadings' *The New York Times* (New York, 25 October 2014) www.nytimes.com/2014/10/26/world/middleeast/horror-before-the-beheadings-what-isis-hostages-endured-in-syria.html.
- 141** Information retrieved from the website of the Internal Displacement Monitoring Centre, www.internal-displacement.org/.
- 142** CIHL 457.
- 143** *ibid* 457.
- 144** GCIV article 49 and APII article 17.
- 145** See Amnesty International, "'We Had Nowhere Else to Go': Forced Displacement and Demolitions in Northern Syria' (13 October 2015) 38 www.amnesty.org/en/documents/mde24/2503/2015/en.
- 146** *ibid* 32.
- 147** See eg GCI article 19, API article 12(1), and APII article 11(1).
- 148** See eg GCI article 21, API article 13(1), and APII article 11(2).
- 149** GCII article 22.
- 150** *ibid* article 22.
- 151** *ibid* article 22.
- 152** *ibid* article 24.
- 153** For hospital ships utilized by National Red Cross Societies, officially recognized relief societies, or private persons of neutral countries, see *ibid* article 25.
- 154** *ibid* article 30.
- 155** *ibid* article 31.
- 156** *ibid* article 34.
- 157** *ibid* article 35.
- 158** API article 8(j).
- 159** CIHL 101.
- 160** *ibid* 101.
- 161** API article 8 also defines medical transportation (in its sub-paragraph (f)), namely as 'the conveyance by land, water or air of the wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and by this Protocol'.
- 162** ICRC, 'ICRC Appeal to All Involved in Violence in the Near East' (News Release 00/42, 21 November 2000).
- 163** API article 8(h).
- 164** *ibid* article 8(i).

- 165** *ibid* article 8(j).
- 166** GCI article 35.
- 167** CIHL 101.
- 168** *ibid* 91 and 102.
- 169** *ibid* 102.
- 170** *ibid* 100.
- 171** Rome Statute article 8(2)(b)(xxiv).
- 172** *ibid* article 8(2)(e)(ii).
- 173** *ibid* article 8(2)(b)(vii).
- 174** CIHL 104.
- 175** *ibid* 103–4.
- 176** *ibid* 112.
- 177** *ibid* 112.
- 178** See eg ‘Mali: UN Condemns Attack which Killed Six Peacekeepers’ *UN News Centre* (2 July 2015) www.un.org/apps/news/story.asp?NewsID=51331#.VrDgKlJ1w4A.
- 179** Rome Statute article 8(2)(b)(iii).
- 180** *ibid* article 8(2)(e)(iii).
- 181** CIHL 119.
- 182** *ibid* 119.
- 183** *ibid* 120–1. A blueprint for such an agreement can be found in API article 60(3).
- 184** CIHL 120.
- 185** API article 60(7).
- 186** CIHL 121.
- 187** Agreement http://peacemaker.un.org/sites/peacemaker.un.org/files/BA_930508_DemilitarizationSrebrenicaZepo.pdf.
- 188** ‘“May We All Learn and Act on the Lessons of Srebrenica” Says Secretary-General, in Message to Anniversary Ceremony’ UN Press Release SG/SM/9993 (11 July 2005) <https://www.un.org/press/en/2005/sgsm9993.doc.htm>.
- 189** Jean C Martin, ‘Theatre of Operations’, in Marc Weller, Alexia Solomou, and Jake W Rylatt (eds), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 766.
- 190** API article 59(2).
- 191** *ibid* article 59(1).
- 192** *ibid* article 59(2).
- 193** *ibid* article 59(4).
- 194** *ibid* article 59(5).
- 195** *ibid* article 59(7).

196 Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 (1954 Convention).

197 Ahmed Rashid, 'After 1,700 Years, Buddhas Fall to Taliban Dynamite', *The Telegraph* (London, 12 March 2001) www.telegraph.co.uk/news/worldnews/asia/afghanistan/1326063/After-1700-years-Buddhas-fall-to-Taliban-dynamite.html.

198 Monica Mark, 'Malian Islamists Attack World Heritage Site Mosques in Timbuktu', *The Guardian* (Sydney, 2 July 2012) www.theguardian.com/world/2012/jul/02/mali-islamists-attack-world-heritage-mosques-timbuktu.

199 Stuart Jeffries, 'Isis's Destruction of Palmyra: "The Heart has been Ripped Out of the City"', *The Guardian* (Sydney, 2 September 2015) www.theguardian.com/world/2015/sep/02/isis-destruction-of-palmyra-syria-heart-been-ripped-out-of-the-city.

200 Dinstein (above n 93) 170.

201 *ibid.*

202 Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 429 (Hague Convention II).

203 Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227 (Hague Regulations).

204 Convention (IX) concerning Bombardment by Naval Forces in Time of War (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 345 (Hague Convention IX).

205 Convention (XI) Relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 367 (Hague Convention XI).

206 Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare (adopted 19 February 1923).

207 For more information, see Dinstein (above n 93) 171-3.

208 *ibid.*

209 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact) (adopted 15 April 1935, entered into force 26 August 1935) 167 UNTS 289.

210 Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (CUP 2006) 51.

211 Friedrich T Schipper and Erich Frank, 'A Concise Legal History of the Protection of Cultural Property in the Event of Armed Conflict and a Comparative Analysis of the 1935 Roerich Pact and the 1954 Hague Convention in the Context of the Law of War' (2013) 9(1) *Archaeologies: J World Archaeol Congress* 17 <http://link.springer.com/article/10.1007/s11759-013-9230-7>.

212 Dinstein (above n 93) 171-3.

213 *ibid* 174 (original footnote omitted).

214 *ibid.*

215 'Convention for the Protection of Cultural Property in the Event of Armed Conflict' <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/1954-hague-convention/>.

216 Protocol for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 358 (First Protocol).

217 First Protocol.

218 Schipper and Frank (above n 211) 18.

219 Which, by the way, may bear the distinctive emblem as described in 1954 Convention article 16(1) ('a shield, pointed below, per saltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle)') so as to facilitate its recognition; see 1954 Convention article 6.

220 Dinstein (above n 93) 174.

221 Emphasis added.

222 Dinstein (above n 93) 175.

223 O'Keefe (above n 210) 103.

224 *ibid* 104; Dinstein (above n 93) 175.

225 Dinstein (above n 93) 175.

226 1954 Convention article 4(2).

227 Dinstein (above n 93) 176.

228 1954 Convention article 8(1).

229 *ibid* article 8(6). Schipper and Frank note about this register: 'To-date only a few properties have been added to the international register of cultural property under special protection, so that the practical value must not be estimated too high—the only site registered is the Vatican City, alongside eight shelters': Schipper and Frank (above n 211) 20. (The registered shelters, incidentally, are only to be found in Germany and the Netherlands.)

230 1954 Convention article 11(2).

231 Dinstein (above n 93) 177.

232 *ibid*.

233

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, 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.

234

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.

(But see also API article 85(4)(d) for another example.)

235 O’Keefe (above n 210) 202.

236 *ibid* 203.

237 *ibid*.

238

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.

239 O’Keefe (above n 210) 216 (emphasis added). See also Dinstein (above n 93) 181.

240 Schipper and Frank (above n 211) 21.

241 *ibid*.

242 *ibid*.

243 *ibid*.

244 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172 (Second Protocol 1999).

245 Schipper and Frank (above n 211) 21.

246 Dinstein (above n 93) 183.

247 Dinstein notes that ‘[t]he meaning of “function” is somewhat wider than use, although it should not be mixed up with either purpose or location’: Dinstein (above n 93) 183.

248 Second Protocol 1999 article 6(a).

249 *ibid* article 6(b).

250 *ibid* article 7.

251 *ibid* article 10.

252 *ibid* article 11.

253 *ibid* article 12.

254 *ibid* article 13(1)(b).

255 *ibid* article 13(2).

256 O’Keefe (above n 210) 274.

257 Second Protocol 1999 article 15. For more information, see O’Keefe (above n 210) 274-88.

258 Information retrieved from the ICC page dedicated to this case, <https://www.icc-cpi.int/mali/al-mahdi>.

259 *ibid*.

260 Marina Lostal, ‘The First of Its Kind: The ICC Opens a Case against Ahmad Al Faqi Al Mahdi for the Destruction of Cultural Heritage in Mali’ *Global Policy Forum* (2 October 2015) www.globalpolicy.org/home/163-general/52814-icc-opens-a-case-for-the-destruction-of-cultural-heritage-in-mali.html.

261 Bryson (above n 59).

262 See Christophe Paulussen and Eva Entenmann, 'National Responses in Select Western European Countries to the Foreign Fighter Phenomenon', in A de Guttry, F Capone, and C Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Asser Press 2016) 419 (n 156).

(p. 391) 9 Victims of War

The branch of the laws of war that focuses on the victims of war is known in some circles as Geneva law, in contrast to Hague law (which traditionally dealt with the conduct of hostilities, also known as the means and methods of warfare, and which we covered in the previous two chapters). Strictly speaking, today the labels Geneva law and Hague law make less and less sense, since the Additional Protocols to the Geneva Conventions include rules previously associated with Hague law and the conduct of hostilities. But the deeper structure of the laws of war is still based on the different logics found in these different branches. For Françoise Hampson, Geneva law focuses on the potential victim, while Hague law guides the decision making of the perpetrator:

Hague law is directed to the military operator. It guides his decision making at the time. It deals principally with the places where, and times when, fighting is occurring. The rules tend to identify the considerations that must be taken into account and provide guidance as to how they are to be balanced, rather than simply prohibiting a particular outcome [fn An obvious exception is the absolute prohibition of intentional attacks against civilians and the civilian population]. The rules are a detailed articulation of general principles, such as the principles of distinction, proportionality and military necessity. Geneva law, on the other hand, is focused on the actual or potential victim, rather than the perpetrator. Many, but by no means all, of the issues that it addresses arise away from the immediate field of battle. The law tends to prohibit certain results or outcomes, usually by requiring certain forms of behavior.¹

Similarly, the law-making dynamic is different. We considered the efforts to protect wartime maritime trading rights through some of the treaties discussed in the previous chapter; the impetus is different when it comes to the (p. 392) treaties that protect the victims of war. As Kalmanovitz puts it in his historical study:

In Paris, when delegates agreed that destroying a state's foreign trade should not be a legitimate war strategy, they acted old style, out of sheer state interest. In Geneva and Saint Petersburg, when delegates agreed on measures to ameliorate the suffering of soldiers in the battlefield, and to prevent it by banning the use of explosive projectiles, they were motivated by charity and respect for the inviolability of the human person.²

We will be stressing again in this chapter that there is a need to separate out international from non-international armed conflicts. In my teaching and practice I find that many people understandably lose patience with the idea of such a formalistic distinction in today's world. The situations in Syria, Ukraine, Palestine, Yemen, Afghanistan and so on can surely hardly be described as anything but international? And when it comes to the victims of war, why should they suffer from reduced protections due to some drafting decisions taken by states in 1949? Moreover, the International Criminal Tribunal for the former Yugoslavia, I am often told, has 'dissolved the difference'; and the judgment presided over by my former thesis director as President of the Tribunal, the late Judge Antonio Cassese, is quoted back at me:

[E]lementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their

own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.³

As we saw in Chapter 7, there are indeed prohibitions on weapons that apply in both types of conflict, but here the Judges of the Tribunal were looking to discern customary crimes under international law rather than explain the overall framework of the laws of war. Moreover, states have deliberately amended the scope of the weapons treaties and the International Criminal Court to outlaw these weapons in situations of non-international (p. 393) armed conflict (although many states have not yet adopted these amendments).⁴ But when it comes to the protective regime for the victims of war, the different types of conflict remain, as a matter of law, stubbornly separate. Although some states have chosen to extend the weapons law regime (as well as the protection of cultural property⁵) to non-international armed conflicts, the Geneva Conventions of 1949 have not been amended in the same way. While many of the essential protections apply as customary international law in both kinds of conflict,⁶ we will nevertheless distinguish between the separate international and non-international regimes. My insistence on this distinction is related to the significance that the distinction can play in quite specific legal contexts.

First, the war crimes regimes are not the same. A prosecutor or a defence lawyer in a criminal trial will be concerned to concentrate on the crime as it appears in the relevant statute or law. Some violations of international humanitarian law have not been criminalized by treaty as statutory war crimes. An attempt to prosecute for a crime not recognized in the relevant legal order would fail. Similarly, the regime for grave breaches of the Geneva Conventions and Protocol I creates not only war crimes specifically applicable only in international armed conflict, but also other obligations in this context, including an obligation to prosecute or extradite someone alleged to have committed such a war crime.⁷ While states may be entitled, or even obliged, to prosecute or extradite those accused of war crimes in a non-international armed conflict, the legal basis will not be an enforceable treaty obligation under the Geneva Conventions of Protocol I. For a prosecutor, or those seeking to ensure the prosecution or extradition of a suspected war criminal, the categorization of a conflict as international may be essential to their case; by contrast, if the defendant can show the conflict is non-international, there may be no war crime to answer for in that particular jurisdiction.

(p. 394) Second, there may be other regimes, such as the Arms Trade Treaty (2013), that contain specific obligations that apply with regard to the future possibility of violations of international humanitarian law. Where the obligations relate to grave breaches, it remains the case that such breaches can only be committed in an international armed conflict.⁸

Third, human rights case-law, especially before the European Court of Human Rights, has developed so that in a situation of international armed conflict where protective regimes co-exist, the human rights regime that covers the deprivation of liberty may *accommodate* 'the taking of prisoners of war and the detention of civilians who pose a risk to security'.⁹ But when it comes to non-international armed conflicts, national courts have been reluctant to extend to governments such a right to intern people without trial.¹⁰

Precisely because the law of non-international armed conflict is less developed and does not comprise such a comprehensive protective regime, today the potential target or internee may want to rely on the protections that normally apply outside an inter-state conflict, which can include more protective human rights law, constitutional law, principles of law enforcement and habeas corpus.¹¹ This is a controversial and contested area of the law. For a government, these legal protections can be seen as serious obstacles to military

operations and winning the war.¹² For those being targeted by the government, asserting the right not to be targeted is a matter of life and death.

My point is that it is too simplistic to state that one or the other regime is more protective, or to claim that we can and should apply rules for inter-state conflict to civil war by analogy; rather, we have to acknowledge that when the arguments start in concrete disputes, the stakes will be different for each party to the argument, and the policy implications of applying one or the other regime are context dependent.¹³

(p. 395) What follows in no way attempts to describe (or even summarize) the range of the protections and obligations contained in the contemporary international humanitarian law. The reader is referred to the comprehensive manuals written by established experts in the field.¹⁴ Here I want simply to explain the legal significance of some of the key terms and highlight a few ongoing controversies.

9.1 Protected Persons and Property in International Armed Conflict

In an international armed conflict, the Geneva Conventions of 1949 and Protocol I together provide a protection regime, sometimes delineating exactly who counts as a 'protected person' and what should be considered 'protected property'. These terms are used on some occasions as terms of art, prescribing a particular group that qualifies for this 'status', and at other times as a reference to the floor of protection that is offered even to those who do not qualify strictly speaking for the status of protected person.¹⁵ The consequences of being a protected person, or not, are sometimes treated today as of less practical significance, as the basic protections will apply either through treaty or customary international law. But let me enumerate a few legal consequences of being a 'protected person'.

First, the International Committee of the Red Cross (ICRC) has the right to have access to certain protected persons as a matter of international treaty law under the 1949 Geneva Conventions. This is an obligation on every state, as all states are now parties to the Geneva Conventions. This right of access includes the right for the ICRC to interview prisoners of war and internees (p. 396) without witnesses,¹⁶ as well as rights for certain protected persons to communicate with the ICRC and other organizations.¹⁷ Second, the Geneva Conventions prohibit any renunciation or restriction of the rights by protected persons.¹⁸ Third, the grave breaches regime, as well as the Statute of the International Criminal Court, requires that the victim of the offence be a protected person or that the act be committed against protected property.¹⁹ Fourth, reprisals are explicitly forbidden against persons and property protected by the Conventions and Additional Protocol I.²⁰

So, for example, to understand what constitutes the war crime of a grave breach of the Geneva Conventions under the International Criminal Court Statute, one has to determine what is meant by an act 'against persons or property protected under the provisions of the relevant Geneva Convention'.²¹ The persons and property so protected as such have been helpfully listed in the specialist commentary.²²

Let us separate out the different fields of protection by grouping them under three headings: (i) medical personnel and equipment, the wounded, sick and shipwrecked; (ii) prisoners of war; and (iii) civilians.

(p. 397) 9.1.1 Medical Personnel and Equipment, the Wounded, Sick and Shipwrecked (International Armed Conflict)

The detailed regime protecting medical personnel and the wounded contained in the Geneva Conventions can be directly traced back to 1859 and a celebrated episode in Solferino (about 90 miles from Milan). Henri Dunant, a businessman from Geneva, was looking for Napoleon III in order to get him to sign some papers related to Dunant's business in Algeria. This led him to the battlefield of Solferino, and more specifically to the

village of Castiglione, where he found himself confronted with the realities of around 9,000 wounded and dying soldiers. He tried to help but was overwhelmed by the utter inadequacy of the facilities and assistance available to the wounded all around him. Famously, it was said there were more veterinary surgeons for the horses than doctors for the soldiers.

On his return to Geneva, Dunant wrote a small book, which he sent around to his impressive list of contacts, ensuring it got into the hands of a number of key sovereign leaders. Not only did he describe his feelings of despair and outrage, but he also asked 'Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers?'²³ This idea was the germ that led eventually to the first Geneva Convention (1864) and the creation of the ICRC, as well as the Red Cross and Red Crescent Movement.²⁴ An essential aspect of this experience was his determination that the wounded from both sides should be treated equally according to their wounds and not their allegiance – friend and enemy alike. In his words:

How many young men of eighteen and twenty come reluctantly here, from the depths of Germany or from the Eastern Provinces of the immense Austrian Empire – and some of them, perhaps, under rude compulsion – were forced to suffer not only physical pain, but also the ill-will of the Milanese, who have a profound hatred for their race, for their leaders, and for their Sovereign. These men could count on little sympathy until they should reach French soil. Ah poor mothers in Germany, in Austria, (p. 398) in Hungary and Bohemia, how can one help thinking of their agony, when they hear that their sons are wounded and prisoners in this hostile land!

But the women of Castiglione, seeing that I made no distinction between nationalities, followed my example, showing the same kindness to all these men whose origins were so different, and all of whom were foreigner to them. 'Tutti fratelli' [all are brothers], they repeated feelingly. All honour to these compassionate women, to these girls of Castiglione! Imperturbable, unwavering, unfaltering, their quiet self-sacrifice made little of fatigue and horrors, and of their own devotion.²⁵

Dunant ended his booklet by asking 'we hear so much these days of progress and civilization, but unfortunately we still cannot avoid wars, should we not urgently try, in a genuine spirit of humanity and civilization, to prevent, or at least to alleviate, the horrors of war?'²⁶ He was awarded the first Nobel Peace Prize in 1901, along with Frédéric Passy, a French peace campaigner and founder of the Inter-Parliamentary Union.

Today multiple provisions of the Geneva Conventions and their Protocols, alongside customary international law,²⁷ address protection for medical personnel, the wounded sick and shipwrecked, as well as the relevant hospitals, medical transports and equipment.²⁸ The essential obligations are to search for and collect the wounded, and to protect and care for them without any discrimination. Medical personnel, the wounded, sick and shipwrecked are to be respected and may not be attacked.

Although the wounded and sick were originally categories confined to military personnel, today it is accepted that the obligations should extend to everyone. The UK *Manual* uses a definition taken from Additional Protocol I, stating that

the wounded and sick are 'persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility'. (p. 399)

The definition goes beyond persons wounded on the battlefield to encompass anybody in need of medical treatment. That includes 'maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers' who refrain from any act of hostility. Those who carry on fighting despite their wounds are not included in the wounded and sick category.²⁹

Medical facilities and medical transports have to be respected,³⁰ even though some might see them as military facilities providing an advantage to the enemy. Conflicts in Gaza, Syria and Yemen have all seen strikes on medical facilities, and these have contributed immeasurably to the tragic humanitarian situation.³¹ In light of some of the confusion that sometimes surrounds this topic, we will set out the scope of limitations on this protection in some detail.

This special protection can be lost if the facilities 'are used to commit, outside their humanitarian duties, acts harmful to the enemy'.³² Crucially, an extra layer of protection exists here, and Article 21 adds that protection can only end 'after a due warning has been given'. This obligation exists for military and civilian facilities,³³ and in all types of conflict,³⁴ as well as in occupied territory.³⁵ It is specified that the warning must set 'in all appropriate cases, a reasonable time limit', and protection is only lost 'after such warning has remained unheeded'.³⁶

The treaties explain that the fact that personnel are armed for their own self-defence, or to defend the sick and wounded in their charge, does not deprive them of their special protection.³⁷ Similarly, the presence for medical reasons of combatants in the facility is also not to be considered an act harmful to the enemy.³⁸

(p. 400) The 2016 ICRC *Commentary* elaborates on what could actually constitute using the facilities to commit acts 'harmful to the enemy':

Examples of such use include firing at the enemy for reasons other than individual self-defence, installing a firing position in a medical post, the use of a hospital as a shelter for able-bodied combatants, as an arms or ammunition dump, or as a military observation post, or the placing of a medical unit in proximity to a military objective with the intention of shielding it from the enemy's military operations. Furthermore, scenarios that are recognized as being 'acts harmful to the enemy' in the context of hospital ships under the Second Convention (transmitting information of military value) and of civilian hospitals under the Fourth Convention (use of a civilian hospital as a centre for liaison with fighting troops) may also constitute 'acts harmful to the enemy' in the context of military medical establishments and units under the First Convention. Engaging in such acts may not only lead to a loss of protection, but may also qualify, where the establishments and units were displaying the distinctive emblems, as improper use of the emblems or as the war crime of perfidy, if done in order to kill or injure an enemy combatant.³⁹

It is worth stressing that this loss of special protective status does not turn the object into a military objective that can necessarily be attacked.⁴⁰ The rules on precaution, distinction, proportionality and necessity would still apply and demand compliance. Medical facilities and transports should benefit from a presumption against attack. Medical personnel should remain protected from attack unless they pose an immediate threat to the lives of others,⁴¹ and any attack on medical personnel should similarly require an appropriate warning, as in the case of medical facilities. Instructions to issue warnings before attacking medical personnel who have lost their protection (p. 401) can be found in recent Military Manuals.⁴² The protections at sea for the sick, wounded and shipwrecked also cover those civilians who may have been accompanying the armed force or belong to merchant ships or civilian

aircraft (to the extent they are not covered by more favourable provisions of international law).⁴³

The obligations with regard to submarines have been referred to in section 7.4.2 in the context of the limited possibilities for commanders to rely on the idea of necessity. A complex point arises from the limited ability of a submarine to collect and care for the shipwrecked, sick and wounded due to their limited space and their vulnerability to attack. The Geneva Convention provisions limit the obligations to search for and collect the shipwrecked 'after each engagement' to 'all possible measures'.⁴⁴ Nevertheless, the rules on the conduct of hostilities apply to attacks from submarines, so there would be obligations of precaution in attack to avoid civilian injury even when targeting a military objective.⁴⁵ Those ordering an attack should be able to estimate the expected civilian injury, and would have to determine that such injury was not excessive when compared to the anticipated military advantage. Even where no civilians are involved at all, today parties to the conflict are obliged to take all possible measures to search for and collect the shipwrecked, even if this cannot feasibly be undertaken by the submarine crew themselves.⁴⁶

9.1.2 Prisoners of War (International Armed Conflict)

The protection offered by the Third Geneva Convention on Prisoners of War only applies in inter-state armed conflicts. A completely different regime applies for non-international armed conflicts involving armed groups (see (p. 402) section 9.2 below).⁴⁷ I have lost count of the times I am asked 'Why not apply the protective regime for prisoners of war in non-international armed conflicts?' The stock response is simply stated: the Prisoner of War Convention requires release and repatriation without delay after the cessation of active hostilities.⁴⁸ Any government will want to reserve the right to incarcerate those who took up arms against it and prosecute them for terrorism, rebellion, sedition and so on. In an inter-state conflict, repatriation means the prisoners are normally transported across a border to a state that is no longer hostile. At the end of an internal conflict, the detainees who had taken up arms against the government would be 'back on the streets'.

Furthermore, as we saw in Chapter 7, the prisoner of war regime is closely associated in the doctrine with the idea of combatant immunity. So, by implication, for many people, having prisoner of war status suggests that they cannot be prosecuted for having taken up arms against the state. In fact it is a bit more complex.

When the laws of war are taught in military academies, the armed forces are typically told 'The law of war recognizes the combatant's privilege to lawfully target enemy combatants and civilians while the latter are taking a direct part in hostilities and, conversely, to be targeted by lawful enemy combatants.'⁴⁹ But this privilege only extends to 'lawful enemy combatants', which does not include those who are not acting on behalf of a government: 'law of war denies the combatant's privilege and entitlement to prisoner of war status to private citizens (other than members of a *levée en masse*) who resort to armed violence without government authority'.⁵⁰ Combatant privilege and prisoner of war status are therefore reserved in broad terms for those acting for a government, and are denied to private citizens (also known as insurgents, non-state actors, rebels or terrorists). This is the standard approach,⁵¹ and it has the merit of clarity, especially when one needs to reduce the logic of the rules down to basic obligations and protections, but we need (p. 403) not necessarily see combatant privilege as tied up with prisoner of war status in this way.

The present book has kept combatant immunity and prisoner of war status in separate chapters. In fact, when we get into the detail, there are some people entitled to prisoner of war status who are not entitled to target the enemy, and so who do not enjoy combatant immunity; well-known examples are war correspondents and the civilian members of the crew of merchant ships and civil aircraft.⁵² It is suggested here that a better approach is not to connect combatant immunity with prisoner of war protection; this way the path is

opened for the better protection of detainees using the norms of the prisoner of war regime, without any perceived risk of according some 'right to fight' or 'licence to kill' to the non-governmental opposition.⁵³

Sivakumaran has detailed how various governments have accorded (at least in theory) prisoner of war treatment (but not status) to the non-governmental opposition in certain conflicts over the last 90 years: Spain (1936), France in Algeria (1958), Nigeria (1967), Federal Republic of Yugoslavia (1991), Bosnia-Herzegovina (1992), Philippines (1996) and Libya (TNC) (2011).⁵⁴ And the Geneva Conventions themselves encourage the parties to a non-international armed conflict to adopt 'special agreements' that would bring into force the protection offered by the provisions of the Prisoner of War Convention.⁵⁵

Why, then, was there so much resistance by the United States Presidency to the application of the Prisoner of War Convention to those in the hands of the US at the start of the Afghanistan conflict in 2001? We will enter into some of the detail here, as it helps to understand the central theme of this book: how changing conceptions of war are undermining established legal protections for the victims of armed conflict.

The White House Legal Counsel Alberto Gonzales wrote the following in a memorandum to President George W Bush, explaining that the denial of the protection of the Prisoner of War Convention 'preserves flexibility', because:

(p. 404)

As you have said, the war against terrorism is a new kind of war. It is not a traditional clash between nations adhering to the laws of war that formed the backdrop for [the Geneva Convention on Prisoners of War] GPW. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians, and the need to try terrorists for war crimes such as wantonly killing civilians.

The memorandum goes on, under a separate heading, to explain that such a denial of application of the Geneva Convention 'Substantially reduces the threat of domestic prosecution under the War Crimes Act (18 USC 2441).' The fear for the White House lawyer was that US prosecutors and courts would misapply or misconstrue the War Crimes Act based on undefined language in the Geneva Convention, such as 'outrages on personal dignity' and 'inhuman treatment', with dramatic consequences. Punishments for US personnel under paragraph 2441 of the Act included the death penalty. In a chilling sentence, the Legal Counsel advises 'A determination that the GPW [Geneva Convention on Prisoners of War] is not applicable to the Taliban would mean that Section 2441 would not apply to actions taken with respect to the Taliban.'⁵⁶

In response to the possible counter-argument that denying the application of the Convention would put US personnel at risk should they be captured, it was claimed that 'we can still bring war crimes charges against anyone who mistreats US personnel'. This is a remarkable approach. It was argued that US prosecutors should not be given the possibility to prosecute war crimes for any alleged US mistreatment of the Taliban, yet the same prosecutors would apparently be able to prosecute as war criminals those Taliban who mistreated US personnel.

It was therefore, according to this material, the fear of national war crimes prosecutions against US military personnel (and their leaders) that drove the convoluted reasoning that attempted to disapply the protection of the Geneva Convention to such detainees.⁵⁷ In fact, one cannot simply shield one's own personnel from war crimes prosecutions by declining to apply the (p. 405) Geneva Conventions. Prosecutors in international courts or from other jurisdictions will be able to bring war crimes prosecutions based on whether the

Conventions and any customary international law apply as a matter of law based on the facts, and not on whether the detaining power chose to apply the Conventions.⁵⁸

Moving on from this controversy, what are the actual protections that apply, not just as principles⁵⁹ but as a matter of law? And what consequences flow from breaches of these provisions of the Geneva Conventions?

In order to be a protected prisoner of war in the context of this treaty, one must actually qualify as a prisoner of war in an inter-state conflict, as defined in Article 4 of the Prisoner of War Convention. As explained above, from this status flows an entitlement to private visits from the ICRC or a Protecting Power,⁶⁰ as well the fact that the following acts, when committed against a prisoner of war, will constitute a grave breach of the Convention: 'wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention'.⁶¹ The commission of such a war crime leads to a universal obligation on all states to search for and prosecute or extradite an alleged perpetrator or anyone alleged to have ordered such a grave breach.

Article 4 defines who qualifies as a prisoner of war.⁶² The key point is that members of the armed forces are entitled to prisoner of war status on capture, (p. 406) or having surrendered to the enemy state. Accepted exceptions include those who are caught engaging in espionage (spies),⁶³ mercenaries,⁶⁴ and those members of the armed forces who fail to distinguish themselves from the civilian population when engaging in an attack or in a military operation preparatory to an attack.⁶⁵

The concrete protections are complex and can be only summarized here as comprising humane treatment and protection from violence, insults and public curiosity, with an explicit prohibition on reprisals.⁶⁶ Interrogation is not prohibited, but the prisoner of war is only obliged to give 'his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information'.⁶⁷

The detaining state is to establish an Information Bureau and cooperate with the ICRC Central Prisoners of War Information Agency. Cards are sent (p. 407) to the family through the Central Agency. Successful escapees are not liable to punishment on recapture.⁶⁸ And there are detailed rules on evacuation, internment, labour, financial resources, tobacco, pay, relations with the exterior, complaints, fair trial, release and repatriation at the end of hostilities.

Since the 1949 Geneva Prisoner of War Convention was adopted, human rights law has developed so that the human rights of prisoners of war have been taken into consideration. Some of the provisions in the Prisoner of War Convention need now to be read against modern approaches to the human rights of people with disabilities. So 'isolation wards' for people with 'mental disease' could lead to violations of those persons' rights and render the detention arbitrary or illegal.⁶⁹ Moreover, the concept of 'reasonable accommodation' favours repatriation.⁷⁰

Human rights and refugee law have also affected the detaining state's duty to repatriate. The Prisoner of War Convention has now been interpreted against the background of any prisoner of war's human right not to be returned where there is a substantial risk of torture or ill-treatment. As Sassòli's detailed study makes plain, such a prohibition on return should extend to cover

threats of punishment for the mere fact of having been captured and interned as a POW . . . [I]t is hardly conceivable that 196 states could be party to a Convention the very purpose of which is to protect POWs in the power of the enemy, if they

considered that the mere fact of having been made a prisoner by the enemy could entail legitimate punishment after repatriation.⁷¹

9.1.3 Civilians in the Hands of the Enemy (International Armed Conflict)

Chapter 7 outlined two cardinal rules of armed conflict. First, civilians can never be the object of direct attack and, second, civilians are protected by the law on precaution in both attack and defence, as well as the specific (p. 408) prohibitions on indiscriminate and disproportionate attacks. In this section we address the specific regimes applicable in international armed conflict that protect civilians in the hands of the enemy (as opposed to protection from attack). In particular we will examine the context of civilians considered as enemy aliens in the territory of a state party to an international armed conflict, as well as civilians in occupied territory. While a number of provisions protect civilians in both these categories,⁷² and indeed civilians more generally,⁷³ we will concentrate on the protected persons regimes for those considered alien, enemy and hostile, as it is here that one finds the remnants of a logic of war that considers groups of foreigners as enemies.

Notwithstanding Rousseau's definition of war encountered in Chapter 1, that war is purely the relationship between enemy states and not between individuals, the protections in the Fourth Geneva Convention focus on protecting foreign civilians who are in the hands of the enemy. We should perhaps already clarify that, although the Fourth Geneva Convention speaks of individuals being in 'enemy hands' or in the 'hands of a Party to the conflict or Occupying Power', this is understood widely. The *Pictet Commentary to Geneva Convention IV* (1958) explains that 'the expression "in the hands of" need not necessarily be understood in the physical sense; it simply means that the person is in territory which is under the control of the Power in question'.⁷⁴

9.1.3.1 Civilian Aliens in the Territory of the Enemy (International Armed Conflict)

Civilians in enemy territory are now protected specifically by Articles 34 to 46 of the Fourth Geneva Convention. In Chapter 5 we examined the legality under the US Constitution of interning persons of Japanese descent during the Second World War. The rules under the Fourth Geneva Convention (1949) protect only those who are not nationals of the state with control over them. Part of the Convention addressed the plight of those interned during the Second World War as enemy aliens. This protection regime now gets little (p. 409) attention, but the background deserves highlighting for what it tells us about attitudes in war.

The following factsheet explains part of the history concerning internship in the UK during the Second World War.

At the outbreak of war there were around 80,000 potential enemy aliens in Britain who, it was feared, could be spies, or willing to assist Britain's enemies in the event of an invasion. All Germans and Austrians over the age of 16 were called before special tribunals and were divided into one of three groups:

- 'A' - high security risks, numbering just under 600, who were immediately interned;
- 'B' - 'doubtful cases', numbering around 6,500, who were supervised and subject to restrictions;

- 'C' – 'no security risk', numbering around 64,000, who were left at liberty. More than 55,000 of category 'C' were recognised as refugees from Nazi oppression. The vast majority of these were Jewish.

The situation began to change in the spring of 1940. The failure of the Norwegian campaign led to an outbreak of spy fever and agitation against enemy aliens. More and more Germans and Austrians were rounded up. Italians were also included, even though Britain was not at war with Italy until June. When Italy and Britain did go to war, there were at least 19,000 Italians in Britain, and Churchill ordered they all be rounded up. This was despite the fact that most of them had lived in Britain for decades.

Thousands of Germans, Austrians and Italians were sent to camps set up at racecourses and incomplete housing estates, such as Huyton outside Liverpool. The majority were interned on the Isle of Man, where internment camps had also been set up in World War One. Facilities were basic, but it was boredom that was the greatest enemy . . .

That many of the 'enemy aliens' were Jewish refugees and therefore hardly likely to be sympathetic to the Nazis, was a complication no one bothered to try and unravel – they were still treated as German and Austrian nationals. In one Isle of Man camp over 80 per cent of the internees were Jewish refugees.

As regards British citizens interned by the Nazis, in September 1942 the Germans sent 2,000 British-born civilians from the Channel Islands to internment camps in Germany. Another 200 were deported in January 1943, as a reprisal for a British commando raid.(p. 410)

In 1941–2 approximately 130,000 civilians from Allied countries living and working in colonies invaded by the Japanese were interned. These included men, women and children from the Netherlands, the UK, Australia, New Zealand and the USA . . .

Internment was also carried out in the USA after the Americans entered the war in December 1941. Some 100,000 Japanese-Americans living on the west coast of America were interned, often in very poor conditions.⁷⁵

The injustice and absurdity of such internment is wonderfully captured by Ali Smith in her recent novel *Summer*, where she describes the arrival of a group of German internees on the Isle of Man:

The local island people lining the road as they marched up the hill were watching them with their mouths hanging open.

I think they think we're Nazis, Daniel said. They think we're Nazi prisoners of war.

See, I never would've imagined the NCO marching alongside them said then, that there'd be so many of you Jews who was Nazis. I can't comprehend it. Why would you like the Nazis so much when the Nazis don't like *you* so much?

We're not Nazis, Daniel said. You couldn't get more opposite from Nazis. Didn't they brief you?

Briefed us nothing the soldier said.

We're the ones who thought we'd got away from the Nazis, the man next to Daniel said. We're doctors, teachers, chemists, shopkeepers, labourers, factory workers, you name it. What we're not is Nazis.

Told us nothing, the soldier said. Enemy aliens is what they said. Are you not the Germans then?

The Germans are not all Nazis, the man said.⁷⁶

Even after the internment of these 'enemies', the fear of an enemy within persevered. Neil Storey's book on the mounting fears of invasion in 1940 excerpts the following briefing by the secret service to senior police officers in 1940, giving a sense of the mood of a country at War:

(p. 411)

Racial Minorities of Doubtful Loyalty

1. Irish: This is the only section likely to take extensive action to assist the Germans.
2. Scottish and Welsh Nationalist Movements: Some evidence of German penetration, especially among the Welsh.
3. Germans: None still at large except some women of German nationality or extraction. Might give aid on a small scale to parachutists.
4. Other Refugees: 10,000 Czechs, 20,000 Dutch and Belgians. Some may be considered anti-Nazi. British refugees 6,000 to 7,000 returned from the Low Countries many unable even to speak English.
5. Italians: Most of the members of the Italian Fascist Party have either left the country or been arrested. ⁷⁷

The protective regime in the Fourth Geneva Convention now applies some general protections to all civilians.⁷⁸ But for a particular set of protected persons (enemy aliens) it provides specific protection, whilst also authorizing internment for such individuals. The condition in the Convention now stipulates that internment is authorized 'only if the security of the Detaining Power makes it absolutely necessary'.⁷⁹ This is an objective rather than a subjective test.⁸⁰ Nothing more severe than internment or assigned residence is permitted as a measure of control.⁸¹ Today there are specific rules that preclude a state from treating refugees as security risks purely on the basis of their nationality.⁸²

Stripped of its historical context and the particular regime of the Fourth Geneva Convention, this power to intern gets invoked or alluded to in the contemporary world in order to justify wide-ranging security detention in all sorts of situations, including counter-terrorism operations and non-international armed conflicts. On balance, it is probably better that this internment regime should be restricted to the situation carefully circumscribed by the treaty, with the attendant full protection found in the Geneva Convention, and not applied by analogy in other circumstances where the full protective regime will not be carried over.⁸³ It is suggested that we should (p. 412) stick to a strict legal interpretation here in order to avoid abusive use of this kind of security internment by governments and non-state actors. If states and other actors want to intern outside this context, they need to find separate legal authority to do this.

Who, then, is a protected person who can be interned under the regime prescribed in this Geneva Convention? The treaty definition is difficult to understand on first reading, but the essential elements are that:

1. There is an international armed conflict between two or more states.
2. The person is in non-occupied territory and under the control of the territorial state.
3. The person is not a national of the detaining state.

4. The person is not a national of a neutral state or of a co-belligerent state with the detaining state, as long as the state of which they are a national has normal diplomatic representation in the state in whose hands they are.
5. The person is not protected under any of the other three Geneva Conventions of 1949 (discussed above).⁸⁴

The attendant protections include the right to access ICRC representatives,⁸⁵ a detailed regime concerning treatment of internees almost as comprehensive as that for prisoners of war,⁸⁶ and the right to have the detention reconsidered with a review of the admissibility of the internment at least twice a year.⁸⁷ In addition, 'unlawful confinement' in this context is a grave breach of this Geneva Convention and a war crime. The crime will be committed either in the context of an initial unlawful detention, or through a failure to apply the periodic procedural protections with a view to possible release.

The International Criminal Tribunal for the former Yugoslavia explained that unlawful confinement occurred:

(p. 413)

- (i) when a civilian or civilians have been detained in contravention of Article 42 of Geneva Convention IV, *ie*, they are detained without reasonable grounds for believing that the security of the Detaining Power makes it absolutely necessary; and
- (ii) where the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where their initial detention may have been justified.⁸⁸

In the *Čelibići Camp* case, the Trial Chamber judgment of the same Tribunal found that the Commission established by the War Presidency in Konjic did not meet the requirements of Article 43, and that the *de facto* commander Mucić was guilty of the war crime of unlawful confinement. The procedural safeguards have to be meaningful:

An initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in article 43 of Geneva Convention IV.⁸⁹

However, it was clear to the Trial Chamber that this Commission did not have the necessary power to decide to order the release of prisoners whose detention could not be considered as being justified for any serious reason. To the contrary, the power of this Commission was limited to initiating investigations of the prisoners and conducting interviews with prisoners in order to obtain relevant information concerning other individuals suspected of armed rebellion outside the prison camp. It was not possible for the members of the Commission to supervise the actual release of prisoners who were suggested for release by its members.⁹⁰

For this crime, participation as a camp guard through mere presence may not be enough to find direct reasonability for committing the war crime. As the Appeals Chamber explained:

[T]he fact alone of a role in some capacity, however junior, in maintaining a prison in which civilians are unlawfully detained is an inadequate basis (p. 414) on which to find primary criminal responsibility of the nature which is denoted by a finding that someone has *committed* a crime. Such responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense, such as those who actually place an accused in detention without reasonable grounds to believe that he constitutes a security risk; or who, having some powers

over the place of detention, accepts a civilian into detention without knowing that such grounds exist; or who, having power or authority to release detainees, fails to do so despite knowledge that no reasonable grounds for their detention exist, or that any such reasons have ceased to exist.⁹¹

To be clear, this type of internment covers a narrow category of individuals: for example, it would cover Iraqis in the United States or the United Kingdom during the armed conflicts between those states and Iraq. And of course it would cover Americans and British civilians interned by the Iraqi authorities in Iraq. But, as explained above, nationals of neutral states or co-belligerents could not be interned under this regime. Nor can this regime be applied by analogy to a global war on terror. It is confined to armed conflicts between two states.

9.1.3.2 Civilians under Occupation (International Armed Conflict)

As explained in earlier chapters, in the past, wars led not only to conquest and subjugation, but also to acquisition of territory. Occupation was a temporary situation while the victor negotiated what territory might be acquired, and even the payment owed by the vanquished for the cost of the war. It was only with the emergence in Europe of ideas of national self-determination and sovereignty for European states,⁹² that the foundations of occupation law started to go beyond general principles of sparing the civilian population, and included the notion of conserving the political and economic system of the nation under occupation.⁹³

(p. 415) Today, as we saw in section 3.6, it is not possible legally to acquire territory by force. Suffice it to recall the words of the Friendly Relations Declaration, adopted by all UN Member States in 1970: 'The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.'⁹⁴

The modern international law on occupation aims in part at conservation of the legal system of the occupied party,⁹⁵ and is supposed to protect the population under occupation, including their public and private property.⁹⁶ Contemporary controversy concerns this first aim, and the debate turns on what has become known as 'transformative occupation'.⁹⁷ This is where the occupier seeks to change the law of the country under occupation beyond certain limits. The situation is complicated by the fact that the occupier may well be able to argue that the changes are for the good, that they better conform with the occupier's human rights obligations or with democratic principles.⁹⁸ The occupier may even argue that it is working for self-determination and liberation of the people. But of course these changes may be mainly for the benefit of the occupier and its nationals (sometimes settled in the occupied territory).⁹⁹ Benvenisti's book-length study of occupation highlights how the international legal duties imposed on the occupier were 'transformed into a legal tool extensively invoked by occupants in those areas in which they wished to intervene'. He continues, 'My analysis of occupation shows – and this should not be surprising – that social decisions taken and implemented in occupied territories were never incompatible with outcomes sought by occupants.'¹⁰⁰

Clearly the changes brought about by the occupying Allies in Germany and Japan at the end of the Second World War went beyond the 'conservationist' (p. 416) idea and what was necessary to restore and ensure public order. This was acknowledged at the time, and said to be justified by the exceptional circumstances.¹⁰¹ Today the tension may be expressed in terms of human rights obligations that require the occupier to replace discriminatory law, harsh punishments or inadequate due process rights. But, as just indicated, a critical approach demands careful scrutiny of changes brought about by the occupier and the limits that are imposed by the modern law of occupation.¹⁰² The issue is not simple, as the law not only imposes limits but also requires that the occupier administer the occupied territory. Where significant changes that go beyond the limits imposed by international law are necessary, the preferred option for many commentators is that the Security Council should

specifically authorize a departure from rules that limit the right of the occupier to introduce legal changes.

A major problem for the drafters in 1949 was the need to find compromises between the delegations from states that had been occupied during the Second World War, including France, who was also keen to legitimize the role of those engaged in an organized resistance, with those who had recently become occupiers and were more focused on the needs and protection of their military forces. This was, in a way, a departure from the law of war treaties adopted so far, as those earlier texts were concerned with the fate of combatants and associated medical personnel. The story is engaging told by the historian Geoffrey Best:

Even if the members of opposed armed forces have a dislike, or are taught to have a dislike, for each other, the discipline to which they are normally subject may ensure some respect for law; besides which, the law-protected enemies they are most likely to encounter person-to-person are by definition the least likely to continue to threaten or bother them: surrenderers, prisoners, and the disabled. An army however stands in a different relationship towards an enemy civilian population. Instead of recognizable categories of fellow fighters, once seen never, probably, to be seen again, there is a mass of people alien in more than one sense to the soldiers who have to live among them. A perfectly docile occupied population is scarcely conceivable; and so far as it might exist, it would by most conventional canons (p. 417) of judgment (eg nationalist, patriotic, collectivist, tribal) be contemptible. There can hardly not be some hostility and resistance shown to the uninvited, forceful, menacing stranger.

The awkward questions were therefore inescapably posed: how much trouble should the occupier be prepared to put up with, and how tough was he allowed to get when the amount of trouble became unbearable? From some of the major war-crimes trials – the ‘High Command’ and ‘Hostages’ trials above all – came clearly the warning that the toughness could not lawfully go beyond a certain point; but in none of them was it suggested that he must passively submit to whatever indignities and inquiries the occupied population chose to inflict upon him.

The security- and order-maintaining parts of the Civilians Convention show how the Diplomatic Conference trod this tightrope. They were the necessary counterpart to the civilian-protecting parts, which otherwise and on their own must be considered pure fantasy. Much argument and a certain amount of unpleasantness had to be gone through before they were reached. The recently occupied countries found them bitter pills to swallow. The countries with experience as occupiers feared lest they were giving away too much.¹⁰³

9.1.3.2.1 Internment and Punishment of Civilians in Occupied Territory

This balancing act is demonstrated by the regime for internment. As with enemy aliens in the territory of a belligerent state, those under occupation are susceptible to internment, and this is covered by a similar regime. Because the criteria are complex and slightly different from those outlined above, we might again list the criteria for being a protected person in the context of occupation.

1. There is a foreign occupation by a state of territory over which it does not have sovereignty (there need be no resistance) and the occupation continues as long as there is no consent to it.¹⁰⁴

- (p. 418) 2. The person is in occupied territory and under the control of the occupying state.
3. The person is not a national of the occupying state.
4. The person is not a national of a co-belligerent state with the occupying state, as long as the state of which they are a national has normal diplomatic representation in the state in whose hands they are.
5. The person is not protected under any of the other three Geneva Conventions of 1949 (discussed above).¹⁰⁵

Internment of security detainees is foreseen under the following conditions:

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.¹⁰⁶

Interestingly, when it came to negotiating the Civilians Convention after the Second World War, it was admitted that the people under occupation could not be expected to respect the occupier as they would their own government. While the rules that recognize the right of members of an organized resistance movement to prisoner of war status are dealt with in the Prisoner of War (p. 419) Convention,¹⁰⁷ provisions were also made that recognized the general lack of allegiance to the occupier for those under occupation. A second provision provides for detention limited in proportion to the offence committed where

[p]rotected persons . . . commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them.¹⁰⁸

The use of the death penalty is limited, and the same provision states:

The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.

In addition, the occupier cannot impose the death penalty for spying, sabotage or intentional acts causing death, where the death penalty did not exist in the law of the occupied state before occupation. This was fiercely resisted by the United Kingdom and the United States, along with some of their allies. Schabas recounts how they argued that 'if the death penalty in an occupied territory were eliminated, it would only provoke soldiers in the occupying army to take matters into their own hands and summarily execute civilians rather than arrest them and turn them over to the judicial authorities'.¹⁰⁹ As the historian Geoffrey Best points out, this sort of provision divided 'those who had experienced the nastiest sort of military occupation' from those 'who resignedly assumed that military occupation could never be nice'. For the British and the Americans it 'seemed lunacy', as it 'appeared to mean that a capital-punishment State could protect its occupation-resisting

civilians – even those who killed any number of occupying troops, etc – by the neat expedient of declaring the death penalty abolished just before the occupying forces arrived'.¹¹⁰ In the end, the provision was put to the vote and, having (p. 420) lost the vote, a number of states entered formal reservations to the treaty to ensure they could impose the death penalty in such circumstances.¹¹¹ These remain in place for the United States, South Korea, Pakistan, Suriname and Uruguay. The United Kingdom and a number of other states have withdrawn their reservations on this point.

My aim here is to illustrate that this new Fourth Geneva Convention (the Civilians Convention) was conceived as covering protected civilians who would engage in acts of sabotage and resistance. On capture and trial they remain civilians protected by the Convention. If they are not civilians, they must be members of the armed forces of a state, or members of an organized resistance movement belonging to a state party to the conflict, and they would find protection under the Prisoner of War Convention.¹¹² A protected person who is a civilian does not lose their civilian status through any acts or activity.¹¹³ The idea of a third category of person who is neither a combatant/fighter nor a civilian makes no sense in the context of protecting those in the hands of the enemy. The introduction of such a third category of persons 'engaging in hostilities' in the US *Law of War Manual* has been roundly criticized as not only engendering confusion, but also suggesting the absence of protection, leading to a result that 'directly contravenes the letter and spirit' of the international law of armed conflict.¹¹⁴

9.1.3.2.2 Deportations and Transfers

A last topic related to occupied territory is deportations and transfers. The Convention generally prohibits forcible transfers in the territory, as well as deportations of protected persons out of the occupied territory.¹¹⁵ Unlawful (p. 421) transfers and deportations are grave breaches of the Convention (war crimes).

The Convention also states that 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.'¹¹⁶ It is this prohibition that renders illegal the establishment of settlements in occupied territory, and which is invoked in the context of the Israeli settlements in the territories they occupy. In addition, the International Criminal Court Statute includes a war crime of 'The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory'.¹¹⁷

The Israeli authorities and courts have claimed that the prohibition on transfer into occupied territory in the Geneva Convention is not applicable to Israel. This claim involves various arguments: first, that the Civilians Convention of 1949 does not apply as a matter of law to the occupation of the West Bank because Israel does not consider that the territory belongs to another state; second, Israel considers that this provision should only apply to *forcible* transfers of their population into the occupied territory; and, lastly, Israel argues that the Convention (even if it were applicable) and any relevant customary international law have not been incorporated into Israeli law, and therefore no prohibition could be enforced in the domestic courts of Israel.

The arguments that the Fourth Geneva Convention does not apply in this context and that the prohibition only relates to forced transfers have been convincingly rebutted, including in the findings of the International Court of Justice in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*.¹¹⁸ The Court also stated with regard to the prohibition on transfers into occupied territory:

(p. 422)

That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.¹¹⁹

More recently, Theodor Meron, who was the Legal Advisor of the Israel Ministry of Foreign Affairs in 1967, has revisited these issues, referencing the legal opinions he gave at the time and explaining the flaws in the reasoning of the Israeli authorities and judges. At one level he engages in a forensic interpretation of the international treaties involved, and points to the 'erroneous' interpretations offered by others. At another level he highlights the humanitarian nature of the Convention, and the way it provides for inalienable rights. In his expression, it is a 'people-oriented convention' unconcerned with legal claims to territory.¹²⁰ He makes the important point that the Convention references rights and privileges for protected persons that cannot be simply restricted, overridden or eliminated. The occupier owes a special duty under international law to foreigners under its occupation:

There is no question, as the Supreme Court has acknowledged on many occasions, that members of the Arab population of the West Bank are persons protected by the Convention. Conversely, however, Jewish settlers on the West Bank, as citizens of the occupant, to whom they owe allegiance, are not protected persons. Any discrimination between the two groups can only be justified when the Arab population, as constituting protected persons, benefits from additional rights accorded by the Convention. In reality, however, it is the Arab population that is subjected to discrimination.¹²¹

In sum, the regime for occupied territory has multiple aspects that need to be reconciled while respecting the rights of protected persons. First, the Hague Regulations recognize that the occupier shall take all 'measures in his power to restore, and ensure, as far as possible, public order and safety',¹²² and the Geneva Civilians Convention states that the occupier 'may take such (p. 423) measures of control and security in regard to protected persons as may be necessary as a result of the war'.¹²³ Second, the category of protected persons is defined as those who are foreigners in the eyes of the occupier; their rights are inalienable and cannot be bargained away or surrendered.¹²⁴ Third, the occupier is obligated to respect, 'unless absolutely prevented, the laws in force in the country',¹²⁵ while at the same time having a responsibility for the welfare of the population under occupation,¹²⁶ which over time inevitably means expanding duties towards the population in occupied territory.¹²⁷ For Greenwood there is also a 'duty to prevent economic collapse as well as a breakdown of law and order. This duty probably extends to requiring the occupant to ensure that there is a functioning currency in the occupied territory and that essential services are maintained.'¹²⁸ Lastly, the 1949 Civilians Convention and Additional Protocol I have created a grave breaches regime.¹²⁹ This legal regime not only criminalizes certain acts related to occupied territory, but also creates an obligation to search for, prosecute or extradite those alleged to have committed or ordered such grave breaches. We will examine these obligations in more detail in the following chapter on war crimes.

9.1.4 Civilians in Unoccupied Territory Undergoing Hostilities (International Armed Conflict)

There is some debate over the protective reach of the Civilians Convention to civilians caught up during an 'invasion phase' and before an occupation has been established.¹³⁰

Sassòli has suggested that civilians in invaded (p. 424) (as opposed to occupied) territory must have some protection under the Convention:

Most of the rules of Convention IV benefit only 'protected civilians', as defined in Article 4, who 'find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or occupying power of which they are not nationals.' When inhabitants of an invaded territory fall under the control of invading forces, such as by arrest and detention, they are without a doubt in the hands of a party to the conflict of which they are not nationals and are therefore protected persons. As such, they must benefit from some rules of Part III of Convention IV dealing with the 'status and treatment of protected persons'.¹³¹

The problem is that these civilians are strictly speaking in neither of the two categories of protected persons we dealt with above: they are neither enemy aliens in the territory of a party to the conflict (like the Germans interned in the UK), nor are they non-nationals in the hands of an occupying power. Furthermore, some of the far-reaching obligations of the occupier could not be fulfilled during the invasion phase (eg support for educational institutions). Sassòli's solution is a shift to 'functional occupation', with a 'sliding scale' of obligations. For him 'the very concept of occupation itself can also be understood using a functional approach under which a territory may be considered occupied along a sliding scale for the purpose of the applicability of certain rules of IHL of military occupation but not for others'.¹³²

In any event, any civilians, or indeed members of the armed forces, would be protected by Article 75 of the Additional Protocol of 1977, which is considered, including by the United States, which is not a party, to contain a set of binding obligations.¹³³ These human rights-style protections are comprehensive and deserve to be constantly recalled. They include the right to be treated humanely, protection from indecent assault and threats to the life or well-being of persons, separate quarters and supervision for female detainees, prohibitions on the taking of hostages, collective punishment, and arbitrary detention, as well as guarantees for a fair trial.

(p. 425) 9.2 Protection in a Non-International Armed Conflict

While the basic protections for all those in the hands of the enemy also apply in non-international armed conflict – guarantees of humane treatment and fair trial for offences related to the conflict¹³⁴ – the treaties make no provision for combatant immunity or internment without trial in non-international armed conflicts. The issues of targeting and detention therefore require separate discussions, not least because of the controversies that surround the unwritten law in this area. It bears repeating at this point that around 90% of the armed conflicts in the world have to be classed as non-international armed conflicts.¹³⁵

9.2.1 Fighters, Direct Participation in Hostilities and Continuous Combat Function

We saw in Chapter 7 that a military objective is limited to those objects that both make an effective contribution to military action and whose destruction at that time offers a definite military advantage. We also saw that civilians can lose their protection from attack where they engage in a variety of acts harmful to the enemy. These acts could include: an armed attack by whatever means; taking up firing positions or moving in military configuration towards an objective; positioning, emplacement and/or detonation of mines, booby traps or emplaced munitions; conducting reconnaissance, surveillance or espionage on behalf of an opposing force, and so on. On the other hand we also concluded, along with General Rogers, that civilian activity that does not render the civilians legitimate targets includes

'Working in commercial institutions that indirectly support the war effort by financing the government through taxation.'¹³⁶

(p. 426) The tricky question, then, is how to describe those who can be targeted in a non-international armed conflict. States will not accept that the armed forces of the non-state actor are to be seen as *combatants* in a legal sense, as this implies a right to fight, immunity from prosecution for fighting and prisoner of war status on capture. As we shall see, they might be labelled 'fighters', but this does not really help in practical terms. In a conflict involving non-state actors, it will usually be difficult to determine who really is a member of the armed forces of the non-state group as opposed to a local inhabitant or a supporter.

This problem is explicitly recognized in the US *Law of War Manual*:

Whether a person has joined a non-State armed group may be a difficult factual question. Non-State armed groups may not use formal indicia of membership (*eg*, uniforms or identity cards), or members of these groups may seek to conceal their association with the group. It may be appropriate to use circumstantial or functional information to assess whether a person is part of a non-State armed group.¹³⁷

The terminology for those fighting against the armed forces of a state in a non-international armed conflict is convoluted and confusing. As already mentioned, most states and manuals will avoid the expression 'combatants' to avoid giving the impression that the person has a right to fight and combatant immunity. Additional Protocol II outlaws attacks on civilians and then states that this protection does not apply 'for such time as they take a direct part in hostilities'.¹³⁸ The US *Manual* uses the term 'private persons who engage in hostilities';¹³⁹ The expert *Manual on the Law of Non-International Armed Conflicts* refers to 'fighters' for the armed forces of both sides, and in that context 'civilians who actively (directly) participate in hostilities are treated as "fighters"'.¹⁴⁰

In their national law and military manuals, states employ various terms such as 'unlawful combatants', 'unprivileged belligerents', 'enemy combatants', 'rebel forces', 'armed rebels', 'insurgents', 'enemy armed forces', 'enemy soldiers' and 'soldiers in the enemy army'.¹⁴¹ The idea of labelling all members of the (p. 427) armed forces of the non-state side as 'fighters' is tempting, as it implies that they are doing something violent and could therefore be liable to attack, but as the ICRC points out, the term 'fighter' 'would be translated as "combatant" in a number of languages and is therefore not wholly satisfactory'.¹⁴² Nor is it satisfactory when it is a way of legitimizing the killing. According to the US *Law of War Manual*, 'belonging to an armed group makes a person liable to being made the object of attack regardless of whether he or she is taking a direct part in hostilities';¹⁴³ such an individual simply standing queuing for food or sleeping 'remains the lawful object of attack'.

The scope of activity that renders you liable to be labelled (and by implication targetable) as a 'fighter', 'unprivileged combatant', 'exercising a continuous combat function' or part of 'hostile forces' is extremely controversial, and there is no guidance in international treaties. Where labelling leads to targeting, it should in my view be rejected. The latest New Zealand *Manual* (2019) captured the point well with this paragraph:

DIRECT PARTICIPATION IS NOT A STATUS

6.5.3 'Direct participation in hostilities' refers to the actions of a person; it does not confer a separate legal status. Some of New Zealand's coalition partners use the terms *unlawful combatants* or *unprivileged belligerents* to describe persons who are not combatants but who take a direct part in hostilities. These terms are not used in this manual to avoid any suggestion that such persons fall between combatant and civilian status and can be denied fundamental rights as a result. Terms such as 'insurgent', 'freedom-fighter', 'jihadi', 'terrorist' or 'rebel' are commonly used to

describe persons who do not have combatant status but who take a direct part in the hostilities. None of these terms define the legal status of the person concerned under LOAC [the law of armed conflict]. Terms such as 'counter-insurgency operations' relate to a method of operation rather than the legal status of the persons concerned.

The point is that, in certain non-international armed conflicts, care should be taken before resorting to status-based killing where it is unclear who belongs to the armed forces on the rebel side or is directly participating in hostilities. We should hesitate before accepting assertions that someone is alleged to be a combatant, fighter, exercising a continuous combat function, directly (p. 428) participating in hostilities or substantially contributing to the enemy's capacity to engage in combat.

A recent reminder of how such terms come to be read as justifying unjustified lethal violence emerged from the inquiry into allegations against Australian forces in Afghanistan:

Direct participation in hostilities. Dr Cromptvoets [a sociologist from the Australian National University] was told that 'Direct participation in hostilities' was another tool used by Australian Special Forces to commit 'just about any atrocity that took their fancy'. One example of this related to 'squirters' – a reference to villagers running away when a force was inserted by helicopter. The scenario conveyed to Dr Cromptvoets was that Special Forces would open fire, killing many men (and sometimes women and children) as they ran away. She was told that Special Forces would then contrive a plausible excuse, such as the squirters 'were running away from us to their weapons caches'. These were, she was told, 'sanctioned massacres'.¹⁴⁴

Following a long series of discussions from 2003 to 2009, the ICRC concluded its interpretative guidance, which features two categories of persons (in addition to the armed forces of a state) it is said can be targeted under international humanitarian law. At the same time it suggests there is an additional level of restraint based on necessity and other branches of international law.¹⁴⁵ The guidance separates those directly participating in (p. 429) hostilities from those members of the armed group who can be targeted due to their 'continuous combat function'. Those who fall into the latter group are assumed to be targetable even in the absence of a hostile act:

Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.¹⁴⁶

This explanation of status-based targeting is not universally accepted. For some it widens the range of people who can be targeted too far. For others, including various military experts, as well as some armed forces (primarily the United States and Israel), the category created by this test is too narrow. They claim that, as a matter of law, the armed forces of the state are entitled to target those who are simply members of the military wing of organized armed groups.¹⁴⁷ The explanation given is that limiting those who can be targeted to those who are continuously involved in the military operations of the rebel side

is unfair on the non-involved members of the armed forces of the state who, it seems, can be targeted at any time under the rule. One prominent critic explains it thus:

[B]y limiting continuous loss of protection to members of organized armed groups with a continuous combat function, the ICRC gives regularly participating civilians a privileged, unbalanced, and unjustified status of protection in comparison to members of the opposing armed forces, who are continuously targetable.¹⁴⁸

(p. 430) This complaint is, in a way, surprising, as the armed forces of a state do not really consider that their forces are targetable at all. Each attack on the armed forces is considered by the state as an act of sedition, or terrorism, and criminal. No one captured for attacking the armed forces of a state in a non-international armed conflict is today considered to have done no wrong.

At the least protective end of the spectrum of ideas as to who can be targeted we see the US *Manual*, extending the meaning of taking a direct part in hostilities so that this activity

extends beyond merely engaging in combat and also includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations. However, taking a direct part in hostilities does not encompass the general support that members of the civilian population provide to their State's war effort, such as by buying war bonds.¹⁴⁹

The US *Manual* has been specifically criticized by Adil Ahmed Haque as it 'broadly construes taking a direct part in hostilities to include making a *particularly valuable* contribution to the war effort'.¹⁵⁰ He also questions the myth of the 'farmer by day, guerrilla by night', and suggests that there is no need to weaken the rule that protects civilians by resorting to metaphors such as the 'revolving door'. As he explains:

Simply put, a civilian who is in fact a 'farmer by day, guerrilla by night' will look like a guerrilla and be treated as such. In those exceptional cases in which an attacker has such detailed information about an individual that she determines that the individual is repeatedly fighting for an armed group but is *not* a functional member of that group, the attacker likely has effective control over the area or is monitoring the individual using a remotely piloted vehicle. If the attacker has effective control over the area, then typically she can arrest, detain, or intern the individual, and kill her if she forcibly resists. If the attacker is monitoring the individual using a remotely piloted vehicle, then typically she can continue to monitor the individual and kill her if and only if she again takes a direct part in hostilities.¹⁵¹

(p. 431) Moreover, some human rights experts question the whole concept of continuous combat function as it, in effect, creates a 'status determination' that could lead to erroneous targeting where a fighter has disengaged. As Philip Alston cautions, 'If States are to accept this category, the onus will be on them to show that the evidentiary basis is strong.'¹⁵²

Hampson has raised a more fundamental objection, questioning whether there ought not to be more recourse to a law-and-order paradigm that more closely follows the standards applicable under human rights law. This, she says, is particularly appropriate in smaller non-international armed conflicts:

In low-intensity armed conflicts, the situation is likely to be made worse if armed forces target by reference to status rather than behavior. Mistakes and 'collateral casualties' may be even less well tolerated by the civilian population than in high-intensity NIACs [non-international armed conflicts]. The issue is not whether armed forces can be used to deal with organized armed violence during an emergency, but

whether whatever forces are used are applying rules based on a law and order paradigm or an armed conflict paradigm.¹⁵³

Turning to the ICRC's interpretive guidance on direct participation in hostilities, Hampson explains why the idea of continuous combat function does not necessarily flow from the concept of combatants and the law in the treaties:

The status of combatant exists only in IACs [international armed conflicts]. While it is readily understandable that members of an organized armed group are not regarded as combatants, implying as it does an entitlement to fight, this does raise an interesting question about the status of members of the State's armed forces. . . . Although an individual has no right in international law to participate in a NIAC, he is not committing an international crime by doing so, but obviously he is very likely to be committing a crime (p. 432) under domestic law. Similarly, he will not commit an international crime if he kills a member of the State's armed forces or a member of another organized group, but he will commit an international crime if he breaches the rules on the conduct of hostilities by intentionally killing a civilian, for example.

The treaty rule that addresses DPH [direct participation in hostilities] is the same in IACs and NIACs. Civilians enjoy the protection afforded against the effects of hostilities 'unless and for such time as they take a direct part in hostilities.' Whatever the difficulties regarding the time during which a person can be attacked or the conduct that constitutes 'taking a direct part,' it is clear that the person has to be doing something that makes him a target of attack. In other words, that depends on behavior and not status.¹⁵⁴

Sassòli, who has given the matter considerable thought, is very clear:

[T]he difficult and complex question arises in practice as to how government forces can determine that a person has a 'continuous combat function' for an armed group while he or she does not commit hostile acts. In my opinion, the enemy must base its targeting decisions on appearances except where very reliable intelligence information exists. Therefore, in the absence of sound intelligence information to the contrary, those who do not identify themselves as members of an armed group are civilians who may only be attacked if and for such time as they commit acts of direct participation.¹⁵⁵

9.2.2 Detention in Non-International Armed Conflict

As we saw in sections 9.1.2 and 9.1.3, the Geneva Conventions specifically provide for internment regimes for prisoners of war and civilians constituting a security threat in international armed conflict. These regimes come with specific protections: there are procedures for reviewing the appropriateness of any individual internment¹⁵⁶ and for the ICRC to have access to internees,¹⁵⁷ as well as for certain protected persons to communicate with (p. 433) the ICRC and other organizations.¹⁵⁸ The grave breaches regime applies to protected persons who are so interned, and operates to demand that all states search for and bring before their own courts anyone alleged to have committed such grave breaches against these internees. These regimes were not extended to non-international armed conflict in the humanitarian law treaties.

Nevertheless, a minimal protection regime is found in Common Article 3 to the Four Geneva Conventions and is universally applicable. Serious violations committed against persons

taking no active part in the hostilities constitute war crimes at the international level. Common Article 3 provides in part:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) 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, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- 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 judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded, sick and shipwrecked shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.¹⁵⁹

(p. 434) The controversy comes when this protective regime, which creates obligations for both the state and the non-state party to the conflict, is claimed by states to authorize detention abroad. In the past, a state that detained insurgents on its territory applied its national law to such detentions, and there would be a legal basis for detention in the law. If no national law authorized the detention it would be unlawful, and could be challenged using *habeas corpus* or a similar human rights claim. Now that states detain outside their national borders, most dramatically in Guantánamo, but also in places such as Afghanistan and Iraq, the question has arisen whether there is an inherent right to detain under the laws of war, or whether human rights law demands not just the right to challenge such a detention using a fair and accessible procedure, but also that the state find a legal basis for detention.

As with the issue of targeting fighters discussed above, the question of reciprocity lurks in the background. Just as states do not accept that it is acceptable for armed groups to target them with lethal force, nor do they lightly accept that armed groups can detain their soldiers until the end of the conflict. This is sometimes said to explain why there is no provision for internment in non-international armed conflicts.¹⁶⁰ Nevertheless, in the context of the military action in Afghanistan and Iraq, the claim has been made that the law of war contains an inherent right for states to detain fighters and others who pose a security risk. This has recently been challenged as contradicting the human right not to be arbitrarily detained.

The United Kingdom Supreme Court faced with such a challenge declined to find that international humanitarian law contained such an inherent right to detain. The majority chose instead to find that the Security Council had provided the necessary authority. Lord Sumption's judgment explains: 'I conclude that in both Iraq and Afghanistan, the relevant Security Council Resolutions in principle constituted authority in international law for the detention of members of the opposing armed forces whenever it was required for imperative reasons of security.'¹⁶¹

All forms of detention, whether by the government forces or by the armed opposition, will need to have a legal basis that allows for a degree of predictability so that the armed forces and inhabitants know what behaviour can (p. 435) lead to detention and how any detention can be challenged.¹⁶² As the ICRC explains, even if one considers there is an inherent power to detain, 'additional authority related to the grounds and procedure for deprivation of liberty in non-international armed conflict must in all cases be provided, in keeping with the principle of legality'.¹⁶³

Clearly there is no escaping the centrality of detention in all forms of armed conflict. The challenge is to agree on how to bring all such detention within the rule of law so that detainees (who are not being prosecuted for a criminal offence) are not only treated humanely, but also able to challenge on a regular basis the necessity for their detention.¹⁶⁴

I would suggest that the basic principles are simple, well known and have already been articulated in the cases that deal with the legality of detention. They could also be applied where individuals are detained by non-state actors. With regard to the body entitled to order release, there must be 'guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals.'¹⁶⁵ With regard to the detainee, they have some basic rights. In the words of Lord Sumption, the minimum conditions of fairness would be:

- (i) that the internee should be told, so far as possible without compromising secret material, the gist of the facts which are said to make his detention necessary for imperative reasons of security;
- (p. 436) (ii) that the review procedure should be explained to him;
- (iii) that he should be allowed sufficient contact with the outside world to be able to obtain evidence of his own; and
- (iv) that he should be entitled to make representations, preferably in person but if that is impractical then in some other effective manner.¹⁶⁶

9.3 The Role of the International Committee of the Red Cross

We recounted at the beginning of this chapter how the origins of the ICRC were inspired by Henri Dunant's experience when confronted with the inadequate arrangements for treating the wounded on the battlefield of Solferino. The mission statement of the ICRC today explains that it is 'an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance'.¹⁶⁷ The history of this organization is rich and fascinating, and the reader is referred in particular to Bugnion's massive study, *The International Committee of the Red Cross and the Protection of War Victims*, and to Moorehead's *Dunant's Dream*.

The ICRC states that it has 20,000 staff working in over 100 countries around the world, and the organization had a budget of around \$2 billion. If we consider the larger Red Cross and Red Crescent Movement, which includes not only the ICRC, but also 192 National Societies and their International Federation of Red Cross and Red Crescent Societies (IFRC), it is said to be made up of 'nearly 100 million members, volunteers and supporters'.¹⁶⁸ In situations of armed conflict the ICRC takes the lead.¹⁶⁹ For (p. 437) present purposes we will briefly consider just a few legal aspects of the role played by the ICRC and the emblem.

9.3.1 ICRC Access and Visits

We have already mentioned that in international armed conflicts there is a treaty obligation on states to allow ICRC delegates access to persons protected under the Conventions. In non-international armed conflicts the ICRC can offer its services, and according to the ICRC it 'systematically requests access to persons deprived of their liberty in connection with non-international armed conflicts, and such access is generally granted'.¹⁷⁰ The ICRC's customary law study explains the separate rules as follows:

Rule 124 A. In international armed conflicts, the ICRC must be granted regular access to all persons deprived of their liberty in order to verify the conditions of their detention and to restore contacts between those persons and their families.

Rule 124 B. In non-international armed conflicts, the ICRC may offer its services to the parties to the conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict in order to verify the conditions of their detention and to restore contacts between those persons and their families.

The ICRC must be able to interview detainees in private without witnesses, and the purposes of these visits are partly humanitarian and partly to implement

rules of customary international law, including the prevention of enforced disappearances, extrajudicial executions, torture and other cruel, inhuman or degrading treatment or punishment, monitoring the standard of detention conditions and the restoration of family links through the exchange of Red Cross messages.¹⁷¹

(p. 438) 9.3.2 Confidentiality, the Privileged Status of ICRC Information and Evidence, and the Option of Denunciation

Obviously the information gathered during such ICRC visits is helpful not only to establish family contact and improve conditions, but also potentially for the purposes of obtaining accountability and even the prosecution of war crimes. The ICRC's methodology for conducting interviews with detainees and others is, however, premised on the idea of confidentiality. Parties to a conflict are promised that any report made by the ICRC will be passed to the detaining party and not to anyone else. This is designed to ensure that access is permitted and return visits are ensured. Evidence gathering and denunciation for violations of the laws of war is primarily left to other bodies such as the UN or regional organizations, primarily through Commissions of Inquiry or mandated experts,¹⁷² or to non-governmental organizations and the media. The ICRC explains the method and rationale for its approach as

aiming to put a stop to current violations and prevent potential future ones. As such, its focus is rectification rather than retribution. If violations of the law are alleged or observed, ICRC delegates document such information and – where applicable, with the consent of the person making the allegation – bring it to the attention of responsible authorities. The latter are then responsible – if the

information is confirmed – for changing relevant practices, including, if necessary, by applying disciplinary or penal sanctions vis-à-vis those responsible.¹⁷³

The detaining party is not free to share the information with the media, or even with its parliament or judiciary or in any legal proceedings, without written consent from the ICRC.¹⁷⁴

The issue has arisen as to whether the ICRC could rely on its special role should its staff be compelled to testify or produce documents before an (p. 439) international criminal court. The situations with regard to national courts will usually be regulated by separate agreements between the ICRC and the authorities or specific national law.¹⁷⁵ Several international tribunals have agreed that the ICRC has a right not to divulge information related to its activities.¹⁷⁶ This right is considered by the ICRC a ‘form of testimonial immunity’. At the International Criminal Court, a specific sub-Rule states that, should the ICRC information be of great importance for a particular case, consultations will be held to resolve the matter, taking into account the respective functions of the Court and the ICRC, and the interests of justice and of victims.¹⁷⁷

The ICRC itself explains that the confidentiality approach is not an ‘inalienable principle’ but rather applied for the objective benefit of the victims of violence. Its policy document states that ‘It can never serve to justify, by silence, an unsatisfactory and static situation that is unlikely to change for the better in any significant way.’ It has a policy that that it ‘must be in a position deliberately to breach its undertaking of confidentiality in exceptional cases in which the approach runs counter to the interests of the victims’.¹⁷⁸

Any such exceptional public denunciation would happen in accordance with the ICRC’s specific policy on violations:

Public condemnation

The ICRC reserves the right to issue a public condemnation of specific violations of international humanitarian law providing the following conditions are met:

- (1) the violations are major and repeated or likely to be repeated;
- (2) delegates have witnessed the violations with their own eyes, or the existence and extent of those violations have been established on the basis of reliable and verifiable sources;
- (3) bilateral confidential representations and, when attempted, humanitarian mobilization efforts have failed to put an end to the violations;
- (4) such publicity is in the interest of the persons or populations affected or threatened.¹⁷⁹

(p. 440) 9.4 The Use and Misuse of Emblems

9.4.1 The Emblem of the Red Cross, the Red Crescent or the Red Crystal

The emblem of a red cross on a white background is described in the First Geneva Convention (1949) as ‘a compliment to Switzerland’ and a reversal of the Swiss colours.¹⁸⁰ It was introduced in 1863, to be worn on armbands of the voluntary medical corps called for by Henri Dunant’s campaign.¹⁸¹ The adoption of a uniform symbol for medical personnel on the battlefield resolved a long-standing problem where different armies were using different symbols and colours.¹⁸² Today, the relevant military authorize and control the use of the red cross as a protective emblem for the armed forces’ medical personnel, property, hospitals, ambulances and other medical forms of transport. It can also be used as a

protective emblem for a variety of other medical establishments and personnel.¹⁸³ The red cross enjoys equal status with the red crescent and red crystal, and states can choose which emblem to adopt.¹⁸⁴ The medical services of armed non-state actors engaged in an armed conflict are also entitled to use the emblem as a protective device.¹⁸⁵

As we saw at the beginning of the chapter, hospitals and medical personnel, etc are protected whether or not they display the emblem. This is often misunderstood:

[W]hile the emblem makes it easier to identify a protected person or property, this person or property is protected independently of the emblem. For example, a hospital may not be attacked under the pretext that it was not marked by a red cross. Conversely, a red cross wrongly placed on a military target does not confer immunity on it.¹⁸⁶

(p. 441) Today the problem is often that targeting is carried out from a distance, and the distinctive sign may not be visible in this context. Special provisions cover radio signals and blue flashing lights,¹⁸⁷ and the ICRC has a policy of communicating the GPS coordinates of its medical facilities to the parties.¹⁸⁸ But unfortunately identification is not always a solution. Some armed forces and non-governmental organizations have had to opt for camouflaging their hospitals, or leaving them unidentified for fear of attracting attacks or revealing information concerning tactical developments.¹⁸⁹ Although some attacks on hospitals may be due to negligence, recklessness or a confusion over coordinates, there is increasing concern that medical workers and hospitals are being targeted in order to grind down the morale of the civilian population, force displacement and dissuade those who 'put terrorists back on the battlefield'. Non-governmental organizations have found their hospitals repeatedly hit in Syria, leading to claims that hospitals were being deliberately targeted.¹⁹⁰ After hospitals were hit that were part of the UN's de-confliction mechanism in Syria, the UN Under-Secretary-General told the Security Council that 'A number of partners now feel that supplying geographical coordinates to be given to the warring parties effectively paints a target on their backs.'¹⁹¹

9.4.2 Other Emblems

The laws of war include a series of other emblems, such as the white flag of truce.¹⁹² Under the Hague Regulations there is protection for 'a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to (p. 442) inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and interpreter who may accompany him.'¹⁹³ A specific emblem for protected cultural property and personnel involved in its control or protection consists of a blue square shield pointing down on a white background.¹⁹⁴ Civil defence personnel, buildings and equipment, as well as civilian shelters, are identified by a blue triangle on an orange background.¹⁹⁵ Dangerous installations, such as dams, dykes and nuclear power stations, are identified by three orange circles on a horizontal axis.¹⁹⁶ It is prohibited to make improper use of these emblems, as well as unauthorized use of the distinctive emblems of the United Nations.¹⁹⁷

9.4.3 Misuse of Emblems Constituting a War Crime

As we have seen, attacking hospitals and medical personnel is prohibited and can be prosecuted as a war crime. The Statute of the International Criminal Court includes the specific war crime of 'Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law'.¹⁹⁸ Another crime applicable in international armed conflict relates to *misuse* of emblems, flags, insignia and uniforms, where this results in death or serious personal injury.¹⁹⁹ The misuse of an emblem or the white flag, or pretending to have civilian status or to be sick or injured, can also be

considered perfidy.²⁰⁰ Under Additional Protocol I, 'it is prohibited to kill, injure or capture an adversary by resort to perfidy'.²⁰¹ As opposed to simple misuse of an emblem, the 'essence of perfidy is thus the invitation to (p. 443) obtain and then breach the adversary's confidence'.²⁰² Perfidy causing death or serious injury is criminalized as a grave breach of Protocol I,²⁰³ can be prosecuted as an offence at the national level, and can constitute a war crime prosecuted in the International Criminal Court as 'killing or wounding treacherously individuals belonging to the hostile nation or army'.²⁰⁴

Let us now turn in Chapter 10 to look at war crimes and accountability more generally.

Footnotes:

¹ Hampson, 'Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law', 87 *ILS* (2011) 187-213 at 193.

² *The Laws of War in International Thought* (2020) at 142.

³ *Prosecutor v Tadić*, Case IT-94-1, 2 October 1995, para 119.

⁴ See the 2001 amendment to the Convention on Certain Conventional Weapons (1980) entered into force in 2004; in 2019, 86 of the 125 parties to the Convention had agreed to the amended treaty.

⁵ See Henckaerts, 'New Rules for the Protection of Cultural Property in Armed Conflict', 835 *International Review of the Red Cross* (1999) 593-620.

⁶ For an accessible list of the rules that apply in non-international armed conflict, as well as those where they 'arguably' apply, see Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict', 857 *International Review of the Red Cross* (2005) 175-212 esp at 198-212.

⁷ Gaeta, 'Grave Breaches of the Geneva Conventions', in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 615-46.

⁸ For the detail see the discussion of Art 6(3) in Casey-Maslen, Clapham, Giacca and Parker, *The Arms Trade Treaty: A Commentary* (2016) 229-43.

⁹ See *Hassan v UK*, European Court of Human Rights, 16 September 2014 at para 104.

¹⁰ See generally Hill-Cawthorne, *Detention in Non-International Armed Conflict* (2016), and in particular the litigation that culminated in *Serdar Mohammed v Secretary of State for Defence* [2017] UKSC 2.

¹¹ Farrell, *Habeas Corpus in International Law* (2017); Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* (2017).

¹² See Aughey and Sari, 'Targeting and Detention in Non-International Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence', 91 *ILS* (2015) 60-118; Olson, 'Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law - Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict', 40 *Case Western Reserve Journal of International Law* (2009) 437-61.

¹³ For the detail of some of the differing effects on human rights regimes depending on whether the conflict is international or non-international see Clapham, 'The Complex Relationship between the 1949 Geneva Conventions and International Human Rights Law', in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 701-35.

- ¹⁴ See especially Sassòli, *International Humanitarian Law* (2019) (hereinafter '*IHL*'); and Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict*, 4th edn (2021).
- ¹⁵ See, eg, Art 75 of Additional Protocol I (AP I), discussed below. Note this statement from the US *Law of War Manual* (2016) at para 8.1.4.2 (footnotes omitted, emphasis added): 'Article 75 of AP I reflects fundamental guarantees for the treatment of persons detained during *international* armed conflict. Although not a Party to AP I, the United States has stated that the US Government will choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an *international* armed conflict, and expects all other nations to adhere to these principles as well. This statement was intended to contribute to the crystallization of the principles contained in Article 75 as rules of customary international law applicable in *international* armed conflict.'
- ¹⁶ See GC III Art 126; and GC IV Arts 76 and 143.
- ¹⁷ See GC IV Art 30; Van Der Heijden, 'Other Issues Relating to the Treatment of Civilians in Enemy Hands', in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 1241-68 at 1254-55.
- ¹⁸ See Common Arts 6/6/6/7 and 7/7/7/8 of the Four Geneva Conventions 1949 explained by Casey-Maslen, 'Special Agreements in International Armed Conflicts', in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 135-44; and d'Argent, 'Non-Renunciation of the Rights Provided by the Conventions', *ibid* at 145-53.
- ¹⁹ See Arts 50/51/130/147 of the Four Geneva Conventions and Arts 8, 11 and 85 of AP I. See eg ICRC, *Commentary on the First Geneva Convention*, 2nd edn (2016) at MNs 2926-2928 for those persons and property protected under that Convention. See also Art 8(2)(a) of the ICC Statute.
- ²⁰ See Arts 46/47/13/33 of the 1949 Geneva Conventions, and Arts 20 and 51-56 of AP I.
- ²¹ Art 8(2)(a).
- ²² See Dörmann, Doswald-Beck and Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003) at 29 and 33: protected property includes those things that cannot be attacked as specified in Arts 19 and 33-35 of GC I (medical units, transports, etc and the property of aid societies); Arts 22, 24, 25 and 27 of GC II (1949) (hospital ships, etc); Arts 18, 19, 21, 22, 33, 53 and 57 of GC IV (eg hospitals and medical transports, etc; property of protected persons; public and private property in occupied territory). Loss of protection and exceptions for military necessity are discussed below and specifically dealt with in the relevant articles – see, eg, Art 53 of GC IV. Protected persons would include those covered by Arts 13, 24, 25 and 26 of GC I (wounded and sick from the armed forces or a *levée en masse*, medical personnel), Arts 13, 36 and 37 of GC II (at sea, the shipwrecked, sick and wounded members of the armed forces or a *levée en masse* and medical personnel), Art 4 of GC III (prisoners of war), Arts 4, 13 and 20 of GC IV (eg those in the hands of the enemy and hospital staff). See also Arts 8, 44, 45, 73 and 85(3)(e) of AP I.
- ²³ Dunant, *A Memory of Solferino* [1862] (1959) at 115.
- ²⁴ See Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (2003); Durand, *Henry Dunant* (2011).
- ²⁵ Dunant, *A Memory of Solferino* (n 23) at 71-72.
- ²⁶ *Ibid* at 127.

- ²⁷ See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol 1: *Rules* (2005).
- ²⁸ For a useful overview of the main protections, see Melzer, *International Humanitarian Law: A Comprehensive Introduction* (2016) Ch 4; for further detail, see Sassòli, *IHL* (n 14) Ch 8.1.
- ²⁹ Paras 7.2 and 7.2.1, referencing Art 8(a) of AP I.
- ³⁰ See Arts 21 and 35 of GC I (1949) and Arts 8, 21–31 of AP I (1977).
- ³¹ See further Watkin, ‘Medical Care in Urban Conflict’, 95 *International Law Studies* (2019) 49–93.
- ³² GC I (1949) Art 21.
- ³³ AP I (1977) Art 13(1).
- ³⁴ See also AP II Art 11(2) and Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (n 27) at 97; and Wilmschurst and Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) Ch 7 at 169–78.
- ³⁵ GC IV (1949) Art 19.
- ³⁶ GCs I and IV Arts 21 and 19; see also AP II Art 11(2).
- ³⁷ Eg GC I (1949) Art 22; see also GC IV (1949) Art 19.
- ³⁸ AP I Art 13(2).
- ³⁹ ICRC, *Commentary on the First Geneva Convention* (2016) (n 19) at MN 1842 (footnotes omitted).
- ⁴⁰ Melzer, *International Humanitarian Law* (n 28) at 145.
- ⁴¹ The US *Law of War Manual* suggests (at para 7.8.3, footnote omitted) that medical and religious personnel may be made the object of attack if they ‘participate in hostilities or otherwise commit acts harmful to the enemy. For example, weapons may not be used by medical and religious personnel against enemy military forces except in self-defense or defense of their patients.’ Rather than a vague reference to acts harmful to the enemy, a better conclusion is that medical personnel can only be attacked where they pose an immediate threat rather than representing some harmful act for the attacking forces.
- ⁴² See the New Zealand *Manual of Armed Forces Law*, vol 4: *Law of Armed Conflict*, DM 69 (2nd edn) (2019) at para 11.5.13; Australian Manual (2006), *Law of Armed Conflict*, ADDP 06.4, at para 9.6.9.
- ⁴³ GC II (1949) Arts 13(5) and 16.
- ⁴⁴ GC II Art 18; compare GC I Art 15, which includes an obligation to search for and collect the wounded and sick on land ‘at all times’.
- ⁴⁵ Heintschell von Heinegg, ‘The Law of Armed Conflict at Sea’, in Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict*, 3rd edn (2013) 463–547 at 478–82. The same author has pointed out that ‘Submarines are highly sophisticated and expensive weapon platforms and most countries would be rather hesitant to use them against merchant shipping.’ See his discussion in Heintschell von Heinegg, ‘Submarine Operations and International Law’, in Engdahl and Wrangé (eds), *Law at War: The Law as Was and the Law as it Should Be* (2008) 141–62 at 143ff.
- ⁴⁶ See further ICRC, *Commentary on the Second Geneva Convention* (2017) at MN 1616–1702.

- ⁴⁷ Exceptionally, in situations where there is a recognition of belligerency by the government of the opposition forces, the Convention could be applied so that prisoners are treated as prisoners of war; according to Sivakumaran, such formal recognition has not been seen since the adoption of the 1949 Geneva Convention: *The Law of Non-International Armed Conflict* (2012) at 19. Nevertheless, even without a formal state of Belligerency, the Convention was applied in the Nigerian civil war over Biafra, explained by Bugnion as flowing from recognition: '*Jus ad Bellum, Jus in Bello* and Non-International Armed Conflicts', VI *Yearbook of International Humanitarian Law* (2003) 167–98 at 181.
- ⁴⁸ GC III Art 118.
- ⁴⁹ Parks, 'Teaching the Law of War: A Reprise', *IDF Law Review* (2007) 9–24 at 10.
- ⁵⁰ Ibid at 11; for the definition of *levée en masse*, see GC III Art 4A(6) below.
- ⁵¹ See the discussion in section 7.1 and the references therein.
- ⁵² GC III Art 4A(4) and (5); Note the *ICRC Commentary to GC III* (2020) at para 1058 states 'The ICRC is of the view that persons entitled to prisoner-of-war status on the basis of Article 4A(5) are only those members of the crew whose professional activities are directly linked to the military activities of the armed forces. This includes all members of the crew involved in operating the vessel or aircraft.'
- ⁵³ See also Watts, 'Who Is a Prisoner of War?', in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 889–910 at 909–10.
- ⁵⁴ Sivakumaran (n 47) at 523–25.
- ⁵⁵ GC III 3 para 3; see further Vierucci, 'Applicability of the Conventions by Means of Ad Hoc Agreements', in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 509–21.
- ⁵⁶ Memorandum of 25 January 2002, 'Decision re application of the Geneva Convention on Prisoners of War to the conflict with Al Qaeda and the Taliban', available at <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.01.25.pdf>.
- ⁵⁷ For the subsequent litigation before the Supreme Court and the change in policy, see Hodgkinson, 'Detention Operations: A Strategic Overview', in Corn, Van Landingham and Reeves (eds), *US Military Operations: Law, Policy, and Practice* (2016) 275–305.
- ⁵⁸ The ICC Appeals Chamber has authorized an investigation into the situation in Afghanistan since May 2003 and into other crimes connected to the conflict in other states since July 2002, ICC-02/17-138, 5 March 2020. The allegations concern: (i) the Taliban and affiliated groups for crimes against humanity and war crimes; (ii) the Afghan National Security Forces for war crimes; (iii) the armed forces of the United States and its Central Intelligence Agency (CIA) for war crimes.
- ⁵⁹ The White House Counsel memo of 25 January 2002, referred to above, argued that while the Geneva Convention should not be applied, the US would continue to treat detainees in a manner consistent with the 'principles' of the Prisoner of War Convention.
- ⁶⁰ GC III Art 126.
- ⁶¹ GC III Art 130.
- ⁶² Art 4 provides:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war [*levée en masse*].

The categories of resistance movement (Art 4A(2)) and *levée en masse* (Art 4A(6)) are narrowly interpreted and applied; see, for a very clear explanation, Kolb, *Advanced Introduction to International Humanitarian Law* (2014) at 124–34. See also Art 67(2) of AP I for military personnel serving within civil defence organizations having the right to be prisoners of war.

⁶³ See Hague IV Regulation Art 29 and AP I Art 46; ICRC Customary IHL Rule 107 (n 27); Sassòli, *IHL* (n 14) at para 8.73.

⁶⁴ AP I Art 47; ICRC Customary IHL Rule 108 (n 27); Sassòli, *IHL* (n 14) at para 8.72.

⁶⁵ The ICRC Customary IHL Rule 106 (n 27); AP I Art 44; and UK *Manual of the Law of Armed Conflict* (2004) at paras 4.4–4.12; US, *Law of War Manual* at para 4.17.5; see also

Sassòli, *IHL* (n 14) at para 8.58; for a useful explanation of the limited applicability of Art 44, see Kolb (n 62) at 134–42.

⁶⁶ GC III Art 13.

⁶⁷ GC III Art 17.

⁶⁸ GC III Art 91.

⁶⁹ See Priddy, *Disability and Armed Conflict* (2019) 65–72.

⁷⁰ *Ibid* at 69.

⁷¹ Sassòli, ‘Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War’, in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 1039–66 at 1054.

⁷² See GC IV Arts 27–34.

⁷³ GC IV Arts 13–26; AP I Arts 48–79; ICRC Customary IHL Rules 87–138.

⁷⁴ Pictet (ed), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary* (1958) (hereinafter ‘*Pictet Commentary to Geneva Convention IV*’) at 47; for subsequent confirmation in the case law of the international criminal tribunals, see Salmón, ‘Who Is a Protected Civilian?’ in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 1135–53 at 1142.

⁷⁵ BBC Factfile: Civilian Internment 1939–1945, available at <https://www.bbc.co.uk/history/ww2peopleswar/timeline/factfiles/nonflash/a6651858.shtml>.

⁷⁶ *Summer* (London: Hamish Hamilton, 2020) at 147–48.

⁷⁷ *Beating the Nazi Invader* (2020) at 178.

⁷⁸ GC IV Arts 13–26.

⁷⁹ GC IV Art 42.

⁸⁰ See Hill-Cawthorne (n 10) at 41.

⁸¹ GC IV Art 41.

⁸² GC IV Art 44; Convention Relating to the Status of Refugees (1951) Art 8.

⁸³ Hill-Cawthorne (n 10) at 74; for a careful look at the advantages and disadvantages of applying this regime by analogy to a non-international armed conflict, see Olson, ‘Admissibility of and Procedures for Internment’, in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 1327–47 at 1342–44.

⁸⁴ See GC IV Art 4, see also the *Pictet Commentary to Geneva Convention IV* (n 74) at 45–51; also explained by Sassòli, *IHL* (n 14) at paras 8.149–8.158; for a discussion of protection for those with the same nationality but different allegiance or ethnicity from the Power in whose hands they find themselves, see Salmón (n 74) at 1142–45.

⁸⁵ GC IV Art 143.

⁸⁶ GC IV Arts 79–135.

⁸⁷ GC IV Art 43.

⁸⁸ *Prosecutor v Kordić et al*, IT-95-14/2-T, 26 February 2001, at para 291.

⁸⁹ *Prosecutor v Delalić et al*, IT-96-21-T, 16 November 1998, at para 583 (the *Čelibići Camp* case).

⁹⁰ *Ibid* at para 1137.

- ⁹¹ *Prosecutor v Delalić et al*, IT-96-21-A, 20 February 2001, at para 342.
- ⁹² For the complexity of the scope of the right to self-determination, see Fisch, *The Rights of Self-Determination of Peoples: The Domestication of an Illusion*, tr Mage (2015); Miller, *Is Self-Determination a Dangerous Illusion?* (2020).
- ⁹³ For a scholarly coverage of these origins, see Benvenisti, *The International Law of Occupation*, 2nd edn (2012); Arai-Takahashi, 'Preoccupied with Occupation: Critical Examinations of the Historical Development of the Law of Occupation', 94 *IRRC* 885 (2012) 51–80.
- ⁹⁴ A/RES/25/2625. See also Security Council Resolution 242 (1967) preambular para 2.
- ⁹⁵ See Art 43 of the Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention IV (1907) (hereinafter 'Hague Regulations'), and Arts 64 and 67 of GC IV.
- ⁹⁶ For the detail, see Arai-Takahashi, 'Protection of Private Property', in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) at 1515–34; and Van Engeland, 'Protection of Public Property', *ibid* at 1535–50.
- ⁹⁷ Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', 100 *AJIL* (2006) 580–622.
- ⁹⁸ Discussed in detail *ibid* and in Fox, 'Transformative Occupation and the Unilateralist Impulse', 94 *IRRC* 885 (2012) 237–66.
- ⁹⁹ See the insightful piece by Gross, especially with regard to decisions taken by the Israeli courts, 'The Righting of the Law of Occupation', in Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and Its Challenges* (2016) 21–54.
- ¹⁰⁰ *The International Law of Occupation* (n 93) at 10–11.
- ¹⁰¹ Discussed by Roberts, 'Transformative Military Occupation' (n 97) at 601–03.
- ¹⁰² For an examination of the steps taken by the occupiers in Iraq in 2003–04, see Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', 16 *EJIL* (2005) 661–94; for an expert view on the legislation that can be applied by the military authority of the occupying power, see Sassòli, *IHL* (n 14) at paras 8.239–8.246.
- ¹⁰³ Best, *War and Law Since 1945* (1994) at 124; the recent study by Longobardo concludes at one point that 'international humanitarian law offers scant indications regarding the implementation of the duty to restore and ensure public order': *The Use of Armed Force in Occupied Territory* (2018) at 184.
- ¹⁰⁴ For what constitutes an occupation, see Sassòli, 'The Concept and Beginning of Occupation', in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 1389–419. For the controversy concerning the applicability of the wording of Common Art 2 to the Geneva Conventions to the Israeli occupation of Palestinian territory, see the 2004 Advisory Opinion of the International Court of Justice discussed below. For the arguments as to why the law of occupation continues to apply with regard to Gaza, see Dinstein, *The International Law of Belligerent Occupation*, 2nd edn (2019) at 296–303; see also the 'Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory', UN Doc A/HRC/40/CRP.2, 18 March 2019 at paras 59–67 (original: English).
- ¹⁰⁵ See GC IV Arts 2 and 4; see also the *Pictet Commentary to Geneva Convention IV* (n 74) at 45–51; also explained by Sassòli, *IHL* (n 14) at paras 8.149–8.158; for a discussion of

protection for those with the same nationality but different allegiance or ethnicity from the Power in whose hands they find themselves, see Salmón (n 74) at 1142-45.

106 GC IV Art 78; the internment regime can also be applied to benefit those who have been convicted of certain offences against the occupier – see Art 68.

107 See GC III Art 4A(2); and see also AP I Arts 43 and 44.

108 GC IV Art 68; and see *Pictet Commentary to Geneva Convention IV* (n 74) at 344, explaining that the idea is to give persons guilty of minor offences the benefit of the conditions in Arts 79 et seq, and that the provision is a ‘humane one and was intended to draw a distinction between such offenders and common criminals’.

109 Schabas, *The Abolition of the Death Penalty in International Law*, 2nd edn (1997).

110 Best, *War and Law Since 1945* (n 103) at 126.

111 Eg ‘The United States reserve the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins.’ *Final Record of the Diplomatic Conference of Geneva of 1949*, vol I, Federal Political Department, Berne, p 346.

112 GC III Art 4; and see Del Mar, ‘The Requirement of “Belonging” under International Humanitarian Law’, 21 *JICJ* 1 (2010) 105-24.

113 See Dörmann, ‘Unlawful Combatants’, in Clapham and Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2014) 605-23 esp at 607-13. Of course if a civilian does not qualify as a protected person due to their nationality then they would not be protected by the detailed regime of the Civilians Convention but rather by customary international law and AP I Art 75. For those outside occupied territory, see below.

114 Blank, ‘Muddying the Waters: The Need for Precision-Guided Terminology in the DoD Law of War Manual’, in Newton (ed), *The United States Department of Defense Law of War Manual: Commentary and Critique* (2018) 261-81 at 274.

115 GC IV Art 49.

116 GC IV Art 49(6).

117 ICC Statute Art 8(2)(b)(viii); see also AP I Art 85(4)(a).

118 ‘The Court notes that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, that Convention is applicable when two conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties. If those two conditions are satisfied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties. The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.’ Advisory Opinion of 9 July 2004 at para 96. For further detail, see Meron, ‘The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War’, 111 *AJIL* (2017) 357-75 at 361-64.

119 Advisory Opinion of July 2004 at para 120.

120 Meron, ‘The West Bank’ (n 118) 366-67.

121 *Ibid* at 369 (footnote omitted).

- 122** Hague Regulations (n 95) Art 43; note the only authentic version of the treaty (French) uses an expression 'l'ordre et la vie publics', which is considered as covering a wider range of matters; see Arai-Takahashi, 'Law-Making and the Judicial Guarantees in Occupied Territories', in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 1421-53 at 1426.
- 123** GC IV Art 27(4).
- 124** For detail see d'Argent (n 18).
- 125** Hague Regulations (n 95) Art 43. For detailed look at the scope of this phrase and the limits of what an occupier can do, see Benvenisti, *The International Law of Occupation* (n 93) at 89-95.
- 126** See in particular GC IV Arts 50-63.
- 127** Benvenisti grounds this in Art 43 of the Hague Regulations and goes on to say that 'This obligation is more pronounced in occupations where the occupant becomes actively involved in managing daily life and controls the institutions that run local public institution, and the local population thus becomes reliant on them.' *The International Law of Occupation* (n 93) at 87.
- 128** Greenwood, 'The Administration of Occupied Territory in International Law', in Playfair (ed), *International Law in the Administration of Occupied Territories* (1992) 241-66 at 246.
- 129** GC IV Arts 146 and 147; and AP I Art 85.
- 130** For a full articulation of the debate, see Zwanenburg, Bothe and Sassòli, 'Is the Law of Occupation Applicable to the Invasion Phase?', 94 *IRRC* 885 (2012) 29-50.
- 131** Sassòli, *IHL* (n 14) at para 8.217.
- 132** *Ibid* at para 8.221.
- 133** 'The US Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.' White House, 'Fact Sheet: New Actions on Guantanamo and Detainee Policy', 7 March 2011.
- 134** See Common Art 3 to the Four Geneva Conventions of 1949 (reproduced below) and AP II of 1977. In addition most of the rules of customary international law apply, see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (n 27); the exceptions relate mostly to combatant immunity, prisoners of war and the law covering occupation - see further Sassòli, *IHL* (n 14) at paras 7.44 et seq.
- 135** Cameron (ICRC), 'The Geneva Conventions: 150 Years of Codification of the Laws of War' in Hazan, Berchtold, Ducimetière and Imperiali (eds), *War and Peace* (2019) 122-27 at 126; for one recent listing of the different conflicts around the world divided according to the legal classification of the Geneva Conventions as international or non-international, see Bellal (ed), *The War Report: Armed Conflicts in 2018* (2019), which lists 7 active international armed conflicts, 11 belligerent occupations and 51 non-international armed conflicts.
- 136** Rogers, *Law on the Battlefield*, 3rd edn (2012) at 15.
- 137** At para 4.18.4.1, 'Being Part of a Hostile, Non-State Armed Group' (footnote omitted).
- 138** AP II Art 13(3).
- 139** See para 4.18.1.

140 Schmitt, Garraway and Dinstein, *The Manual on the Law of Non-International Armed Conflict: With Commentary* (2006) at paras 1.1.2 and 1.1.3.

141 See the examples collected at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule1, esp part B.

142 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (n 27) at 13.

143 At para 5.7.1.

144 ‘Report of Inquiry under Division 4a of Part 4 of the Inspector-General of the Australian Defence Force Regulation 2016 into Questions of Unlawful Conduct Concerning The Special Operations Task Group in Afghanistan’ (2020) at 120, para 7b.

145 The guidance includes such a condition in Principle IX, ‘Restraints on the use of force in direct attack: In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.’ The inclusion of this principle was, however, rejected by certain military experts who had participated in the process (see the discussion of military necessity in section 7.4 above), and the US *Manual on the Law of War* explicitly rejects the idea of necessity creating an obligation to capture rather than kill (see para 2.2.3.1 esp fns 44 and 45). For a theoretical discussion of the normative process and the subsequent impact of the guidance at the national level, see Yip, ‘The ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities: Sociological and Democratic Legitimacy in Domestic Legal Orders’, 8 *Transnational Legal Theory* (2017) 224–46. She argues (at 234) that even if the rule contains a degree of determinacy that leads to certainty, nevertheless, ‘where legitimate targets are not hors de combat and yet are in a situation where their threats can easily be neutralised through capture, killing them seems repugnant to an ordinary sense of justice’.

146 Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) at 34.

147 See for example the findings in Schmitt and Merriam, ‘The Tyranny of Context: Israeli Targeting Practices in Legal Perspective’, 37 *University of Pennsylvania Journal of International Law* 1 (2015) 53–139 at 112–13.

148 Boothby, ‘“And For Such Time As”: The Time Dimension to Direct Participation in Hostilities’, 42 *New York University Journal of International Law and Politics* 3 (2010) 741–68 at 743; the same point is made by the Israeli Defense Forces in Schmitt and Merriam (n 147) at 113.

149 US *Law of War Manual* (2016) at para 5.8.3 (footnote omitted).

150 Haque, ‘Misdirected: Targeting and Attack under the DoD Manual’, in Newton (ed), *The United States Department of Defense Law of War Manual: Commentary and Critique* (2018) 225–60 at 236.

151 Ibid at 241–42; *contra* Dinstein, who has argued ‘When a person behaves as a “farmer by day, fighter by night” several times in a row, he can be considered DPIH [directly participating in hostilities] on a 24/7 basis. That is of tremendous practical import, since it may prove impossible to take the person out while he is lying in ambush.’ ‘“Direct Participation in Hostilities”’, 18 *Tilburg Law Review* (2017) 3–16 at 13.

- ¹⁵² See Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Study on targeted killings*, A/HRC/14/24/Add.6, 28 May 2010 at para 66.
- ¹⁵³ 'Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law' (n 1) at 197.
- ¹⁵⁴ Ibid at 198 (footnotes omitted).
- ¹⁵⁵ Sassòli, *IHL* (n 14) at para 8.318.
- ¹⁵⁶ See Art 5 of GC III; and Arts 43, 68, 78 of GC IV.
- ¹⁵⁷ See Art 126 of GC III; and Arts 76 and 143 of GC IV.
- ¹⁵⁸ See Art 30 of GC IV.
- ¹⁵⁹ Art 3 of GC II.
- ¹⁶⁰ *Serdar Mohammed v Secretary of State for Defence* [2015] EWCA (Civ) 843 (Eng) [178], and in the Supreme Court [2017] UKSC 2 [10], [127], [158] and [263]; and see the references in Clapham, 'Detention by Armed Groups under International Law', 93 *International Law Studies* (2017) 1-44 at 8-9.
- ¹⁶¹ *Serdar Mohammed v Secretary of State for Defence* [2017] UKSC 2 [30].
- ¹⁶² For suggestions as to how this should work, in particular with regard to detention by non-state forces, see Clapham, 'Detention by Armed Groups under International Law' (n 160).
- ¹⁶³ ICRC, *Commentary on the First Geneva Convention* (2016) (n 19) at para 728; for a full explanation of the ICRC position, see Rodenhäuser, 'Legal Basis, Grounds and Procedures for Detention in Non-International Armed Conflicts', in *Legal and Operational Challenges Raised by Contemporary Non-International Armed Conflicts: Proceedings of the Bruges Colloquium* (ICRC, 2019) 63-74 at 71 (original emphasis): 'Invoking such inherent power to intern *alone*, however, would not be sufficient to make internment lawful. In keeping with the principle of legality, the detaining power needs to have defined grounds and procedures for internment. In other words, for internment to be lawful, there needs to be not only a legal basis but also grounds and procedures that are spelled out in a binding instrument. In traditional NIACs, such grounds and procedures would be defined in national law. When States operate extraterritorially, a binding instrument setting out grounds and procedures for internment could be an agreement among the parties involved, or the law of the intervening State, or binding Standard Operational Procedures (SOP).'
- ¹⁶⁴ Hampson, 'Administrative Detention in Non-International Armed Conflicts', in Lattimer and Sands (eds), *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War* (2019) 157-78; for the situation under the International Covenant on Civil and Political Rights, see Shany, 'A Human Rights Perspective to Global Battlefield Detention: Time to Reconsider Indefinite Detention', 93 *ILS* (2017) 102-31.
- ¹⁶⁵ *Hassan v UK* (n 9) at para 106.
- ¹⁶⁶ *Serdar Mohammed v Secretary of State for Defence* [2017] UKSC 2 [107]; later applied in *Alseran et al v Ministry of Defence* [2017] EWHC 3289 (QB) at [91] so, for example, Al-Waheed was awarded £3,300 for his unlawful detention in violation of human rights law from 23 February to 28 March 2007 at [17]. It was found at [703] that 'His detention during that period therefore lacked any lawful basis and was contrary to article 5(1) [ECHR]'. And the procedural guarantees were not met under article 5(4) ECHR, at [704] to [712].
- ¹⁶⁷ See at <https://www.icrc.org/en/mandate-and-mission>.

- 168** From the Movement's site at <https://www.ifrc.org/en/who-we-are/the-movement/> accessed 29 January 2020.
- 169** Art 5 of the *Agreement on the Organization of the International Activities of the Components of the Red Cross and Red Crescent Movement* (1997), *IRRC* No 322 (1998) 159–76.
- 170** Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (n 27) at 444.
- 171** *Ibid.*
- 172** See Harwood, *The Roles and Functions of Atrocity-Related United Nations Commissions of Inquiry in the International Legal Order* (2020); Alston and Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (2016).
- 173** ICRC Blog post at <https://blogs.icrc.org/law-and-policy/2019/01/31/5-things-make-icrc-confidential-information-unsuitable-legal-proceedings/>: 'The ICRC does not perform the role of a commission of inquiry and, as a general rule, neither the organization nor its staff will participate in inquiry procedures.' Melzer, *International Humanitarian Law* (n 28) at 327.
- 174** ICRC, 'The ICRC's Privilege of Non-Disclosure of Confidential Information', 97 *IRRC* (2016) 433–44.
- 175** See further Debuf, 'Tools to Do the Job: The ICRC's Legal Status, Privileges and Immunities', 97 *IRRC* (2016) 319–44 at 324 fn 17.
- 176** *Ibid.*
- 177** See Rule 73(6) of the ICC Rules of Procedure and Evidence.
- 178** ICRC, 'The International Committee of the Red Cross's (ICRC's) Confidential Approach', 94 *IRRC* (2012) 1135–44 at 1137.
- 179** ICRC, 'Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of Other Fundamental Rules Protecting Persons in Situations of Violence', 87 *IRRC* (2005) 393–400 at 397. It is worth noting that it is stated that the policy on violations applies beyond the specific rules related to the victims of war outlined in this chapter and extends to the law on the conduct of hostilities (*ibid* at 394); and that where international humanitarian law does not 'formally apply', the ICRC responds to 'violations of other fundamental rules protecting persons in situations of violence' (*ibid* at 398).
- 180** Art 38 of GC I.
- 181** ICRC, *Commentary on the First Geneva Convention* (2016) (n 19) at para 2532.
- 182** Bouvier, 'The Use of the Emblem', in Clapham, Gaeta, and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 855–86 at 857.
- 183** For the detail, see *ibid.*
- 184** ICRC, *Commentary on the First Geneva Convention* (2016) (n 19) at para 2532.
- 185** Bouvier (n 182) at 868.
- 186** Sandoz, 'Land Warfare', in Clapham and Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2014) 91–117 at 103.
- 187** See Annex I to AP I, 'Regulations Concerning Identification'.
- 188** Bouvier (n 182) at 881.
- 189** *Ibid* at 882–83.

190 See, eg, 'Strikes on Syrian Medical Facilities Appear Deliberate: UN', *Reuters*, 8 November 2019.

191 Lowcock, 'Briefing to the Security Council on the Humanitarian Situation in Idlib', 18 June 2019. The UN Secretary-General subsequently set up an Board of Inquiry, see 'Summary by the Secretary-General of the report of the United Nations Headquarters Board of Inquiry into certain incidents in northwest Syria since 17 September 2018 involving facilities on the United Nations deconfliction list and United Nations supported facilities'; one recommendation to come out of this was that 'With regard to the "deconfliction mechanism" . . . OCHA [UN Office for the Coordination of Humanitarian Affairs] should consider renaming it as "Humanitarian Notification Mechanism" to highlight its distinct nature, in the overall framework of international humanitarian law . . . '.

192 See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (n 27) Rule 58 at 205ff.

193 Hague Regulations IV Art 32; and see also Art 23(f).

194 Arts 1, 16 and 17, Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954); see also the decision in 2015 to add a symbol of a blue shield with a red border for enhanced protection under the Second Protocol of 1999. Decision 9.COM 4, CLT-14/9.COM/CONF.203/4/REV2 – annex, figure 6(b).

195 AP I Arts 61–67, and Annex I Arts 14–15.

196 AP I Art 56, Annex I Art 16; Art 15 of AP II; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (n 27) Rule 42 at 139–42.

197 AP I Art 38.

198 ICC Statute Art 8(2)(b)(xxiv) and (e)(ii).

199 ICC Statute Art 8(2)(b)(vii).

200 AP I Art 37; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (n 27) Rule 65 at 221–26; Hague IV Regulations Art 23(b).

201 AP I Art 37. The United States does not recognize that the customary international law on perfidy prohibits operations for capture; see *US Law of War Manual* (2016) at para 5.22.2.1. For some of the issues related to undercover soldiers engaged in operations to kill or capture, see Rosenzweig, *Combatants Dressed as Civilians? The Case of Israeli Mista'arvim under International Law*, *The Israel Democracy Institute Policy Paper 8e* (2014).

202 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (n 27) at 223.

203 AP I Art 85(3)(f).

204 ICC Statute Art 8(2)(b)(xi) and (e)(ix); the Court's Elements of the Crime explains that the perpetrator 'invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict'.

(p. 249) 8 Protection of Civilians

I. General Rules

Introductory Remarks

1. For the purpose of discussion it is useful to divide the international rules on the protection of the civilian population and of individual civilians during armed conflict into two groups, which are the response to two distinct situations: (a) the rules providing protection to the civilian population or individual persons under the control of the adversary against violence or arbitrary acts; and (b) the rules providing protection of the civilian population against direct effects of military operations and other acts of hostility. The first group relates to the legal protection of human beings against violence and abuse of power. These rules are often called the Law of Geneva or Red Cross Law as they were essentially codified in the Geneva Conventions. The second group of rules sets limits to the conduct of military operations itself. This law is called the Law of The Hague, as the 1907 Hague Regulations annexed to HC IV was the first comprehensive codification in this area. This distinction based on where the rules were negotiated is nowadays rather historical. The two 1977 Additional Protocols to the Geneva Conventions in fact contain both types of rules.
2. The affinity of the rules protecting human beings against violence and against abuse of power in armed conflict to the international regime of protecting human rights is particularly striking (*see above*, Sections 3.49–3.51, and below, Section 8.18, and Chapter 14).
3. This Chapter discusses the provisions of international law concerning the protection of civilians in armed conflict. The rules applicable in international armed conflict are highly developed and extensively codified. Of course, their scope of application is limited to conflicts of an international character, in particular armed clashes between states. Situations of foreign occupation are also international armed conflicts. The four Geneva Conventions, supplemented by their first 1977 Additional Protocol constitute the heart of protections granted to civilians in international armed conflicts. The law protecting civilians in non-international armed conflicts has been codified by Article 3 common to the four Geneva Conventions and developed in 1977 by AP II. Although these provisions are more summary in nature than the law on international armed conflicts, they contain important rules on the protection of civilians in an internal conflict. In both cases the written law is supplemented by rules of international customary law. As shown in the *Study on Customary International Humanitarian Law* the ICRC was mandated to conduct, there is an important set of rules protecting the civilian population (p. 250) that applies in any type of armed conflict, independent of its character as international or non-international.¹
4. In particular, as recognized by the ICJ in its *Nicaragua* judgment,² the fundamental provisions of international humanitarian law as codified by Article 3 common to the Geneva Conventions (*see* Section 3.09), apply to all types of armed conflicts. Accordingly, the obligation to treat humanely all persons once they are in the power of the adverse party, including those persons who have actively participated in hostilities must be respected in all circumstances. After the adoption of the 1977 Protocols there is hardly a significant difference between the two legal regimes as far as the fundamental guarantees are concerned, since AP II designed for non-international armed conflict protects individuals against the misuse of power just as clearly as the law of international armed conflicts (*see* in particular Articles 4–6 AP II and Article 75 AP I, which reflect customary international law).³ In addition, no distinction should be made between international and non-international armed conflicts as far as rules governing the conduct of military operations are concerned, in particular the rules derived from the principle of distinction. Remaining

differences between the two legal systems should, however, not be neglected: important rules of international humanitarian law, such as the legal status of combatants or the law applying to belligerent occupation, are relevant for international armed conflict situations only.⁴

8.01

In order to ensure respect for and protection of the civilian population and civilian objects, the parties to an armed conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives. Accordingly, they shall direct their operations only against military objectives (Article 48 AP I).

1. Members of the armed forces (and persons participating in a *levée en masse*) are combatants in the sense of international humanitarian law applicable to international armed conflicts.⁵ They alone have the right to take a direct part in military operations and thereby to kill, injure, or destroy without being personally held responsible for the consequences of their acts, provided, of course, they respect the constraints of international humanitarian law. On the other hand, combatants may be targeted by the armed forces of the adverse party. Civilians have no such right to take a direct part in hostilities. The non-involvement of civilians in hostilities is the precondition of the functioning of the principle according to which the civilian population shall be protected from military operations in all circumstances. Indeed, combatants are only willing to distinguish between members of the enemy armed forces and civilians, and thus spare the adversary's civilian population, if they do not have to fear to be attacked by these same civilians (*see below*, Section 8.19). If civilians nevertheless take a direct part in hostilities, they lose their protection against direct attacks (*see below*, Section 8.17).

(p. 251) 2. For the purpose of international humanitarian law, as far as the rules on the conduct of hostilities are concerned, a civilian is a person who is not a member of the armed forces or of a *levée en masse* (Article 50, para. 1, AP I).⁶ This (negative) definition, linked to that of members of the armed forces, has the advantage of being conclusive. In traditional warfare it has usually been clear who is a member of the opposing armed forces or who is not, and thus is entitled to protection. This is particularly true for international armed conflicts. In internal armed conflicts also, it has generally been evident who is in fact involved in acts of violence and who is not. In present forms of armed conflict it may be more and more difficult to distinguish between fighters and non-fighters, particularly in non-international armed conflicts. Yet, the obligation to distinguish remains a fundamental principle of the law applicable in armed conflict. The *Study on Customary International Humanitarian Law* mentions this obligation as Rule 1 in its Chapter 1.⁷

3. Civilians do not have to identify themselves as such, in order to claim the protection to which they are entitled (such as by carrying an identity card). Rather, it is the duty of combatants to distinguish themselves from the civilian population, by wearing a uniform or at least a permanent distinctive sign visible from a distance, and by carrying their arms openly (*see above*, Section 5.08). In case of doubt, a person shall be treated as a civilian (Article 50, para. 1, 2nd sentence, AP I).

4. Persons accompanying the armed forces or who are in the service of armed forces, without being members thereof, are considered to be civilians. They may not take a direct part in military operations nor commit otherwise any act of violence. Yet, in case of capture they are to be treated as prisoners of war. That category of civilians who are only indirectly involved in the war effort includes war correspondents, members of labour units or of services responsible for the soldiers' welfare, and civilian members of military aircraft crews or crews of merchant ships (Article 4 A, paras 4 and 5, GC III; Section 5.19). The same holds true for persons who—although undoubtedly civilians—are involved in the war

effort in some other form, for example as workers in armaments factories. Their activities are not considered to be a direct participation in hostilities in the sense of international law, and thus they may not be made the object of a direct attack. If they fall into the power of an adverse party they will be protected under GC IV, provided they fulfil the nationality criteria of Article 4 (if not they enjoy the protection of the fundamental guarantees spelled out in Article 75 AP I and customary international law). Finally, civilians serving as advisors to the armed forces and employees of private (civilian) contractors in the service of armed forces, but not being part thereof, are also not supposed to take part in hostilities. This holds true, in particular, for employees of civilian contractors.⁸

(p. 252) **5.** On the consequences of civilians taking a direct part in hostilities, *see* below, Section 8.17.

6. There is only one situation where it is legitimate for civilians to engage in acts of hostility under the same conditions as members of armed forces: the *levée en masse*, that is taking up arms against advancing armed forces occupying their country; in such a situation they enjoy combatant status (*see* above, Section 5.10). Of course, they may also be targeted by the advancing forces. If captured, they become prisoners of war (Article 4 A, para. 6, GC III).

7. In the law relating to non-international armed conflict, the non-participation of civilians in hostilities is an implicit prerequisite for their protection. According to Article 13, para. 3, AP II civilians shall enjoy the protection afforded by the provisions on the civilian population, 'unless and for such time they take a direct part in hostilities'. However, a civilian who participated in hostilities, but ceases to do so, e.g. because s/he laid down his/her arms, or is placed *hors de combat* by sickness, wounds, detention, or any other cause, remains protected by international humanitarian law, in particular by the fundamental guarantees for humane treatment (Article 3 GC I-IV; Articles 4-6 AP II). Such protection does not exclude prosecution under national law of persons who have engaged in hostilities. The legal guarantees of due process and a fair trial, embodied in common Article 3 of the Geneva Conventions and Article 6 AP II, must be observed under all circumstances.

8.02

Civilians shall be respected and protected. They are entitled to respect for their persons, their honour, their family rights, their religious convictions, and their manners and customs (Article 27, para. 1, GC IV; Article 46, para. 1, HagueReg). Their property is also protected (Article 46, para. 2, HagueReg). Neither the civilian population as such, nor individual civilians not taking a direct part in hostilities, shall be the object of attacks (Article 51, para. 2, AP I; Article 13, para. 2, AP II). Civilians shall not be killed, wounded, or unlawfully detained. While in detention, civilians must be treated humanely (Articles 27, 76, and 79-134 GC IV; Articles 11, 75 AP I; Article 5 AP II).

1. Persons who are not members of the armed forces and who do not or have ceased to take a direct part in hostilities shall under all circumstances be respected and protected: war must not be waged against civilians uninvolved in the hostilities, and civilians must at all times be treated humanely. The duty to protect, to respect, and to treat civilians humanely is no doubt part of customary international law.⁹ In treaty law, it is Article 27, para. 1, GC IV, which gives forceful expression to this general obligation. Article 27 covers all situations in which a party to an armed conflict comes into contact with civilians of the opposing side, especially with aliens on its own territory and with inhabitants of occupied territories. This protection is supplemented by Article 75 AP I, which clarifies that all persons in the power of a party to an international armed conflict are entitled to such protection, including those who due to the nationality criterion of Article 4 of the Fourth

Geneva Convention would not be protected by that Convention. Common Article 3 of the Geneva Conventions, as developed by AP II, obliges the parties to a non-international armed conflict in the same way to treat humanely all those not or no more directly involved in hostilities. As Jean Pictet emphasized already in 1958, the principle (p. 253) of humane treatment 'is in truth the *leitmotiv* of the four Geneva Conventions'.¹⁰ This being said, 'humane treatment' is not defined in any provision of humanitarian treaty law. What constitutes humane treatment follows logically from the principles and rules of the Conventions, including those of Article 27 GC IV, and the list of conduct that is incompatible with it.¹¹ As stressed in the updated ICRC Commentary to the Geneva Conventions, the 'meaning of humane treatment is context specific and has to be considered in the concrete circumstances of each case, taking into account both objective and subjective elements, such as the environment, the physical and mental condition of the person, as well as his or her age, social, cultural religious or political background and past experiences'.¹²

2. The first sentence of Article 27 says that civilians be 'respected' and 'protected'. The 'duty to respect' civilians requires a conduct defined in the negative: all acts that might unjustifiably cause harm to a civilian must be avoided. The 'duty to protect' civilians goes an important step further and calls for affirmative action. Accordingly, everything necessary must be done to ward off or reduce suffering. This means taking all measures required to ensure the safety of civilians, for example evacuation from dangerous places or the establishment of safety zones (*see below*, Sections 8.12–8.13). It also means guaranteeing the protection of the inhabitants of occupied territories against the effects not only of military operations, but also of belligerent occupation as such (*see below*, Chapter 9, in particular Section 9.08). To leave the civilian population to its fate when danger arises from fighting would be a breach of this general 'duty to protect'. It must be borne in mind that under the conditions of modern warfare such danger exists not only in the immediate vicinity of combat areas, but also in areas far removed from the fighting.

3. The second sentence specifies the interests and rights that must be respected and protected: the persons themselves, their honour, their family rights, their religious convictions and practices, and their manners and customs. This list is not exhaustive. It does, however, clearly show that, even in the exceptional circumstances of war, human beings are entitled to protection and respect, in conformity with the basic principles of international law on the protection of human rights. The ICJ has underlined the close links between the two domains of international law.¹³

4. In particular, the obligation of respect for persons includes the duty to protect and respect both their physical and mental or intellectual integrity. All physical or moral coercion, for example to obtain information, is prohibited from the outset (Article 31 GC IV). Torture of any kind is not only prohibited under all circumstances (Article 32 GC IV), but also must be prosecuted as a grave breach of the Geneva Conventions. Committing torture is a war crime (*see* Article 147 GC IV and ICC Statute, Article 8, para. 2, lit. a (ii)). Likewise, it is prohibited to undertake medical and scientific experiments or organ (p. 254) transplants that are not therapeutically justified (*see below*, Section 12.06). Other types of ill treatment, such as mutilation or corporal punishment, are prohibited (Article 32 GC IV, Article 75, para. 2, lit. a (iv), AP I). International humanitarian law comprehensively prohibits outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution, and any form of indecent assault (Article 75, para. 2, lit. b, AP I). The mentioned acts constitute war crimes (*see* ICC Statute, Article 8, para. 2, lit. a (iii), lit. b (x), (xxi), (xxii)). Death sentences against a civilian person are allowed only in cases permitted by GC IV (*see below*, Section 9.49).

5. Respect and protection of mental and intellectual integrity, which includes regard for personal honour, means that the person's uniqueness as an individual and as a member of a social group must be respected. In practical terms this means, for example, that his or her image may not be exposed to the curiosity of the public (e.g. in photographs or on television). Article 27 GC IV explicitly states this as a consequence of the obligation of humane treatment. The family's rights to protection include the right to continue to live within the family unit. The separation and dispersion of families are prohibited. Respect for family rights implies not only that family ties must be maintained, but also further that they must be restored should they have been broken as a result of armed conflict.¹⁴ Article 26 GC IV intends to safeguard the family unit, to re-establish contact between members of a dispersed family. The parties to an armed conflict must not only allow members of dispersed families to make enquiries, but they must also facilitate such enquiries.

6. The religious convictions of civilians in the power of the adversary shall be respected. This obligation covers any system of philosophical or religious beliefs. It encompasses the freedom to practise religion through religious observances, services, and rites. Protected persons in the territory of a party to the conflict or in occupied territory must be able to practise their religion freely, without any restrictions other than those necessary for the maintenance of public law and morals. They shall not be forced to profess any specific religion or belief. This prohibition protects first and foremost the persons concerned, especially against possible persecution.

7. The reference to the manners and customs to be respected is a reminder that the individual is also part of the social fabric. Accordingly, the adversary has no right to tear a civilian out of his or her social surroundings or to destroy that context through fundamental alteration. International humanitarian law also expressly prohibits forced removal of protected persons from their place of residence in order to settle them elsewhere (*see* Sections 9.17–9.18). The entire law governing belligerent occupation is based on the principle that, in general, the social order of the occupied territory shall not be altered by the occupying power (*see* below, Sections 9.01 ff.).

8. Article 27, para. 3, GC IV further stipulates that 'without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular on race, religion or political opinion'. This list is not exhaustive and should include factors like biological sex and age, regardless of whether specific provision is made elsewhere in the Convention. Thus, criteria including but not (p. 255) limited to a protected persons' biological sex, gender, sexual orientation, state of health (including mental health, pregnancy), age (young or elderly), disability, religious and cultural background, nationality, political opinion must, where relevant, be taken into account in order to meet their specific needs and vulnerabilities.

9. The third sentence stipulates that the personal property of civilians shall also be protected. The legal basis for the guarantee of property rights in time of armed conflict is to be found not so much in the Geneva Conventions as in the HagueReg (Article 46, para. 2). The obligation to protect property rights is part of customary law.¹⁵ The law governing belligerent occupation establishes in detail under what circumstances the occupying power may seize private property (*see* below, Sections 9.31–9.38). GC IV also prohibits the occupying power from unlawful destruction of movable or immovable property of inhabitants of the occupied territories (Article 53). Unlawful and wanton destruction or appropriation of property on a large scale, which cannot be justified by military necessity, is a grave breach within the meaning of Article 147 GC IV (*see* also ICC Statute, Article 8, para. 2, lit. a (iv)).

10. The fourth sentence recalls that neither the civilian population as such nor individual civilians are legitimate targets of attacks (*see in detail below*, Chapter 7). Attacks against the civilian population or individual civilians resulting in death or serious injuries are punishable as grave breaches of AP I, that is as war crimes (Article 85, para. 3, lit. a, AP I, and ICC Statute, Article 8 para. 2, lit. b (i) even if they do not result in death or injury). Wilful killing of civilians in the power of the enemy is also a grave breach of GC IV (Article 147—ICC Statute, Article 8, para. 2, lit. a (i)).

11. The prohibition of the use of force against civilians is not absolute. For example, if a civilian is reasonably suspected of an offence for which an arrest would be a commensurate measure, then such arrest is permissible under international humanitarian law. It may involve the use of force, if necessary, in accordance with the standards of law enforcement. Moreover, force against civilians is permitted as an act of self-defence, again, taking into account the limits imposed by the rule of proportionality. Force may be used against civilians taking a direct part in hostilities as they lose protection against direct attacks for the time of their direct participation (*see below*, Section 8.17). Yet, considerations of military necessity and humanity set limits to the amount of force to be used in such situations. Finally, death or injury of civilians is lawful if it is an unavoidable and proportionate side effect of a lawful attack directed at a military objective ('collateral damage'—*see below*, Section 8.09 and above, Sections 7.04, 7.06).

12. Not only acts of violence but also threatening with such acts is prohibited if their primary purpose is to spread terror among the civilian population (Article 51, para. 2, 2nd sentence, AP I). The ICTY recognized such conduct as a war crime under customary international law.¹⁶ Threats may be expressed e.g. in the form of proclamations, verbal intimidation, or media campaigns. International humanitarian law prohibits terrorism in all its aspects and under all circumstances: Article 33 GC IV ensures this for civilians in (p. 256) the power of an adverse party; the rules on the conduct of hostilities prohibit all acts that would be deemed terrorist when committed outside an armed conflict.¹⁷

13. In non-international armed conflicts, 'persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely' (Article 3, para. 1, GC I-IV). This includes the right of civilians to be treated humanely and consequently prohibits violence to life and person, such as murder, torture, or other forms of ill-treatment. AP II confirms common Article 3 and extends the legal protection of civilians through additional fundamental guarantees (Article 4, para. 2, AP II). Article 13, para. 2, AP II prohibits not only attacks as such against civilians but also acts or threats of violence the primary purpose of which is to spread terror.

14. The protection of persons in detention is one of the core purposes of international humanitarian law. The different situations in which civilian persons may be detained will be discussed at the appropriate place in this commentary.

15. Certain particularly reprehensible attacks on a person's physical or mental integrity are treated as grave breaches of international humanitarian law or are other serious violations of international humanitarian law (Article 147 GC IV; Article 11, para. 4 AP I; Article 85, paras 3 and 4, AP I, and ICC Statute, Article 8, para. 2, lit. a and b—for international armed conflict—and Article 8, para. 2, lit. c and e for non-international armed conflicts. *See above in this Section and also below*, Sections 21.08 ff.).

16. The situation of persons with disabilities has received significant attention in recent years, including in armed conflicts, as testifies the Convention on the Rights of Persons with Disabilities (CRPD). Article 11 of this Convention addresses armed conflicts and imposes an obligation on States Parties to ensure the safety and protection of persons with disabilities

in accordance with both international humanitarian law and human rights law. As highlighted by the ICRC in its 2019 IHL Challenges Report

‘Even where persons with disabilities are not expressly mentioned in relevant IHL rules, they enjoy general protection as civilians or persons *hors de combat* during armed conflict ... Under IHL, parties to conflict must treat all civilians and persons who are *hors de combat* without “adverse distinction”. This may, and in some cases does, require the taking of all feasible measures to remove and prevent the raising of any barriers that persons with disabilities might face in gaining access to services or protection provided under IHL on par with other civilians and persons *hors de combat* ... IHL and human rights law, including the CRPD, require humane treatment of detainees, without discrimination. Specific measures are thus required to ensure that persons with disabilities can obtain basic services and facilities on an equal basis with other detainees.’¹⁸

17. The discussion of the legal provisions on the protection of the civilian population not only underlines the close links between international humanitarian law and (p. 257) human rights law, but also shows the manifold interaction between these two domains of international law.¹⁹

8.03

Any attack on the honour of women, in particular rape, enforced prostitution, or any form of indecent assault, is prohibited (Article 27, para. 2, GC IV; Article 76, para. 1, AP I).

1. The Geneva Conventions contain different provisions intended to protect women affected by armed conflict.²⁰ Article 27, para. 2, GC IV and Article 76 AP I, which combine these rules and at the same time extend the protection, provide for general protection to be observed under all circumstances. Accordingly, women must be the object of special respect. They must be protected, in particular against rape and enforced prostitution.²¹ It should be emphasized that this rule applies to all situations to which GC IV and AP I are applicable, in particular in occupied territories and in the case of aliens in the territory of a belligerent. Serious contravention of this rule is punishable as a grave breach, a war crime, if the material and mental elements of, for example, torture, inhuman treatment, or outrages upon personal dignity are met (Article 147 GC IV). The ICC Statute in Article 8, para. 2, lit. b (xxii), and Article 8, para. 2, lit. e (vi) contains for the first time a specific list of sex crimes constituting serious violations of international law that are war crimes.

2. If a pregnant woman or a mother with small children is detained on suspicion of an offence, her case is to be treated with priority and particular dispatch (Article 76, para. 2). In the case of an offence related to the armed conflict, pregnant women and mothers having small children a death sentence shall be avoided. Under no circumstances shall the death penalty be carried out (Article 76, para. 3).

8.04

Children shall be the object of special respect and protection. They shall be provided with the care and aid they require, whether because of their youth or for any other reason (Art. 24 GC IV; Article 77, para. 1, AP I). Children who have not attained the age of eighteen shall not take part in hostilities. They shall not be enlisted into the armed forces. If they fall into the power of an adverse party they shall be granted special protection (Article 77,

para. 3, AP I; see also Article 38 ChildConv; ProtChildConv; see above Section 5.06).

1. Children deserve respect and special protection during an armed conflict.²² They are entitled under all circumstances to be treated in accordance with their age. In particular, they must be protected against any form of indecent assault (Article 77, para. 1, AP I). Children under fifteen who are orphaned and children separated from their families as a result of the war or for other reasons must not be left to their own resources (Article 24, para. 1, GC IV). With the consent of the protecting power, such children may be taken to a neutral country for the duration of the conflict (Article 24, para. 2). In order to avoid permanent transfer to a foreign country not in the child's interest, AP I only permits evacuation as a temporary measure, if necessary for reason of the child's health, (p. 258) for medical treatment, or to ensure the child's safety (Article 78 AP I). Return to their country of origin must always be possible as soon as circumstances allow. Adoption of children is generally inadmissible. Adoption might be possible in the case of orphans provided all applicable legal conditions are met.
2. AP I does not give a definition of the notion 'child' and, in particular, does not, in most cases, fix an age limit, a deliberate omission. In this way, varying views of different cultures may be taken into consideration.²³
3. A particularly tragic aspect of modern warfare is the role which children sometimes have to play in hostilities: the child soldiers. While it would have been helpful to say in an unambiguous way that children under fifteen years of age are not permitted to take a part in hostilities, the law is not so affirmative. Article 77, para. 2, AP I reads in its first sentence that all parties to the conflict shall take 'all feasible measures' to ensure that children below the age of fifteen years take no direct part in hostilities and, in particular, that they refrain from recruiting them into their armed forces. Article 38 of the 1989 ChildConv confirms this rule, while Articles 1 and 2 of the 2000 ProtChildConv puts the age limit at eighteen years for state armed forces, both for participating in combat and for being compulsorily recruited in armed forces. Voluntary recruitment below the age of eighteen remains under certain conditions possible (Article 3 of the 2000 ProtChildConv). Article 4 of the 2000 ProtChildConv provides '(a)rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years'. AP I further adds that in the age group of 15-18-year-olds, the oldest shall be recruited first, if at all (Article 77, para. 2, second sentence, AP I). It is hoped, however, that the 'straight 18' approach of the 2000 ProtChildConv for direct participation in hostilities becomes the universal standard. The Rome Statute has declared conscripting or enlisting children below the age of fifteen years to be a war crime (ICC Statute, Article 8, para. 2, lit. b (xxvi) and Article 8, para. 2, lit. (e) (vii)). The same holds true for 'using them to participate actively in hostilities' (ibid.).
4. If children under the age of fifteen years nonetheless take part in military operations, they shall, if captured, be detained under conditions which take their age into consideration. Such special conditions shall be afforded whether or not they are recognized as prisoners of war. In particular, such 'child soldiers' shall be detained separately from adults (Article 77, paras 3 and 4 AP I).
5. If a person sentenced to death for an offence related to the armed conflict was below eighteen years of age at the time the offence was committed, the sentence shall not be carried out (Article 77, para. 5 AP I).
6. The provisions on the protection of children in non-international armed conflict are essentially identical to those applicable in international conflicts (Article 4, para. 3, AP II).

7. The obligation to grant special respect to women and children is anchored in customary law, in particular also the prohibition to recruit children into the armed forces or armed groups.²⁴

(p. 259) **8.05**

None of the parties to the conflict shall use civilians as a shield to render certain points or areas immune from military operations (Article 28 GC IV; Article 51, para. 7, AP I).

1. This prohibition follows directly from the rule that neither the civilian population as such nor individual civilians shall be involved in hostilities. The immunity granted to the civilian population may not be abused for military purposes and, therefore, civilians shall not be used in order to gain a military advantage or to deny the adversary such an advantage. The adversary would otherwise be in a position where s/he would have to choose between attacking (protected) civilians in an otherwise lawful military operation and relinquishing a possible military advantage.

2. AP I distinguishes between two situations. *First*, objects which may be military objectives must not be installed in a civilian area in order to benefit from the prohibition of attacks against the civilian population. This applies especially when the same military purpose can be achieved by putting the military object at another location where there are no problems in terms of protecting the civilian population. *Second*, civilians may not be deliberately 'used' as a shield for cover a potential military objective. In the same way, civilians may not be misused to protect a military operation. The following examples illustrate the prohibition: the deployment of a military unit with protection by a column of refugees; the transfer of protected persons (prisoners of war, civilian internees) to strategically significant locations (weapon positions, communication centres, etc.); the closing of a militarily important road by assembling a crowd of women and children.

3. Violation of the prohibition to use civilians as a shield does not exempt the other side from observing the constraints on military attacks in general (Article 51, para. 8, AP I). Thus, for example, the military commander must take into account the column of refugees used by the adversary to shield the target.

4. The prohibition of (mis)using civilians as a shield against the military operations must not be misunderstood as meaning that international humanitarian law provides the civilian population absolute immunity against attacks. Section 8.05 only prohibits the deployment of civilians as a shield against the adversary's military activities. The extent to which casualties among the civilian population as a side effect of military attacks may be tolerated is discussed in detail in Sections 8.08–8.17.

5. Using civilians as a shield 'to render certain points, areas or military forces immune from military operations' is a war crime (ICC Statute, Article 8, para. 2, lit. b (xxiii)).

8.06

Collective penalties (Article 33, para. 1, GC IV), measures of intimidation or terrorism (Article 33, para. 1, GC IV, Article 51, para. 2, AP I; Article 13, para. 2, AP II), reprisals against the civilian population and its property (Article 33, para. 3, GC IV; Articles 20, 51, para. 6, and 52, para. 1, AP I), and pillage (Article 33, para. 2, GC IV; Article 47 HagueReg) are all prohibited.

1. Collective penalties, acts of terrorism, reprisals, and pillage are examples for the use of force against the civilian population or individual civilians. Article 27 GC IV prohibits all these acts, without exception. According to that provision, civilians shall 'at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity'. Article 27 GC IV, together (p. 260) with Article 33 GC IV, and Article 51, para. 2, AP I outlaw in clear terms any resort to acts of terrorism in the course of an international armed conflict. Common Article 3 GC I-IV and Article 13, para. 2, AP II do the same for non-international armed conflicts. International humanitarian law forbids terrorism under all circumstances, at all times and without exception.

2. Collective penalties no doubt contradict the principle of individual penal responsibility, according to which no one may be convicted of or punished for an act which he or she did not personally commit. They are prohibited (Article 33, para. 1, GC IV). This prohibition is an aspect of the universally accepted principle of fair trial. The right to a fair trial is guaranteed by all international human rights conventions and by the four Geneva Conventions (for civilians: Article 38 GC IV—with reference to the rules of general international law applicable in times of peace—and Articles 67 and 71 ff., GC IV; Article 75, para. 4, AP I).

3. For non-international armed conflicts, Article 6, para. 2, lit. b, AP II also expressly lays down the principle of individual penal responsibility in addition to other fair trial rights in para. 2. It gives concrete form to common Article 3 of the Geneva Conventions, which requires a fair trial by a regularly constituted court.

4. According to Article 33, para. 1, second sentence, GC IV, every measure aimed at 'intimidating or terrorizing' civilians is prohibited.²⁵

5. Over and above the general prohibition which is codified in Article 33 GC IV, Article 51, para. 2, second sentence, AP I contains a rule drawn up specifically for military operations: 'Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.' This prohibits acts of terrorism as a weapon against the civilian population. It should be pointed out that not every causing of terror among the civilian population can be prevented by international law. Military operations against (lawful) military objectives in proximity to a concentration of civilians will always arouse fear and terror, without making the attack necessarily an illegal operation. In such situations, the rule of proportionality, that is whether the incidental civilian harm or damage is not excessive to the expected military advantage, is the determining factor (*see* Section 8.08). In other words, it is not causing terror among the civilian population as such that is prohibited, but the use of such measures with the primary intention of spreading terror. The same holds true for non-international armed conflicts (Article 13, para. 2, second sentence, AP II).

6. Reprisals against the civilian population, individual civilians, or their property are prohibited (Article 33, para. 3, GC IV). AP I has extended the prohibition of reprisals to the law on the conduct of military operations (e.g. Article 51, para. 6; Article 52, para. 1). Civilians and the civilian population as a whole are now comprehensively protected against reprisals, at least in an international armed conflict. On the problem of reprisals in general, *see* above, Sections 7.42–7.45.

7. Finally, Article 33, para. 2, GC IV also prohibits pillage. A comprehensive prohibition of pillage is likewise to be found in Article 47 HagueReg. Pillaging is a war crime under the Rome Statute (ICC Article 8, para. 2, lit. b (xvi) and para. 2, lit. e (v)).

(p. 261) **8.07**

The taking of hostages is prohibited (Article 34 GC IV).

1. The term 'hostages' applies to persons who are held in the power of the adversary, with the aim of obtaining a specific action (such as release of prisoners, cancellation of a military operation, etc.) from the other party to the conflict or from particular individuals as a condition for the safe release of the person held.
2. While in the past the taking of hostages to gain military advantage was considered lawful, since the GCs came into force the parties to a conflict are prohibited from taking hostages of protected persons in any circumstances (Article 34 GC IV). AP I reinforces this prohibition, so that there are no conceivable gaps in the legal protection (Article 75, para. 2 (c)). The taking of hostages is also prohibited in non-international armed conflicts (common Article 3 GC, Article 4, para. 2, lit. c, AP II). It is to be punished as a grave breach of the Geneva Conventions or a war crime (Article 147 GC IV, ICC Statute, Article 8, para. 2, lit. a (viii) and Article 8, para. 2, lit. c (iii)). The prohibition of taking civilians as hostages is considered to be part of customary law.²⁶

8.08

Attacks on military objects must not cause incidental loss of civilian life, injury to civilians, or damage to civilian objects excessive in relation to the concrete and direct military advantage anticipated (Article 51, para. 5, lit. b, AP I; Article 23, para. 1, lit. g, HagueReg).

1. Attacks on the civilian population as such or on individual civilians are prohibited (see above, Sections 7.01–7.11 and 7.12–7.24). The same applies to civilian objects. This does not mean, however, that in a war all casualties among civilians and any destruction of civilian objects must be considered to be violations of international humanitarian law. With pragmatic acceptance of reality the law takes into account such losses and damage as unavoidable, incidental consequences of (lawful) military operations, i.e. attacks against military objectives. Section 8.08 states the conditions in which such 'collateral damage' may be acceptable. The relevant criterion is the principle of proportionality, one of the fundamental principles of international humanitarian law.
2. The requirement that the damage caused in the area surrounding a military operation shall not exceed a 'reasonable' proportion in relation to the military success strived for is probably as old as warfare itself. In the year 1907, the HagueReg introduced this principle into international treaty law in the following form '... it is especially forbidden: ... to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war' (Article 23, para. 1, lit. g). Expanding on this, AP I conferred its present form on the principle of proportionality as applied to the assessment of expected collateral damage when attacking military objectives: incidental losses among the civilian population and damage to civilian objects.
3. Accordingly, an attack against a military objective is prohibited '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' (Article 51, para. 5, lit. b, AP I). This is an explicit expression of the underlying idea of international humanitarian law to find a (p. 262) balance between military considerations on one hand and the principle of humanity on the other. Whenever an attack at a military objective is launched the *foreseeable* incidental civilian harm must be factored in, be it the direct, indirect, or reverberating effects.²⁷ If an object is used simultaneously for military and civilian purposes, e.g. a power plant providing

electricity for air defences and civilian housing and hospitals, the consequences on civilian housing and hospitals must also be considered as part of the proportionality assessment.²⁸

4. This approach requires military officers in charge of planning, deciding, and carrying out a military operation to reflect on the possible damaging effects of the action on the civilian population and civilian objects. The same idea can be found in Article 57 AP I, under the heading 'Precautions in attack', which urges persons in charge of a military operation to take all feasible precautions to ensure that the civilian population and civilian objects are spared from the effects of hostilities as far as possible and that losses or destruction in the civilian domain is kept to a minimum (*see* Section 8.09). This obligation of military commanders to judge the situation also from the point of view of international humanitarian law must be established and enforced within the armed forces through generally applicable instructions.

5. A reasoned decision on the incidental losses to be anticipated among the civilian population or civilian objects as the result of a military attack can be reached only if information is available concerning not only the military value of the target but also on any civilian environment that may be involved. The military commander is therefore obliged within the bounds of what is 'feasible' (Article 57, para. 2, lit. a (i), AP I), to obtain information necessary to decide on the admissibility of the planned military operation.

6. Concerning the scale of the information-gathering required, several states expressed their understanding in a declaration submitted upon ratification of AP I that 'feasible' is to be understood as 'that which is practicable or practically possible, taking into account all circumstances ruling at the time including humanitarian and military considerations'.²⁹ Any decision taken by a military commander must be based on information obtained according to accepted, common standards (by reconnaissance, etc.). The decision should only be assessed on the amount of information available or reasonably available at the moment the decision is taken and not on the basis of subsequent knowledge nor, of course, on the actual course of the military operation. States have also made formal statements on this point.³⁰

(p. 263) **7.** However, if in the course of a military operation it appears that the attack will cause incidental casualties among civilians and/or destruction of civilian objects that can no longer be considered proportional, the action must be cancelled or at least suspended (Article 57, para. 2, lit. b, AP I).

8. The anticipated incidental loss of civilian life and destruction must be measured against the 'concrete and direct military advantage' (Article 51, para. 5, lit. b, AP I). 'Military advantage' refers to military benefits from an attack, not political, psychological, economic, financial, or moral, and may cover any advantage 'anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack', as expressly stated in some declarations of interpretation.³¹ The 'attack as a whole' involves however a finite, delimitable event and therefore must not be understood as the entire war.³² The qualifiers 'direct' and 'concrete' set clear limitations. The advantage must be tangible, and must not be 'based merely on hope or speculation', it must be 'substantial and relatively close'.³³

9. Civilians must be warned in advance of military actions that may affect them, 'unless circumstances do not permit' (Article 57, para. 2, lit. c, AP I).

10. Military decisions must be based on sound information, on military experience, and on the realization that respect for the civilian population is an absolute obligation in international law concerning the conduct of military operations. 'Anticipated military advantage' and 'possible losses of civilian life, which shall be avoided' are concepts tinged with subjectivity, giving those in charge of military operations quite a margin of discretion. Military considerations require this kind of latitude. Those making decisions, however, may not escape responsibility by claiming that they were not authorized or able to reach such decisions. Waldemar Solf rightly stresses that most important decisions in all areas of life ultimately involve balancing factors which are not quantifiable.³⁴ International

humanitarian law makes great demands on the judgement of military commanders, but it does not require them to do the impossible.

11. The rule discussed here sets no absolute limits to the acceptable level of damage; it expresses a ratio between two quantities. Under Article 51, para. 5, lit. b, AP I, the greatest potential incidental losses among the civilian population during a military action are to be measured in proportion to the extent of the anticipated military advantage.³⁵ The greater this advantage, the greater the acceptable level of civilian casualties and destruction. Although the rule is silent on this point, it must be assumed that there is an upper limit to the extent of acceptable damage to the civilian sector. It would be absurd if the (p. 264) rule governing collateral damage could completely nullify the fundamental prohibition of waging total war against the civilian population (Article 48 AP I).³⁶

8.09

When launching an attack on a military objective, all feasible precautions shall be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians, and damage to civilian objects (Article 57, para. 2, lit. a (ii), AP I).

1. This rule stresses the obligation of all those responsible for planning, deciding, or carrying out a military operation to take all measures for the greatest possible protection of civilians and civilian objects, as well as other groups of persons entitled to respect and protection, for example wounded and sick military personnel, or protected objects such as military medical units, military hospitals, and so on. Furthermore, an attacking party must respect any existing safety zones, undefended localities, and demilitarized or neutralized zones. This precautionary measure goes beyond the obligation to refrain from deciding to launch an attack which may be expected to cause excessive incidental civilian casualties or damages (Article 57, para. 2, lit. a (iii), AP I). Even if an attack against a legitimate target would comply with the rule of proportionality contained in the said Article, additional precautions must be taken, if feasible, in particular in the choice of means and methods of warfare, to further minimize or avoid incidental civilian harm or damage.

2. The other precautionary measures to be taken when preparing and carrying out a military action are dealt with in detail in Sections 7.06, 7.18, and 8.08. At this point it should be pointed out that the party to a conflict whose civilian population or civilian objects might suffer incidental losses or damage in an (as such lawful) attack by the enemy forces also has specific obligations. In particular, the said party must make it possible that the adversary forces may attack military objectives without excessive collateral damage to civilians. This is the counterpart to the obligation according to which a distinction must always be made between combatants or military objectives on the one hand and civilian persons or civilian objects on the other. Each party to a conflict therefore has the duty to remove the civilian population, individual civilians, and civilian objects under its control from the vicinity of military objectives 'to the maximum extent feasible' (Article 58, lit. a, AP I). Moreover, military objectives must, to the maximum extent feasible, not be located within or near densely populated areas (Article 58, lit. b). Finally, the said party to the conflict must, to the maximum extent feasible, take other precautions to protect the civilian population, individual civilians, and civilian objects against the dangers associated with military operations (Article 58, lit. c). Among these measures are civil defence activities (*see below*, Sections 8.18–8.21). Moreover, the duty to take precautions against the effects of military actions applies not only with regard to a party to the conflict's own population but also to other civilians temporarily under its control, for example aliens, refugees, and others. It also applies to occupied territories (*see below*, Chapter 9).

3. In the course of the deliberations it was argued that in modern wars it would no longer be possible to make a distinction between potential military objectives on one hand and the civilian infrastructure on the other. It was reasoned that the prohibition of retaining or locating military objectives in civilian areas could make military defence measures (p. 265) impossible, and this would amount to an unacceptable breach of the right of self-defence.³⁷ Article 58 responds to this objection by expressing very pragmatically the duty to take precautions 'to the maximum extent feasible'. The precise meaning of 'feasible' was set down in some declarations of interpretation of AP I in the following manner: 'that which is practicable or practically possible, taking into account all circumstances ruling at the time including humanitarian and military considerations'.³⁸ According to this interpretation, it is also possible in a defensive war to find an acceptable compromise between military arguments and humanitarian considerations, especially since in this case it is a question of protecting the civilian population of the defending party.

8.10

If soldiers are employed for the protection of civilian objects, they may be attacked, on account of their status as combatants. Their presence is therefore a factor endangering the object to be protected. Whenever soldiers are employed for the protection of civilian objects, the situation must be assessed by weighing the expected military advantage (see above, Section 8.08).

The presence of members of armed forces on or at a civilian object does not *ipso facto* turn the object into a military objective which may legitimately be attacked. Only the soldiers employed for the protection of the object and the military equipment are lawful targets of an attack. Such an attack against them is then subject to the usual obligation which requires to weigh the expected military advantage against the expected incidental loss of civilian life or the probable damage to civilian objects (see above, Section 8.08). If the anticipated damage is excessive in relation to the desired military success, then the attack must not be carried out; other ways to achieve the same aim must be found.

8.11

Hospital and safety zones and localities may be established by agreement so as to protect wounded, sick, and aged persons, children, expectant mothers, and mothers of children under seven from any attack (Article 14 GC IV). Military objects shall not be located within or in the vicinity of hospital and safety zones and localities. These zones and localities shall be neither used for military purposes nor defended.

1. Hospital zones and localities are zones and localities intended for the accommodation and care of wounded and sick persons of military or civilian origin. They may be established for members of the armed forces (Article 23 GC I) or for civilians (Article 14 GC IV; see below, Sections 12.24–12.27). The provisions relating to hospital and safety zones in the First and Fourth Geneva Conventions are sufficiently flexible to make various combinations possible. There is, for instance, no reason why a hospital zone should not combine the two types and provide shelter for both soldiers and civilians in need of treatment, since once a soldier is wounded or sick, s/he may be said to be a suffering, inoffensive human being. Safety zones or localities, reserved solely for the categories of civilians enumerated in the Convention, may be set up independently of hospital zones. Or zones which are at the same time hospital and safety zones might be set up, to shelter both civilian and military wounded and sick, as well as certain categories of the civilian population.³⁹

(p. 266) **2.** Hospital and safety zones and localities provide safe accommodation for certain categories of especially vulnerable civilians, such as the wounded and sick, elderly persons, children under fifteen, expectant mothers, and mothers of children under seven (Article 14 GC IV).

3. Neutralized zones are specified areas within operational zones where military operations are excluded, by mutual agreement of the belligerents, so that wounded and sick combatants as well as civilians not taking part in the hostilities may be brought to safety (Article 15 GC IV). There are also 'non-defended localities' and 'open cities', which likewise serve to protect the civilian population (Article 59 AP I), as well as demilitarized zones (Article 60 AP I; see below, Section 8.13).

4. In order that such zones and localities can fulfil their purpose, they must be secured as fully as possible against the effects of military operations. Such refuges are usually required most urgently within or in the vicinity of a zone where fighting is either taking place or likely to occur. On the question of safety, therefore, a difficult compromise must be reached between the need for a protected zone, on one hand, and military considerations, on the other.

5. Only hospital and safety zones and localities serving humanitarian purposes are entitled to protection by the Conventions.

6. Hospital and safety zones or localities may be established in time of peace already. After the outbreak of hostilities, the parties to the armed conflict are called upon to declare such zones through mutual agreement. This may mean the establishment of new zones or localities or the recognition of existing zones or localities established unilaterally by a party to the conflict before or during the hostilities. Hospital or safety zones can be set up in a party's own territory or in occupied territory. A draft agreement relating to hospital and safety zones and localities is provided in Annex I to GC IV.

7. In addition to the exact determination of the geographical position of the hospital and safety zones and localities in the agreement, such areas, in particular their limits, must be clearly and recognizably marked. Only in this way can their protection be ensured in practice.

8. The following categories of persons may find refuge in hospital zones or localities or in safety zones or localities:

- the wounded and sick of military or civilian origin;
- the frail and aged;
- children under fifteen; and
- expectant mothers and mothers of children under seven.

In practice it is not always possible to differentiate between hospital zones or localities and safety zones or localities, for example because wounded persons have been admitted to a safety zone or children to a hospital locality. This is not a problem provided that the concerned persons are not or no longer involved in hostilities, or that anyway they do not present a danger to the enemy, in which case they are entitled unconditionally to respect and protection. AP I makes no distinction between the legal status of wounded or sick civilians and that of wounded and sick combatants (Article 8, lit. a).

(p. 267) **9.** It is self-evident that no adverse discrimination founded on irrelevant criteria may be made when admitting persons seeking protection (Article 9 and Article 75, para. 1, AP I). Only the need for protection counts.

10. In addition to the listed categories of persons, administrative personnel and persons who provide care are permitted to stay inside the zones. The original inhabitants of the territory or the locality where a protected zone is located may also remain. The latter must abide by the rules applicable to the zone or the locality.

11. Hospital and safety zones or localities shall not be attacked and they shall be protected against attacks. This means that measures shall be taken to provide protection for all, in the sense of ensuring personal security against acts of violence. However, defence of the zone or locality as a whole, with the aim of preventing enemy forces from taking it over, is prohibited. It must be handed over to the approaching forces of the adverse party without fighting, where possible in accordance with an arrangement, in order to avoid any danger to the persons accommodated in the zone or locality. If the zone or locality is defended militarily against the advancing enemy it loses its special protection, after a preliminary warning. The persons within the zones or localities, however, remain entitled to protection as wounded or sick members of the armed forces, or as civilians.

12. Objects which may be military objectives may not be brought into these zones or localities, nor into the vicinity thereof. Particular care shall be taken that the special protection of the place of refuge is not endangered by the effects of possible (lawful) attacks on nearby military objectives (collateral damage). Those who attack a military objective in such circumstances must take into consideration the presence of a protected zone in the vicinity of a chosen target (*see above* Section 8.09).

13. It is the task of protecting powers and/or the ICRC to offer their good offices to the parties to the conflict for the establishment of hospital and safety zones or localities or for the recognition of existing ones (Article 23, para. 3, GC I; Article 14, para. 3, GC IV). The ICRC's comprehensive right of initiative in humanitarian matters gives it the right to make suggestions to the parties to a conflict at any time and to provide assistance in establishing protection zones or localities (Article 9 GC I-III; Article 10 GC IV; *see below*, Section 21.24).

14. The law of non-international armed conflict does not include provisions on protective zones. However, nothing prevents parties to such an internal conflict from establishing zones or localities through special agreements. Common Article 3, para. 3, GC I-IV, is the legal basis for such an ad hoc agreement.

8.12

The parties to the conflict may agree to establish demilitarized (neutralized) zones (Article 15 GC IV; Article 60 AP I). No military activities shall be carried out in these zones. Their sole purpose is to provide shelter for wounded, sick, and other persons not involved in the conflict.

1. Demilitarized zones are tracts of land which, according to an express arrangement between two states, shall not be drawn into hostilities (Article 60 AP I). In contrast, other rules apply to agreements concluded during a conflict and which concern hospital and safety zones in regions where fighting is taking place (*see* Section 8.11) or 'open cities' (Sections 7.19-7.24.).

(p. 268) **2.** The specifically humanitarian justification for demilitarized zones, that is the protection of civilians and civilian objects against the effects of hostilities, distinguishes them from similar institutions such as regions that have been permanently neutralized or demilitarized by international treaty, for example the Antarctic⁴⁰ or the Åland Islands.⁴¹

3. The establishment of a demilitarized zone requires an explicit agreement between two or more parties to an armed conflict. To avoid misunderstanding, a tacit understanding is not sufficient. An agreement may be concluded either in time of peace or during a conflict. It is self-evident that the location and extent of the zone to be demilitarized must be

precisely described. The zone must also be clearly marked, so that its boundaries can be recognized in all circumstances and at all times.

4. A region may be made into a demilitarized zone by agreement if the following conditions are met:

- a) Combatants, mobile weapons, and mobile military equipment must be removed from the zone. Military members of the medical service are not affected by this requirement.
- b) No hostile use shall be made of fixed military installations or establishments.
- c) No acts of hostility shall be committed by the authorities or the population.
- d) No activities in support of military operations shall be undertaken. This point must be dealt with in detail in the agreement, providing expressly for any exceptions, such as, for example, the ongoing activities of industrial installations which could be used for arms production. Misunderstandings must be avoided through clear agreements.

5. A demilitarized zone is first and foremost open to the population already living there. In addition, other persons may be granted access, in particular civilian and military wounded and sick persons and civilians in need of special protection. The local authorities may usually continue their activities. In particular, (civilian) police forces shall continue to maintain public order.

6. If enemy armed forces approach the demilitarized zone, control must be handed over without resistance. The zone retains its status after passing to the other party to the conflict, if this was so determined in the agreement or if the occupying power unilaterally so decides. As before, it must not be used for military purposes, otherwise the zone loses its special status.

7. A breach by one of the parties to the conflict (usually the party controlling the zone) of the rules applying to a demilitarized zone does not release the other party from its obligation to respect the zone unless it was a 'material breach' (Article 60, para. 7, AP I). Such a 'material breach' carries with it the serious consequence of loss of immunity for the zone. What constitutes such a 'material breach'? The moving of heavy weapons into the zone would undoubtedly fall into this category, while the presence of a few scattered soldiers, even if armed, could not be regarded as a material breach. As a matter of principle, the removal of protected status must be preceded by a warning.

(p. 269) 8. If a zone has lost its special status, military operations must comply with the limits imposed by other rules of international law applicable in armed conflict. Accordingly, for example, the civilian population of the area in question or the displaced persons and refugees located there must be spared and respected according to the general rules.

9. An attack against a demilitarized zone is a grave breach of AP I if it causes death or serious injury (Article 85, para. 3, lit. d, AP I). The Rome Statute does not contain this war crime, it only contains the crime of 'attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives' is a war crime (ICC Statute, Article 8, para. 2, lit. b (v), which is based on Article 25 HagueReg and Article 59 AP I).

8.13

Journalists engaged in dangerous professional missions in areas of armed conflict are considered as civilians. They are protected, provided that they take no action adversely affecting their status as civilians (Article 79 AP I). War correspondents are journalists accredited by the armed forces, yet they remain civilians. As persons accompanying the armed forces without being members thereof, in case of capture they benefit of the status of prisoners

of war (Article 4 A, para. 4, GC III). Journalists may obtain an identity card which attests to their status (Article 4 A, para. 4, and Annex IV, GC III; 79, para. 3 and Annex II, AP I).

1. The term 'journalist' encompasses all occupations associated with the media, including reporters, cameramen, sound technicians, and photographers. International humanitarian law differentiates between 'war correspondents' on one hand and 'journalists engaged in dangerous professional missions' on the other. Both categories are treated as civilians by international humanitarian law.

2. War correspondents are representatives of the media who, in the case of an armed conflict, are formally accredited to the armed forces of a party to the conflict, without being members thereof (Article 4 A, para. 4, GC III). They accompany the forces in the area of operations, or work in locations to which the armed forces permit them to go. The armed forces shall provide them with a special identity card which confirms their status (*see* Annex IV A to GC III). War correspondents are and remain civilians. They work on their own responsibility or the responsibility of editors or an agency. They must therefore not be confused with persons working in the information services of the armed forces, which are members of the armed forces and have combatant status. Whether or not war correspondents are subject to censorship is not a question for international humanitarian law.

3. War correspondents are permitted to carry out all those activities in the area of operations which normally form part of their occupation, including 'looking around', taking notes, making visual and audio recordings, etc. Such activity may not be considered hostile acts justifying military action against the person. On the other hand, as civilians who are not members of the armed forces, war correspondents must not under any circumstances take a direct part in hostilities. If they do so, they have to accept the consequences (*see* below, Section 8.16). In military operations, practically speaking, war correspondents can only be spared if they are clearly recognizable as civilians. This is hardly possible if journalists wear uniform-like clothing or ride on a military vehicle or are together with members of the armed forces ('embedded journalists'). If they are close to a military target or if they accompany a military unit on patrol, they accept the risk of becoming victims of (lawful) military operations (on such 'collateral' damage, *see* Section 8.08).

(p. 270) 4. Injured or shipwrecked war correspondents shall be treated in accordance with the provisions of GC I or GC II. If captured, they are entitled to the same treatment as a prisoner of war, under the provisions of GC III (*see* Section 5.19), without however losing their civilian status.

5. AP I includes a special provision on journalists engaged in a dangerous professional mission (Article 79).⁴² Those journalists are dealt with distinctly from war correspondents. Originally, the UN had the intention to draft a special convention relating to the protection of journalists in war. When the above-mentioned Article 79 was included in AP I, however, work on the planned convention was abandoned, and the General Assembly of the UN explicitly stated its satisfaction with the adoption of Article 79, AP I.⁴³

6. Without creating new law and without changing the legal situation of war correspondents (*see* above, para. 2), Article 79 confirms that journalists are civilians. A special legal category was deliberately not created. Journalists enjoy the same rights and must abide by the same rules of conduct as all civilians. They may not be made the target of an attack. They must, however, behave in such a way as to make themselves recognizable as civilians in an area of military operations, a condition under which their immunity may become effective. Naturally, journalists may not take a direct part in hostilities, yet their professional activity may never be considered to be a hostile act. In an operational zone they accept the risks which are always associated with operations against military

objectives. If captured, they shall be treated as civilians who have fallen into the hands of a party to the conflict (see below, Sections 8.26 and 8.30–8.32).

7. Journalists who engage in dangerous professional missions in war zones may receive an identity card confirming their status. This identity card must resemble the model in Annex II of AP I. The authorities of the state in which journalists reside or of which they are nationals or in which the news agency employing them is located are responsible for issuing such an identity card (Article 79, para. 3).

8. On a different level it should be recalled that, according to a judgment of the ICTY, a journalist who has witnessed atrocities on his professional assignment may not be compelled to testify in criminal proceedings against a person accused of an international crime.⁴⁴ According to Article 73 of the ICC Rules of Procedure and Evidence, communications made and information gained in the course of a confidential relationship may be considered as privileged and consequently not subject to disclosure. Arguably, this exception to the obligation to testify may also be invoked by a journalist in a case related to an armed conflict.

8.14

Civilians may at any time seek assistance from a protecting power, the International Committee of the Red Cross (ICRC), or any relief organization (Article 30, para. 1, GC IV). Representatives of protecting powers and of the ICRC shall be entitled to visit protected persons at any place and at any time they choose (Article 143 GC IV).

(p. 271) 1. This provision must be read in connection with Chapter 21, which gives more detail on the procedures and institutions for monitoring the implementation of international humanitarian law. In particular, for the status and tasks of the protecting power, see Sections 21.20–21.21, and for the role of the ICRC, Section 21.24. In the present Chapter on the protection of the civilian population it may be useful to briefly consider the respective roles of the protecting power, the ICRC, and private relief organizations.

2. Under Article 30 GC IV, the civilian population is entitled to contact at any time these institutions and organizations with personal requests. The authorities must not only make such contacts possible but must facilitate them. Indeed, the protecting power and the ICRC can only carry out their duties if they have direct contact with the population. Only in this way can they obtain unimpeded access to information enabling them to form as true a picture as possible of the effects of possible breaches of international humanitarian law.

3. Of the relief societies also mentioned in Section 8.15, the most prominent are the national Red Cross and Red Crescent societies.⁴⁵ As national societies ‘duly recognized and authorized’ by their government (Article 26 GC I), they undertake wartime duties in favour of the victims of armed conflicts. Those duties are embodied in part in the four GCs and otherwise are rooted in the free initiative of these oldest of all relief societies. The national Red Cross and Red Crescent societies are bound by the Statutes of the International Red Cross and Red Crescent Movement to carry out their activities on the basis of the seven Fundamental Principles of the Movement, among which the principles of Humanity, Neutrality, Impartiality, and Independence should be specially noted in this context. The ICRC recognizes a national society if it fulfils the conditions laid down in the Movement’s Statutes. The ICRC also has the mandate of verifying that the Fundamental Principles are observed by the components of the Movement, while at the same time respecting the independence of individual national societies.⁴⁶

4. The tasks of national Red Cross and Red Crescent societies during armed conflict are laid down in numerous provisions of the Geneva Conventions. In summary, Article 81, para. 2, AP I requires the parties to a conflict to grant to their national societies facilities necessary for their humanitarian activities. These facilities undoubtedly include the ability of inhabitants to approach a society freely and without hindrance. On the role of Red Cross and Red Crescent societies in occupied territories, *see* Section 9.42 and Article 63 GC IV. In addition to the Red Cross and Red Crescent societies, other relief organizations may work for the benefit of the population.

5. The population not only has the right to approach these institutions but the authorities must grant the facilities and freedom of movement so that this right may be exercised. Only military reasons or security requirements can justify temporary restrictions (Article 30, para. 2, and Article 63, para. 1, GC IV). It is self-evident that no disadvantage to a person may result from having approached one of these institutions with a request for assistance or for any other reason.

(p. 272) 6. GC IV contains a number of provisions which oblige parties to an armed conflict to transmit to the protecting power or, in its absence, to the ICRC information on persons on the other side of the front line. This is especially the case with respect to restrictions on personal freedom by court order or administrative decision (*see* Sections 8.27, 8.30, and 9.51). The ICRC has a Central Tracing Agency which processes and stores information and which permanently carries out the tasks set out in Article 140, GC IV for the Central Information Agency.

7. Representatives of a protecting power and delegates of the ICRC are entitled to go to all places where protected persons may be, including places of detention or internment (Article 143 GC IV). These visits serve in particular to clarify whether and to what extent the rules of international humanitarian law are being observed. In this regard, *see* Sections 8.30, 9.51, 21.20, and 21.24.

8. The law of non-international conflicts contains no corresponding provision with a clear-cut obligation of parties to an armed conflict to accept the activities of humanitarian organizations. According to common Article 3 of the Geneva Conventions, an impartial humanitarian organization, such as the ICRC, may offer its services to the parties to the conflict. Such an offer by the ICRC must not be seen as interference in internal affairs.⁴⁷ It must be examined in good faith and may not be arbitrarily refused. Any person must be allowed to approach delegates of the ICRC, without fear of negative effects. If such right were not guaranteed, the ICRC would be unable to carry out its mandate and it would no doubt withdraw its delegates from that country.

8.15

Persons who are reasonably suspected of activities hostile to the security of the state are not entitled to claim the respect of all rights accorded to civilians, in particular not those which, if exercised in favour of that person, would be prejudicial to the security of the State (Article 5, paras 1 and 2, GC IV). Yet these persons shall always be treated humanely. In particular, they shall have the right to a regular and fair judicial procedure (Article 5, para. 3, GC IV; Articles 45, para. 3, and 75 AP I).

1. A protected person, in this case a civilian belonging to the adverse party who is reasonably suspected of being engaged in activities hostile to the security of that state, remains under the protection of international humanitarian law. Yet s/he is not entitled to claim all the rights usually granted to protected persons (Article 5, para. 1, GC IV).⁴⁸ Although GC IV does not further specify, it can be assumed that this rule refers primarily to acts of espionage or sabotage. Article 5, para. 2 elaborates that in occupied territory a person detained as a spy or saboteur, or 'under definite suspicion of activity hostile to the

security of the Occupying Power', may forfeit his or her right of communication as guaranteed by the Convention.

2. In both situations the detaining power is temporarily released from the obligation to respect the totality of rights granted by GC IV, although only to the extent that these rights would, 'if exercised in favour of such individual person, be prejudicial to the security of such State' (Article 5, para. 1, GC IV). In practice, this means that the right (p. 273) to have contact with the outside world may be suspended.⁴⁹ In contrast, the obligation to respect the fundamental guarantees of international humanitarian law may never be derogated from. The respect for the detained person's fundamental rights is in no circumstances 'prejudicial to the security of such State'. In close alliance with international law on human rights,⁵⁰ Article 75 AP I has codified the fundamental guarantees making up the minimum standard to which everyone, without exception, is entitled. Even spies and saboteurs are protected by this 'humanitarian safety net'.⁵¹ In particular, the detaining power is bound to report the identity of captured civilians to their state of origin no later than two weeks after their capture (Article 136, para. 2, GC IV). The same applies for persons detained according to Article 5 GC IV. The restrictions must be lifted as soon as they are no longer justified and *incommunicado* detention is no longer necessary for security reasons (Article 5, para. 3, second sentence).

3. As mentioned above, certain rights of civilians who are detained for activities hostile to the security of the state may be suspended (Article 5, para. 1, GC IV), but the detainees shall always be treated with humanity. In particular, they have the right to a regular and fair trial (Article 5, para. 3, GC IV; Article 75 AP I).

8.16

Civilians taking a direct part in hostilities lose their right to protection against the effects of hostilities for the duration of each specific act amounting to direct participation (Article 51, para. 3, AP I; Article 13, para. 3, AP II). In case of doubt a person shall be protected against direct attack. When civilians cease to take a direct part in hostilities, they may no longer be attacked, but remain subject to criminal prosecution for violations of international or domestic law they may have committed during such participation (see below, Sections 21.10-21.12).

1. Only members of the armed forces have the right to take a direct part in hostilities (Article 43, para. 2, AP I), civilians have not (see above, Sections 5.01 *et seq.* and 8.01). Yet, practice shows that under certain circumstances civilians do take up arms. There are different types of civilian involvement in military activities, such as individual civilians taking spontaneously and individually an active part in hostilities, civilians resorting to violence as members of an organized armed group, or armed forces hiring individual civilians or entire companies, usually called military/security companies, to carry out tasks which normally belong to the armed forces, such as logistical support, maintenance of weapon systems, protection of persons or premises, training assignments, or even interrogation and custody of detainees.

2. International humanitarian law is built upon the assumption that civilians do not take a direct part in hostilities. It therefore provides for protection of civilians against the effects of hostilities, but only for such time as they do not take a direct part in the hostilities themselves (Article 51, para. 1, AP I, Article 13, para. 3, AP II). Yet, such participation is not prohibited by international humanitarian law, nor is it an international crime.

3. What does ‘taking a direct part in hostilities’ mean? While neither the Geneva Conventions nor the 1977 Protocols give much guidance for the interpretation of that notion, an analysis of practice has to step in. After intensive consultation of academic and (p. 274) military experts the ICRC made the following interpretive recommendation: in order to qualify as direct participation in hostilities three cumulative criteria must be met:

- (1) the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
- (2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a co-ordinated military operation of which that act constitutes an integral part (direct causation); and
- (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).⁵²

If these conditions are met, civilians⁵³ performing such acts lose their protection against direct attacks. Moreover, if they were killed or injured incidentally in an attack on a military objective, their loss of lives or injury would not count as relevant civilian incidental casualty when assessing the proportionality of an attack (*see above*, Section 8.01, para. 2).

4. The notion of direct participation in hostilities should, however, not be understood too broadly. Not every activity carried out in the course of an armed conflict is a hostile act incompatible with the protection afforded to civilians against direct attack. Employment in the (civilian) armament industry, for example, does not mean that its employees are necessarily taking a direct part in hostilities. Since, on the other hand, buildings and infrastructure of the armament industry usually are lawful targets for military operations and may be destroyed, the rules governing the assessment of possible collateral damage to civilians must be observed (*see above*, Section 8.08).

5. Civilians taking a direct part in hostilities against the adversary may be resisted or attacked. That means that force may be used against civilians who capture or attack enemy personnel, destroy military equipment, or gather information for the direct use in military operations. The same applies to civilians who operate a weapons system, supervise such operation, or service such equipment. The transmission of information concerning targets directly intended for an attack of this target may also be considered as taking a direct part in hostilities.

(p. 275) **6.** Once civilians taking a direct part in hostilities are captured, or are otherwise *hors de combat*, they must be treated according to the rules applying to civilians—if they fulfil the nationality criteria in accordance with the rules of GC IV, if not in accordance with Article 75 AP I as reflective of customary international law. No doubt, they may be detained if presumed to have committed a crime or interned for security reasons as long as such detention is justified (*see* Article 5 GC IV). Although as civilians they are not entitled to a prisoner-of-war status (Article 4 GC III), the detaining power may grant persons having directly participated in hostilities an equivalent treatment. Experience from several conflicts in the past, especially in civil wars with foreign military intervention, has shown that such a measure may not only be justified for humanitarian reasons but also for military considerations. This must, however, not deprive them of procedural guarantees applicable to internment as contained in Articles 42, 43, or 78 GC IV.

7. Such civilians may be held to account for their acts, in conformity with applicable (international and domestic) law, in particular criminal law. They enjoy the benefit of

judicial guarantees, in particular the right to a fair trial, in the same way as any other civilian (see below, Section 9.48).

8. Article 13, para. 3, AP II stipulates in identical terms that in a non-international armed conflict civilians are entitled to protection of their person 'unless and for such time as they take a direct part in hostilities'. They may likewise be held accountable for their acts. When detained or interned they enjoy the protections as contained in Article 3 common to the GCs, Articles 4–6 AP II and customary international law, which apply to all persons not or no longer taking a direct part in hostilities.

9. In conclusion, the fact of having taken a direct part in hostilities does not confer the status of a combatant to a civilian. International law does not know anything like 'unlawful combatants' or 'illegal combatants', supposed to be an intermediate status between civilians and combatants.⁵⁴

8.17

Basic rules protecting the civilian population and individual civilians which bind parties to an international armed conflict also apply to non-international armed conflicts. Customary law has gone beyond treaty law and binds all parties to a non-international armed conflict, the government and insurgent groups, likewise (see below Section 21.12).

This is to recall and to underline what has been mentioned several times above in this Chapter: *first*, that the general rules protecting the civilian population or civilians individually are part of international customary law. And *second* that these rules bind parties to an international and a non-international armed conflict alike.⁵⁵

II. Civil Defence

Introductory Remarks

1. The purpose of civil defence is to protect the civilian population as far as possible from the effects of hostilities and to help it to survive during the war despite death, injuries, and (p. 276) destruction. The function of civil defence is to protect and to assist exclusively the civilian population. Civil defence is not part of a country's war effort; civil defence organizations belong to the civilian sphere, even if military units are assigned to support them. This is the meaning of 'civil defence' as codified by AP I and recognized by international law.⁵⁶

2. During negotiation of the new provisions, difficult questions had to be answered, since numerous countries had already found different solutions for the organized protection of their civilian population in the event of war. They differed, for example, as to whether and to what extent such an organization should also have defence responsibilities.

3. The solution chosen in 1977 is based on the concept of non-military protection of the civilian population. The organizations undertaking civil defence functions are civilian organizations. This does not mean that members of the armed forces or even entire military units cannot be assigned to a civil defence organization if the need arises (Article 67). It is quite possible for military units to bring aid to the civilian population, in co-ordination with the civil defence organization, while retaining their status as a part of the country's armed forces, that is being permitted to engage in military operations. Civil defence units, in contrast, may under no circumstances perform military tasks. They must be permanently assigned and exclusively devoted to civil defence tasks as defined in Article 61 AP I.

4. Each state is free to decide whether and how it will guarantee the protection of the civilian population by a civil defence organization. AP I simply lays down the conditions under which a civil defence organization is entitled to protection by international law and to privileged status. Similarly, it is for the state to determine whether it wishes to use its civil defence organization in disasters and emergencies other than those arising in armed conflict, for example in natural disasters. Such activities are not covered by international humanitarian law. The provisions of AP I do however apply if a natural disaster occurs in a country involved in an armed conflict.

8.18

Civil defence organizations are protected in like manner as the medical service (Articles 61-7 AP I). Civil defence tasks are particularly warning, rescue, and maintenance, fire protection, medical service, protection against the effects of nuclear, biological, and chemical weapons (NBC defence), construction of shelters, and other measures to restore and maintain order (Article 61 AP I). Civil defence organizations, their personnel, buildings, and vehicles as well as shelters provided for the civilian population shall be especially respected and protected (Articles 62-4 AP I).

1. Like medical services, civil defence organizations and their personnel and equipment must not be involved in military operations. They may not be attacked. Personnel and equipment must be kept safe so that civil defence is able to step in and carry out its duties when war has brought death, destruction, and despair to the civilian population. The rule prohibiting interference with the activities of the civil defence organization of the opposing side is an imperative duty of all parties to a conflict. Article 62, para. 1, second sentence, does, however, permit restriction of their tasks 'in case of imperative military necessity'. This exception must be interpreted restrictively, and in any case it may endure only for a limited period.

(p. 277) 2. Civil defence personnel must not take part in hostilities, nor shall hostile acts be carried out under the protection of a civil defence organization. Here again, civil defence organizations and medical units are dealt with in the same way.

3. The possible tasks of a civil defence organization are listed in Article 61, lit. a, AP I. They are exclusively humanitarian tasks 'intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival'. A civil defence organization may, according to this provision, carry out all or some of the following tasks:

- (i) warning;
- (ii) evacuation;
- (iii) management of shelters;
- (iv) management of black-out measures;
- (v) rescue;
- (vi) medical services including first aid, and religious assistance;
- (vii) fire-fighting;
- (viii) detection and marking of danger areas;
- (ix) decontamination and similar protective measures;

- (x) provision of emergency accommodation and supplies;
- (xi) emergency assistance in the restoration and maintenance of order in distressed areas;
- (xii) emergency repair of indispensable public utilities;
- (xiii) emergency disposal of the dead;
- (xiv) assistance in the preservation of objects essential for survival;
- (xv) complementary activities necessary to carry out any of these tasks, including, but not limited to, planning and organization.

4. These tasks are exclusively allowed for the protection of the civilian population, for fulfilling a humanitarian purpose. Some of the tasks listed may not be exclusively humanitarian. It is therefore crucial to clearly define what aspect of a task will be assigned to civil defence, thus clearly distinguishing it from what might be considered a contribution to the war effort. Task (viii), ‘detection and marking of danger areas’, for example, may not be abused in order to seek information that can be used for military purposes, but must be performed solely to prevent the civilian population from entering dangerous areas (e.g. mined zones) and sustaining harm. Moreover, the question arises whether the list in Article 61, lit. a is an exhaustive description of the tasks of civil defence in wartime, or whether other tasks could be added, for example measures to protect the environment. The history of this provision in fact indicates that the list is final.⁵⁷ On the other hand, it seems reasonable to interpret the provision as meaning that a task not expressly included may also be allocated to civil defence, as long as it directly serves the well-being of the civilian population in a situation of armed conflict. Measures to limit environmental disasters resulting from armed conflict could, for example, be included, since it is almost inevitable that such disasters would cause loss or damage to the civilian population.

5. Civil defence organizations are establishments or other units organized or authorized to perform the tasks enumerated *supra* 3 and ‘which are assigned and devoted (p. 278) exclusively to such tasks’ (Article 61, lit. b). Therefore there may be more than one organization in a state. Private institutions, performing perhaps only some of the tasks assigned to civil defence, may be employed in addition to a state-run service, provided that they are devoted exclusively to civil defence work. This does not mean that such institutions may not occasionally serve other purposes. However, while they are employed in connection with civil defence they may only carry out civil defence duties. Private organizations wishing to undertake civil defence duties must be authorized by the appropriate national authorities, in order to avoid abuse of the—protected—status of civil defence organizations.

6. The personnel of civil defence organizations must be respected and protected, and enabled to perform their tasks without hindrance except in case of imperative military necessity (Article 62 AP I). The personnel comprise all those persons who, as a part of an organization, perform civil defence work, including administrative activities, and not only permanent staff but also persons actually carrying out civil defence work under the supervision of such a recognized organization. Article 62, para. 2 also provides for the protection of all those who respond to an appeal from the competent authorities and perform civil defence work under their control.

7. Medical personnel working in civil defence have special status: they are protected as members of civilian medical services. They must be respected and protected and may not be hindered from carrying out their tasks (*see below*, Section 8.22). Their integration in a civil defence organization does not change this. Medical personnel may make themselves recognizable by means of the red cross, red crescent, or red crystal emblem, or with the distinctive sign of civil defence (*see below*, Section 8.21), or both (*see* Article 66, para. 9, AP I).⁵⁸ Civil defence organizations may also employ, for medical duties, persons who either

additionally or primarily also perform other tasks, which Article 8, lit. c, AP I prohibits for medical personnel. This may for instance include first aid workers. They may wear the distinctive sign of civil defence but not the red cross emblem.

8. Members of the armed forces permanently assigned to a civil defence organization in order to perform civil defence work have a position different from that of civilian personnel (Article 67). Such military personnel must be employed exclusively for civil defence and in particular may not have a combat task or perform any other military duties. Although they retain their position as members of the armed forces, they must be respected and protected. If they should fall into the power of the adversary, they are prisoners of war.

9. It is self-evident that civil defence organizations require equipment, vehicles, buildings, and so on in order to carry out their tasks. These objects must not be attacked. They may not be diverted from their proper use except by the party to which they belong (Article 62, para. 3).

10. Of particular interest is the legal status of shelters provided for the civilian population. To the extent that such a structure serves solely to accommodate civilians, it is considered to be a civilian object within the meaning of Article 52 AP I. Attacks against (p. 279) civilian objects are prohibited (*see above*, Sections 7.12–7.24). This holds true whether the shelter formally belongs to a civil defence organization or not. If it does, then the actual protection can be increased by marking it with the distinctive sign of civil defence (Section 8.21). The integration of shelters into the sphere of responsibility of civil defence increases the degree of protection.

11. With the consent and under the control of the relevant party to the conflict, civil defence organizations of neutral or other states not parties to the conflict may be employed on its territory (Article 64). They are subject to the same provisions and enjoy the same protection as the national organization. It should be noted that such assistance by a civil defence organization of a state not involved in the conflict shall not be considered as interference in the conflict.

12. The relevant party to the conflict must, when appropriate, facilitate the international co-ordination of civil defence measures through the relevant international organization (Article 64, para. 2), namely the International Civil Defence Organization (ICDO), an intergovernmental organization for civil defence matters.

8.19

The protection accorded to (civilian) civil defence organizations, their personnel, and facilities under international law shall cease if, in spite of a warning, such an organization commits acts harmful to the enemy (Article 65, para. 1, AP I). Co-operation with military authorities and the employment of members of the armed forces shall not be considered as acts harmful to the enemy. The performance of civil defence tasks may also benefit military victims (Article 65, para. 2, lit. c, AP I). Civil defence organizations may be formed along military lines (Article 65, para. 4, AP I). Their personnel may be enlisted for compulsory service (Article 65, para. 4, AP I) and bear individual weapons for the purpose of maintaining internal order and for self-defence (Article 65, para. 3, AP I).

1. Under the heading ‘Cessation of protection’, Article 65 AP I lays down the following principle: the special protection of civil defence ends only if acts harmful to the enemy are committed and if a warning with a reasonable time limit has remained unheeded. This applies to the organizations as such and also to their personnel, buildings, vehicles, and equipment. This statement of principle is followed by a description of acts not to be considered ‘harmful to the enemy’ and require no further comment, merely the observation

that civil defence personnel are permitted to carry light personal handguns (Article 65, para. 3). Such weapons may be used only to maintain order and in self-defence against attacks. This rule is modelled on the provisions governing medical personnel (*see below*, Section 12.16).

2. The significance of cessation of the legal protection of civil defence requires clarification. It is true that civil defence organizations on the one hand and personnel and equipment on the other under certain circumstances can no longer claim the protection of Articles 61–7 AP I. Since members of civil defence are necessarily civilians, however, they remain entitled to the general protection owed to all civilians (*see* Sections 8.02–8.17). Only if such persons take a direct part in hostilities may they lose temporarily the protection afforded to civilians (Article 51, para. 3). The same holds true, *mutatis mutandis*, for their equipment, which is considered to be a (protected) civilian object (Article 52).

(p. 280) **8.20**

Civilian civil defence organizations may be permitted to continue their humanitarian activities in occupied territories (Article 63 GC IV; Article 63 AP I).

1. Article 63, para. 2, GC IV allows local civil defence organizations to continue their activities when their territory is occupied. Article 63 AP I has enhanced their status in case of belligerent occupation and thus increased their protection.

2. Article 63 AP I is to be understood in the context of the Protocol's Chapter VI (Articles 61–7 AP I), on civil defence. These provisions are also relevant for status, duties, entitlement to protection, and cessation of this protection of civil defence in occupied territories. The occupying power must not only allow civil defence organizations of the occupied territories to continue their work but must also guarantee 'the facilities necessary for the performance of their tasks' (Article 63, para. 1). For this reason, the occupying power may not, for example, requisition buildings or equipment belonging to civil defence, if it is harmful for the population of the occupied territory (Article 63, para. 4).

3. As already noted, military personnel serving with civil defence organizations become prisoners of war when captured. Under specific conditions they may be employed for civil defence tasks in the interest of the civilian population of the occupied territories by the occupying power (Article 67, para. 2, AP I).

4. The occupying power must allow civil defence organizations of neutral or other states not parties to the conflict to perform civil defence duties in occupied territories, unless it can adequately carry out such work with its own resources (Article 64, para. 3, AP I). The use in occupied territories of civil defence organizations from states not involved in the conflict requires the consent of the occupying power.

8.21

The international distinctive sign of civil defence is an equilateral blue triangle on an orange ground (Article 66, para. 4, AP I). It is shown in the Annex on Distinctive Emblems, No. 5. Civil defence personnel shall be recognizable by this distinctive sign and by an identity card (Article 66, para. 3, AP I). Aid organizations may also use their own traditional signs.

1. AP I establishes the equilateral blue triangle on an orange ground as the distinctive sign of civil defence (*see* Annex, No. 5; Article 66, para. 4, and Annex I, Article 16, AP I). A special identity card for civil defence personnel was also introduced. The distinctive sign serves to make civil defence organizations as such, their personnel, buildings, vehicles, and other equipment recognizable. Shelters for the civilian population which are not under the

control of a civil defence organization may also be marked with this sign. For the distinctive sign to serve its purpose, it must be sufficiently large to be recognizable from a distance.

2. The provisions relating to the civil defence sign have been modelled on the rules applicable to the distinctive sign of medical personnel and medical units and transports (*see* below, Sections 12.12–12.18). These may be consulted for guidance concerning display.

3. Abuse of the civil defence sign is forbidden and should be punished by the relevant party to the conflict. Perfidious use of the sign is a grave breach of AP I (in other words, a war crime) when committed wilfully and causing death or serious injury (Article 85, para. 3, lit. f, AP I; *see* Section 21.10).

(p. 281) 4. The marking of all establishments, personnel, and equipment serving civil defence purposes is intended to enable the civilian population to survive during a war. The blue triangle on an orange ground alone can fulfil this task only to a very limited extent. What is decisive is that the civil defence establishments are kept as far as possible out of the firing line. In particular, shelters for the civilian population must be constructed in such a way that they have the greatest possible chance of being spared in the event of war. Effective civil defence helps to create the conditions necessary for international humanitarian law to be observed and for the civilian population to be respected and protected.

III. Aliens in the Territory of a Party to the Conflict

8.22

Protected persons may leave the territory of the state of residence, unless their departure is contrary to the national interest (Article 35, para. 1, GC IV). The departure shall be carried out in humane conditions (Article 36 GC IV). If any such person is refused permission to leave, such a decision must be reviewed by a court or an administrative board (Article 35, para. 2, GC IV).

1. Aliens have the right to leave the territory of their state of residence, but they are not under an obligation to do so. Aliens who have spent many years in this country may be forced to leave the country only in exceptional circumstances, as stipulated in GC IV (*see* Section 8.28).

2. Yet the right to leave a state involved in an armed conflict is significantly restricted by GC IV. Under Article 35, para. 1, persons are not entitled to leave the territory if their departure is contrary to the national interest. This reference to the national interest of the state of residence allows this state to prohibit residents suitable for military service from leaving. Likewise, economic considerations may be adduced in order to prohibit persons from leaving on the grounds of ‘national interest’.⁵⁹ The wide discretionary power granted to the authorities by Article 35 may well be restricted today by Article 12 ICCPR, according to which departure from a country may be refused only on specific grounds. This provision may however be suspended in a state of emergency.

3. Under Article 35 the request for departure must be dealt with by ‘regularly established procedures’. This means, among others, that persons applying for departure must be heard and enabled to present evidence. As expressly laid down in Article 35, para. 1, the decision must be made, and the grounds given, ‘as rapidly as possible’. If the request is refused, then the applicant must be entitled to have the decision reconsidered by an ordinary court or by a specially created administrative board (para. 2). The protecting power must be

notified of the names of all persons whose application for departure has been rejected (para. 3). In addition, information concerning the reasons for rejection must be provided.

4. Persons leaving the territory of a party to a conflict, with or without an explicit decision by the authorities, must be allowed to depart in an orderly manner. Article 35, para. 1, states in particular that they must be allowed to take with them the money necessary for the journey and ‘a reasonable amount of their effects and articles of personal use’. (p. 282) The departure itself must take place ‘in satisfactory conditions as regards safety, hygiene, sanitation, and food’ (Article 36). The costs are chargeable to the country of destination or, in the case of departure for a third country, to the state of origin. Collective repatriation, based on a special agreement between the states concerned, is also possible. The departure arrangements may be entrusted to the protecting power or the ICRC (see also Section 8.28).

8.23

Aliens remaining in the territory of a party to the armed conflict shall, in principle, be treated in the same way as in peacetime (Article 38, para. 1, GC IV).

1. Even a national of an adverse power is entitled to humane treatment by the authorities of the country of residence. In principle, such an alien may claim the protection of international human rights law also during an armed conflict, in the same way as in peacetime. As expressly laid down in Article 38 GC IV: ‘the situation of [civilians belonging to the enemy state] shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace’, subject to the special provisions of GC IV. See in particular Sections 8.24–8.26.

2. In wartime, the authorities of the state of residence may apply to aliens such measures of control and security as they deem necessary in the prevailing circumstances as a result of armed conflict (Article 27, para. 4, GC IV). If it is absolutely necessary for security reasons, assigned residence or internment may be ordered (see Section 8.26).

3. As any other protected person aliens on the territory of a party to a conflict have the right to approach the protecting power, if any, or the ICRC. They may also contact the National Red Cross or Red Crescent Society, or any other organization that may be able to assist them (Article 30 GC IV). Conversely, representatives of the protecting power and delegates of the ICRC have unrestricted access to all places where protected persons might be found, especially places of detention and internment camps (Articles 30 and 143 GC IV; see below, Section 8.31).

8.24

Aliens must be ensured, in particular:

- **freedom of religion,**
- **medical care, and**
- **the right to leave areas exposed to the dangers of the conflict.**

They are entitled to these rights to the same extent as the nationals of the state in which they are living (Article 38 GC IV).

1. Article 27 GC IV, insofar as it applies to aliens on the territory of a party to a conflict, requires the authorities to ‘respect ... their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs’. In the event of armed conflict, the nationals of an enemy state must be protected particularly from violence, intimidation, insults, and from public curiosity. If necessary, the authorities must order special measures for the protection of persons particularly at risk. Article 37 specifically

reminds that aliens who are confined pending proceedings or serving a sentence involving loss of liberty, shall during their confinement be humanely treated. Moreover, unjustified discrimination is prohibited under all circumstances (Article 27, para. 3, GC IV; Article 75, para. 1, AP I).

2. The taking of hostages is prohibited (Article 34 GC IV; Article 75, para. 2, lit. b, AP I). Furthermore, aliens who have stayed in the country may not be moved to places (p. 283) of military importance in order to prevent the adversary from attacking these objects (Article 28 GC IV). On the contrary, the authorities must protect aliens from harm caused by military operations in the same way as they protect their own citizens, that is as far as circumstances permit (*see above*, Sections 8.05 and 8.09).

3. In addition to the fundamental rights codified by Article 27, Article 38, GC IV guarantees to aliens a few additional rights:

- to receive individual and collective relief consignments;
- to receive medical attention if their state of health requires;
- to practise their religion and to receive spiritual sustenance;
- to be protected from the dangers of war, especially the right to leave a dangerous area;
- to receive preferential treatment for children (*see also* Article 77 AP I—special care, and Article 78—evacuation), pregnant women, and mothers of small children (*see also* Article 76—special care).

4. The general prohibition against discrimination, which is given particular weight by Article 38, is intended to ensure that aliens remaining in the territory of a party to a conflict do not have to suffer more from immediate effects of war than nationals of the state in question. On the other hand, aliens may not claim any preferential treatment.

5. The rights listed under paras 1 and 3 of Article 38 are examples only. The reference to ‘the provisions concerning aliens in time of peace’ makes it clear that the list is not exhaustive. A right not explicitly listed which no doubt deserves special mentioning is the right to a fair trial. Aliens accused of having committed a criminal offence in connection with the conflict are entitled to a trial in accordance with the international obligations of the state, in particular the human rights conventions. The prohibition of discrimination must be respected under all circumstances. In addition, the minimum standard codified by Article 75, para. 4, AP I, must be heeded in all judicial proceedings (*see* Section 8.15).

6. Detained persons accused or convicted of a criminal offence shall be treated in accordance with the provisions applicable to detainees in peacetime, and without discrimination. *See also below*, Section 9.49, paras 3 and 4.

7. By way of exception, Article 5, para. 1, GC IV restricts the rights of detained persons suspected of being engaged in activities detrimental to the security of the state (*see above*, Sections 8.15–8.16).

8.25

Aliens shall be given the opportunity to find a job. That opportunity shall be equal to that enjoyed by the nationals of the state in which they are living (Article 39 GC IV). Aliens may be compelled to work only under the same conditions as nationals of the state in which they are living (Article 40, para. 1, GC IV).

1. Persons remaining in the territory of the opposing party to the conflict must be given the opportunity to earn their own living, irrespective of whether they are in the hands of the adversary on their own free will or not. When looking for work, aliens may not be put in a worse situation than nationals of the state. The state retains, however, the right to prevent aliens from being employed for certain types of work, for security reasons (Article 27, para. 4, GC IV; *see above*, Section 8.23).

(p. 284) 2. If persons are prevented from earning their own living because of security measures applied to them, for example an order placing them in assigned residence, the authorities must support them (Article 39, para. 2, GC IV).

3. Like nationals of the state, aliens may be compelled to work. Aliens of enemy nationality may be assigned only to work 'which is normally necessary to ensure the feeding, sheltering, clothing, transport, and health of human beings and which is not directly related to the conduct of military operations' (Article 40, para. 2, GC IV). Activities connected with the armed forces or work in weapons factories, for example, are prohibited. The obligation of equal treatment of aliens and nationals is applicable particularly with regard to safety at the workplace, measures of protection, salary, and compensation payments in case of industrial accidents or occupational diseases.

4. Article 40, para. 4, GC IV, expressly provides that aliens may submit complaints to the protecting power (if any), to the ICRC, or to the National Red Cross or Red Crescent Society.

8.26

The placing in assigned residence or internment of aliens may be ordered only if security considerations make it absolutely necessary (Article 42, para. 1, GC IV) or if other measures of control prove to be insufficient (Article 41, para. 1, GC IV). Such decisions are subject to review by a court or an administrative board (Article 43, para. 1, GC IV).

1. Assigned residence and internment are the severest security measures that authorities of the state of residence may decide against protected persons, in particular nationals of the opposing side (Article 41, para. 1, GC IV). Regarding the legal questions associated with deportation of aliens to their own country or to a third state, *see* Section 8.28. Assigned residence restricts personal freedom of movement. Internment involves sending a person to a place of detention or a camp established for the purpose. Both measures may be ordered only if national security makes this 'absolutely necessary' (Article 42, para. 1, GC IV—*see also below*, Section 8.30). Only considerations related to the security of the state can justify internment. An order for internment or for the less restrictive measure of assigned residence must be determined in accordance with the specific circumstances and the principle of proportionality. Finally, the provisions in force in peacetime shall be applied (*see above*, Section 8.23).

2. GC IV says little about which institution should make decisions concerning assigned residence or internment, or about the procedure to be followed. It may be assumed that this will probably be an administrative body. In practice, proceedings must be rapid, so there is little alternative. By contrast, Article 43 expressly stipulates that such decisions must be reviewed by a court or a special administrative board, either at the request of the concerned person or on its own initiative. In particular, this authority must review, at least twice yearly, the legality of every decision ordering assigned residence or internment. This control procedure is intended to safeguard the rights of persons affected.⁶⁰

(p. 285) **3.** Regarding assigned residence, with its less far-reaching restrictions, Article 41, para. 2, GC IV implies that the authorities must always take action if, as a result of the assigned residence, the concerned persons can no longer support themselves or their dependants.

4. Finally, it should be noted that a person may request his/her own internment 'if his situation renders this step necessary' (Article 42, para. 2, GC IV), that is if he/she no longer feels safe. The state of residence must comply with this request.

8.27

Refugees and stateless persons shall in all circumstances be treated as protected persons (Article 44 GC IV; Article 73 AP I).

1. Article 73 AP I says unequivocally that refugees and stateless persons who find themselves in the territory of a party to an armed conflict have the same right to protection as nationals of the adversary state. This applies particularly to refugees who are nationals of the other party to the conflict, who have left their country because they felt threatened. The term 'refugee' must be understood in a broad sense. A refugee in this connection is any person who does not in fact enjoy the protection of a government.⁶¹

2. Refugees and stateless persons shall be regarded as protected persons in every respect. As expressly laid down by Article 44 GC IV, refugees may not be regarded as enemy aliens on the mere basis of their nationality. Thus they may not automatically be subject to the same measures of control. This applies, for instance, to assigned residence or internment. The state of residence must always grant equal treatment to nationals of the adversary, taking into consideration the special circumstances resulting from their status as refugees or stateless persons.

8.28

Enemy aliens may be transferred to a state party to the Fourth Geneva Convention if this does not cause any disadvantage for these persons (Article 45 GC IV).

1. This provision relates to the handing over of civilians in the power of a party to an armed conflict to a third state, which may or may not be involved in the conflict. Such a transfer may well be in the interest of the concerned person, especially if living conditions in the accepting state are less difficult than those in the territory of the party to the conflict.

2. The legal position of the person may not be worsened by such a transfer. Under Article 45 GC IV, certain conditions must be met to ensure that the transfer is in the interests of the persons concerned and therefore permissible. A person may only be transferred to a state party to GC IV, which safeguards their legal protection. Moreover, the transferring state must ascertain that the accepting state is actually willing and able to treat the persons concerned according to the provisions of international humanitarian law. If these conditions are met, civilian nationals of the opposing party to the conflict, including refugees, stateless persons, and nationals of third states with which there are no normal diplomatic relations, may be transferred to a third state, even against their own will. Thereupon, that state becomes responsible for fulfilling its obligations under GC IV, including the obligation to permit such persons to leave the country at any time (see above, Section 8.23).

3. In no circumstances may civilians be transferred to a country where they reasonably have to fear persecution on account of their political opinions or religious convictions (p. 286) (Article 45, para. 4, GC IV—an expression of the principle of non-refoulement specific to a situation of armed conflict), or where they will not be afforded the protection guaranteed by Articles 27–141 GC IV. If the transferring state realizes that the accepting state does not respect the obligations under international humanitarian law on important

matters,⁶² that state must find an effective remedy and, if necessary, take the already transferred person back (Article 45, para. 3, GC IV). Extradition treaties concluded before the outbreak of the conflict continue to apply to persons accused of criminal offences under the domestic law (Article 45, para. 5, GC IV).

4. If, at the outbreak of an armed conflict, aliens find themselves in the territory of a party to the conflict, is it permissible for the authorities simply to put them against their will on an aircraft or to have them cross the border with a neighbouring state? GC IV does not expressly regulate the conditions in which individual or collective deportation is permissible in such a situation. No doubt, the general rules made for peacetime apply, namely the principle of non-refoulement. In particular, persons may not be deported to a country where they can expect to be persecuted for their political opinions or religious conviction. Article 45, para. 4, GC IV has established a universally applicable principle of international law. In this connection, attention is also drawn to Article 13 ICCPR, which requires an orderly procedure for expulsion of aliens and, in particular, a procedure enabling the persons concerned to present their own case. This rule should be applied generally. If these conditions are met, then nothing stands in the way of deportation, also from the point of view of international humanitarian law. Of course, it must be carried out in a humane way. See also Section 9.51.

5. GC IV does not say whether members of one party to the conflict may be handed over or deported against their will to their state of origin, if that state is the other party to the conflict. Here again, the rule undoubtedly applies that persons may not be transferred to a country where they have reasons to fear, in particular, persecution for their political opinions or religious convictions (Article 45, para. 4, GC IV) or torture, other forms of ill-treatment, or arbitrary deprivation of life. Apart from these special circumstances, repatriation must be considered as permissible. Special attention should be paid to the circumstances of such individual or collective deportation. In particular, the persons concerned may not be exposed to danger. An orderly, previously arranged transfer is essential.

8.29

All restrictions imposed on aliens shall be cancelled as soon as possible after the close of hostilities (Article 46 GC IV).

The term 'close' means a permanent termination of hostilities. For interpretation of this term, see Section 3.23. If necessary, the return of assets or the procedure for the transfer of compensation payments, for example for the benefit of interned persons, shall be regulated by special agreement.

(p. 287) IV. Internment of Civilians

Introductory Remarks

1. Section 8.30 reminds that a person may be interned only if such a measure is absolutely necessary, that is 'if the security of the Detaining Power makes it absolutely necessary' (Article 42, para. 1, GC IV; see also Article 78 GC IV). Section 9.20 recalls the conditions under which an inhabitant of an occupied territory may be interned, while Section 8.27 states the circumstances in which the internment of aliens present in the territory of a party to the conflict is permissible.

2. Sections 8.32 ff. deal with the treatment of interned civilians. They apply both to internment in occupied territories and to internment of aliens in the territory of a party to a conflict.

3. The internment of a belligerent's own nationals during wartime is not covered by international humanitarian law (except through Article 75 AP I). The international provisions concerning the protection of human rights are applicable.

8.30

Internment of civilians shall be permissible only in exceptional cases:

- **if such a measure is absolutely necessary for imperative reasons of security (Articles 41-43, and 78, para. 1, GC IV); or**
- **as a penalty to be imposed on civilians (Article 68 GC IV).**

Decisions regarding such internment shall be made according to regular procedures and subject to review by an independent institution (Articles 43 and 78, para. 2, GC IV).

1. Internment is a drastic restriction of personal freedom. It is permitted only as *ultima ratio*, that is only if security requirements cannot be satisfied by less severe measures, such as, for example, the obligation to register with the police or assigned residence. Internment is permissible solely as a measure to ensure public order in the state of residence. It is not a form of punishment. GC IV lists in a conclusive way the reasons allowing internment of a civilian who is a national of the adverse party.

2. Civilians present in the territory of the other party may be interned 'if the security of the detaining power makes it absolutely necessary' (Article 42, para. 1, GC IV). In the event of belligerent occupation, the occupying power may intern a person if it regards it as necessary 'for imperative reasons of security' (Article 78, para. 1, GC IV). In both situations the person in question must be a threat to public security in the state of residence. GC IV gives the authorities a great latitude.⁶³ In exercising their discretion they must take into account the personal situation of the person concerned. Internment may be ordered only as a last resort, if other measures are not sufficient. The ICTY held

the mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living and is not, therefore a valid reason for interning him . . . To justify recourse to such measures, the party must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.⁶⁴

(p. 288) It further held that internment is an 'exceptional measure to be taken only after careful consideration of each individual case. Such measure must never be taken on a collective basis.'⁶⁵ The internee must be informed promptly, in a language he or she understands, of the reasons why these measures have been taken. He or she must be released with the minimum delay possible and in any event as soon as the circumstances justifying the internment have ceased to exist (Article 75, para. 3, AP I).

3. GC IV regulates the procedure by which a decision to intern a person shall be taken, both in the case of belligerent occupation and in the case of aliens present in the territory of the adverse party to the conflict (Articles 42 ff. and Article 78, para. 2). In particular, in the event of occupation Article 78, para. 2, GC IV requires a 'regular procedure'. This includes the right of the person to be heard. The same must unquestionably also apply to internment of aliens in the hands of the opposing side, although Articles 42 ff. GC IV remain silent on this point. This idea is supported by Article 38 GC IV, with its reference to 'provisions ... in time of peace' (see above, Section 8.28). Moreover, any 'regular procedure' must take into account international humanitarian law, in particular GC IV.⁶⁶ It is clear,

however, that according to the provisions of GC IV decisions concerning internment may be taken by an administrative body and must not necessarily be submitted to a court.

4. In both situations, also in light of the latitude for the detaining power in its initial decision to detain, the competent authorities must establish review procedures which allow the examination of internment orders (Article 43; Article 78, para. 2 GC IV). On the one hand, the person concerned by the internment order must be able to have the decision reconsidered by a court or an administrative board which must reach a decision within the shortest possible time.⁶⁷ On the other hand, this authority, whether a court or an administrative board, must on its own initiative periodically, and at least every six months, review all decisions regarding internment and decide whether the conditions for internment are still met. As pointed out by the ICTY, the court or board must have the 'necessary power to decide finally on the release of prisoners whose detention could not be considered as justified for any serious reason' and as to the onus of justifying detention of civilians, it 'is upon the detaining power to establish that the particular civilian does pose such a risk to its security that he must be detained, and the obligation lies on it to release the civilian if there is inadequate foundation for such a view'.⁶⁸ There must be an 'objective foundation' for a 'definite suspicion'.⁶⁹ This supervision by a special, independent body is extremely important and should be suitable of ending abusive internment. In the context of the war crime/grave breach of unlawful confinement (Articles 147 GC IV and 8, para. 2, lit. a(vii), ICC Statute), the ICTY found that '(a)n initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or board'.⁷⁰ The (p. 289) process should be such that the person interned is in a position to meaningfully challenge the (continued) legality of detention.⁷¹

8.31

The treatment of internees basically corresponds to the treatment of prisoners of war, yet always taking into account the civilian character of the persons concerned (Articles 79-141 GC IV).

— **Representatives of the protecting power and delegates of the ICRC may visit the internees at any time in their place of detention and talk to them individually and without witnesses (Article 143 GC IV).**

— **The place of internment shall be placed under the authority of a responsible officer or a public official chosen from the civil administration of the detaining power (Article 99, para. 1, GC IV). The internees shall, as far as possible, be accommodated according to their nationality, language, and customs (Article 82, para. 1, GC IV). Members of the same family shall be lodged together. Separation of a temporary nature may be decided only for reasons of employment or health or for the purpose of implementing penal or disciplinary measures (Article 82, para. 2, GC IV).**

— **Internees shall always be accommodated separately from prisoners of war and from persons detained for any other reason, in particular convicted prisoners (Article 84 GC IV).**

— **Internees shall be treated humanely. In particular, any victimization, punishment drill, military drill, or reduction of food rations is prohibited (Article 100 GC IV). Contact with the exterior shall be permitted (Articles 105-16 GC IV).**

- **In principle, internees are not obliged to work (Article 95, para. 1, GC IV). Internees may, however, be employed for work within places of internment or for activities serving their own interests, but not in relation with the conduct of military operations (Article 95, para. 3, GC IV).**
- **Internees who commit offences shall be subject to the laws in force in the territory in which they are detained (Article 117, para. 1, GC IV).**
- **Internees have the right to have personal and confidential contact with representatives of protecting powers and with delegates of the International Committee of the Red Cross.**

1. Section IV of Part III of GC IV, entitled ‘Regulations for the Treatment of Internees’, includes detailed provisions on the organization of places of internment and on the treatment of internees. They closely follow the rules applicable to the detention of prisoners of war (Articles 21-108 GC III; *see* Chapter 13, in particular Sections 13.17-13.29).

2. Articles 79-135 GC IV regulate the following matters (according to the headings of the individual chapter of Section IV):

- General provisions (Articles 79-82)
- (p. 290) — Places of internment (Articles 83-8)
- Food and clothing (Articles 89 *et seq.*)
- Hygiene and medical attention (Articles 91 *et seq.*)
- Religious, intellectual, and physical activities (Articles 93-6)
- Personal property and financial resources (Articles 97 *et seq.*)
- Administration and discipline (Articles 99-104)
- Contacts with the exterior, including provisions dealing with relief consignments (Articles 105-16)
- Penal and disciplinary sanctions (Articles 117-26)
- Transfer of internees (Articles 127 *et seq.*)
- Deaths (Articles 129-31)
- Release, repatriation, and accommodation in neutral countries (Articles 132-5).

3. Certain provisions of this well-elaborated code for the protection of civilian internees deserve closer attention:

- a) The party to the conflict that interns civilians must inform immediately the internees themselves, the authorities of their state of origin and the protecting power (if any) of the measures taken in connection with the internment and any subsequent modifications (Article 105 GC IV). In practice, this means particularly that the Central Tracing Agency of the ICRC is to be informed of every decision regarding internment and of any change in the condition of an internee, through the National Information Bureau.
- b) Directly following their internment, in the event of transfer to another place of internment, or in the case of illness, internees must be given the opportunity to

personally inform their families and the Central Tracing Agency of the ICRC with an internment card (Article 106 GC IV).

c) Internees must be given detailed information about their rights and obligations through notices posted in the place of internment. The full text of GC IV shall also be available in the place of internment, in a language that the internees can understand (Article 99 GC IV).

d) Representatives of protecting powers and delegates of the ICRC have the right to visit interned civilians in their place of internment (Article 143 GC IV). The purpose of these visits is to check that the provisions of GC IV are observed by the detaining power and to deal with any personal requests by the internees which may require action by a neutral institution. During such visits, relief supplies may also be distributed to the internees. For the right to contact the protecting power or the ICRC, *see* Sections 8.14 and 9.51 .

8.32

Upon the close of hostilities or occupation, the belligerent parties shall ensure the return of all internees to their last place of residence or facilitate their repatriation (Article 134 GC IV).

1. As civilians can be interned only for so long as security considerations so require (*see* Sections 8.26, 8.30, and 9.20), the detention must be ended and the internees released as soon as the motive for internment ceases to exist. This clearly follows from Article 132, para. 1, GC IV, and Article 75, para. 3, AP I. The periodical review of decisions regarding (p. 291) internment by the responsible court or the administrative body (*see* Section 8.26 and commentary) serves to ensure that the release is ordered when necessary, even without being requested by the concerned person.

2. Article 132, para. 2, GC IV, calls upon the parties to the conflict to attempt, while the conflict is in progress, through agreement to find alternative solutions for internment of certain categories of detained persons. We thereby mean children, pregnant women, mothers with infants or small children, the injured and sick, and in general any person interned for a long time. Other categories are not excluded from such agreements; Article 132, para. 2, GC IV, merely states an order of priority.

3. The following alternative measures are possible: release, repatriation, return to the place of residence, or accommodation in a neutral country (Article 132, para. 2, GC IV). Every release or return must be carried out in orderly conditions. The protecting power and/or the ICRC should be asked to assist the release of internees and, in particular, to facilitate the transfer to a third state.

4. When repatriation or transfer to a third state is ordered during the conflict, to what extent should the wishes of the concerned person be taken into consideration? Any refusal to be transferred to a specific country must at all times be respected if a person fears and there is a real risk for persecution, arbitrary deprivation of life, torture, other forms of ill-treatment or enforced disappearance; this principle is rooted in the general rules of international humanitarian law and of human rights law (principle of non-refoulement). In the case of occupied territories, any transfer against their will of inhabitants of an occupied territory from such territory to the territory of the occupying power, to the unoccupied part of their state of origin, or to a third state is prohibited (*see* below, Section 9.17), even with the consent of the concerned person. The general rule codified by Article 49, para. 2, GC IV undoubtedly applies also to internees.

5. At the close of hostilities, which is a situation of fact and not a legal situation for example fixed by decrees,⁷² all internment decisions must be suspended and the internees released as quickly as possible. Article 133, para. 1, GC IV makes clear that this is an absolute obligation. The release must be carried out in an orderly way and must take into account the state of health of the internees. The states involved must guarantee and facilitate the return of the internees to their last place of residence or facilitate their repatriation (Article 134 GC IV). They are also required to search for dispersed internees through setting up committees by agreement (Article 133, para. 3, GC IV). Aliens repatriated from the territory of a party to the conflict must have their wishes taken into consideration, in that they shall not be transferred to a country in which they may fear persecution, arbitrary deprivation of life, torture, other forms of ill-treatment or enforced disappearance (*see above*, para. 4). Upon the return of occupied territory to the original country, a solution must be found, justified by human rights considerations, for those persons who would face persecution, arbitrary deprivation of life, torture, other forms of ill-treatment or enforced disappearance if transferred to the authorities of that country.

(p. 292) 6. With the close of hostilities the detaining power may detain those internees against whom criminal proceedings have been initiated or who have a sentence to serve (Article 133, para. 2, GC IV). They shall be released at latest once the sentence has been served or, unless circumstances require continued detention, the trial has ended.

Footnotes:

¹ Cf. *CIHL* Rules 1-6, 87-138. *See also*, with respect to the law on non-international armed conflict, below, Chapter 19.

² ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, Merits, Judgment, *ICJ Reports 1986*, para. 218.

³ *CIHL* Rules 87-105.

⁴ *See below*, Sections 19.13 *et seq.*

⁵ *See above*, Sections 5.01 *et seq.*, especially Section 5.04.

⁶ The law of non-international armed conflicts does not contain such an explicit definition. It is submitted that all persons who are not members of state armed forces or organized armed groups of a party to the conflict are civilians. Organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ('continuous combat function'). *See* N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, 2009), 27-36.

⁷ *See CIHL* Rule 1.

⁸ *See below* Section 5.20 and *Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict* (ICRC and the Federal Department of Foreign Affairs of the Swiss Confederation, 2008), <<https://www.eisf.eu/library/the-montreux-document-on-pertinent-international-legal-obligations-and-good-practices-for-states-related-to-operations-of-private-military-and-security-companies-during-armed-conflict/>>.

⁹ *CIHL* Rules 87-105.

¹⁰ J. S. Pictet, *Commentary to the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, 1958), 204.

¹¹ *Ibid.*

- ¹² ICRC, *Commentary on the First Geneva Convention* (CUP, 2016), Article 3, para. 553.
- ¹³ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 104, with reference to ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, para. 25; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, para. 216. See below, Chapter 14.
- ¹⁴ Pictet, above (n. 10) 202-3.
- ¹⁵ *CIHL* Rules 50-2.
- ¹⁶ ICTY, *The Prosecutor v. Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment, 30 November 2006, paras 69-98.
- ¹⁷ ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts* (ICRC, 2011) 47-53, <<http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>>.
- ¹⁸ ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts. Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions*, <<https://www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts>>, 41-3. See also ICRC, *How law protects persons with disabilities in armed conflict* (2017), <<https://www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict>>.
- ¹⁹ See above, 'Introductory Remarks', para. 2, and below, Chapter 14.
- ²⁰ H. Durham, 'International Humanitarian Law and the Protection of Women', in Durham and Gurd (eds), *Listening to the Silences: Women and War* (Koninklijke Brill, 2005), 95-107, and J. Gardam, 'Women and Armed Conflict: The Response of International Humanitarian Law' in Durham and Gurd (eds) 111-23.
- ²¹ For non-international armed conflicts see Article 4, in particular para. 2, lit. e, AP II.
- ²² R. Harvey, *Children and Armed Conflict: A Guide to International Humanitarian and Human Rights Law* (International Bureau for Children's Rights, 2003).
- ²³ Article 1 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; *ICRC Commentary on the Additional Protocols*, para. 3179.
- ²⁴ *CIHL* Rules 134-6.
- ²⁵ See above, Section 8.02.
- ²⁶ *CIHL* Rule 96. See also K. Dörmann, 'Article 8', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd edn (C.H. Beck/Hart/Nomos, 2016), Mn 171, with further references indicating that the prohibition now applies to all persons in the power of an adverse party.
- ²⁷ ILA Study Group, *The Conduct of Hostilities and International Humanitarian Law Challenges of 21st Century Warfare* (2017), 24, <<https://www.ila-hq.org/index.php/study-groups>>.
- ²⁸ *Id.*, 26; see more broadly ICRC, Université Laval, *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law (Report prepared and edited by L. Gisel)*, (2018), 32 *et seq.*

- ²⁹ Such declarations were submitted upon ratification *inter alia* by: Australia, Belgium, Canada, Egypt, Germany, Italy, the Netherlands, New Zealand, Spain, and the UK. No state party to AP I has raised any objection to these declarations.
- ³⁰ Corresponding declarations were submitted *inter alia* by Australia, Belgium, Canada, Germany, Italy, the Netherlands, New Zealand, Spain, Switzerland, and the UK, with no objections raised. See also ICTY, *The Prosecutor v Galić*, IT-98-29-T, Judgment, Trial Chamber, 5 December 2003, para. 58; ILA Study Group, *The Conduct of Hostilities and International Humanitarian Law Challenges of 21st Century Warfare*, (2017), 24–5, <<https://www.ila-hq.org/index.php/study-groups>>.
- ³¹ Such declarations were submitted upon ratification by Australia, Belgium, Canada, Germany, Italy, the Netherlands, New Zealand, Spain, and the UK, with no objections raised.
- ³² K. Dörmann, ‘Obligations of International Humanitarian Law’, 4(2) *Military and Strategic Affairs* (2012), 15; ILA Study Group, *The Conduct of Hostilities and International Humanitarian Law Challenges of 21st Century Warfare*, (2017), 31; <<https://www.ila-hq.org/index.php/study-groups>>.
- ³³ ILA Study Group, *The Conduct of Hostilities and International Humanitarian Law Challenges of 21st Century Warfare*, (2017), 31 *et seq.*, with references, <https://www.ila-hq.org/index.php/study-groups>. See more broadly ICRC, Université Laval, *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law (Report prepared and edited by L. Gisel)*, (2018), 11 *et seq.*
- ³⁴ M. Bothe, K. J. Partsch, and W. A. Solf, *New Rules for Victims of Armed Conflicts: Commentary of the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Nijhoff, 1982), 310.
- ³⁵ ILA Study Group, *The Conduct of Hostilities and International Humanitarian Law Challenges of 21st Century Warfare*, (2017), 34 *et seq.*, <<https://www.ila-hq.org/index.php/study-groups>>.
- ³⁶ Similarly, *ICRC Commentary on the Additional Protocols*, paras 1979 *et seq.*
- ³⁷ Bothe, Partsch, and Solf, above (n. 34) 373. Austria and Switzerland submitted similarly worded declarations upon ratification, according to which Article 58 can be applied only subject to the requirements of national defence. Switzerland withdrew its reservation to Article 58 in 2005.
- ³⁸ Such declarations were submitted by Belgium, Canada, Germany, Italy, the Netherlands, New Zealand, Spain, and the UK, with no objections raised against them.
- ³⁹ J. Pictet, above (n. 10), 125.
- ⁴⁰ See Article 1 of the Antarctic Treaty of 1 December 1959.
- ⁴¹ See H. Rotkirch, ‘The Demilitarization and Neutralization of the Åland Islands: A Regime “in European Interests” Withstanding Changing Circumstances’, (1986) 23(4) *Journal of Peace Research* 357–76.
- ⁴² See H.-P. Gasser, ‘The journalist’s right to information in time of war and on dangerous missions’ (2006) 9 *YIHL* 366.
- ⁴³ See *ICRC Commentary on the Additional Protocols*, paras 3250 *et seq.*
- ⁴⁴ ICTY, *The Prosecutor v Brđanin and Talić*, Case No. IT-99-36-AR73.9, Appeals Chamber, Decision on Interlocutory Appeal, 11 December 2002, paras 34 *et seq.*

- ⁴⁵ A society may also choose a third name and emblem: the red crystal on a white ground (see AP III).
- ⁴⁶ Statutes of the International Red Cross and Red Crescent Movement (1986, amended in 1995 and 2006), particularly Articles 3, 4, and 5, reprinted in *Handbook of the International Red Cross and Red Crescent Movement*, < <https://www.icrc.org/en/publication/0962-handbook-international-red-cross-and-red-crescent-movement#gs.kgsckw> >.
- ⁴⁷ See ICRC, *Commentary on the First Geneva Convention* (CUP, 2016), Article 3, para. 804.
- ⁴⁸ As such the provisions apply in particular to persons who take a direct part in hostilities without fulfilling the criteria of GC I-III, i.e. such persons as are labelled ‘unlawful combatants’, see K. Dörmann, ‘The Legal Situation of “Unlawful/Unprivileged” Combatants’ (2003) 879 *IRRC* 65 and below, Section 8.16, no. 6.
- ⁴⁹ See Pictet, above (n. 10), 56.
- ⁵⁰ In particular, Articles 10 and 14 ICCPR.
- ⁵¹ Dörmann, above (n. 47), 64 *et seq.*
- ⁵² See Melzer, *Interpretative Guidance*, above (n. 6) 16. It should be noted that, while the experts consulted in the process did not manage to reach agreement on all aspects dealt with in the guidance, the vast majority of experts supported the three cumulative conditions. An overview of issues that led to debate can be found in ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, above (n. 17), 44. For scholarly critique of certain aspects of the Interpretive Guidance and a response to those views by N. Melzer, see R. Goodman *et al.*, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2010) 42(3) *New York University Journal of International Law and Politics* 637; N. Lubell, *Extraterritorial Use of Force against Non-State Actors* (OUP, 2010), 140–3, 147–55; D. Akande, ‘Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities’ (2010) 59(1) *International and Comparative Law Quarterly* 180–92.
- ⁵³ The ICRC *Interpretive Guidance* distinguishes for the purpose of the conduct of hostilities members of organized armed forces or groups (whose continuous function is to conduct hostilities on behalf of a party to an armed conflict) from civilians (who do not directly participate in hostilities, or who do so on a merely spontaneous, sporadic, or unorganized basis). The notion of direct participation with the temporal suspension of protection against direct attacks only applies to the latter. For former protection against attack is suspended for as long as they are members of the armed forces or assume a continuous combat function. For more details see: <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.
- ⁵⁴ K. Dörmann, ‘The Legal Situation of “Unlawful/Unprivileged Combatants” ’ (2003) 879 *IRRC* 45–74.
- ⁵⁵ See above, n. 1.
- ⁵⁶ See, however, Article 63, para. 2 GC IV (occupied territories).
- ⁵⁷ See Bothe, Partsch, and Solf, above (n. 34), 394–5.
- ⁵⁸ See ICRC *Commentary on the Additional Protocols*, paras 2696 *et seq.*
- ⁵⁹ Pictet, above (n. 10), 236.
- ⁶⁰ See also J. Pejic, ‘Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence’ (2005) 87 *IRRC* 375–91.

⁶¹ See *ICRC Commentary on the Additional Protocols*, para. 2942 (conc. Article 73 AP I).

⁶² See Pictet, above (n. 10) 269: 'As examples Articles 27, 28 and 30 to 34 may be quoted; if the persons transferred are interned, which will most often be the case, a great many of the provisions in the chapter on internment will also have to be borne in mind, in particular those dealing with civil capacity, maintenance, food, clothing, hygiene and medical attention, religious and intellectual activities, correspondence and relief. In the treatment accorded to protected persons, the application of all these provisions is essential.'

⁶³ ICTY, *The Prosecutor v Delalić et al.*, Trial Chamber, Judgment of 16 November 1998, para. 574.

⁶⁴ ICTY, *The Prosecutor v Delalić et al.*, Trial Chamber, Judgment, para. 577; Appeals Chamber, Judgment of 20 February 2001, para. 327.

⁶⁵ ICTY, *The Prosecutor v Delalić et al.*, Trial Chamber, Judgment, paras 578 and 583; ICTY, *The Prosecutor v Kordić and Cerkez*, Trial Chamber, Judgment of 26 February 2001, paras 285 and 289.

⁶⁶ See also Pejic, above (n. 60).

⁶⁷ ICTY, *The Prosecutor v Delalić et al.*, Trial Chamber, Judgment, para. 580

⁶⁸ ICTY, *The Prosecutor v Delalić et al.*, Appeals Chamber, Judgment, para. 329.

⁶⁹ *Ibid.*, para. 328.

⁷⁰ *Ibid.*, para. 322.

⁷¹ Pejic lists the following safeguards: the right to information about the reasons for internment, the right to be registered and held in a recognized place of internment, the national authorities of a foreign person interned must be informed, right of a person interned to challenge, with the least possible delay, the lawfulness of his or her detention, the review of the lawfulness of internment must be carried out by an independent and impartial body, the internee should be allowed to have legal assistance, the right to periodical review of the lawfulness of continued detention, the possibility for the internee's legal representative to attend the proceedings in person, the right to have contacts with—to correspond with and be visited by—members of his or her family, the right to the medical care and attention required by his or her condition, the right to make submissions relating to his or her treatment and conditions of detention, and (ICRC) access to persons interned. See Pejic, above (n. 60) 384–91.

⁷² Pictet, above (n. 10), 514.

(p. 360) 12 Protection of the Wounded, Sick, and Shipwrecked

Introductory Remarks

1. The protection of the wounded, sick, and shipwrecked during armed conflicts has a long history in various cultures and traditions¹ and retains its universal relevance to the present day.² However, as in many other areas of international humanitarian law in particular, and public international law more generally, the root of the codification in international legal instruments of this universal idea lies in Europe. It was there where a vast number of special agreements, which contained *inter alia* provisions on the protection of each other's wounded and the exemption of army surgeons from captivity, were concluded between states since the seventeenth century.³ It was also in Europe, where the first general multilateral convention, the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, took shape. The 1864 Convention was the result of an initiative by the Swiss businessman, Henry Dunant. After having eyewitnessed the fate of those wounded during the battle of Solferino in 1859, and having attended to them together with a number of other volunteers, he wrote *Un Souvenir de Solferino* (1862) in which he recorded the lack of arrangements made for those who had been wounded in battle (*see above*, Sections 2.18–2.19). In this book, he made two suggestions as to the measures, which should be taken to ameliorate the situation: the establishment of 'relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers'⁴ and 'to formulate some international principle, sanctioned by a Convention inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded in the different European countries'.⁵ His book had a profound impact on the political elites and the general public in Europe and both of Dunant's suggestions came to fruition shortly afterwards. In 1863, an 'International Committee for Relief of the Wounded' was established, which later became the 'International Committee of the Red Cross' in 1876. And in 1864, the aforementioned Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted.⁶ The 1864 Convention (p. 361) rested on three broad principles. *First*, it stipulated the fundamental obligation of states parties to collect and care for wounded or sick combatants, regardless of their nationality (Article 6). *Second*, Articles 1–5 regulated the neutrality and inviolability of medical personnel and inhabitants of the country who bring help to the wounded, as well as of medical establishments, units, and equipment. *Third*, the 1864 Convention introduced the distinctive sign of the red cross on a white ground for the purpose of identifying hospitals, ambulances, evacuation parties, and medical personnel.

2. The 1864 Geneva Convention is the root of what has since become known as 'Geneva Law', that is the law of protected persons. With the sick and wounded military personnel as the first object of humanitarian care, preceding prisoners of war and later civilians, it is the precursor of a number of subsequent treaties, which build on and develop the three underlying principles of the 1864 Convention. The first attempt to do so failed, however: although 'Additional Articles relating to the Condition of the Wounded in War' were adopted in 1868 to clarify some provisions and to adapt the principles of the 1864 Convention to sea warfare, these Articles were never ratified. The latter aim was realized during the First Hague Peace Conference, with the adoption of the 1899 Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, which was subsequently revised by the 1907 Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. One year prior to the adoption of the latter 1907 Hague Convention (X), states were able to agree on how to improve and

supplement the provisions of the 1864 Convention, and adopted the 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. That agreement was subsequently replaced by the 1929 Geneva Convention with the same title. Following the Second World War, GC I superseded the 1929 Convention and GC II extended the latter's protective regime to wounded, sick, and shipwrecked members of armed forces at sea. Furthermore, GC IV introduced a number of provisions with a view to ameliorate the condition of wounded and sick civilians, although these rules lacked behind the detailed regulation in GC I and II. The First Additional Protocol, which supplements the 1949 Geneva Conventions, has overcome that division between members of armed forces and civilians and applies to all wounded, sick, and shipwrecked regardless of their status.

3. Many of the aforementioned treaty rules applicable in international armed conflicts are today generally accepted to reflect customary international law.⁷ Since the adoption of Common Article 3 and AP II,⁸ the law of non-international armed conflict also incorporates a number of treaty rules, which protect the wounded, sick, and shipwrecked, albeit with lesser detail than the treaty rules of international armed conflicts. However, almost all customary rules on the protection of the wounded, sick, and shipwrecked are purported to apply in both international and non-international armed conflicts.⁹

(p. 362) I. Wounded, Sick, and Shipwrecked Persons

12.01

'Wounded' and 'sick' mean persons, whether military or civilian, who, because of trauma, disease, or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, newborn babies, and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility (Article 8, lit. a, AP I).

12.02

'Shipwrecked' persons are those, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune and who refrain from all acts of hostility (Article 8, lit. b, AP I).

1. The definition of persons protected under the various treaties for the protection of the wounded, sick, and shipwrecked evolved constantly from the adoption of the 1864 Geneva Convention, which only applied to 'combatants'. The 1906 Geneva Convention subsequently broadened the scope of application to add 'other persons officially attached to the armed forces', and the 1929 Geneva Convention similarly referred to 'officers and soldiers and other persons officially attached to the armed forces'. As far as warfare at sea was concerned, the Hague Convention (III) of 1899 applied to 'sailors and soldiers who are taken on board', while the 1907 Hague Convention (X) added to this definition 'other persons officially attached to fleets or armies' in analogy to the 1906 Geneva Convention. GC I and II are again broader in their scope *ratione personae*. Article 13 of GC I and II stipulates that the two conventions apply to all those wounded, sick, and shipwrecked, who are also entitled to prisoner-of-war status in accordance with Article 4 (A) of GC III (see below, Chapter 13). Accordingly, if these persons fall into the hands of the enemy, they enjoy the protection of GC I, II, and III, although the applicability of the latter Convention, will, as a matter of fact rather than law, only materialize in full once wounded and sick military personnel are brought back behind the lines and are on the way to convalescence and cure.¹⁰ Besides the difference that GC I applies to wounded and sick on land and GC II applies to wounded, sick, and shipwrecked at sea, the protective regimes under the two

conventions are virtually identical. Article 4, para. 2, GC II also clarifies that forces put ashore become subject to GC I.

2. The first treaty, which regulates certain aspects of the protection of wounded and sick civilians, is GC IV. Its rules include those, which apply in general to all wounded and sick civilians as well as other civilians in need of medical attention, such as the infirm and expectant mothers.¹¹ GC IV further stipulates other rules on the treatment of more specific categories of civilians, namely wounded and sick in occupied territory and those (p. 363) who are interned.¹² Prior to the adoption of AP I, international humanitarian law thus knew a twofold system of protection: a virtually identical regime under GC I and II for both wounded and sick on land and wounded, sick, and shipwrecked at sea on the one hand, and a more rudimentary system of protection for civilians under GC IV. The deficiencies of that approach under the GCs were remedied by AP I. Article 8, lit. a and b, AP I, which reflect customary international law,¹³ do not distinguish between military or civilian persons and establish a uniform protective regime.

3. The generic categories of sick, wounded, and shipwrecked in GC I and II and AP I also extend to air forces.¹⁴ Thus, a wounded member of the air force enjoys the protection of GC I and AP I if found on land, and the protection of GC II and AP I if found at sea. Article 12 GC II also expressly clarifies that members of the armed forces who are forced to land at sea by or from aircraft are to be considered shipwrecked. Besides the aforementioned provision, the only special regulation with regard to occupants of aircraft concerns persons parachuting from an aircraft in distress. In accordance with Article 42 AP I, such persons are protected from being attacked during their descent and upon reaching the ground in territory controlled by an adverse party must be given an opportunity to surrender before being made the object of attack, unless it is apparent that they are engaging in a hostile act. Article 42 does not protect airborne troops, however.

4. In order to qualify as 'wounded' or 'sick', a person must be in need of medical assistance or care for the mentioned reasons of trauma, disease, or other physical or mental disorder or disability.¹⁵ This definition in AP I also extends to persons, who are neither 'sick' nor 'wounded' in the ordinary meaning of these words, which is clear from the express inclusion of newborn babies and expectant mothers into the definition.¹⁶ The definition does not contain a *de minimis* requirement as to the severity of the medical condition that causes the need of medical assistance or care. Importantly, it does not require a person to be placed *hors de combat*. Rather, a person also qualifies as 'wounded' or 'sick' if s/he is in need of medical assistance or care even if s/he retains the capability to fight (provided the second prong of the test, namely to abstain from any act of hostility, is satisfied).¹⁷ 'Shipwrecked', in turn, is defined equally broadly in AP I in as much as it applies not only to those in peril at sea, as did GC II, but also to those in peril in other waters. Article 8, lit. b, AP I further clarifies the temporal scope of being protected because of the status as a shipwrecked person: the protection continues until the shipwrecked person acquires another status under the GCs or AP I, such as combatant, sick, or wounded if rescued by his or her own armed forces, prisoner of war if rescued by enemy armed forces, or civilian if rescued by the adverse party.¹⁸

5. Persons who commit any act of hostility are not considered 'wounded, sick, or shipwrecked' in the legal sense, even if they are in need of medical attention, or are in peril at sea, or in other waters. They are not protected from being made the object of attack within the parameters of international humanitarian law. The law does not answer clearly (p. 364) the question when an act is to be considered 'hostile'. However, the term must be interpreted in analogy to the term 'hostile act' in Articles 41, para. 1, lit. c, on enemies *hors de combat* and 42, para. 2, AP I on occupants of aircraft parachuting in distress. Further guidance can be drawn from Article 51, para. 3, AP I on civilians who directly participate in hostilities.¹⁹ Accordingly, 'hostile acts' are those which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the opposing armed

forces.²⁰ Such acts thus clearly include the firing of shots, but also the destruction of installations and military equipment, an attempt to escape or to communicate with the party to the conflict to which the wounded, sick, or shipwrecked person belongs, unless this communication concerns the wounded and sick who require assistance from the party's medical service.²¹ The rule of thumb is, in short, that persons commit 'hostile acts' when they (continue to) perform functions inherent to being combatants. Beyond performing such functions, it has also been argued that to act as a voluntary human shield may equally trigger the loss of protection.²² Conversely, as soon as a person in need of medical attention, or in peril at sea, or in other waters ceases to commit 'hostile acts', that person is entitled to protection as wounded, sick, or shipwrecked. This is without prejudice to any possible prosecution for a war crime of perfidy, provided the conditions of Article 37 AP I are fulfilled (on perfidy *see above*, Sections 7.37–7.39).

12.03

The wounded, sick, and shipwrecked, to whichever party they belong, shall be respected and protected in all circumstances (Articles 12, para. 1, and 35, para. 1, GC I; Article 12, para. 1, GC II; Article 3, para. 1 No. 2, GC III; Article 16 GC IV; Article 10, para. 1, AP I; Article 7, para. 1, AP II). Any attempts upon their lives, or violence to their persons, are prohibited. They shall be treated humanely and cared for without any adverse distinction founded on any grounds other than medical ones (Article 12, para. 2, GC I; Article 12, para. 2, GC II; Article 10, para. 2, AP I; Article 7, para. 2, AP II).

1. The wounded, sick, and shipwrecked must be 'respected' and 'protected'. To 'respect' alludes to sparing the wounded, sick, or shipwrecked persons and to not attacking them. The obligation to respect requires parties to an armed conflict and their individual members to abstain from acts, which would endanger a wounded, sick, or shipwrecked person or inflict (further) injury on him or her.²³ That obligation also extends to civilians and the civilian population. While this is so with international humanitarian law in general (*see above*, Sections 133–4), the rules regulating the protection of the wounded, sick, and shipwrecked are explicit in that regard.²⁴ To 'protect', on the other hand, denotes that parties to an armed conflict must take (pro)active measures for the protection and (p. 365) safeguarding of the wounded, sick, and shipwrecked.²⁵ The obligation to respect and protect is the foundation of the protective regime established by the GCs, AP I and II, as well as customary international humanitarian law. All other rules, including the duty to treat humanely the wounded, sick, and shipwrecked and care for them, and the prohibition of attempts upon their lives or violence to their persons, are concrete manifestations of that general obligation.

2. What is to be considered 'humane treatment' very much depends on the concrete circumstances. In general terms, however, acts or omissions, which cause mental or physical suffering, represent attacks on bodily or mental integrity or on human dignity clearly fall short of that standard.²⁶ Humane treatment requires in general terms that the individual concerned is treated so as to lead an acceptable existence in as normal a manner as possible.²⁷ As such, the requirement of humane treatment guides all aspects of treatment (not only medical treatment) and necessitates that gender, economic, cultural, and political factors that shape social structures be taken into account when determining what the requirement of humane treatment entails in the concrete circumstances.²⁸

3. The requirement that wounded, sick, and shipwrecked are also to be cared for is a derivative of the obligation to protect: it requires belligerent parties and individual soldiers to ensure the medical care and attention, which the condition of the person concerned requires. Nevertheless, the concrete instance of complying with the obligation to provide such care is subject to the material possibility to do so. In the words of Article 10, para. 2, AP I, such care is to be provided 'to the fullest extent practicable and with the least possible

delay'. While the obligation to care for the wounded, sick, and shipwrecked is hence characterized by a certain degree of flexibility in as much as it accommodates differences in available resources between parties, it entails a due diligence obligation and implies that states take those preparatory and organizational steps that can reasonably be expected to establish adequate medical services.²⁹ Failure to do so and a scarcity of financing and infrastructure cannot excuse a failure to grant the minimum standard of medical care required by international humanitarian law.³⁰

4. The categorical prohibition of attempts upon the lives of, or violence to wounded, sick, and shipwrecked covers a wide range of acts. Article 12, para. 2, GC I and GC II contain non-exhaustive lists of concrete examples, such as murder, extermination, torture, or biological experiments.³¹ The prohibition of biological experiments mentioned in GC I and II is a precursor of the more detailed prohibition to subject persons who are in the power of the adverse party or who are deprived of liberty to any medical procedure which is not consistent with generally accepted medical standards (see below, Section 12.06). The (p. 366) aforementioned instances of attempts upon the lives of, or violence to wounded, sick, and shipwrecked amount to grave breaches of the GCs, which states are obliged to punish.³²

5. The obligation to respect and protect the wounded, sick, and shipwrecked is applicable 'in all circumstances'. The formulation epitomizes that parties to an armed conflict cannot invoke military necessity as a ground precluding the wrongfulness of non-compliance, unless the relevant rule is expressly subject to exceptions on grounds of military necessity.³³ Much as elsewhere in international humanitarian law, considerations of military necessity are incorporated into the law on the protection of the wounded, sick, and shipwrecked, but do not have a generally suspensory effect.³⁴ Openings for considerations of military necessity in the area of the protection of the wounded, sick, and shipwrecked can be found for example in the wording in Article 10, para. 2, AP I referred to previously, which obliges states to provide care 'to the fullest extent practicable and with the least possible delay', or in Article 12 of GC I, which sets forth the obligation that, if compelled to abandon wounded or sick to the enemy, a party to an armed conflict must, 'as far as military considerations permit', leave with them a part of its medical personnel and material to assist in their care.

6. Any adverse distinction between wounded, sick, and shipwrecked on grounds other than medical ones is prohibited. The *rationale* of that prohibition is to ensure that the wounded, sick, and shipwrecked, whether friend or foe, military personnel or civilian, are entitled to the same protection, respect and care, if and to the extent that they are in the same need of it. As such, the aforementioned rules in GC I and II and in AP I and II are a further manifestation of the general principle of non-discrimination, which underlies international humanitarian law as a whole.³⁵ It needs to be emphasized, however, that that principle only prohibits *adverse* distinctions, but does not preclude preferential treatment and care for those in more urgent need of medical attention than others.³⁶ Such preferential treatment and care may be warranted by the nature of the wounds of a protected person, but also by other (physical) attributes.³⁷ Indeed, common Article 12, para. 4, GC I and II makes the preferential treatment of women compulsory in as much as it provides that they 'shall be treated with all consideration due to their sex'. Article 12, para. 3, GC I and II also allow a prioritization of treatment when urgent medical reasons so require, so that doctors are allowed to treat those in more urgent need of treatment first, and those who do not require immediate treatment and care later.³⁸ Nevertheless, international humanitarian law does not set forth a concrete set of 'medical grounds' or 'reasons', which provide criteria for the justification of treating one protected person differently from another person. Such criteria instead derive from standards of medical (p. 367) ethics (see below, Section 614). The prohibition of adverse distinction does not preclude preferential treatment of one's own

personnel in situations where enemy personnel receive adequate medical care as required by their medical condition.³⁹

12.04

Reprisals against the wounded, sick, and shipwrecked persons and against persons or objects protected by GC I and GC II and AP I are prohibited (Article 46 GC I; Article 47 GC II; Article 20 AP I; see above, Section 7.43).

In contrast to the express prohibition of reprisals against prisoners of war in Article 2 of the 1929 Convention relative to the Treatment of Prisoners of War, all conventions on the wounded, sick, and shipwrecked, which preceded the 1949 GCs, were silent on the issue of reprisals. However, such silence was not attributable to the belief that reprisals against the wounded, sick, and shipwrecked and other persons and objects necessary for their care were permissible prior to the entry into force of the 1949 GCs. Rather, a prohibition of reprisals was clearly already on the minds of the Commission of Experts, which was convened by the ICRC in 1937 to study the revision of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.⁴⁰ However, since that attempt to revise the 1929 Convention failed, express treaty prohibitions of reprisals against the wounded, sick, and shipwrecked persons and against protected personnel, buildings, or equipment were only introduced into GC I and II, albeit on the understanding that these prohibitions confirmed a generally accepted rule.⁴¹ The prohibition of reprisals is comprehensive in as much as it does not only encompass reprisals against the wounded, sick, and shipwrecked themselves, but also against personnel, buildings, vessels, or equipment protected by GC I and GC II. Article 20 AP I extends that prohibition to the persons and objects protected by Part II of the Protocol.

12.05

All possible measures shall be taken at all times to search for, collect, and evacuate the wounded, sick, and shipwrecked and to ensure their adequate medical assistance (Article 15 GC I; Article 18, para. 1, GC II; Article 19 GC III; Article 16 GC IV; Article 8 AP II). They shall be protected against pillage and ill-treatment (Article 15 GC I; Article 18, para. 1, GC II; Article 16 GC IV; Article 8 AP II).

1. Parties to an armed conflict are under an obligation to actively search for, collect, and evacuate the wounded, sick, and shipwrecked, provided circumstances permit them to do so. That obligation is incumbent upon them especially after an engagement. GC I also stipulates that parties to an armed conflict must arrange for an armistice, ceasefire, or local arrangement with a view to remove, exchange, and transport the wounded left on the battlefield.⁴² Parties to an armed conflict thus are obliged to create circumstances, which make the search for and collection of the wounded, sick, and shipwrecked possible. GCs I, II, and IV further contain virtually identical provisions, which enjoin parties to an armed conflict to endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, and shipwrecked, and for the passage of ministers of all religions, medical personnel, and medical equipment on their way to such areas.⁴³ The obligation to take 'all possible measures' to search for, collect, and evacuate and to ensure the adequate medical assistance of the wounded, sick, and shipwrecked further entails that parties to an armed conflict, which prove unable to do (p. 368) so themselves, must permit humanitarian organizations to fulfil that role or assist in that endeavour.⁴⁴ In addition, in international armed conflicts, the military authorities may appeal to the civilian population to collect and care for the wounded, sick, and shipwrecked, and the civilian population may also do so on its own initiative.⁴⁵ No one may be harmed, prosecuted, convicted, or punished for performing such humanitarian acts.⁴⁶ The law of non-international armed

conflicts is less far-reaching as regards the right of initiative of humanitarian organizations and the civilian population. Article 18, para. 1, AP II only allows relief societies to 'offer their services for the performance of their traditional functions' and the civilian population 'may, even on its own initiative, offer to collect and care for the wounded, sick, and shipwrecked'. However, while the provision clarifies that the competent authorities may decline such offers, they may not do so arbitrarily in the face of urgent needs.⁴⁷

2. As far as the evacuation of prisoners of war is concerned, GC III provides for the general obligation in Article 19, para. 1, GC III to evacuate them away from the combat zone, whether they are in good health or wounded, sick, or shipwrecked (see below, Section 711). However, as an exception to that rule, Article 19, para. 2, allows wounded and sick prisoners of war to be kept back in a danger zone if an evacuation would be of greater risk to their health than to remain where they are. Article 47 GC III contains a similar provision for situations in which prisoners of war are transferred after their arrival in a camp. Sick or wounded prisoners of war may not be transferred as long as their recovery may be endangered by the journey, unless their safety imperatively demands it. They are also not to be transferred if the combat zone draws closer to a camp, unless their transfer can be carried out in adequate conditions of safety, or unless they are exposed to greater risks by remaining where they are than by being transferred.

3. The obligation to protect the wounded, sick, and shipwrecked against pillage and ill-treatment entails that parties to an armed conflict must take active measures and ensure that protected persons be guarded and, if necessary, defended against pillage and ill-treatment. If medical personnel resort to the use of their weapons (*see* below Section 12.12) for the defence of the wounded and sick in their charge, they do not thereby forfeit their protected status.⁴⁸ A prohibition of pillage in occupied territory had earlier been included in the Hague Regulations of 1899 and 1907 (both Articles 47) and, with regard to the wounded, sick, and shipwrecked, in the Hague Convention (X) of 1907 (Article 16). The latter provision also included a prohibition of ill-treatment. The prohibition in Article 16 of the Hague Convention (X) was echoed in the 1929 Geneva Convention (Article 3), subsequently included into GCs I, II, and IV and extended to non-international armed conflicts under AP II. 'Pillage', sometimes also referred to as 'looting' or 'plunder', means the appropriation of property by individuals for private or personal use, to which the rightful owner has not consented.⁴⁹ Although it is sometimes suggested that such appropriation is required to be systematic and violent in order to amount to pillage,⁵⁰ neither element is a prerequisite. Even an individual soldier, who appropriates property from a wounded person and does not use any force to do so commits (p. 369) pillage. As regards the second prohibition of 'ill-treatment', no actual meaning of the terms is spelled out in international humanitarian law. However, the categorical wording of the relevant provisions ('at all times') and the absence of any degree of severity that such treatment must attain in order to fall foul of the prohibition suggests to interpret the terms as widely as possible. As such, the prohibition covers a range of acts, including torture, inhuman, humiliating, and degrading treatment prohibited under international humanitarian and human rights law,⁵¹ but goes beyond them in as much as it covers any form of treatment, which causes physical pain or mental suffering to the victim.

12.06

It is prohibited to subject wounded, sick, and shipwrecked persons who are deprived of their liberty as a result of an armed conflict or occupation to any medical procedure not consistent with generally accepted medical standards (Article 11 AP I; Article 5, para. 2, lit. e, AP II).

1. Article 11 AP I and Article 5, para. 2, lit. e, AP II build on and develop the protection of wounded, sick, and shipwrecked persons against abusive medical procedures in the Geneva Conventions, which prohibit biological experiments and the creation of conditions through which such persons are exposed to contagion or infection⁵² and medical and scientific experiments not justified by the state of health of the person concerned.⁵³ In order to comply with the obligation not to endanger the physical and mental health and integrity of persons who are deprived of their liberty as a result of an armed conflict or occupation, parties to an armed conflict must take all hygienic measures to prevent wounds to become infected, for example, and medication must be provided and so on. Medical experiments, which affect the mental equilibrium of protected persons are equally prohibited.⁵⁴ Furthermore, Article 11, para. 1, AP I and Article 5, para. 2, lit. e, AP II prohibit any medical procedure, which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are in no way deprived of their liberty. This rule is the corollary to the protection of persons against punishment for carrying out medical activities compatible with medical ethics (see below, Section 12.14). The obligations under Article 11, para. 1, AP I and Article 5, para. 2, lit. e, AP II are quite similar. However, a significant difference is that the former contains categorical rules, which have to be complied with under any circumstance, while AP II subjects those who are responsible for the internment or detention to the obligations under Article 5, para. 2, lit. e, only 'within the limits of their capabilities'.⁵⁵

2. Article 11 AP I applies to all persons 'who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of [an international armed conflict or occupation]'. The category of persons 'who are in the power of the adverse party' include prisoners of war, civilian internees, persons who have been refused authorization to leave the territory of the adverse party, inhabitants of territory occupied by the adverse party or who are otherwise in the power of the adverse party.⁵⁶ 'Persons (p. 370) deprived of their liberty as a result of an armed conflict or occupation', on the other hand, include nationals of neutral states or other states not parties to the conflict which have normal diplomatic relations with the party to the conflict responsible for the deprivation of liberty, nationals of a co-belligerent state, those who have become refugees after the outbreak of hostilities, nationals of states not parties to AP I and even the nationals of the party to the conflict, which is responsible for the deprivation of liberty, provided that the deprivation of their liberty is a result of the armed conflict or occupation.⁵⁷ It is worth of note, however, that a breach of Article 11 AP I in the form of a 'wilful act or omission which seriously endangers the physical or mental health or integrity of any person' only amounts to a grave breach of AP I if the victim is a person 'who is in the power of a Party other than the one on which he depends'.⁵⁸ In other words, violations of Article 11 committed against a party's own nationals do not amount to grave breaches.⁵⁹ In contrast to its twin provision in Article 11, para. 1, AP I, Article 5, para. 2, lit. e, AP II, applies to all persons deprived of their liberty for reasons related to a non-international armed conflict by internment or detention.

3. Article 5, para. 2, lit. e, AP II is limited to the aforementioned generic obligations. The law of international armed conflict, however, translates the obligations in Article 11, para. 1, AP I into a number of more specific rules on the protection of these persons in the context of their medical treatment. *First*, to physically mutilate, carry out medical or scientific experiments, and remove tissue organs for transplantation is impermissible, even if the person who is subjected to such treatment consents to it, except when these acts are justified in conformity with the conditions mentioned in Article 11, para. 1, AP I.⁶⁰ This prohibition is subject to one important, but narrowly circumscribed exception: if given voluntarily, without any coercion or inducement, and only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for

the benefit of both the donor and the recipient, persons may donate blood for transfusion or skin for grafting.⁶¹ Each party to the armed conflict must keep a medical record for every such donation.⁶² *Second*, wounded, sick, and shipwrecked persons have the right to refuse any surgical operation, even if such refusal is clearly detrimental to their health or even means certain death. In such cases, medical personnel must endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.⁶³ *Third*, each party to the conflict must endeavour to keep medical records with respect to persons deprived of their liberty as a result of an international armed conflict or occupation, and must make them available at all times for inspection by the protecting power.⁶⁴

12.07

Parties to the conflict shall record in respect of each wounded, sick, shipwrecked, or dead person of the adverse party falling into their hands, any particulars which may assist in his identification. All pertinent information shall be forwarded to the appropriate information bureau (Article 16 GC I; Article 19 GC II; see below, Section 13.10).

The particulars in respect of each wounded, sick, or dead person, which parties to the conflict are obliged to record, if possible, include the designation of the power on (p. 371) which he depends; army, regimental, personal, or serial number; surname; first name or names; date of birth; any other particulars shown on his identity card or disc; date and place of capture or death; and particulars concerning wounds or illness, or cause of death.⁶⁵ That list is flexible and non-limitative. Other information may be added or supplied, in particular when some certain details that are mentioned in the list are unobtainable.⁶⁶ By and large, the system of recording particulars of wounded, sick, and shipwrecked persons and the dead, and communicating these particulars through information bureaux, correspond to the system under Articles 122 and 123 of GC III (see below Section 13.11). Article 16, para. 4, GC I sets forth further rules on the recording of and forwarding information on dead persons.

II. The Dead and Missing

Introductory Remarks

The central consideration of the rules of international humanitarian law on the dead and missing persons is that families have the right to know the fate of their relatives.⁶⁷ Although it has been suggested that such a right is not to be understood to create a subjective right of families to gain information,⁶⁸ the opposite conclusion flows from human rights jurisprudence.⁶⁹ The main difference between the rules relating to the dead on the one hand, and those relating to missing persons, on the other hand, stem from the fact that the fate of a missing person remains uncertain, although a point may be reached at which missing persons can be equated with dead persons if they can be presumed to have deceased.⁷⁰ The following rules apply to dead and missing persons without any adverse distinction. It therefore is of no relevance whether they are combatants or civilians or whether and on whose behalf they participated in hostilities.⁷¹

12.08

The dead are to be searched for, collected, identified, and prevented from being despoiled (Articles 15, para. 1, and 16 GC I; Article 18 and 19 GC II; Article 16, para. 2, GC IV; Article 33, para. 4, AP I; Article 8 AP II). Burial or cremation of the dead shall be preceded by a documented examination of the bodies (Article 17, para. 1, GC I; Article 20, para. 1, GC II). The dead must be disposed of in a respectful manner and their graves respected and

properly maintained (Article 17, para. 3, GC I; Article 120, para. 4, GC III; Article 130, para. 1, GC IV; Article 34 AP I; Article 8 AP II).

1. Parties to an armed conflict, whether international or non-international, are under an obligation to take all possible measures to search for the dead whenever circumstances permit, and particularly after an engagement.⁷² That obligation corresponds to the (p. 372) obligation to search for the wounded, sick, and shipwrecked (*see above*, Section 12.05). However, in contrast to the rules in relation to the wounded and sick, GCs I and II are silent on arrangements between the belligerent parties with a view to remove the dead. AP I and customary international humanitarian law have closed this gap by establishing the duty to endeavour to agree on arrangements for teams to search for, identify, and recover the dead from the battlefield.⁷³ These teams, whose members are to be respected and protected, may be accompanied by the personnel of the adverse party while carrying out these missions in areas controlled by the adverse party.⁷⁴ After the search for and collection of the dead, they must be identified (*see above*, Section 12.07). While the law of international armed conflicts is explicit in that regard, it is less clear whether the law of non-international armed conflict imposes such a duty of identification. However, supplementary obligations, at least of states, flow from human rights norms.⁷⁵ Furthermore, parties to an armed conflict must prevent the despoliation of the dead. That prohibition of despoiling the dead has long been recognized⁷⁶ and, the obligation of parties to an armed conflict to prevent such acts requires them to thwart acts of pillage (*see above*, Section 12.05).

2. The dead are generally to be interred in graves, unless religious reasons or the demands of hygiene require that they be cremated. In any case, funerals must take place in an honourable manner and in accordance with the religious rites of the deceased and only after careful examination with a view to confirming death, establishing identity, and enabling a report to be made. Graves must be properly maintained and marked, and, if possible, arranged according to the nationality of the deceased. At the commencement of hostilities, the parties to the conflict must establish an Official Graves Registration Service whose main task it is to allow subsequent exhumations and identification of bodies or ashes and their transportation to the home country. As soon as practically possible, the parties to an armed conflict must also inform the Information Bureau about the location and markings of the graves and the particulars of the dead interred therein. AP I supplements the aforementioned stipulations in Article 17 GC I and establishes further obligations of parties to an armed conflict to endeavour to conclude agreements on the protection and maintenance of and access by relatives to gravesites as well as on the return of the remains of the deceased and his or her personal effects.⁷⁷ Exhumations by the state on whose territory the gravesites are situated are, in principle, prohibited unless the aforementioned agreements provide for it or, absent such agreement, where that state has offered to facilitate the return of the remains of the deceased to the home country, but such an offer has been rejected. In the latter case, a number of further safeguards apply.⁷⁸ An additional exception to the rule that exhumations are prohibited is for reasons of overriding public necessity.⁷⁹

3. The treatment of persons killed in naval warfare as described in Article 20 GC II corresponds for the most part with GC I. As long as no funeral at sea takes place the regulations of the GC I apply once dead persons are landed. Warships sunk with their crews are considered to be war graves.⁸⁰ Examples from World War I are the British warships (p. 373) HMS *Royal Oak*, *Edinburgh*, and *Repulse*, and also the *Hampshire* which sank with Lord Kitchener aboard.⁸¹

12.09

Each party to the conflict must search for missing persons as soon as circumstances permit and shall transmit all relevant information concerning such persons (Article 33, para. 1, AP I).

Article 33 AP I builds on a number of rules in the GCs, including those relating to providing information to families and authorities under the GCs and the exchange of information through the Information Bureau.⁸² In order to facilitate the search for missing persons, parties to an armed conflict must record particulars of persons held in captivity for more than two weeks,⁸³ and facilitate and carry out the search for and the recording of information concerning persons who have died in other circumstances as a result of hostilities or occupation.⁸⁴ These obligations of parties to an armed conflict are, however, without prejudice to further reaching obligations vis-à-vis persons who enjoy more favourable considerations under international humanitarian law.⁸⁵ The gathered information and requests for such information are transmitted through the protecting power, the Central Tracing Agency of the ICRC, or national Red Cross societies (cf. Sections 9.11, 21.24).⁸⁶

III. Medical Units and Transport

12.10

Medical units and medical transports must be respected and protected at all times and shall not be made the object of attack (Article 27, para. 1, HagueReg; Article 19, para. 1, GC I; Article 18, para. 1, GC IV; Article 12, para. 1, and Article 21 AP I; Article 11, para. 1, AP II). As far as possible, medical units shall be so sited that attacks against military objectives do not imperil their safety (Article 19, para. 2, GC I; Article 18, para. 5, GC IV; Article 12, para. 4, AP I).

1. Similar to the extension of the definition of ‘wounded’, ‘sick’, and ‘shipwrecked’ to also cover civilians (see above Sections 601–2), the definition of ‘medical units’ in Article 8, lit. e, AP I expands the coverage in comparison with Article 19 GC I. While the latter provision only refers to ‘fixed establishments and mobile units of the Medical Services’, Article 8, lit. e, AP I defines as ‘medical units’ all ‘establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis, or treatment—including first-aid treatment—of the wounded, sick, and shipwrecked, or for the prevention of disease’. These medical units can be fixed or mobile, permanent or temporary.⁸⁷ The provision further contains a non-exhaustive list of examples, such as hospitals and other similar units, blood transfusion centres, (p. 374) preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. This enlarged definition also moves beyond the protection provided under Articles 1, 8, para. 1, GC IV in as much as that latter provision only covered civilian hospitals. The central criterion deriving from the definition in Article 8, lit. e, AP I, which is generally considered to reflect customary international humanitarian law and equally applicable in non-international armed conflicts,⁸⁸ is that establishments or other units be ‘organized for medical purposes’ and exclusively assigned to these purposes,⁸⁹ while it is the use at the relevant moment which is decisive in that respect.⁹⁰ As far as their entitlement to, and meaning of ‘respect’ and ‘protection’ is concerned, the observations above (Section 603) apply *mutatis mutandis*. In order for civilian medical units to be considered ‘medical units’ entitled to that respect and protection, however, Article 12 requires them to either belong to one of the parties to the conflict, be recognized and

authorized by the competent authority of one of the parties to the conflict, or be authorized in conformity with Article 9, para. 2, AP I or Article 27 GC I.⁹¹

2. With a view to strengthen the safety of medical units, parties to an armed conflict are recommended to notify each other of the location of their fixed medical units.⁹² However, not to so notify the adverse party does not deprive medical units of their entitlement to respect and protection.⁹³ As a further measure to decrease the likelihood of medical units being caught in the midst of fighting and collaterally damaged, the warring parties are under an obligation to locate medical units away from military objectives whenever possible.⁹⁴ Indeed, the deliberate use of medical units in an attempt to shield military objectives from attack is expressly prohibited.⁹⁵ In the latter case, the attacking party is nevertheless not released from the obligation to take all possible precautionary measures with a view to limit incidental damage to medical units, in analogy to Article 51, para. 8, AP I.⁹⁶ With regard to the marking of medical units and transports with the distinctive emblem of the Red Cross, Red Crescent, and Red Crystal, reference is made to the discussion below (Sections 12.24 *et seq.*).

3. According to Article 21 AP I, the rules on medical means of transportation by land (medical vehicles), as defined in Article 8, *lit. h*, AP I⁹⁷ correspond to those on mobile medical units. In contrast, the regime for medical ships, craft, and aircraft differs in important respects (*see below*, Sections 17.54 *et seq.*).

12.11

The requisition of medical units and medical vehicles is permissible only if the medical needs of the civilian population, as well as those of any wounded and sick under treatment are satisfied (Articles 19, paras 1, 33, 35, para. 2, GC I; Article 57 GC IV; Articles 14, 21 AP I).

1. The respect and protection of medical units and medical vehicles does not prevent them from ever being requisitioned. However, in such cases, a number of important (p. 375) limitations apply. The *rationale* of these limitations is that the medical needs of wounded and sick persons remain satisfied. *First*, the personnel of requisitioned medical units must be allowed to freely pursue their duties, as long as the capturing power has not itself ensured the necessary care of the wounded and sick found in such units.⁹⁸ In other words, such personnel are protected as part of the medical unit, notwithstanding additional rules, which apply to them specifically as medical personnel (*see below*, Sections 12.13 *et seq.*). *Second*, the material, buildings and stores of medical units of the armed forces of the adversary may not be diverted from their purpose as long as they are required for the care of the wounded and sick. This is subject to the exception that commanders in the field may make use of them, in case of urgent military necessity, although they may only do so if previous arrangements are made for the welfare of the wounded and sick who are nursed in them.⁹⁹ *Third*, property of aid societies may not be requisitioned except in case of urgent necessity, and only after the welfare of the wounded and sick has been ensured.¹⁰⁰ *Fourth*, the law of occupation subjects the power of an occupying power to requisition medical units to stringent conditions. Underlying this regulatory framework is the general responsibility of an occupying power for ensuring and maintaining the medical and hospital establishments and services, public health, and hygiene in territory occupied by it.¹⁰¹ Accordingly, when an occupying power requisitions civilian hospitals in occupied territory, such seizure may only be temporary and must be urgently necessary for the care of military wounded and sick.

2. Furthermore, requisitioning civilian hospitals under the aforementioned conditions is only permissible if and when suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation. In any case, the material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.¹⁰²

Article 14 AP I imposes further obligations on an occupying power vis-à-vis the requisitioning of civilian medical units. It is unlawful to requisition any resources, which are indispensable to the proper functioning of medical units, including their equipment, materiel, or the services of their personnel, as long as the seizing of such resources would render it impossible to provide adequate medical services and care. Requisition is nevertheless rendered unlawful if the resources are used for purposes other than the adequate and immediate medical treatment of the wounded and sick members of the armed forces of the occupying power or of prisoners of war. In addition, the requisition of these resources must cease as soon as the necessity of their use disappears. However, even if the aforementioned conditions are met, requisitioning civilian medical units and their resources is lawful only if immediate arrangements are made to ensure that the medical needs of the civilian population, as well as those of any wounded and sick under treatment who are affected by the requisition, continue to be satisfied.

12.12

Medical units and transports lose their protection if they are used to commit, outside their humanitarian function, acts harmful to the enemy, but only after a due warning (p. 376) has been given and such warning has remained unheeded (Article 21 GC I; Article 19, para. 1, GC IV; Articles 13, paras 1, 21 AP I; Article 11, para. 2, AP II).

1. The conditions under which medical units and transports lose their protection differ in some important respects from the condition for the status of wounded, sick, and shipwrecked persons to abstain from any act of hostility (above Sections 601–2). The first such difference is that the notion of an ‘act of hostility’ is narrower than ‘acts harmful to the enemy’. The latter include all situations in which medical units and transports are used to interfere, directly or indirectly, in military operations and thereby cause harm to the enemy.¹⁰³ In other words, the use of medical units and transports for acts, which do not amount to acts of hostilities may nevertheless entail that the unit or transport loses its protection, provided that they are committed outside their humanitarian function (see below) and due warning has been given.¹⁰⁴ Often-cited examples of acts harmful to the enemy are the installation of an observation post on a hospital roof or a firing position in a medical post, sheltering able-bodied combatants in a medical unit or transport, using medical units as a weapons or ammunitions dump or an ambulance to transport weapons or ammunitions, or the siting of a medical unit or transport so as to impede the military operations of enemy armed forces.¹⁰⁵ Indeed, these and other acts harmful to the enemy do not only entail the loss of protection, but also amount to violations of international humanitarian law, which may be punishable as the war crimes of making improper use of the distinctive emblems of the Geneva Conventions if its results in death or serious personal injury¹⁰⁶ or of perfidy if it results in the death, injury, or capture of an adversary.¹⁰⁷ At the same time, international humanitarian law expressly excludes certain acts from being considered ‘harmful to the enemy’, namely:

- that the personnel of the unit are equipped with, or use, light individual weapons for their own defence or for that of the wounded and sick in their charge;
- that medical units or transports are protected by sentries or by an escort;

- that small arms taken from the wounded and sick, and not yet handed to the proper service, are found in the units or transports; and
- that members of the armed forces or other combatants are in the unit or transport for medical reasons.¹⁰⁸

2. However, the fact alone that medical units or transports are used for harmful acts is not enough for them to be deprived of their protection. A *first* additional condition that must be met is that such a harmful act is committed ‘outside their humanitarian function’.¹⁰⁹ This condition conversely implies that certain acts, which may be considered harmful to the enemy, may nevertheless not entail a loss of protection because they are committed in fulfilment of the humanitarian function of the medical unit or transport in question. Thus, an ambulance which is unable to move because it has run out of petrol and thereby (p. 377) impedes the military operation of the enemy does not lose its protection, for example, nor does a medical unit whose electronic medical equipment happens to interfere with the military communications of the enemy armed forces.¹¹⁰ As a *second* condition before an attack on a medical unit or transport, which is used to commit acts harmful to the enemy outside its humanitarian function, becomes lawful is that due warning be given and that warning has remained unheeded.

3. The aim of this warning is to reconcile the military necessity to attack medical units and transport, which are abused for military purposes, with the humanitarian concern for those who are in need of medical assistance or care and others who use the unit or transport for legitimate, that is medical, purposes. There is no requirement as to the form in which such a warning has to be given, but the warning must, in all appropriate cases, name a reasonable time limit. When cases are to be considered ‘appropriate’ and what is to be considered a ‘reasonable’ time limit is context-specific. An obvious case in which it would not be appropriate to issue a warning is that of a medical transport, which approaches a military checkpoint while firing upon those manning the checkpoint. Needless to say, even in such a case, where those manning the checkpoint can return fire without issuing a warning, they must comply with the principle of proportionality and thus seek to avoid and minimize incidental loss of life of and injury to any wounded or sick person within such a transport.¹¹¹ If a warning is appropriate, on the other hand, the requirement that a ‘reasonable time limit’ be set entails that the period of respite must be long enough either to allow the harmful acts to be stopped or for the wounded and sick inside the medical unit or transport to be evacuated.¹¹²

IV. Medical Personnel

12.13

‘Medical personnel’ means those persons assigned, by a party to the conflict, exclusively to medical purposes or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term includes:

- a) medical personnel of a party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;**
- b) medical personnel of national Red Cross (Red Crescent) societies and other national voluntary aid societies duly recognized and authorized by a party to the conflict;**

c) medical personnel made available to a party to the conflict for humanitarian purposes by a neutral or other state which is not a party to that conflict; by a recognized and authorized aid society of such a state; and by an impartial international humanitarian organization (Articles 24-26 GC I; Articles 36 GC II; Articles 8, *lit. c*, and 9, para. 2. AP I).

(p. 378) **1.** The definition of ‘medical personnel’ in the present section flows from AP I and the identical definition under customary international humanitarian law.¹¹³ It consolidates and expands the definitions in GCs I and II and earlier instruments, which only apply to medical personnel serving the armed forces.¹¹⁴ It further goes beyond the protection provided in accordance with Article 20 GC IV, which only applied to the medical personnel of civilian hospitals. In order to qualify as ‘medical personnel’ under Article 8, *lit. c*, AP I, persons must be assigned to those medical purposes, which are mentioned in connection to the definition of ‘medical units’ in Article 8, *lit. e*, that is the search for, collection, transportation, diagnosis, or treatment of the wounded, sick, and shipwrecked, or for the prevention of disease. However, with a view to avoid abuse of the distinctive emblem for military or other purposes, these categories of persons must be assigned to the aforementioned tasks ‘exclusively’, that is they must be their sole tasks.¹¹⁵ In addition, those who are engaged in the administration of medical units or to the operation or administration of medical transports also qualify as ‘medical personnel’. The formal status of medical personnel—and the entitlement to the protection that this status entails—is nevertheless contingent on the assignment of a party to the armed conflict. This is especially relevant for civilian medical personnel. Persons engaged in the medical care of others, while not being members of the armed forces, may not automatically be assumed to also fulfil that task vis-à-vis the wounded and sick during armed conflicts.¹¹⁶ Although the civilian population and aid societies have the right to collect and care for the wounded and sick on their own initiative,¹¹⁷ they will not enjoy the protection of ‘medical personnel’ absent the official assignment of medical tasks by the competent authority. While no corresponding definition of ‘medical personnel’ exists in treaty law applicable to non-international armed conflict, the drafting history of AP II suggests that the aforementioned definition equally applies.¹¹⁸

2. The following observations are warranted in relation to the three categories of ‘medical personnel’ mentioned in Article 8, *lit. c* (i)–(iii).

The *first* category consists of medical personnel of a party to the conflict. This category includes permanent medical personnel of the armed forces and auxiliary medical personnel of the armed forces mentioned in GC I.¹¹⁹ Further included are medical and hospital personnel of hospital ships and their crews to whom GC II applies.¹²⁰ The first category also comprises civilian medical personnel and medical personnel assigned to civil defence organizations. The latter organizations are subject to detailed regulation in Part IV, Chapter VI (Articles 61–7) AP I. Their personnel, which can be civilian or military,¹²¹ may fulfil a variety of tasks, but enjoy the protection of medical personnel only if they are assigned by the party to the conflict to the performance of medical services.¹²² The *second* category of protection personnel of national Red Cross societies and other recognized relief societies had already been recognized in accordance with Article 26 GC I and Article 24 GC II. The question arises as to the requirements that these societies must fulfil in order for their medical personnel to come within the notion of (p. 379) ‘medical personnel’ as defined in Article 8, *lit. c*(ii), AP I. The provision requires such organizations to be *national* societies (i.e. they must be established in the territory of the party to the conflict concerned); they must be *recognized* by that party (i.e. they must have been regularly constituted in accordance with national legislation); and they must be *authorized* (i.e. the party to the conflict must agree that personnel of these societies are employed as medical personnel).¹²³

Article 26 GC I further requires staff of these national aid societies to be subject to military laws and regulations of their government. States must notify each other about the societies which they have thus authorized. The *third* category comprises three sub-categories of permanent medical personnel made available to a party to the conflict by third states or impartial international humanitarian organizations with the previous consent of both their own government and the party to the conflict concerned.¹²⁴ The first two of these sub-categories broadly correspond to the first two aforementioned categories (medical personnel of a state and of a national aid society). The third sub-category then extends the definition to medical personnel of an impartial international humanitarian organization. The requirement that such an organization be 'impartial' denotes that it makes no adverse distinction founded on any ground, including nationality, race, religious beliefs, class, or political opinions, and that the only ground for discriminating between different persons is the urgency and degree of need of medical care of them.¹²⁵ As such the impartiality requirement is a further encapsulation of the general principle of non-discrimination (see above Section 12.03). In order to be considered 'humanitarian', such an organization also 'must be concerned with the condition of man, considered solely as a human being without regard to the value which he represents as a military, political, professional or other unit'.¹²⁶

12.14

Medical personnel shall be respected and protected in all circumstances (Articles 24 and 25 GC I; Articles 36 and 37 GC II; Article 15 AP I; Article 9 AP II). It is prohibited to punish persons for carrying out medical activities compatible with medical ethics or to compel persons engaged in medical activities to perform acts or to carry out work contrary to the rules of medical ethics (Article 16 AP I; Article 10 AP II).

1. As regards the content of the general obligation to respect and protect medical personnel, reference is made to Section 12.03 above, which apply *mutatis mutandis*. In addition, the applicable rules provide further detail as to how such respect for and protection of medical personnel is to be implemented. AP I sets forth the obligation to grant all available help needed to civilian medical personnel in an area where civilian medical services are disrupted by reason of combat activity.¹²⁷ In a similar vein, an occupying power must also render assistance to civilian medical personnel in occupied territory.¹²⁸ A comparable obligation applies in non-international armed conflict, where parties to an armed conflict are obliged to grant all available help for the performance of the duties of medical personnel.¹²⁹ In contrast to AP I, however, AP II does not provide for the right of civilian medical personnel to be granted access to any place where their services are (p. 380) essential, albeit subject to such supervisory and safety measures as the relevant party to the conflict may be necessary.¹³⁰

2. In addition to those provisions, which stipulate that priority in the treatment of the wounded and sick must be based on no grounds other than medical ones, and the general interdiction to compel medical personnel to carry out tasks which are incompatible with their humanitarian mission,¹³¹ Article 16 AP I and Article 10 AP II establish a detailed protective framework for medical personnel to be able to act in accordance with medical ethics. This framework consists of three distinct prohibitions: the prohibition of punishing medical personnel for fulfilling their medical duties, the prohibition of coercing them to act contrary to these duties, and the prohibition to compel them to disclose information concerning the wounded and sick if they deem that information to be harmful to the patients concerned or their families. The first two of these prohibitions also entail that medical personnel have the right to refuse to obey an illegal order.¹³² The precise content of the third prohibition applicable in international armed conflict differs from that applicable in non-international armed conflict. In the former case, the prohibition is subject

to two exceptions, namely that medical personnel must disclose information on wounded and sick in their care to their own party to the conflict, if such a duty is imposed on them by virtue of that party's national law, and that medical personnel must comply with regulations that oblige them to notify communicable diseases.

3. In contrast, medical confidentiality is subject more generally to any national law during a non-international armed conflict. Consequently, medical personnel may be compelled to disclose information on their patients if domestic law so provides, with all potential negative consequences for the patients that such a disclosure might entail. Applicable international human rights law, and in particular the right to privacy and to health, will provide legal parameters for the compatibility of such national laws with international law.

4. The references in Article 16 AP I and Article 10 AP II to 'medical ethics' raise the question as to the content of these ethical standards, as they derive from relevant instruments, including the Hippocratic Oath and its modern version, the Declaration of Geneva (also referred to as 'Geneva Oath') adopted by the World Medical Association¹³³ and its supplementary Code of Medical Ethics.¹³⁴ In addition, a number of documents have specifically been drafted with a view to identify medical ethics in times of armed conflicts, most importantly the Regulations in Time of Armed Conflict of the World Medical Association¹³⁵ and the Rules Governing the Care of Sick and Wounded, Particularly in Time of Conflict.¹³⁶ Accordingly, medical personnel's primary obligations are to their patients and they are *inter alia* obliged to always exercise their independent professional judgement and maintain the highest standards of professional conduct; respect a competent patient's right to accept or refuse treatment; not allow their judgement to be influenced by personal profit or unfair discrimination; be dedicated to providing competent medical service in full professional and moral independence, with compassion and respect for human dignity; and act in the patient's best interest when providing medical care. Furthermore, it is, among others, deemed unethical for medical personnel to give advice or perform prophylactic, diagnostic, or therapeutic procedures that are not justifiable for the patient's health care; weaken the physical or mental strength of a human being without therapeutic justification; employ scientific knowledge to imperil health or destroy life; employ personal health information to facilitate interrogation; and condone, facilitate, or participate in the practice of torture or any form of cruel, inhuman, or degrading treatment.¹³⁷

12.15

Medical personnel lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy.

The notion of 'committing, outside their humanitarian function, acts harmful to the enemy' corresponds to the condition under which medical units and transports lose their protection. Reference is therefore made to Section 12.12 above.¹³⁸

12.16

Military medical personnel are medical personnel who are members of the armed forces. Military medical personnel are military non-combatants (Article 43, para. 2, AP I).

12.17

If military medical personnel and protection personnel of recognized national relief societies fulfilling the same duties fall into the hands of the adversary, they may be retained as long as the state of health and the number of prisoners of war so require. They will not themselves be regarded

as prisoners of war. They will nevertheless benefit at least from all the provisions of GC III (Article 28 GC I; Article 37 GC II; Article 33 GC III).

12.18

Medical personnel whose retention is not indispensable for the care of prisoners of war shall be repatriated (Article 30 GC I; Article 37 GC II).

1. Although military medical personnel mentioned in Articles 24 and 25 GC I are members of the armed forces, they do not have the right to participate directly in hostilities. Together with military religious personnel, they thus constitute the exception to the rule (p. 382) that members of the armed forces are combatants entitled to prisoner-of-war status *and* treatment when they fall into the power of an adverse party. Their non-combatant status does not mean, however, that they must be repatriated immediately if they fall into the hands of the enemy, as used to be the case prior to the 1949 GCs.¹³⁹ Rather, they and protection personnel of recognized national relief societies fulfilling the same duties, may be retained if and for such time as the state of health and the number of prisoners of war require. In that case, permanent medical personnel of the armed forces and protection personnel of recognized national relief societies are not deemed prisoners of war, but entitled to treatment at least as beneficial as that granted in accordance with the provisions of GC III; they are, in other words, entitled to prisoner-of-war treatment as long as treatment under GC III is to their advantage.¹⁴⁰ During their retention, they must continue to carry out their medical duties on behalf of prisoners of war, preferably those of the armed forces to which they themselves belong, while being subject to the military laws and regulations of the detaining power.¹⁴¹ In the context of fulfilling these duties, the detaining power is obliged to grant them certain facilities and privileges. These include the authorization to periodic visits of prisoners of war in labour units and hospitals outside the prisoners-of-war camp, and the privilege not to be made to work outside their medical duties.¹⁴² In each camp, the senior officer is answerable to the camp authorities for the work of medical personnel. In order to avoid uncertainty about the rank of medical personnel the parties shall reach agreement at the beginning of the conflict.¹⁴³ Importantly, Article 28, para. 4, GC I and Article 33, para. 4, GC III remind the detaining power that retention of medical personnel is no substitute for the fulfilment of its own duties with regard to the medical welfare of prisoners of war.

2. In contrast to permanent medical personnel of the armed forces and protection personnel of recognized national relief societies fulfilling the same duties, auxiliary medical personnel of the armed forces mentioned in Article 25 GC I do become prisoners of war if they fall into the hands of the enemy. They too must be employed on their medical duties in so far as the need arises.¹⁴⁴

3. Article 32 GC I provides that the personnel of aid societies of neutral states shall not be retained if they fall into the hands of the adverse party. Unless otherwise agreed, they must be permitted to return to their country, or if this is impossible, to the territory of the party to the conflict in whose service they were. The same applies to other permanent medical personnel made available to a party to the conflict by third states or by impartial international humanitarian organizations, referred to in Article 9, para. 2, AP I.¹⁴⁵

4. As to the personnel of hospital ships, *see* below, Section 17.63.

5. As soon as the retention of medical personnel for the treatment of prisoners of war is no longer required they shall be repatriated. The selection of personnel to be repatriated must

not be discriminatory. Preferably, those who were retained first and those whose state of health so requires should be given priority.¹⁴⁶

(p. 383) **12.19**

Medical personnel must identify themselves.

See below, Sections 12.28–12.31.

V. Medical Aircraft

12.20

Medical aircraft are military or civilian aircraft, designed exclusively for medical transport on a permanent or temporary basis and subordinate to a competent authority of a party to the conflict. As well as the national emblem they must carry the distinctive emblem on their wings and hull and may not be attacked (Article 39 GC II; Articles 26, para. 1, and 29 AP I).

1. Definition (Article 39, para. 1, GC II and Article 8, *lit. j* and *g*, AP I). Any aircraft, independent of ownership or prior design and function may become a medical aircraft if assigned exclusively to the aerial transportation of wounded, sick, and shipwrecked and/or the aerial transport of medical personnel, medical equipment, or medical supplies. Hence, medical aircraft may either be owned by the armed forces, leased, requisitioned, or belong to a relief organization.¹⁴⁷ Although this section as well as the relevant provisions of AP I are limited to medical transport, there are convincing reasons to include into the category of medical aircraft those aircraft that are also designed for the medical treatment of sick and wounded (MedEvac).¹⁴⁸ It is important to note, however, that search-and-rescue aircraft, especially aircraft assigned to combat search-and-rescue operations do not qualify as medical aircraft. In order to qualify, an aircraft must be exclusively assigned to one of the humanitarian tasks just mentioned. The performance of other tasks, for example the transport of troops, would deprive the aircraft of its protected status. Moreover, the assignment to the protected function must be given by a competent authority and the aircraft must, for the duration of the assignment, remain under the control of a party to the conflict. The rationale of that requirement is to ensure that medical aircraft are operated for the said humanitarian purposes only and that there is a subject of international law bearing responsibility in case the aircraft is abused. The assignment may be permanent or temporary. It is permanent if the aircraft is to serve the said purposes ‘for an indeterminate period’; it is temporary, if limited to a given period of time.

2. Protection. Article 24 AP I provides: ‘Medical aircraft shall be respected and protected, subject to the Rules of this Part.’ The obligation to respect is not limited to a prohibition of attacks against medical aircraft. Rather, it implies a prohibition of impeding or preventing the medical aircraft from performing its humanitarian functions. The obligation to protect is positive in character insofar as the parties to the conflict must take all feasible measures to ensure others, especially non-state actors, do respect the protected status and the genuinely humanitarian function. However, in view of the characteristics of aircraft the obligation is not absolute in character, as medical aircraft are accorded protected status only if they are flying at the altitude and time and on the route specifically agreed upon between the parties to the conflict.¹⁴⁹ In the absence of such agreement they may not fly over enemy or enemy-occupied territories.¹⁵⁰ The respect and protection of (p. 384) medical aircraft is not dependent upon any agreement in and over land areas physically controlled by friendly forces, or in and over sea areas not physically controlled by an adverse party (Article 25 AP I). Still, for greater safety in these areas, according to the second sentence of Article 25 AP I, a party to the conflict is advised to notify the adverse party, particularly when such aircraft will come within range of surface-to-air weapons systems of the adverse

party. In and over those parts of the contact zone (i.e. any area on land where the forward elements of opposing forces are in contact with each other)¹⁵¹ which are physically controlled by friendly forces and in and over those areas where control is not clearly established, protection for medical aircraft can be fully effective only by prior agreement between the competent military authorities of the parties to the conflict.¹⁵² Although, in the absence of such an agreement, medical aircraft operate at their own risk, they shall nevertheless be respected after they have been recognized as such.

A medical aircraft which flies over an area physically controlled by the enemy without, or in breach of the terms of, an agreement, either through navigational error or because of an emergency affecting the safety of the flight, shall make every effort to identify itself and to inform the enemy of the circumstances. As soon as such medical aircraft has been recognized, the enemy is obliged to undertake all reasonable efforts which enable it to land or alight on water, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance before resorting to attack.¹⁵³

Upon alighting involuntarily on land or water in enemy or enemy occupied territory, the wounded, sick, and shipwrecked, as well as the crew of the aircraft, shall be prisoners of war. The medical personnel continue to be protected.¹⁵⁴

3. Markings. According to Article 39, para. 2, GC II, medical aircraft shall be clearly marked with the distinctive emblem, together with their national colours, on their lower, upper, and lateral surfaces. They shall also be provided with any other markings or means of identification which may be agreed upon between the parties to the conflict. Such technical means of identification, according to the regulations of Annex I to AP I, may include the flashing blue light,¹⁵⁵ the radio signal,¹⁵⁶ and the Secondary Surveillance Radar (SSR) system.^{157,158} As in the case of hospital ships and other medical vessels, markings are merely intended to facilitate identification and do not themselves confer protected status.¹⁵⁹

12.21

The parties to a conflict are prohibited from using their medical aircraft to gain any military advantage over an adversary. The presence of medical aircraft shall not be used in an attempt to render military objectives immune from attack (Article 28 AP I).

1. Medical aircraft, like hospital ships and other protected vessels, must not be used to commit acts harmful to the enemy. This customary principle has now been codified in Article 28 AP I.¹⁶⁰ They lose their protected status if they carry any equipment (p. 385) intended to collect or transmit intelligence data.¹⁶¹ However, they may 'be equipped with encrypted communications equipment intended solely for navigation, identification and communication consistent with the execution of [their] humanitarian mission'.¹⁶² Medical aircraft shall not be armed, except for small arms for self-defence.¹⁶³ They may, however, be 'equipped with deflective means of defence (such as chaff or flares)'.¹⁶⁴

2. The prohibition of the use of medical aircraft for the purpose of gaining a military advantage over an adversary includes, but is not limited to, their use of shielding a lawful military objective from an attack. In addition to the prohibited equipment referred to above it also applies to any activity effectively contributing to the enemy's military action. Moreover, medical aircraft may not 'engage in conduct inconsistent with the requirements of [their protected] status',¹⁶⁵ including combat search and rescue operations. Any of such activities result in the loss of protected status, that is, they may be captured (seized) or, in exceptional circumstances, attacked. In principle, loss of protected status renders a medical aircraft liable to capture. It may be attacked only if:¹⁶⁶ (a) diversion for landing, inspection and search, and possible capture, is not feasible; (b) no other method is available for exercising military control; (c) the non-compliance is sufficiently grave that the aircraft has

become, or may reasonably be assumed to be, a military objective; and (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or anticipated.

In cases of doubt as to whether a medical aircraft is being used to make an effective contribution to military action, it shall be presumed not to be so used.¹⁶⁷

12.22

Medical aircraft may be ordered to land, whether on land or on water, to permit inspection. The inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting party shall not require the wounded and sick to be taken off the aircraft unless this is essential for inspection. In any event, the inspecting party shall ensure that the condition of the wounded and sick is not adversely affected (Article 30, para. 2, AP I).

The right to order a medical aircraft to alight on land or water is expressed in Article 39, para. 4, GC II and Article 30, paras 1 and 2, AP I.¹⁶⁸ Its purpose is to enable belligerents to verify whether such aircraft are in fact innocently employed in their normal role. In any event, the condition of the wounded and sick on board shall not be adversely affected.

12.23

If inspection discloses that the aircraft does not meet the requirements for special protection or has acted in breach of its obligations, it may be seized. An aircraft which has been assigned as a permanent medical aircraft and is seized may be used thereafter only as a medical aircraft (Article 30, para. 4, AP I).

As in the case of protected vessels, any breach of the requirements for protection set out in the preceding paragraphs leads to loss of exemption of medical aircraft. They (p. 386) may then be captured and used for the captor's own purposes.¹⁶⁹ However, any aircraft captured which had been assigned as a permanent medical aircraft may be used thereafter only as a medical aircraft.¹⁷⁰

VI. Hospital and Safety Zones and Localities; Neutralized Zones

Preliminary Remarks

1. International humanitarian law applicable in international armed conflicts provides for the establishment of different types of zones and localities, intended to provide protection to the wounded and sick from the effects of war. The first type of these zones and localities, namely hospital zones and localities established in accordance with Article 23 GC I, are *specifically* designed to provide such protection to the wounded and sick as well as medical personnel. By and large, the regulation of hospital and safety zones and localities under Article 14 GC IV closely resemble that for hospital zones and localities. One difference is, however, that hospital and safety zones and localities are also established for other categories of persons, who are not strictly speaking 'wounded' or 'sick', namely aged persons, children under fifteen, expectant mothers, and mothers of children under seven (hence the addition 'safety'). In the light of the broad definition of 'sick' and 'wounded' under AP I, which extends to all persons who may be in need of immediate medical assistance (*see above*, Section 12.01), the distinction between hospital zones and localities, on the one hand, and hospital and safety zones and localities, on the other, has become largely obsolete.¹⁷¹

2. The categories of potential beneficiaries of the second type of protected zones, neutralized zones established under Article 15 GC IV, are even broader than those of hospital and safety zones and localities. Neutralized zones can be established to shelter, in addition to wounded and sick combatants or non-combatants, all civilians who do not take part in hostilities and who perform no work of a military character while residing in such a neutralized zone.¹⁷² Besides this difference in coverage, hospital and safety zones and localities are distinguishable from neutralized zones by a number of other features, which reflect the fact that neutralized zones are established in the regions where fighting is taking place and are more temporary in nature.¹⁷³

3. Despite the possibility to establish hospital and safety zones and localities and neutralized zones in the Geneva Conventions, their relevance in actual practice has thus far been limited, notwithstanding the fact that various other types of protected zones have been established in some armed conflicts, especially by, or on the initiative of, the ICRC.¹⁷⁴

(p. 387) 4. AP I adds two further types of protected zones, 'demilitarized zones' (Article 60 AP I) and non-defended localities (Article 59 AP I). Demilitarized zones and non-defended localities are primarily designed to enhance the general protection of the civilian population against the effects of hostilities. They are discussed above in Sections 3.17, 7.22–7.23, and 8.12.

5. While treaty provisions on the institution of protected zones are not available in the law applicable during non-international armed conflicts, nothing prevents parties to such an armed conflict to agree to establish such zones.¹⁷⁵

12.24

The parties to an armed conflict may agree to establish hospital and safety zones and localities to protect from the effects of the conflict the wounded and sick as well as personnel entrusted with the organization and administration of these zones and localities and with the care of the persons assembled therein (Article 23 and Annex I GC I; Article 14 and Annex I GC IV).

1. Hospital and safety zones and localities can be established in time of peace or upon the outbreak and during the course of hostilities. However, their special protection during times of armed conflict are contingent on the agreement between the parties to the armed conflict. A blueprint for such an agreement, which states may, but are not obliged to use,¹⁷⁶ is annexed to both GC I and IV (Annex I). The absence of such an agreement is, of course, without prejudice to the general protection of a hospital and safety zone established in time of peace as a civilian object.

2. According to the Draft Agreement under both GC I and IV, all persons residing in a hospital and safety zone must refrain from any work directly connected with military operations or the production of war material.¹⁷⁷ Furthermore, the power establishing such a zone must do everything possible to prevent persons who have no right of residence therein from gaining entry.¹⁷⁸ Importantly, the Draft Agreement also sets forth four conditions, which a hospital and safety zone must fulfil. *First*, it must comprise only a small part of the territory governed by the power which has established it.¹⁷⁹ This rule is designed to forestall parties to an armed conflict immunizing large parts of territory under their control from military operations by establishing a hospital and safety zone. *Second*, hospital and safety zones must be thinly populated in relation to the possibilities of accommodation in them. However, in the case of a sudden increase in the number of persons, parties to an armed conflict are nevertheless left with the alternative to agree to the establishment of a neutralized zone in accordance with Article 15 GC IV.¹⁸⁰ *Third*, and hardly surprisingly, hospital and safety zones must be removed and free from all military objectives, or large industrial or administrative establishments.¹⁸¹ If their purpose to (p.

388) enhance the protection of the wounded and sick is to be achieved, the need of removal from and absence of anything which is, or might be considered, a military objective is evident. *Fourth*, hospital and safety zones may not be situated in areas which, according to every probability, may become important for the conduct of the war.¹⁸² The determination whether a given area qualifies as one which may become important will be difficult to be made, and may turn out to be wrong in hindsight. Much will depend on the strategy and tactics employed by the adversary and the geographical configuration of a state.¹⁸³

3. In addition to the aforementioned conditions, hospital and safety zones must also comply with two obligations.¹⁸⁴ *First*, the lines of communication and means of transport that they possess must not be used for the transport of military personnel or material, even in transit. *Second*, hospital and safety zones may never be defended by military means.

4. The Draft Agreement further provides for the possibility of a system of control for the purpose of ascertaining if the zones fulfil the conditions and obligations by means of Special Commissions.¹⁸⁵ Their members, who are nominated by either the parties to the armed conflict or by the protecting powers, must have free access to the zones and be given the facilities for their duties of inspection.

5. The protecting powers and the ICRC are invited to lend their good offices in order to facilitate the institution and recognition of hospital and safety zones and localities.¹⁸⁶ This includes the possibility for them to take the initiative and approach the parties to an armed conflict with a view to suggest the establishment of such zones and localities.¹⁸⁷

12.25

Parties to an armed conflict may propose to establish, in the regions where fighting is taking place, neutralized zones (Article 15 GC IV).

1. As alluded to previously, a number of differences exist between neutralized zones, on the one hand, and hospital and safety zones and localities, on the other. In addition to their broader protective scope *ratione personae*, neutralized zones are established in the area where actual fighting is taking place, whereas hospital and safety zones and localities are to be far removed from such fighting. Neutralized zones can be proposed to an adverse party either directly (i.e. the adverse party makes such a proposal), or indirectly (i.e. the proposal comes from a neutral state or by a humanitarian organization).

2. Article 15, para. 2, GC IV specifies further procedural and formal steps towards an agreement on the institution of a neutralized zone. The agreement has to be in written form and must be signed by the representatives of the parties to the conflict. It must further specify the beginning and end of the neutralization of the zone, thus underlining the temporary nature of it. It has, however, been suggested that these steps should be regarded as mere recommendations rather than being mandatory, given the possibility that the neutralization of a zone may become of such urgency that compliance with the procedural and formal requirements should not be to the detriment of those who benefit from (p. 389) neutralized zones.¹⁸⁸ Practice seems to have borne out such a more flexible approach.¹⁸⁹ Again, as in the case of hospital and safety zones and localities, neutralized zones which do not satisfy the procedural and formal requirements under Article 15 GC IV are nevertheless entitled to the general protection granted to civilian objects, provided, of course, that they qualify as such.

12.26

Hospital and safety zones and localities and neutralized zones shall not be the object of attack. They must be protected and respected at all times (Annex I, Article 11, GC I and Annex I, Article 11, GC IV).

1. In contrast to the rules on wounded, sick, and shipwrecked, medical units and transports and medical personnel, Article 23 GC I and Articles 14 and 15 GC IV do not contain any express language, which prohibits attacks on hospital and safety zones and localities and neutralized zones. Nevertheless, such a prohibition is a logical consequence of the special protection that they enjoy under international humanitarian law and the general protection afforded to civilian objects. The same holds true for the obligation to respect and protect these zones. The wounded and sick and (certain categories of) civilians are the ultimate beneficiaries of the establishment of hospital and safety zones and localities and neutralized zones. As much as they themselves and persons and objects which are necessary to ensure their medical care must be respected and protected under all circumstances (*see above* Sections 12.03, 12.10, and 12.14), so must the zones in which they are assembled with a view to protect and shelter them from the effects of war.

2. It should be recalled that the only express provision to that effect, Article 11 of the Draft Agreement annexed to GC I and GC IV, is a recommendation as to the possible content of an agreement to establish a hospital or safety zone or locality. It is not mandatory for the parties to an armed conflict to include this provision into an agreement with a view to establish hospital and safety zones or localities, let alone neutralized zones.¹⁹⁰ Article 11 of the Draft Agreement can, therefore, not be assumed to be constitutive of the prohibition of attacking these zones and the obligation to respect and protect them. Should parties to an armed conflict for whatever reason decide not to include the model provision in Article 11 of the Draft Agreement into an agreement on the establishment of such zones, they would remain prohibited from attacking such a zone and obliged to respect and protect it. The obligation to respect and thus not to attack hospital and safety zones and localities and neutralized zones is further confirmed in military manuals,¹⁹¹ and by the criminalization of such attacks in national legislation¹⁹² and as a war crime under the ICC Statute.¹⁹³

12.27

Hospital and safety zones and localities and neutralized zones shall be clearly marked (Annex I, Article 6, GC I and Annex I, Article 6, GC IV).

See below, Sections 12.28 et seq.

(p. 390) VII. The Distinctive Emblem

12.28

The distinctive emblems of the Geneva Conventions and Additional Protocols are the red cross, the red crescent, or the red crystal (a red frame in the shape of a square on edge) on a white ground (Article 38 GC I; Article 41 GC II; Article 8, para. 1, AP I; Article 12 AP II; Article 2, para. 2, AP III, *see below* Annex ‘Distinctive Emblems’, No. 1).

1. Until the adoption of the 1864 Geneva Convention, a great variety of symbols were used by the medical services of armed forces during armed conflicts. However, because these symbols were often unknown to the adverse party and did not enjoy any legal protection, disrespect of such symbols was common. In order to improve that situation, the 1864 Geneva Convention recognized for the first time a red cross on a white ground as a distinctive and uniform sign, to be adopted for hospitals, ambulances and evacuation parties, as well as for armlets issued by the military authorities and worn by military medical personnel.¹⁹⁴ Since then, the character and function of what is being referred to as ‘distinctive emblem’, as well as the persons it is meant to protect, and the regulation of its use, has evolved.¹⁹⁵ The underlying idea has nevertheless remained unchanged: the

distinctive emblem is a visible sign of the neutral status and the protection granted by international humanitarian law to medical personnel and objects.

2. As a response to the practice of the Ottoman Empire to use the red crescent on a white background rather than the Red Cross during its war with Russia (1876–1878), the Red Crescent and the Red Lion and Sun were recognized as distinctive emblems in addition to the red cross. The use of the new distinctive signs was restricted, however, to states that already used them, namely Turkey, Persia, and Egypt.¹⁹⁶ In the course of drafting the 1949 Geneva Conventions, attempts proved unsuccessful to introduce a new single symbol, to revert to using the single symbol of the red cross, and to recognize a new emblem in addition to the already existing ones (the Red Shield of David, which was used as the distinctive symbol of the Israeli armed forces' medical services). The three distinctive emblems already recognized thus became those of the 1949 Geneva Conventions,¹⁹⁷ and later AP I and II.¹⁹⁸ The Red Lion and Sun subsequently became obsolete for all practical purposes because the only state that ever used it, Iran, replaced it by the Red Crescent in 1980. The remaining two distinctive emblems continued to give rise to considerable controversy. Central to that controversy was the wish of some states and their relief societies to use both or neither of the recognized two distinctive emblems. In addition, in some armed conflicts, the emblems were wrongly perceived as having national, political, or religious connotations, thereby undermining respect for their neutrality. These problems led to the call, in 1992, by the ICRC for the creation of an additional emblem. That appeal was endorsed by the 1999 International Conference of the Red Cross and Red Crescent, which also called for the setting up of a working group to find 'a comprehensive and lasting solution acceptable to all parties in terms of substance and procedure'.¹⁹⁹ The (p. 391) ensuing process led to the adoption, in December 2005, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (AP III). AP III entered into force on 14 January 2007. In accordance with Article 2 of AP III, an additional emblem is created alongside the red cross and red crescent. The new emblem—known as the Red Crystal—consists of a red frame in the shape of a square on edge on a white ground. It may be used for the same purposes and under the same conditions as the other two distinctive emblems of the Geneva Conventions. All distinctive emblems enjoy equal status and are entitled to identical respect.²⁰⁰

3. One broadly distinguishes between two forms of using the distinctive emblems.²⁰¹ The *first* one, protective use, relates to their being used during armed conflicts as the visible sign of the protection granted to medical personnel and objects by the Conventions and Protocols. The *second* form of use is when the distinctive emblems symbolize, mainly during peacetime, persons, equipment, and activities affiliated with a Red Cross or the Red Crescent Society, without implying that they are placed under the protection of the Conventions or Protocols. This use is referred to as 'indicative use'.

12.29

The distinctive emblem shall be used to identify medical and religious personnel, medical units and transports and medical equipment (Articles 39–43 GC I; Articles 41–3 GC II; Articles 18, paras 3 and 4, 20, paras 2 and 3, 21, and 22 para. 2 GC IV; Article 18 AP I; Article 12 AP II; Article 2 AP III).

1. Medical and religious personnel mentioned in GC I and II must wear an armlet or brassard bearing the distinctive emblem. That armlet is to be issued and stamped by the military authority. Medical personnel referred to in Articles 24, 26, and 27 GC I and Articles 36 and 37 GC II, must also carry with them, and may not be deprived of,²⁰² a special identify card bearing the distinctive emblem. Similar rules require armlets and identity cards to be worn by permanent and temporary medical personnel of civilian hospitals in occupied territory and zones of military operations.²⁰³ Instead of identity cards, auxiliary

medical personnel of the armed forces mentioned in Article 25 GC I must carry with them military identity documents, which specify what special training they have received, the temporary character of the duties they are engaged in, and their authority for wearing the armlet.²⁰⁴ The purpose of such identity cards and documents is that medical personnel are provided with a piece of evidence, which proves that they are entitled to the respect and protection that the distinctive emblem signifies, in case they fall into enemy hands.

2. The provisions in AP I on the identification of civilian medical and religious personnel are less categorical as regards the use of the same armlets and identity cards than the aforementioned rules. Although states are under the obligation to 'endeavour to ensure that medical and religious personnel and medical units and transports are identifiable',²⁰⁵ Article 18, para. 3, AP I merely provides that '[i]n occupied territory and in areas where fighting is taking place or is likely to take place, civilian medical personnel and civilian religious personnel *should* be recognizable by the distinctive emblem and an identity card certifying their status.'²⁰⁶ While this wording implies that the use of the distinctive (p. 392) emblem and identity card are not mandatory, it does not mean that civilian medical and religious personnel lose their protection in case such emblems and cards are not used.²⁰⁷ Nevertheless, not to use them obviously increases the risks for civilian medical and religious personnel. In any case, Article 18, para. 3, AP I does not allow for the use of a different emblem other than the distinctive emblem if and when one is used.²⁰⁸ Article 18, para. 3, also applies to the identification of medical personnel assigned to civil defence organizations.²⁰⁹

3. Article 40, paras 2 and 3, GC I and Articles 1 and 2 of the 'Regulations concerning Identification' as amended on 30 November 1993, contained in Annex 1 to AP I, set forth a number of requirements, which identity cards issued to medical personnel must satisfy. These requirements relate, *inter alia*, to the information that they must contain (such as the name, date of birth, in what capacity the holder is entitled to the protection of the Conventions and of the Protocol, date of issuance) and to the way in which they have to be authenticated, namely by the stamp and signature of the competent authority. Identity cards must be uniform throughout the territory of each high-contracting party and, as far as possible, of the same type for all parties to the conflict. Both Annex II to GC I and the 'Regulations Concerning Identification' in AP I contain a model identity card, which parties to an armed conflict may use. Irrespective of whether they decide to adopt the model, they must inform each other about the identity card they use at the outbreak of hostilities. With respect to the issuance of identity cards to temporary medical civilian personnel, the formal requirements are less stringent. Such personnel may be called upon at short notice, leaving insufficient time for the issuance of identity cards which satisfy the same formal requirements as those issued to permanent medical personnel. In case it proves impossible to issue the same identity cards to them as to permanent medical personnel, temporary medical civilian personnel may instead be provided with a certificate signed by the competent authority certifying that the person to whom it is issued is assigned to duty as temporary personnel.²¹⁰

4. Duly authorized personnel of the international Red Cross organizations are also permitted to make protective use of the distinctive emblems.²¹¹ The same right is granted under AP III to the medical services and religious personnel participating in operations under the auspices of the UN, provided the participating states agree to do so.²¹²

5. Medical units and transports must be marked with the distinctive sign with the consent of the competent authority.²¹³ With a view to enable parties to an armed conflict to make out medical objects from a distance and in good time, Articles 4 and 5 of the 'Regulations concerning Identification' in AP I further specify how such identification has to be implemented. The distinctive emblem shall be as large as appropriate under the circumstances. What is 'appropriate under the circumstances' depends on a variety of factors, including (p. 393) the weather, daytime, and the type of weapons used.²¹⁴

Whenever possible, the distinctive emblem must be displayed on a flat surface or on flags visible from as many directions and from as far away as possible. At night or when visibility is reduced, the distinctive emblem may be lighted or illuminated and it may also be made of materials rendering it recognizable by technical means of detection. Note, however, that there is no obligation to do so, in order not to compel a party to an armed conflict to provide enemy aircraft with landmarks which will assist them in attacking military objectives, as is clear from the *caveat* in Article 42 (4) GC I that parties to the armed conflict shall take the necessary steps to ensure visibility only 'in so far as military considerations permit'.²¹⁵ On the other hand, while the lack of illumination of medical units or transports may increase the risk of their being mistakenly targeted or incidentally damaged, it does not deprive medical establishments of the protection accorded to them by international law.

Furthermore, Article 5 of the 'Regulations concerning Identification' contains a suggestion to the effect that the red part of the distinctive emblem should be painted on top of black primer paint in order to facilitate its identification, in particular by infrared instruments.²¹⁶

6. Parties to an armed conflict may also use distinctive signals to identify medical units and transports.²¹⁷ These additional means of identification can consist of light and radio signals and electronic systems, such as the Secondary Surveillance Radar (SSR) system, as specified in Annex 10 to the Chicago Convention on International Civil Aviation of 7 December 1944.

7. Hospital zones and localities established under GC I must be marked by means of the distinctive emblem placed on the outer precincts and on the buildings.²¹⁸ Their marking at night by means of appropriate illumination is optional,²¹⁹ for the same reasons as in the case of medical units. The marking of hospital and safety zones established in accordance with GC IV is slightly different. Article 6 of the Draft Agreement in Annex I GC IV only foresees an obligation of parties to an armed conflict to mark them by means of oblique red bands on a white ground, placed on the buildings and outer precincts. When such zones are reserved exclusively for the wounded and sick, their marking by the distinctive emblem is optional. Since the GCs are silent on the marking of neutralized zones, everything is left to the solution found in the agreement establishing such a zone. States are nevertheless not precluded from agreeing on a solution similar to the one foreseen for hospital and safety zones and localities.²²⁰

8. On the identification of hospital ships, *see above*, Sections 12.20–12.23.

12.30

In times of peace, the distinctive emblem may also be used by national Red Cross or Red Crescent societies, the international Red Cross organizations and their duly authorized personnel and, in exceptional circumstances, to identify ambulances and aid stations providing free treatment to the wounded and sick (Article 44, paras 2–4, GC I, Article 3 AP III).

(p. 394) Article 44, paras 2–4, regulates three forms of 'indicative use' of the distinctive emblem. *First*, national Red Cross, Red Crescent or (in the future possible) Red Crystal societies may make use of the distinctive emblems in times of peace only in accordance with national legislation, but only for such activities which are in conformity with the fundamental principles laid down by the International Red Cross Conferences.²²¹ The distinctive emblem may under these conditions be used, for example, to show that persons or objects belong to a Red Cross or Red Crescent society, or for decorative purposes. Importantly, Article 44, para. 2, also allows such indicative use to continue in time of war, provided that it is done in a way so that it cannot be considered as conferring the protection of the GCs and APs. One compulsory measure to avoid confusion is that the emblem, if used for indicative purposes in times of armed conflict, must be smaller in size than the distinctive emblem used for protective purposes. However, the indicative use of the

distinctive emblem on armlets or the roof of buildings is prohibited in times of armed conflicts.²²² *Second*, the international Red Cross organizations and their duly authorized personnel may also make indicative use of the distinctive emblem at all times.²²³ *Third*, indicative use is permissible for the identification of ambulances and to mark aid stations providing free treatment. This indicative use is subject to rigorous conditions. National legislation must allow for it and it must be expressly authorized by the national Red Cross or Red Crescent society. Furthermore, a prerequisite for the indicative use of the distinctive emblem for aid stations is that they are exclusively assigned to the purpose of giving free treatment to the wounded and sick. Indicative use in relation to ambulances and aid stations is restricted to peacetime and must cease as soon as hostilities break out.²²⁴

12.31

States are obliged to supervise the use of the distinctive emblems and signals and shall prevent and repress any misuse thereof (Articles 53, 54 GC I; Article 45 GC II; Articles 18, para. 8, 37-8, 85, para. 3, lit. f, AP I; Article 6 AP III; Article 23, lit. f, HagueReg).

1. Any improper use of the distinctive emblem is prohibited.²²⁵ In order to enforce this prohibition, states must take all the necessary measures, including those of a legislative nature,²²⁶ for the prevention and repression of abuses of the distinctive signs. These obligations rest upon states irrespective of whether the abuse concerns the protective or indicative purpose served by the distinctive emblem, although the former type of misuse generally entails more serious consequences, including the mandatory criminalization as a grave breach of AP I, if such misuse amounts to an act of perfidy²²⁷ (for further detail on the prohibition of perfidy, and its distinction from ruses of war, *see above*, Sections 7.37-7.39). The obligation to take the appropriate legislative measures to make (certain types of) the misuse of the distinctive emblem punishable is amongst the earliest examples of such an obligation, having already been included in the 1906²²⁸ and 1929²²⁹ Geneva Conventions.²³⁰ In more recent times, the ICRC has developed a model law (p. 395) concerning the use and protection of the distinctive emblem, intended to assist states in fulfilling their obligations in relation to the prevention and repression of the misuse of the distinctive sign under the GCs and APs.²³¹

2. Article 53 GC I details a number of specific prohibitions, which concern the misuse of the distinctive emblem and the arms of Switzerland (the white cross on a red ground) as the sign most closely resembling it. Accordingly, no individual, society, firm or company, which is not entitled to do so in accordance with the GCs or the APs, may use the distinctive emblem. The same prohibition concerns the designation 'Red Cross' or 'Geneva Cross' and their alternatives 'Red Crescent' and 'Red Crystal'.²³² Furthermore, imitations of both the distinctive emblem and the designations just referred to are equally prohibited. These prohibitions apply regardless of the motive of the use of the (imitation of) the emblem or designation. They thus concern the misuse for commercial purposes, for example, as much as a well-intended misuse, for instance by a doctor who is not authorized to use the distinctive emblem in accordance with international humanitarian law. These prohibitions apply 'at all times', that is in peacetime and during armed conflicts; retrospectively in relation to past practices of misuse, and in relation to present and future misuses.²³³

3. In order to avoid confusion, misuse of the arms of Switzerland by private individuals, societies, or firms, or an imitation of those arms is also prohibited. However, in contrast to the misuse of the distinctive emblem, the prohibition only relates to the use of the arms of Switzerland as (parts of) trademarks or commercial marks, or 'for a purpose contrary to commercial honesty, or in circumstances capable of wounding Swiss national sentiment'.²³⁴

12.32

Camouflage of medical units in order to protect them against discovery by the enemy may exceptionally be permitted when compelling military reasons so require. It may only be ordered by brigade commanders and comparable and superior officers. The senior medical officer in charge and the legal adviser shall be consulted in advance.

12.33

The camouflage should be limited in space and time. During an attack it should be suspended.

12.34

Camouflage does not deprive medical units of the protection accorded to them by international law. They are, however, exposed to the risk that the adversary might consider them to be military objectives and attack them.

The basic requirement of Article 42, para. 4, GC I is distinct marking of medical units and establishments by day and night. In exceptional situations, compelling military reasons may, however, require camouflage to conceal landmarks from the adversary, and particularly from its army and air force. In such a situation, camouflage may exceptionally be extended to medical units, provided that all limitations provided in Sections 12.32–12.34 are strictly observed.²³⁵ While such camouflage increases the risk of medical units being mistaken for military objectives or of becoming collaterally damaged during an attack, the fact itself does not alter the protected status of the medical unit in question.

Footnotes:

¹ Henry Dunant Institute (ed.), *International Dimensions of Humanitarian Law*, with early examples from Africa (7), Asia (13), Islam (37–8), Latin America (42), Western States (60); W. M. Sheikh al-Zuhili, 'Islam and international law' (2005) 87 No. 858 *IRRC* 269–83, at 283. See also M. H. Coursier, 'L'Évolution du Droit International Humanitaire' (1960) 99-I *RdC* I 361–465, at 364–9.

² ICRC, *Health Care in Danger: Making the Case* (2011) 24 pp. See also the dedicated website of the ICRC <https://healthcareindanger.org/>.

³ H. Lauterpacht (ed.), *Oppenheim's International Law*, Vol. II: *Disputes, War and Neutrality*, 7th edn (Longman, 1952), 353.

⁴ H. Dunant, *The Battle of Solferino* (ICRC, 1986), at 25.

⁵ *Ibid.*, at 30.

⁶ C. Moorehead, *Dunant's Dream—War, Switzerland and the History of the Red Cross* (Harper Collins, 1998), 1–22.

⁷ Cf. in particular Rules 25–6, 28–30, 35, 109–17 *CIHL*.

⁸ Cf. Part III, Arts 7–12 AP II.

⁹ See below, Chapter 19. According to the *CIHL*, most of the Rules cited therein are applicable in both types of armed conflicts, with few exceptions. For a critical examination

of that assertion, see J. P. Benoit, 'Mistreatment of the Wounded, Sick and Shipwrecked by the ICRC Study on Customary International Humanitarian Law' (2008) 11 *YIHL* 175-219.

¹⁰ J. S. Pictet, *The Geneva Conventions of 12 August 1949, Commentary*, Vol. I (ICRC, 1952), 159 (referring to 'latent' prisoner-of-war status and further describing the position in the following terms: 'The gradual improvement in [the condition of the wounded and sick under GC I and II] implies a corresponding change in their claim to protection. From the moment when the wounded are picked up by the enemy's medical personnel they are under the protection of the two Conventions, the First and the Third. But certain provisions of the latter Convention will remain (so to speak) in the background until such time as the individual who has been picked up is no longer a wounded man in need of special protection and care. Gradually, as he ceases to be a wounded man, the Third Convention as a whole will become applicable, until finally, when he has recovered, it is the only instrument governing his status.') See also *mutatis mutandis* Pictet, *Commentary*, Vol. II (1960), 137.

¹¹ Arts 14-22 GC IV.

¹² See, e.g., Arts 57, 76, 81, 91, 106, 127, 132 GC IV.

¹³ Rule 109 *CIHL*, and commentary, Vol. I, 399.

¹⁴ Pictet, *Commentary*, Vol. II, 86.

¹⁵ Art. 8, *lit. a*, AP I.

¹⁶ Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), *Commentary on the Additional Protocol of 1 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), 117, paras 300-1.

¹⁷ *ICRC Commentary GC I*, 478, para. 1344.

¹⁸ *Ibid.*, 120-4.

¹⁹ F. Kalshoven and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 4th edn (ICRC, 2011), 117.

²⁰ *ICRC Commentary on the Additional Protocols*, 618 (para. 1942).

²¹ *Ibid.*, 118-19 (paras 306-7, 315), 488-9 (paras 1621-4).

²² M. N. Schmitt, ' "Direct Participation in Hostilities" and 21st Century Armed Conflict' in H. Fischer et al. (eds), *Crisis Management and Humanitarian Protection* (Berliner Wissenschafts-Verlag, 2004), 505-29, at 521; *The Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v The Government of Israel*, Israeli Supreme Court, HCJ 769/02, Judgment of 11 December 2005, para. 36. But see Human Rights Watch, *International Humanitarian Law Issues in a Potential War with Iraq* (20 February 2003); N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (ICRC, 2009), 57 (stating that voluntary and deliberate shielding of military objectives by some civilians 'does not, without more, entail the loss of their protection and their liability to direct attack independently of the shielded objective').

²³ *ICRC Commentary GC I*, 481, paras 1352-9.

²⁴ Cf. Art. 18, para. 2, GC I; Art. 17 AP I.

²⁵ *ICRC Commentary GC I*, 481, paras 1352, 1360-6.

²⁶ For the qualification of these acts as the war crime of inhuman treatment, provided that the mental harm, physical suffering, injury or attack on human dignity is 'serious', see, e.g.,

ICTY, *Prosecutor v Kordić and Cerkez* (Appeals Chamber), 17 December 2004, para. 39. Also, cf. ICC Elements of Crimes, Article 8, para. 2, lit. a (ii) and para. 2, lit. c (i).

²⁷ Pictet, *The Fundamental Principles of the Red Cross Proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1965. Commentary* (Henry Dunant Institute, 1979), I (Principle of Humanity).

²⁸ ICRC *Commentary GC I*, para. 1373.

²⁹ ICRC *Commentary GC I*, paras 1389–90.

³⁰ Eritrea-Ethiopia Claims Commission, PoW, Eritrea's Claim, Partial Award (2003) paras 138 and 115–19; PoW, Ethiopia's Claim, Partial Award (2003), paras 104–7.

³¹ For interpretations of specifically prohibited forms of conduct, see ICRC *Commentary GC I*, paras 1397–420.

³² Art. 50 GC I; Art. 51 GC II. See below, Chapter 21, 'Introductory Remarks', para. 4, and Sections 21.10–21.18.

³³ Kalshoven/Zegveld, above (n. 19), 37, 84.

³⁴ See generally, H. McCoubrey, 'The Nature of the Modern Doctrine of Military Necessity' (1991) XXX *RDMilG* 215–52, at 229.

³⁵ Cf. Rule 88 *CIHL*. For other examples of the prohibition of adverse distinction in the law on the protection of the wounded, sick, and shipwrecked, see, e.g., Art. 9, para. 1, AP I, and Art. 9, para. 2, AP II.

³⁶ Rule 110 *CIHL*, Vol. I, 309, 402–3.

³⁷ Pictet, *Commentary*, Vol. I, 138 (mentioning as examples special consideration for women and special treatment in the matter of lodging, heating, and clothing in the case of wounded or sick accustomed to a tropical climate).

³⁸ J. Pictet, 'The medical profession and international humanitarian law' (1985) 247 *IRRC* 191–209, at 198.

³⁹ ICRC *Commentary GC I*, para. 1396.

⁴⁰ *Id.*, para. 2736.

⁴¹ F. Kalshoven, *Belligerent Reprisals*, 2nd edn (Nijhoff, 2005), 263.

⁴² Art. 15, para. 2, GC I.

⁴³ Art. 15, para. 3, GC I; Art. 18, para. 2, GC II; Art. 17 GC IV.

⁴⁴ *CIHL*, Vol. I, 398, 402.

⁴⁵ Art. 18 GC I; Art. 21 GC II; Art. 17 AP I.

⁴⁶ Art. 18, para. 3, GC I; Art. 17, para. 1, AP I.

⁴⁷ ICRC *Commentary*, 1478 (para. 4876).

⁴⁸ ICRC *Commentary GC I*, para. 1499.

⁴⁹ Cf. Art. 8, para. 2, lit. b (xvi), ICC Statute.

⁵⁰ P. Verri, *Dictionary of the International Law of Armed Conflict* (ICRC, 1992), 85.

⁵¹ For the definition of these terms, see Rule 90 *CIHL*, Vol. I, Summary, 317–19.

⁵² Common Article 12, para. 2, GC I and II.

⁵³ Art. 13, para. 1, GC III, Art. 32 GC IV.

- ⁵⁴ *ICRC Commentary AP I*, 152 (paras 462–3).
- ⁵⁵ On this point, see W. Solf, ‘Development of the protection of the wounded, sick and shipwrecked under the Protocols Additional to the 1949 Geneva Conventions’ in C. Swinarski (ed.), *Studies in Honour of Jean Pictet* (Nijhoff, 1984), 237–48, at 243.
- ⁵⁶ *ICRC Commentary on the Additional Protocols*, 152 (paras 462–3), 1391–3 (paras 4588–94), 153 (para. 468).
- ⁵⁷ *Ibid.*, 153–4 (para. 470).
- ⁵⁸ Art. 11, para. 4.
- ⁵⁹ Solf, above (n. 52), 242.
- ⁶⁰ Art. 11, para. 2, AP I.
- ⁶¹ Art. 11, para. 3, AP I.
- ⁶² Art. 11, para. 6, 1st sentence, AP I.
- ⁶³ Art. 11, para. 5, AP I.
- ⁶⁴ Art. 11, para. 6, AP I.
- ⁶⁵ Art. 16, para. 1, *lit.* a–h, GC I.
- ⁶⁶ *ICRC Commentary GC I*, para. 1559.
- ⁶⁷ Cf. Art. 32 AP I.
- ⁶⁸ See, e.g., the German Explanatory memorandum on the Additional Protocols to the Geneva Conventions, reproduced in *CIHL*, Vol. II, Chapter 36, § 169; *ICRC Commentary on the Additional Protocols*, 345 (para. 1212).
- ⁶⁹ See references to this jurisprudence in *CIHL*, Vol. I, 425. See also the recount of the controversy surrounding the question during the negotiations of AP I in *ICRC Commentary on the Additional Protocols*, paras 1211–12.
- ⁷⁰ This approach was adopted by the UN Claims Commission, Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category ‘B’ Claims), UN Doc. S/AC.26/1994/1 (26 May 1994), 17.
- ⁷¹ Cf. Rule 88 *CIHL* and summary of Rule 112 *CIHL*, Vol. I, 408.
- ⁷² Art. 15, para. 1, GC I; Art. 18 GC II; Art. 8 AP II.
- ⁷³ As to the customary status, see Rule 112 *CIHL*, especially Summary of the Rule, Vol. I, 407–8.
- ⁷⁴ Art. 33, para. 4, AP I.
- ⁷⁵ Cf. the reference on applicable human rights norms *supra*, n. 69.
- ⁷⁶ See, e.g., *US v Pohl et al.*, US Military Tribunal at Nuremberg (1947).
- ⁷⁷ Art. 34, para. 2, AP I.
- ⁷⁸ Art. 34, para. 3, 2nd sentence.
- ⁷⁹ Art. 34, para. 4, *lit.* b.
- ⁸⁰ D. P. O’Connell, *The International Law of the Sea*, 2 vols edited by I. A. Shearer (Clarendon Press, 1984), Vol. II, 912.
- ⁸¹ H. McCoubrey, *International Humanitarian Law*, 2nd edn (Aldershot: Dartmouth, 1998), 48 (n. 16).

- ⁸² Arts 16–17 GC I; 19 GC II; Arts 70, 71, and 122 GC III; Arts 26, 106, 136, and 140 GC IV.
- ⁸³ Cf. Art. 33, para. 2, *lit.* a. The following particulars are mentioned in Art. 138 GC IV: name(s), place and date of birth, nationality, last residence and distinguishing characteristics, name of the father and maiden name of the mother, the date, place, and nature of the action taken with regard to the individual in question, the address at which correspondence may be sent, and the name and address of the person to be informed.
- ⁸⁴ Art. 33, para. 2, *lit.* b.
- ⁸⁵ For an overview over these categories of persons and the applicable rules, see *ICRC Commentary on the Additional Protocols*, 356–9 (paras 1253–62).
- ⁸⁶ Art. 33, para. 3, AP I. *See generally* on the role of the ICRC as regards missing persons, M. Sassòli and M. Tougas, ‘The ICRC and the missing’ (2002) 84 No. 848 *IRRC* 727–49.
- ⁸⁷ Cf. Art. 8, *lit.* e, 3rd sentence, AP I.
- ⁸⁸ Rule 28 *CIHL*, Summary, Vol. 1, 95.
- ⁸⁹ While the requirement of exclusivity is not spelled out in Art. 8, *lit.* e, AP I, Art. 8, *lit.* k, AP I defines ‘permanent medical units’ and ‘temporary medical units’ (alongside permanent and temporary medical transports and personnel) as those ‘assigned’ or ‘devoted exclusively to medical purposes’.
- ⁹⁰ *ICRC Commentary on the Additional Protocols*, 128 (paras 371–2).
- ⁹¹ Art. 12, para. 2, AP I.
- ⁹² Art. 12, para. 3, 1st sentence, AP I.
- ⁹³ Art. 12, para. 3, 2nd sentence, AP I.
- ⁹⁴ Art. 12, para. 4, 2nd sentence, AP I.
- ⁹⁵ Art. 12, para. 4, 1st sentence, AP I.
- ⁹⁶ In this vein, *ICRC Commentary on the Additional Protocols*, 170–1 (paras 539–40).
- ⁹⁷ Cf. Art. 21 in conjunction with Art. 8, *lit.* g and h, AP I. *See also* Art. 35 GC I.
- ⁹⁸ Art. 19, para. 1, 2nd sentence, GC I.
- ⁹⁹ Art. 33, paras 1 and 2, GC I.
- ¹⁰⁰ Art. 34 GC I.
- ¹⁰¹ Cf. Art. 56 GC IV, and also Art. 55 GC IV. This responsibility is reiterated in Art. 14, para. 1, AP I. For an analysis of the differences in wording between the provisions in GC IV and Art. 14, para. 1, AP I, see *ICRC Commentary on the Additional Protocols*, 182–3 (paras 580–4).
- ¹⁰² Art. 57 GC IV.
- ¹⁰³ *ICRC Commentary GC I*, para. 1841.
- ¹⁰⁴ *ICRC Commentary on the Additional Protocols*, 175 (para. 551).
- ¹⁰⁵ Cf. *id* and *ICRC Commentary GC I*, para. 1842. *See also* the examples provided in the military manuals of Argentina, the Netherlands, South Africa, Switzerland, and the US, *CIHL*, Vol. II/1, 537–43 (paras 595, 609, 612, 614, and 619).
- ¹⁰⁶ Cf. Art. 8, para. 2, *lit.* b (vii), ICC Statute.
- ¹⁰⁷ Art. 85, para. 3, *lit.* f, AP I.
- ¹⁰⁸ Cf. Art. 22, para. 2, GC I; Art. 35, para. 3, GC II; Arts 13, para. 2, and 19, para. 2, AP I.

- 109** Cf. ICRC Commentary GC I, para. 1840.
- 110** *ICRC Commentary on the Additional Protocols*, 175 (para. 552).
- 111** On the question whether wounded and sick members of armed forces are to be considered as collateral damage in the context of assessing proportionality in such a scenario, see J. Kleffner, 'Military Collaterals and *Jus in Bello* Proportionality' (2018) 48 *IsrYHR* 43-61.
- 112** *ICRC Commentary GC I*, para. 1849.
- 113** Cf. Rule 25 *CIHL*, Summary, Vol. I, 81-2.
- 114** Cf. Arts 24, 25, 26, para. 1 GC I, Art. 36 GC II.
- 115** *ICRC Commentary on the Additional Protocols*, 125 (para. 353).
- 116** *Ibid.*, para. 354.
- 117** Cf. Art. 17, para. 1, 2nd sentence, AP I; *see also above*, Section 12.05.
- 118** Cf. Rule 25 *CIHL*, Summary, Vol. I, 82-3.
- 119** Arts 24-5.
- 120** Art. 36.
- 121** As to the latter, cf. Art. 67 AP I.
- 122** For an enumeration of other tasks of civil defence organizations, *see* Art. 61, *lit. a*, AP I.
- 123** *ICRC Commentary on the Additional Protocols*, 126-7 (para. 358). *See also ICRC Commentary GC I*, paras 2056-66.
- 124** Cf. Art. 9, para. 2, AP I in conjunction with Art. 27, para. 1, GC I.
- 125** Cf. also Pictet, *The Fundamental Principles of the Red Cross*, above (n. 27) II. Impartiality.
- 126** Pictet, *Commentary*, Vol. I, 108.
- 127** Art. 15, para. 2, AP I.
- 128** Art. 15, para. 3, AP I.
- 129** Art. 9, para. 1, 1st sentence, AP II.
- 130** Art. 15, para. 4, AP I.
- 131** Art. 12, para. 3, GC I and II; Art. 33 GC III; Art. 56 GC IV; Arts 10, para. 2, and 15, para. 3, AP I; Art. 9, para. 2, AP II.
- 132** Solf, above (n. 55), at 244.
- 133** Adopted by the 2nd General Assembly of the World Medical Association, Geneva, Switzerland, September 1948, amended by the 22nd World Medical Assembly, Sydney, Australia, August 1968 and the 35th World Medical Assembly, Venice, Italy, October 1983 and the 46th WMA General Assembly, Stockholm, Sweden, September 1994, and editorially revised at the 170th Council Session, Divonne-les-Bains, France, May 2005 and the 173rd Council Session, Divonne-les-Bains, France, May 2006.
- 134** Adopted by the 3rd General Assembly of the World Medical Association, London, England, October 1949, and amended by the 22nd World Medical Assembly Sydney, Australia, August 1968 and the 35th World Medical Assembly Venice, Italy, October 1983 and the WMA General Assembly, Pilanesberg, South Africa, October 2006.

- 135** Adopted by the 10th World Medical Assembly, Havana, Cuba, October 1956, edited by the 11th World Medical Assembly, Istanbul, Turkey, October 1957, and amended by the 35th World Medical Assembly, Venice, Italy, October 1983 and the World Medical General Assembly, Tokyo 2004, and editorially revised at the 173rd Council Session, Divonne-les-Bains, France, May 2006.
- 136** Adopted by the 10th World Medical Assembly, Havana, Cuba, October 1956, edited by the 11th World Medical Assembly, Istanbul, Turkey, October 1957, and amended by the 35th World Medical Assembly, Venice, Italy, October 1983.
- 137** See generally on medical ethics in the context of armed conflicts, A. Baccino-Astrada, *Handbook on the Rights and Duties of Medical Personnel in Armed Conflicts* (ICRC/League, 1989), 36 *et seq*; Torelli, 'La protection du médecin dans les conflits armés' in Swinarski (ed.), above (n. 55), 581-601, at 585-92.
- 138** Also cf. Rule 25, 2nd sentence *CIHL*, Vol. I, 85 (suggesting a separate rule on the loss of protection of medical personnel, whose content is analogous to the Rule on the loss of protection of medical units and transports).
- 139** Cf. Art. 3 of the 1864 Geneva Convention and Article 12 of the 1906 Geneva Convention. On the evolution of the current regulation in GC I to III, see Pictet, above (n. 38) at 199.
- 140** ICRC Commentary GC I, para. 2174.
- 141** Art. 28, para. 2, GC I; Art. 33, para. 2, GC III.
- 142** Art. 28, para. 2, *lit.* b and c, GC I; Art. 33, para. 2, *lit.* b and c, GC III.
- 143** Art. 28, para. 2 *lit.* a, GC I; Art. 33, para. 2 *lit.* a, GC III.
- 144** Art. 29 GC I.
- 145** Cf. Art. 9, para. 2, AP I in conjunction with Art. 32 GC I.
- 146** Arts 30-1 GC I.
- 147** See J. S. Pictet, *Commentary*, Vol. II (ICRC, 1960), 216.
- 148** See *HPCR Manual*, commentary accompanying Rule 1(u), para. 3.
- 149** Art. 39, para. 1, GC II.
- 150** Art. 39, para. 3, GC II; Art. 27 AP I.
- 151** Art. 26, para. 2, AP I.
- 152** Art. 26, para. 1, AP I. See also *HPCR Manual*, Rule 78 (a); M. Bothe, in M. Bothe, K. Partsch, and W. Solf, *New Rules for Victims of Armed Conflicts* (Nijhoff, 1982), 149 *et seq*.
- 153** Art. 27, para. 2, AP I. See also *HPCR Manual*, Rule 78.
- 154** Art. 39, para. 5, GC II.
- 155** Art. 6, Annex I, to AP I.
- 156** Art. 7, Annex I, to AP I.
- 157** Art. 8, Annex I, to AP I.
- 158** See also the recommendations in *ICRC Manual for the use of technical means of identification* by hospital ships, coastal rescue craft, other protected craft and medical aircraft (ICRC, 1995).
- 159** See also *San Remo Manual*, para. 176; *HPCR Manual*, Rule 76 (d).

- 160** See also Bothe, in Bothe/Partsch/Solf, above (n. 153), 157 *et seq*; *San Remo Manual*, para. 178.
- 161** *HPCR Manual*, Rule 81.
- 162** Ibid., See also the statement made by the UK upon ratification of AP I in respect of Art. 28, para. 2 AP I: 'Given the practical need to make use of non-dedicated aircraft for medical evacuation purposes, the UK does not interpret this paragraph as precluding the presence on board of communications equipment and encryption materials or the use thereof solely to facilitate navigation, identification or communication in support of medical transportation as defined in Article 8 (f).'
- 163** Art. 28, para. 3, AP I; *San Remo Manual*, para. 178.
- 164** *HPCR Manual*, Rule 82.
- 165** Y. Dinstein and A.W. Dahl, *Oslo Manual on Select Topics of the Law of Armed Conflict* (Springer, 2020), Rule 115.
- 166** Ibid., para. 57.
- 167** *San Remo Manual*, para. 58.
- 168** See also *HPCR Manual*, Rule 80 (a).
- 169** *HPCR Manual*, Rule 80 (c). As regards attacks on medical aircraft which have lost their protected status, see the commentary on Section 12.21.
- 170** Art. 40, para. 4, AP I. See also *HPCR Manual*, Rule 80 (d).
- 171** Y. Sandoz, in Institut Henri Dunant (ed.), 'Localités et Zones Sous Protection Spéciale', in *Quatre études du droit international humanitaire, Etudes présentées à la Dixième Table Ronde de l'Institut international de droit humanitaire*, San Remo, septembre 1984 (Institut Henri Dunant, 1985) 35-47, at 40.
- 172** On the terminology and the distinction between the different types of zones and localities, see Pictet, *Commentary* (1952), Vol. I, 206-7.
- 173** Pictet, *Commentary* (1958), Vol. IV, 129.
- 174** For a discussion of various zones established during the armed conflicts in the Former Yugoslavia, see Lavoyer, in W. Biermann and M. Vadset (eds), *UN Peacekeeping in Trouble: Lessons Learned from the Former Yugoslavia—Peacekeepers' Views on the Limits and Possibilities of the United Nations in a Civil War-like Conflict* (Ashgate, 1998), 262-79, at 265-74. See also for a brief overview over ICRC practice in other conflicts, Sandoz, above (n. 171), 42-5.
- 175** For instances in which that has occurred, see *ICRC Commentary GC I* (2016), para. 1886, n 4.
- 176** In the words of Art. 23, para. 2, 2nd sentence, and Art. 14, para. 2, 2nd sentence, parties to an armed conflict 'may for this purpose implement the provisions of the Draft Agreement [. . .], with such amendments as they may consider necessary'. Elements of the Draft Agreement have been reflected in in agreements on protected zones, even if the Draft Agreement was not used in its entirety. Parts of the Draft Agreement have also informed agreements on neutralized zones established in accordance with Art. 15 GC IV, see *ICRC Commentary GC I*, 685 n. 61.
- 177** Art. 2 Draft Agreement, Annex I, GC I and IV.
- 178** Ibid., Art. 3.
- 179** Ibid., Art. 4, *lit.* a.

- 180** Pictet, *Commentary* (1952), Vol. I, 419.
- 181** Art. 4, *lit. c*, Draft Agreement, Annex I, GC I and IV.
- 182** Art. 4, *lit. d*.
- 183** Pictet, *Commentary* (1952), Vol. I, 420.
- 184** Art. 5, Draft Agreement, Annex I, GC I and IV.
- 185** Art. 8–10.
- 186** Art. 23, para. 3, GC I; Art. 14, para. 3, GC IV.
- 187** For the ICRC’s role in that regard during the conflicts in the Former Yugoslavia, *see* J. P. Lavoyer, ‘International Humanitarian Law, Protected Zones and the Use of Force’ in Biermann and Vadset, above (n. 174), at 267–72.
- 188** Pictet, *Commentary*, Vol. IV, 132.
- 189** Cf. Lavoyer, above (n. 174).
- 190** *Id.*
- 191** Cf. *CIHL*, Vol. II, 673–8, §§ 9–17, 19, 24–6, 31–3 (Cameroon, Canada, Ecuador, France, Germany, Hungary, Italy, Madagascar, Spain, Sweden, Switzerland, and the US).
- 192** *Ibid.*, 678–9, §§ 35–41 (Argentina, Colombia, Italy, El Salvador, Nicaragua, Poland, and Spain). *See also* the other national practice referred to *ibid.*, 679.
- 193** Cf. Art. 8, para. 2, *lit. b* (ix) ICC Statute; D. Pfirter, in R. S. Lee (ed.), *The International Criminal Court—Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), 162 (referring *inter alia* to Art. 23 GC I and Art. 14 GC IV).
- 194** Art. 7 of the 1864 Geneva Convention.
- 195** *See generally*, F. Bugnion, *The Emblem of the Red Cross: A Brief History* (ICRC, 1977).
- 196** Cf. Art. 19 of the 1929 Geneva Convention.
- 197** Cf. Art. 38 GC I, Art. 41 GC II, Arts 18, 20–3 GC IV.
- 198** Cf. Art. 8, para. 1, AP I; Art. 12 AP II.
- 199** Resolution 3, adopted by the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October to 6 November 1999, Annex, para. 1, *lit. a*.
- 200** Cf. Art. 2, paras 1 and 3, AP III.
- 201** Cf. Art. 44 GC I.
- 202** Cf. Art. 40, para. 4, GC I.
- 203** Art. 20, paras 2 and 3, GC IV.
- 204** Art. 41 GC I.
- 205** Art. 18, para. 1, AP I.
- 206** Emphasis added.
- 207** *ICRC Commentary on the Additional Protocols*, 228, para. 763.
- 208** *Ibid.* Cf. also Article 5, para. 4, of the ‘Regulations concerning Identification’, Annex 1 to AP I (as amended on 30 November 1993), providing that medical and religious personnel carrying out their duties in the battle area shall, as far as possible, also wear headgear and clothing bearing the distinctive emblem.

- 209** Art. 66, para. 9, AP I. *See also* Art. 15 of the ‘Regulations concerning Identification’, Annex 1 to AP I.
- 210** Cf. Art. 3 of the ‘Regulations concerning Identification’, Annex 1 to AP.
- 211** Cf. Art. 44, para. 3, GC I; Art. 4 AP III.
- 212** Art. 5 AP III.
- 213** Art. 42, para. 1, GC I; Art. 18, para. 3, GC IV; Art. 18, para. 4, AP I.
- 214** For the summary of a number of tests on the visibility of the distinctive emblem under varying conditions and using modern technical means of observation, *see* G. C. Cauderay, ‘Visibility of the distinctive emblem on medical establishments, units, and transports’ (1990) 277 *IRRC* 295–321.
- 215** *ICRC Commentary GC I*, para. 2650.
- 216** Art. 5, para. 3, of the ‘Regulations concerning Identification’, Annex 1 to AP I.
- 217** Cf. Art. 18, para. 5, and Chapter III of Annex I to AP I.
- 218** Art. 6, 1st sentence, of the Draft Agreement, Annex I GC.
- 219** *Ibid.*, 2nd sentence.
- 220** Pictet, *Commentary*, Vol. IV, 133–4.
- 221** Art. 44, para. 2, 1st sentence, GC I.
- 222** *Ibid.*, 2nd sentence.
- 223** Art. 44, para. 3.
- 224** Art. 44, para. 4.
- 225** Art. 53, para. 1; Arts 18, para. 8, 38, para. 1, AP I; Art. 12, 3rd sentence, AP II.
- 226** Cf. Art. 54 GC I.
- 227** Cf. Art. 37 AP I.
- 228** Arts 27–8, 1906 Geneva Convention.
- 229** Art. 28, 1929 Wounded and Sick Convention.
- 230** An instructive early case, which demonstrates the adverse consequences of the absence of adequate legislation in the context of the indicative use of the distinctive sign relates to a laundry plant in the Netherlands, which used the emblem of the Red Cross for its commercial purposes. Since the Dutch government had failed to enact a law according to Article 28 of the 1929 Wounded and Sick Convention, years passed before this violation was prosecuted; *see Annual Digest* 1933–4, Case No. 220; *Annual Digest* 1952, Case No. 128 (19 *ILR*, 598).
- 231** ‘Model law concerning the use and protection of the emblem of the Red Cross or Red Crescent’ (1996) 313 *IRRC* 486–95. *See also* the more recent ‘Model law concerning the use and the protection of the emblem of the red cross, the red crescent and the red crystal’, developed for civil law states.
- 232** Cf. Art. 53, para. 4, GC I; Art. 6 AP III.
- 233** *ICRC Commentary GC I*, paras 3078–9.
- 234** Art. 53, para. 2.
- 235** *ICRC Commentary GC I*, para. 2651.

(p. 675) Chapter 27 Gender and Armed Conflict

1 Introduction

THE construction of social sex and gender roles means that armed conflict is sexed and gendered.¹ Men still make up the majority of the fighting forces, while women's generally unequal and subordinate social and economic position makes them vulnerable in particular ways during conflict. Women and men, girls and boys all suffer gender-based violence. Such violence is directed at a person because of his or her gender.² For instance men sustain specific harms such as disappearances and deliberate killings in greater numbers than women, while women disproportionately experience sexual violence. The detention of Bosnian Muslims at Potocari on 12 July 1995 and subsequent separation of women and men is illustrative of gender-based crimes. The International Tribunal for the former Yugoslavia (ICTY) found that after separation, the Bosnian Muslim men had suffered 'severe beatings and other cruel treatments'. In the compound 'rapes and killings were reported by credible (p. 676) witnesses and some committed suicide out of terror. The entire situation in Potocari has been depicted as a campaign of terror. As an ultimate suffering, some women about to board the buses had their young sons dragged away from them, never to be seen again.'³

While it is not spelled out by the ICTY Judges, witness evidence was that the rapes were of women and girls.⁴ The forcible separation of young boys from their mothers had different consequences for both: subsequent execution for the sons, along with thousands of 'military aged' men⁵ and the loss of their family members for the mothers. The same phenomenon was reported in Kosovo where 'young men were at risk, more than any other group of Kosovo society, of grave human rights violations. Many were executed on the spot, on occasion after horrendous torture'.⁶ Children are forcibly abducted into military units where their subsequent experience is likely to be gendered: boys may be required to become child soldiers and girls are likely to have to perform domestic tasks and become subject to sexual violence. Conflict is also gendered in that acts of violence, including sexual violence, are most frequently, but not exclusively,⁷ committed by men. Little attention is given to the role of women as combatants or as the perpetrators of international crimes.⁸

While recognizing the reality of gendered violence for all, this Chapter focuses on the gender-specific harms suffered by women in armed conflict. It outlines these harms and considers the international legal framework for responding to them. Despite the long history of rape and other forms of sexual assault against women during armed conflicts, and explicit evidence offered to tribunals of such offences, such acts of violence had not figured prominently in either the legal restraints on warfare, nor directly in judgments of war crimes trials until those of the 1990s. Although the Hague Regulations and the Geneva Conventions included crimes against women, these crimes remained for many years 'forgotten' and shrouded in silence. This Chapter outlines how the silence has been broken, as these crimes have come to the forefront through the legislative and jurisprudential developments of the ad hoc international criminal Tribunals, the ICTY and the International Criminal Tribunal for Rwanda (ICTR), the hybrid Special Court for Sierra Leone (SCSL), and (p. 677) the International Criminal Court (ICC). In addition relevant UN Security Council Resolutions on 'women, peace and security' will be examined. Finally, the Chapter considers some of the tensions generated by the evolving international response to gender-based violence in armed conflict.

2 Gender-based Violence in Conflict

Conflict related gender-based violence is violence that occurs during or in the immediate aftermath of armed conflict and which has a link with the conflict.⁹ The concept of gender crimes 'emphasises that sexual crimes such as rape are crimes of gender inequality, enacted violently'.¹⁰ Such crimes occur widely in armed conflict and as the jurisprudence of the ad hoc international criminal Tribunals demonstrates, they are experienced by men as well as women.¹¹

The incidence and gendered consequences of such forms of violence for men are becoming better understood, although particular forms of trauma and shame lead to under-reporting and silence. Men may feel that being a victim of sexual violence is 'incompatible with their masculinity [...] both at the level of the attack itself—a man should have been able to prevent himself from being attacked—and in dealing with the consequences of the attack—to be able to cope "like a man"'.¹² While sexual violence against men in armed conflict, in the forms of rape, forced sterilization, and mutilations, still needs a great deal of research, it does not reach the levels of such violence committed against women and it is on this that the next section focuses.

Women's experiences of armed conflict and its aftermath vary greatly depending upon such factors as whether they are civilians or combatants, their national (p. 678) identity, race, class, economic circumstances, urban or rural location, family situation, age, employment, and health. Nevertheless, some frequent experiences can be described,¹³ resting on the reality that: '[c]onflict creates a free-fire zone, a sort of free for all in which pre-existing ideas about women as inferior, and other discriminatory [...] ideas may be given free expression by frequently all male groups of soldiers and other combatants'.¹⁴

Conflict-related sexual violence remains largely unreported for a range of reasons, including social stigma, fear, and a feeling of hopelessness because of both the lack of appropriate services and of any official response.¹⁵ Nevertheless it has been reliably recorded in many areas, including Afghanistan, Burundi, Chad, Colombia, Côte D'Ivoire, Democratic Republic of the Congo, Liberia, Peru, Rwanda, Sierra Leone, Chechnya/Russian Federation, Darfur, Sudan, Northern Uganda, and the former Yugoslavia.¹⁶ Rape and sexual violence are not only widespread, they occur in devastating numbers, with estimates of between 250,000 and 500,000 women raped during the 1994 Rwandan genocide; between 20,000 and 50,000 in Bosnia-Herzegovina in the conflict in the early 1990s; and around 200,000 in Bangladesh in 1971.¹⁷ Sexual violence continues in the conflicts and situations of political unrest of the twenty-first century: the 2012 report of the Special Representative of the Secretary-General on sexual violence in armed conflict records widespread sexual violence, and in some instances mass rapes, in many of the same places as those listed above, as well as in conflicts in Libya (during the violence against the Qadhafi regime), Myanmar (especially in militarized ethnic border areas) and Somalia; in post-conflict in such places as the Central African Republic, Chad, and Sri Lanka; and in election violence and political strife in Egypt, Guinea, and Kenya.¹⁸ In Syria there have been reports of rapes in detention, of abductions, and of rapes at checkpoints and during house searches committed by both Government forces and *Shabbiha* members.¹⁹

Witness testimony in proceedings before international criminal tribunals provides graphic accounts. For example, in the Central African Republic women have been raped by several perpetrators in turn: 'their clothes were ripped off by force [...] they (p. 679) were pushed to the ground, immobilized by MLC soldiers standing on or holding them, raped at gunpoint, in public or in front of or near their family members'.²⁰ In the Democratic Republic of the Congo, there is sufficient 'evidence to establish substantial grounds to believe that rape was a common practice following an attack and that combatants who forced women to engage in sexual intercourse intended to commit such acts by force or threat of force'.²¹ Girl soldiers, irrespective of their age, were subject to rape, sexual

violence, sexual slavery, and forced impregnation.²² In Sierra Leone too 'women and girls were systematically [...] abducted in circumstances of extreme violence, compelled to move along with the fighting forces from place to place, and coerced to perform a variety of conjugal duties including regular sexual intercourse, forced domestic labour such as cleaning and cooking for the "husband", endure forced pregnancy and to care for and bring up children of the "marriage"'.²³

Rape and sexual violence against women occur in varying circumstances: sometimes the perpetrators move on after the attacks, but may be followed by others; sometimes women and girls are abducted into situations of captivity where they are raped repeatedly;²⁴ sometimes they are raped prior to being murdered. Women cannot easily flee combat areas when they are pregnant, encumbered with children, or by social mores, which inhibit their presence in public spaces. Among the ten countries with the highest lifetime risk of maternal death, most are at war today or are in a post-conflict situation, such as Afghanistan, Sierra Leone, Chad, Angola, Liberia, Somalia, and the Democratic Republic of the Congo.²⁵ Women and girls are not safe even after they have fled the conflict zone, experiencing further sexual violence in camps for refugees and IDPs.²⁶ There are reports of men, in particular from Saudi Arabia and other Gulf states seeking young girls in the Syrian refugee camps to buy, offering them 'marriage'. Some are subsequently sent back, but since they feel shamed many do not return to their families and enter prostitution. Families agree to marriages for young girls as a form of protection against further sexual abuse and for the money they receive.²⁷(p. 680)

What is only too apparent is the extreme violence of sexual attacks and the humiliation and degradation that accompany them for both women and men victims. As well as the immediate pain and terror, rape survivors frequently experience long-term physical injury and psychological trauma. Sexual violence against women in armed conflict is structural, part of the instrumentality of conflict and often inherent to its very aims. The UN Security Council has affirmed that 'sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security'.²⁸

Rape and sexual violence are not the only gender-based ways women experience armed conflict,²⁹ although these have become the focus of the international legal system. Alongside the fear of physical violence civilians face economic and social hardships, increased by the danger of attacks involved in leaving the home for routine activities such as finding food, water, and fuel. Women's traditional domestic responsibilities mean that these tasks fall most heavily on them, as does caring for physically and psychologically injured fighters, the elderly, and children. Women whose male relatives have been killed or are otherwise absent may be left financially unassisted and without the requisite legal documentation to substantiate claims to property. Collapse of governmental agencies, including those for maintaining law and order, and the physical concentration of armed fighters all undermine community restraints on human rights abuses. Women also suffer from a higher incidence of violence at home during armed conflict, whether or not they are living within the combat zone.

The report of the UN Fact Finding Mission to Gaza illustrates a number of such gender-based consequences of conflict for women. The Mission heard that:

the blockade and the military operations had aggravated poverty, which particularly affected women, who must find food and other essentials for their families. Women were often the sole breadwinners [...] but jobs were hard to come by. [...] women bore a greater social burden, having to deal with daily life made harsher by the

crisis and, at the same time, provide security and care for injured family members and children, their own and others who have lost their parents.³⁰

Living in tents without any privacy was hard for women who, for example, lacked adequate sanitary protection. 'Psychological pressures on men and women, together with financial difficulties, led to family disputes, family violence and divorce.'³¹(p. 681)

3 Legal Regimes for Addressing Gender and Armed Conflict

A. International humanitarian law prior to 1990

Legal excavation has shown that 'the laws and customs of war had undoubtedly long prohibited rape and other crimes of sexual violence, where they are core crimes within humanitarian law, and, as such, inductively shape the very interpretation of the procedural doctrines and the breadth of substantive crimes within humanitarian law'.³² Rape was included in the first recorded war crimes trial in 1474. Hugo Grotius asserted that 'as Part of the Law of Nations viz. that whoever ravishes a Woman tho' in time of War, deserves to be punished in every Country'.³³ Modern international humanitarian law with respect to the prohibition of sexual violence has developed since the nineteenth century. The Lieber Code, which gave directions to Union forces during the American civil war, prohibited under penalty of death 'All wanton violence committed against persons in the invaded country, [...] all rape, wounding, maiming, or killing of such inhabitants'.³⁴ The Hague Regulations 1899, Article 46 required 'Family honour and rights' to be respected.³⁵ 'Family honour' is a coded way of referring to crimes of sexual violence. The 1929 Geneva Convention on Prisoners of War recognized that women may be combatants and thus detained as prisoners of war. Article 3 required women to be treated 'with all the regard due to their sex'.³⁶ This provision was repeated in the Third Geneva Convention of 1949 with the addition that women prisoners of war 'shall in all cases benefit by treatment as favourable as that granted to men'³⁷ and be provided with separate dormitories,³⁸ conveniences,³⁹ and quarters for disciplinary treatment.⁴⁰

The jurisdiction of the Nuremberg and Tokyo International Tribunals included war crimes (violations of the laws and customs of war) and crimes against (p. 682) humanity.⁴¹ In neither case was rape and sexual violence spelled out.⁴² In the case of war crimes the list of specified crimes was stated not to be exhaustive and crimes against humanity included 'other inhumane acts'. Persecution as a crime against humanity included political, racial, or religious grounds, but not those of sex or gender. The war crimes trials in both instances received a good deal of testimony about such crimes but they barely figured in the judgments.

Article 27 of the Fourth Geneva Convention,⁴³ provides that states parties are under an obligation to protect women in international armed conflict 'against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'. This is framed in terms of protection rather than as an express prohibition of the listed offences and designates rape as a crime against 'honour' rather than as one of violence.⁴⁴ Nor are rape, enforced prostitution, and sexual assault explicitly designated as grave breaches of the Convention,⁴⁵ although the definition of grave breaches to include acts 'wilfully causing great suffering or serious injury to body or health' allows sexual violence to come within it. Common Article 3 to the 1949 Geneva Conventions applicable to non-international armed conflicts prohibits 'at any time and in any place whatsoever [...] outrages upon personal dignity, in particular humiliating and degrading treatment'. This again is a formula that allows for the inclusion of rape and other forms of sexual violence, but without express wording to that effect.

The 1977 Additional Protocols make some further advances. Article 76 of AP I, does not refer to the notion of women's honour, but portrays women as the objects of special respect and protection. The fundamental guarantees stipulated in Article 75 include prohibition of any distinction based, inter alia, on 'sex', and the commission of any 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault' by any person, whether civilian or military. AP II, applicable in non-international armed conflicts, omits the language of protection and in Article 4(2)(e) prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'. However the formula identifies rape as a crime against dignity, not as an act of violence.

Other references to women in the Geneva Conventions emphasize their reproductive, mothering, and caring roles. Analysis of the Geneva Conventions provisions on safeguards for women in armed conflict indicates that the primary target (p. 683) for protection is children. This reduces the status of women without children and obscures the reality that girls are especially vulnerable to forms of sexual attack. For these reasons Judith Gardam has concluded that international humanitarian law has constructed a gender hierarchy parallel to that found in human rights law that has discounted the interests of women in favour of those of combatants and in the name of the notion of 'military necessity'. Gardam asserts:

Far from being a neutral yardstick, military necessity in fact incorporates a hierarchy of values. It assumes [makes natural] that the military victory of the State is pre-eminent. From this flows the seemingly logical value judgment, that the life of the combatant is more important than that of the civilian, even more so if that civilian belongs to the enemy 'State'. [...] The military resists strongly the notion that combatants should assume risks to protect the civilian population. But their position is not immune to challenge. It assumes that war is inevitable.⁴⁶

B. Legal developments after 1991

International humanitarian law no longer provides the sole legal framework for the protection of women in armed conflict. Indeed, since 1977 there has been no further international humanitarian law convention relating to women in armed conflict. However, there has been considerable advancement through the application of international humanitarian law in international criminal courts, through human rights law, through regional treaties, and through UN Security Council Resolutions under the rubric of 'women, peace and security'. Together these legal regimes provide guidance with respect to the obligations of states and non-state actors for the prevention, protection, prosecution, and punishment of gender-based crimes against women in armed conflict.

4 International Criminal Law

A. Legislative provisions

From late 1991 and throughout 1992 global media coverage created widespread pressure for an international legal response encompassing accountability for the atrocities committed against women and men in the conflicts accompanying the disintegration of the former Yugoslavia. In particular, sufficient outrage was expressed (p. 684) about the 'massive, organized and systematic'⁴⁷ rapes and other violent assaults against women to ensure that they could not be ignored, or discounted as a normal phenomenon of armed conflict. Crimes of sexual violence against women became the focus of international campaigns by women's groups arguing for their acceptance as constituting violations of international criminal law and for their inclusion in the jurisdiction of the ICTY and

subsequently the ICTR. Feminist advocates were active at the negotiations for the Rome Statute for a permanent International Criminal Court in 1998.

The ICTY Statute does not spell out crimes of sexual violence as a grave breach or violation of the laws and customs of war but does list rape as a crime against humanity.⁴⁸ The ICTR Statute includes rape as a crime against humanity⁴⁹ and Article 4 includes 'Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault' as a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Rome Statute specifies 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' as crimes against humanity, as 'serious violations of the laws and customs applicable in international armed conflict' and as serious violations of Common Article 3. This list emphasizes that rape and sexual violence are not synonymous and that the latter takes many forms. The disaggregation of sexual violence into diverse categories permits a more focused approach to prevention.⁵⁰ In addition, 'Committing outrages upon personal dignity, in particular humiliating and degrading treatment' is a violation of the laws and customs of war in international armed conflict and of Common Article 3. The crime of persecution against a collectivity as a crime against humanity for the first time includes 'gender'.

Article 7(3) provides the first international legal definition of 'gender' as referring to 'the two sexes, male and female, within the context of society'.⁵¹ The Statute of the Special Court for Sierra Leone⁵² was agreed after the negotiation of the Rome Statute but before its entry into force. Article 2 includes the same crimes as crimes against humanity and Article 3 includes 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault' as violations of Common Article 3 and AP II. An additional crime is that of sexual abuse against girls under Sierra Leone law.(p. 685)

The package of agreements under the umbrella of the Pact on Peace, Security, Good Governance, Economic Development and Regional Integration Stability in the Great Lakes Region, (Stability Pact) 2006, which seek to bring an end to conflict in the Great Lakes region of Africa, includes the groundbreaking Protocol on the Prevention and Suppression of Sexual Violence against Women and Children. The Protocol is a substantive agreement that seeks to fill the legal void that prevails in most of the legal systems in the region as a response to the systemic and massive rape of women and children that have occurred throughout the conflicts there, notably in the DRC. States parties seek 'to combat sexual violence against women and children through preventing, criminalizing, and punishing acts of sexual violence, both in times of peace and in times of war, in accordance with national laws and international criminal law'.⁵³ The Protocol also provides model language for other legal systems and peace negotiations. By drawing upon and bringing together language from other international instruments, notably the Convention on the Elimination of All Forms of Discrimination against Women, the Rome Statute, the Palermo Trafficking Protocol,⁵⁴ and the Protocol to the African Charter on Peoples' and Human Rights on the Rights of Women in Africa,⁵⁵ it enhances its own legitimacy and reinforces those instruments.

The Protocol asserts international standards to address crimes of sexual violence as war crimes and crimes against humanity in the region, defining them in accordance with the Statutes of the ICTY and ICTR and the ICC. It establishes links between sexual violence and the offences of trafficking, slavery, and genocide. The Protocol is not concerned solely with individual criminal responsibility as it incorporates preventive aspects, counselling for the rehabilitation of victims of sexual violence, and it advocates for maximum sentencing. Parties have committed themselves to set up regional mechanisms to protect women and children, and provide legal and material assistance for victims and survivors of sexual violence. The Protocol has not, however, been effective at putting an end to the extreme

sexual violence in the Great Lakes region, notably the DRC. It has been followed by the Goma Declaration on Eradicating Sexual Violence and Ending Impunity in the Great Lakes Region, 18 June 2008, which seeks in part to address the Protocol's shortcomings by offering a Plan of Action for implementation and language for future peace negotiations.

Another innovative treaty is the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.⁵⁶ The Convention requires states parties to criminalize and prosecute forms of gender-based violence (p. 686) (including domestic violence) in their national courts. Article 2(3) makes the Convention applicable in 'times of peace and armed conflict', thereby recognizing the continuation of forms of violence during conflict that do not come within the ambit of war crimes.⁵⁷ Further, although the Convention identifies domestic violence as a gender-based crime that 'affects women disproportionately', it encourages states parties to apply it to all victims of domestic violence.⁵⁸

There is thus now a considerable body of treaty law addressing crimes of sexual violence against women. To date, the practical implementation of this body of law has been carried out through the ad hoc criminal Tribunals, which have developed some understandings of gender-based crimes and sexual violence. However, these have not progressed uniformly and there remain inconsistencies and uncertainties. The ICC Statute, Article 54(1)(b) explicitly requires the Prosecutor to 'take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children'. José Luis Moreno-Ocampo, former Prosecutor at the ICC, saw as his challenge 'to capture this "gendered" reality in our different cases and present them in connection with the contextual elements of the crimes as defined by the Rome Statute',⁵⁹ but, as discussed below, the first completed trials have been disappointing in this respect.

B. Application of law by international criminal tribunals

This section examines some of the ways in which various institutions have applied the somewhat skeletal legal provisions relating to violence against women in conflict situations. A first step in breaking the silence previously surrounding crimes against women in armed conflict is including relevant crimes within international instruments. A second is prosecuting perpetrators as a step towards ending impunity, ensuring accountability and giving practical application to the legal provisions. A third is ensuring that definitions and implementation take into account women's experiences of the crimes committed against them. A fourth is ensuring adequate and appropriate reparation for survivors.

When the ad hoc Tribunals commenced work they had little to rely upon other than the somewhat stark wording of their Statutes and the jurisprudence of the Nuremburg Tribunal and Tokyo Tribunals. There were, for example, no definitions of the various sexual offences under international law (rape, sexual violence, enforced prostitution) and no accepted applicable general principles. The ad hoc Tribunals have had to determine the understandings of sexual crimes as war crimes, (p. 687) crimes against humanity, and genocide. Although the ICC must work with the definitions in the Elements of Crimes agreed by the Assembly of States Parties, the Tribunals' jurisprudence is nevertheless likely to be influential, both for the work of the ICC, and in building understandings of these crimes in national courts.

The Tribunals have addressed issues of gender-based and sexual violence in a number of their judgments.⁶⁰ The Tribunals have determined that where the other elements are present:⁶¹

- rape can constitute a freestanding crime against humanity and a war crime;

- rape can constitute torture as a crime against humanity and a war crime when it comes within the definition of torture;⁶²
- rape and other forms of sexual violence can constitute genocide when committed with intent to destroy in whole or in part a national, ethnical, racial, or religious group;⁶³
- rape and other forms of sexual violence can constitute persecution and enslavement as crimes against humanity;
- sexual violence can constitute part of outrages on personal dignity and inhumane treatment.

Some judgments have made especially important contributions to the understanding of these crimes. For example in the *Foča* case the ICTY considered the situation of Bosnian Muslim women who were detained in a range of local buildings including schools, houses, and apartments.⁶⁴ They were forced to carry out tasks such as cooking and cleaning and were repeatedly raped and degraded in other ways. The ICTY held that the factors of enslavement include control of a person's movement and physical environment, psychological control, and control of sex.⁶⁵ Enslavement requires the exercise of any or all of the powers attaching to the right of ownership over a person,⁶⁶ which are present in the refusal of sexual autonomy and denial of choice to the detained women who had to provide sexual services on demand. When a woman cannot refuse sexual contact, where such matters as abortion, contraception, and personal hygiene are totally under the control of her abusers, and she has '[n]owhere to go and no place to hide',⁶⁷ then her captors exercise ownership over her and she is enslaved.(p. 688)

The ICTY did not, however, make a finding of sexual slavery, as no such crime is determined as a crime against humanity in its Statute. In contrast, the Statute of the SCSL, Article 2(g) includes sexual slavery as a crime against humanity. The camps at Foča (and elsewhere in the former Yugoslavia) were a modern manifestation of the forced detention of the so-called comfort women detained across Asia by the Japanese military in World War II. Those women, too, had no control over their own destinies, even where they were not physically locked up.⁶⁸ Designation as enslavement removes issues of consent to individual acts of intercourse.

It is noteworthy that typical 'women's roles' (cooking, cleaning) were recognized as forced labour and gendered aspects of enslavement. Assignment of domestic tasks to women can be seen as everyday, natural, and as too mundane to be conceived of as constituting crimes against humanity. Forced labour is more readily associated with such atrocities as building the Burmese railway or factory labour, but at Nuremberg it was held that sending 500,000 women domestic labourers to Germany to relieve German housewives and the wives of German farmers also constituted slave labour.⁶⁹

A particular form of sexual slavery in armed conflict is forced marriage. The SCSL Trial Chamber found such occurrences to constitute sexual slavery as a crime against humanity.⁷⁰ Justice Doherty, partially dissenting, discussed various elements of 'bush marriages' that had been identified by the prosecution expert: the women's families were not involved in the marriage; there was no official marriage ceremony; it was a means of survival for a woman who by 'belonging' to a single person would be spared gang rapes, at least while the 'marriage' lasted; the woman was required to do as her 'husband' commanded and 'to gratify his sexual wishes whenever he so desired without question'. A bush marriage frequently involved long-term stigmatization and rejection by families and communities.⁷¹ The Appeal Chamber accepted Justice Doherty's characterization of forced marriage and found that a separate crime of forced marriage existed as a crime against

humanity in the context of Sierra Leone. The separate element was that of forced conjugal association and sexual exclusivity.⁷²

The ICTR has been at the forefront of identifying rape as genocidal when committed with the intention to destroy in whole or in a part a group identified in national, ethnic, racial, or religious terms. Indeed, rape and other forms of extreme sexual violence have been at the very core of group destruction. These include preventing births within a group,⁷³ for example through sexual mutilation, forced (p. 689) sterilization, forced birth control, separation of the sexes, prohibiting marriage, and mental trauma.⁷⁴ Forced pregnancy may also be directed towards destruction of the group. As the Trial Chamber in *Akayesu* stated:

In patriarchal societies [...] an example of a measure intended to prevent births within a group is the case where, during rape, a woman [...] is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.⁷⁵

The Statute of the ICC, Article 7(2)(f), defines forced pregnancy as a crime against humanity. Forced pregnancy is one of the few sexual crimes that can only be committed against women. It comprises two separate acts: forcible impregnation and the forced denial of access to abortion. The ICC definition of forced pregnancy is limited to where there is the 'intent of affecting the ethnic composition of any population'. That religious objections to abortion determined this restrictive understanding of forced pregnancy is made apparent by the rider that the definition 'shall not in any way be interpreted as affecting national laws relating to pregnancy'. In no other instance is there a requirement for an additional intent or motive for an offence to constitute a crime against humanity. Forced pregnancy constitutes a very particular denial of a woman's autonomy and bodily integrity by forcing her to bear a child. Yet in this one instance the continuing insistence for control over women's reproductive capacity has subjugated gender identity (that the crime was committed against her because she is a woman) to ethnic identity.

Rape is central to facts that have led to findings of torture, enslavement, and genocide. A crucial question is how rape is defined under international law. How the law constructs rape determines who has in fact been raped. Where there is dissonance between survivors' perceptions of what has occurred to them, and the law's verdict on this point, the impunity granted means that the law ceases to be relevant to survivors as either an instrument of protection or of punishment. Such impunity is often based upon the myths and stereotypes about male and female sexuality that inform decisions about rape,⁷⁶ but which ignore such factors as the trauma of rape, the practical and security reasons against reporting rape, especially in armed conflict, and the fear and shame experienced by the survivors. If impunity for sexual violence in armed conflict is to cease it is essential that such myths are confronted and dispelled. It is therefore important that the definitions, understandings, and procedures for the prosecution of such crimes before international tribunals reflect the perspectives of rape victims.

The Tribunals had to evolve their own definitions of rape and other sexual offences, and there have been divergent views between different Trial Chambers. (p. 690) One view has been to define rape not through specific prohibited acts but to capture the essence of rape as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'.⁷⁷ The emphasis on coercive circumstances addresses the situation where an individual may, through fear and desperation, not have actually protested or fought against sexual activity. Coercion is inherent in conflict and in the very presence of armed militia and genocidaires. This definition of rape is consonant with the context of the particular crimes within the Tribunals' jurisdiction—war crimes, crimes against humanity,

and genocide—with all the elements of force, terror, and helplessness that are integral to situations where such offences are committed.

An alternative approach is to define rape through a mechanical description of body parts. The ICTY in *Furundžija* held the objective elements of rape to be:

- (i) the sexual penetration, however slight:
 - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - (b) of the mouth of the victim by the penis of the perpetrator
- (ii) by coercion or force or threat of force against the victim or a third person.

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This definition incorporates rape of men and non-penile rape. Brutal rapes with wood, guns, and other weapons are also prevalent in armed conflict. The Trial Chamber held oral rape to be ‘a most humiliating and degrading attack upon human dignity’ and stated that ‘such an extremely serious sexual outrage as forced oral penetration should be classified as rape’.⁷⁹ However, the second part of this definition of rape requires coercion or force of the actual victim or third person. Further, the mechanical description of objects and body parts fails to capture the aggression of rape. In *Kunarac* the Trial Chamber emphasized issues of coercion, consent, and implied consent. It concluded that what appears to be common to legal systems around the world is ‘the basic underlying principle [...] that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim’.⁸⁰ It adopted the *Furundžija* definition, but addressed the issue of consent by adding a final sentence derived from *Akayesu*: ‘Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances’.⁸¹ The Trial Chamber accepted the evidence of the witness, who, *Kunarac* alleged, had consented to, and even initiated, sex with him, that she had been threatened by another soldier, that he would kill her unless she satisfied his commander, *Kunarac*. The Chamber was unmoved by *Kunarac*’s claim that he did not know she was acting out of fear. In the general context of war and the (p. 691) position of Muslim women and girls detained, at that time it was not credible that he was ‘confused by her motives’.

The verdict reveals its understanding of the situation, but its analysis brought the issue of consent back into the definition. The Appeal Chamber approved the definition of the Trial Chamber⁸² adding that there is no basis in customary international law for requiring resistance on the part of the victim, a requirement that would be ‘absurd on the facts’. In 2006 in *Gacumbitsi* the Appeal Chamber was asked by the prosecution to revisit the question of the elements of rape as a crime against humanity or as an act of genocide. The Appeal Chamber adopted the *Kunarac* definition and thus retained the elements of non-consent and knowledge thereof, thereby requiring the prosecution to prove these beyond reasonable doubt. Reference to consent in the Rules of Procedure refers only to the circumstances when evidence of consent is admissible.⁸³

5 Women, Peace, and Security

In addition to the development of international humanitarian law through international criminal law, the political organs of the United Nations have addressed gendered crimes and crimes of sexual violence. On 31 October 2000 the UN Security Council adopted Resolution 1325 on Women, Peace, and Security, addressing the important role of women in the prevention and resolution of conflicts and in peace building. In June 2008 the Security Council built upon Resolution 1325 with Resolution 1820. This resolution linked sexual violence to the primary purpose of the Security Council in the maintenance of international

peace and security. It noted the jurisprudential developments confirming that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide, and stressed the need to end impunity with respect to these crimes. It demanded that parties to armed conflict take appropriate measures 'to protect civilians, including women and girls, from all forms of sexual violence' and spelled out certain measures such as enforcing appropriate military disciplinary measures, upholding the principle of command responsibility, training troops on the categorical prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence, vetting armed and security forces to take into account past actions of rape and other forms of sexual violence, and evacuation to safety of women and children under imminent threat of sexual violence.(p. 692)

Two Security Council Resolutions in 2009 continued the two-pronged approach of seeking enhancement of women's participation in relevant decision-making, and ensuring accountability for the commission of crimes of sexual violence. Security Council Resolution 1888, of 30 September 2009, reiterates much of Resolution 1820 and calls upon the UN Secretary-General to appoint a Special Representative 'to provide coherent and strategic leadership, [...] to address, at both headquarters and country level, sexual violence in armed conflict, while promoting cooperation and coordination of efforts among all relevant stakeholders'.⁸⁴ The Special Representative chairs UN Action against Sexual Violence in Armed Conflict, a network of 12 United Nations agencies established in order to enhance coordinated action and strengthen responses. The Secretary-General was also asked 'to deploy rapidly a team of experts to situations of particular concern with respect to sexual violence in armed conflict, working through the United Nations presence on the ground and with the consent of the host government, to assist national authorities to strengthen the rule of law'.

Resolution 1889, 5 October 2009, returned to women's participation in 'all stages of peace processes, particularly in conflict resolution, post-conflict planning and peacebuilding'. It encourages states to 'increase access to health care, psychosocial support, legal assistance and socio-economic reintegration services for victims of sexual violence, in particular in rural areas'. Security Council Resolution 1960, 16 December 2010, reaffirms the earlier Resolutions and the Council's commitment to the cessation of all acts of sexual violence. It adopts a 'naming and shaming' approach by requesting the Secretary-General to compile lists of those who are 'credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict' and goes further by indicating the use of such lists for 'more focused United Nations engagement with those parties', including potentially through sanctions.⁸⁵ The Security Council reiterates the importance of command responsibility and calls for the 'issuance of clear orders through chains of command prohibiting sexual violence'. In seeking implementation of Resolution 1960, the President of the Council has stressed the need for timely, verified, and reliable data which would assist in determining appropriate action, including possible targeted (p. 693) and graduated measures.⁸⁶ The Security Council has recalled its Resolutions on women, peace, and security in country-specific resolutions.⁸⁷

The Security Council has thus recognized the systemic use of sexual violence 'for political motivations and as a tactic of war'⁸⁸ and its adverse impact on the maintenance of international peace and security. It has called upon parties to conflict, states and institutions, to take concrete measures to prevent such violence, to protect civilians, especially women and children,⁸⁹ to strengthen legal provisions and mechanisms to combat impunity, and to address the medical and social-economic consequences of sexual violence. In a range of resolutions it has also instituted a zero-tolerance policy of sexual exploitation and abuse in UN peacekeeping operations⁹⁰ and has reiterated the importance of including

gender advisers, women protection advisers, and child protection advisers in UN missions.⁹¹

These Resolutions and Statements go a long way in recognizing the extent and pervasiveness of sexual violence in conflict and the importance of empowering women, for example through enhanced participation.⁹² Despite references, inter alia, to gender-based violence, gender advisers, and experts, the Resolutions focus 'in particular' on sexual violence against women and children, thereby conflating 'gender' and 'women' to the detriment of making more visible sexual violence against men. Unlike the Beijing Platform for Action, the resolutions do not make recommendations with respect to the reduction of military expenditures and the availability of armaments.⁹³

6 Conclusions: Tensions and Debates

Feminist activism and interventions have ensured that gender and sex-based crimes in armed conflict have become visible and acquired higher priority within the international legal order since the early 1990s. Such crimes are now explicitly recognized (p. 694) by the Security Council as constituting a threat to the maintenance of international peace and security and have been effectively included within the jurisdiction of the ad hoc international criminal Tribunals and the Statute of the ICC. Convictions have been achieved within the former and relevant charges laid before the latter. They have been moved up in the hierarchy of crimes.⁹⁴ However, there remain conflicting concerns: on the one hand are considerations which show that much more work is still needed to make international humanitarian law truly responsive to women's experiences of armed conflict; while on the other hand are arguments that these developments themselves undermine women's exercise of autonomy.

The implementation of international humanitarian law through international criminal tribunals is still limited. First, only limited numbers of perpetrators of sexual violence are ever brought to justice.⁹⁵ International criminal trials deal only with the most serious incidents of war crimes and crimes against humanity (explicitly so in the case of the ICC⁹⁶). Prosecutorial discretion means that not all such cases are subject to criminal charges and considerations such as the availability, willingness, and credibility of witnesses, the perceived relative importance of diverse charges as well as selected locations for investigation all impact upon decision-making with respect to laying charges. Decisions not to include, or to limit, such charges may be controversial,⁹⁷ as illustrated by the *Lubanga* case, the first completed trial before the ICC. Although the Trial Chamber heard witness evidence of the rape and sexual violence committed against girl soldiers,⁹⁸ no charges relating to sexual violence were brought. In a separate and dissenting (on particular issues) opinion, Judge Odio Benito expressed her disquiet that by excluding sexual violence from its understanding of 'direct participation in hostilities' the majority had rendered it invisible. She continued that such invisibility leads to discrimination 'against the victims of enlistment, conscription and use who systematically suffer from this crime as an intrinsic part of the involvement with the armed group'. She noted the gender-specific aspect of sexual violence in the potential consequence of pregnancy for girls 'that often lead[s] to maternal or infant's deaths, disease, HIV, psychological traumatisations and social isolation'.⁹⁹ These crimes should have been charged and (p. 695) evaluated separately. In setting out principles for determining appropriate reparations the Trial Chamber asserted that the Court 'should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence', ensuring a 'specialist, integrated and multidisciplinary approach'.¹⁰⁰ Nevertheless, in sentencing Lubanga, Judge Odio Benito found herself again in disagreement with the majority in Trial Chamber I, in particular with respect to what she considered their disregard of the damage caused by sexual violence to victims and their families.¹⁰¹ An expert witness had testified as to the post-traumatic stress disorder suffered by child soldiers following such events as experiencing or witnessing

‘killing or mutilation, severe physical or sexual assault, sexual abuse and rape’ and which could be long lasting. Again Judge Odio Benito emphasized the need to ‘keep in mind the differential gender effects and damages that these crimes have upon their victims’.

Acquittals where the evidence cannot sustain conviction of particular accused persons can also cause distress to victims. Unlike in the *Lubanga* case, charges of rape and sexual slavery were brought in the case against Mathieu Ngudjolo Chui.¹⁰² Witnesses had testified to ‘horrific attacks, rapes, gang rapes and enslavement’ that took place during the attack on Bogoro village in February 2003. The accused was acquitted on the grounds that it was not proved beyond a reasonable doubt that he was the commander of the relevant forces at the time of the attack. Although the ICC stressed that this did not mean that crimes had not been committed, or that the population had not suffered, the decision was nevertheless described as a devastating outcome to victims and survivors.¹⁰³ The trials that take place represent a selective and limited picture of the reality and therefore cannot truly convey the extent or circumstances of gendered crimes in armed conflict. At the same time, the mediation of witnesses’ narratives through the rules of evidence and procedure may inhibit their ability to provide the story they wish to tell.

The paucity of international criminal trials and the principle of complementarity in Article 1 of the Statute of the ICC make clear that the internalization of international criminal law into national legal systems and prosecution in national courts of international crimes, including those of gender-based and sexual violence, is a way forward. In this regard the announcement by the UK Foreign Secretary that the United Kingdom is seeking a Declaration from the G8 Foreign Ministers that rape and serious sexual violence amount to grave breaches of the Geneva Conventions, (p. 696) and that they are prepared to pursue domestic prosecution of such crimes on the basis of universal jurisdiction is welcome.¹⁰⁴

Secondly, and linked, while international humanitarian law is regulatory and protective, international criminal law is reactive and its remedies are only punitive. It fails to take account of the multiple harms generated by acts of sexual violence: ‘there is no discursive space to document the likelihood that victims of rape will face other secondary harms such as rejection, depression, destitution, and continuing prostitution’.¹⁰⁵ There is a practical need for international criminal law to recognize that many such witnesses are also victims of crime who are entitled to long-term financial and other remedies, such as medical care, support, shelters and refuges, resettlement, and retraining,¹⁰⁶ taking into account the gendered nature of the offences. Thirdly, inclusion of crimes against women within the canon of international criminal law does not address fundamental issues of power or question the ‘objectivity’ of the international legal system and its hierarchy based on gender. Focusing on specific crimes may exclude broader enquiry into the motives for such offences and result in a failure to ask important questions: Why is it that crimes of sexual violence against women are consistently committed both in armed conflict and non-conflict situations? What is the proper response of international criminal law to the gross inequalities of power that makes their commission so regular? Why does violence against women not stop when a cease-fire or negotiated settlement is achieved but continues in ways directly connected with conflict?¹⁰⁷ In sum, ‘[r]eparation must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women’s and girls’ lives’.¹⁰⁸

These critiques go to the nature of the legal response. Other critiques consider what Janet Halley has termed ‘governance feminism’—successful feminist insistence on the inclusion of crimes of sexual violence against women within the international legal system—as having become excessive with unconsidered consequences. Karen Engle noted that there were disagreements between feminists at the outset of the 1990s, with some arguing that ‘genocidal rape’ should be distinguished from ‘normal, everyday rape’ while others disagreed arguing that rape of women in conflict (p. 697) is nothing new, is committed by

all sides, and that focus on genocide distorts this reality. She suggests that even though this disagreement was diluted with the founding of the ad hoc criminal Tribunals, nevertheless the focus on criminal prosecution undermines women's political and sexual agency.¹⁰⁹

Halley argues that armed conflict has become routinely represented as rape and forms of sexual violence against women, rendering invisible other atrocities and defining women solely through their sexuality and reproductive capacity rather than as holistic beings.

This indeed could promote sexual violence through the 'weaponization' of rape. Halley finds especially problematic the issue of consent: can a woman consent to intercourse with a person from the opposing side in the coercive circumstances of armed conflict? When a woman consents to intercourse with one man hoping for some security from being raped by other men, and also for some food and other unavailable items, conceptual differences between survival, prostitution, enforced prostitution, collaboration, forced marriage, and rape become blurred. The anonymous 'Woman in Berlin' asks: 'What does it mean—rape? When I said the word for the first time aloud [...] it sent shivers down my spine. Now I can think it and write it with an untrembling hand [...] It sounds like the absolute worst, the end of everything—but it's not.'¹¹⁰

Similarities between the coercive circumstances of armed conflict and those that force women into prostitution outside of armed conflict are apparent, and, coupled with the continued myths about rape and implied consent, undermine the applicability of different legal regimes to armed conflict and so-called peacetime. As is apparent from the account of *the Woman in Berlin*, concentration on crimes of sexual violence conceals the many other gender-specific ways in which women experience armed conflict, such as disappearances of male family members, and destruction of property and food sources for women who are the primary carers within family and community. Halley's position has been challenged, for example by Hilary Charlesworth who argues that the inclusion of feminist ideas into international law is not in fact that great, and that it is important not to become 'dazzled by the inclusive language' and the concept of gender integration that has spread through the UN system.¹¹¹

Dianne Otto argues that 'governance feminism' is a misnomer: that the 'the institutional reception and management of feminist ideas' has divested them 'of their emancipatory content', making it more a matter of co-option than governance.¹¹² Otto, however, is concerned about the continued protective stance towards women (p. 698) that assumes their vulnerability, for example by the conjunction of 'women and children' and the zero tolerance response to sexual abuse committed by UN peacekeepers. This policy gives insufficient attention to 'the grinding poverty or the poorly resourced charity-based models of aid that produce economies of survival sex', diverting attention from the politics of social justice in order to 'save the UN's humanitarianism from scandal. It makes the survival of the "victims" it claims to protect even more precarious'.¹¹³ Otto's intention is not to 'understate the harm that can be inflicted by sexual violence, but rather to demystify it and suggest dealing with the problem in a way that is empowering for women'.¹¹⁴

Another concern is that focus on gender-based crimes against women minimizes those offences committed against men. As Adam Jones points out, 'non-combatant men have been and continue to be the most frequent targets of mass killing and genocidal slaughter, as well as a host of lesser atrocities and abuses'.¹¹⁵ He notes that a leading work on 'gendercide' refers only to such behaviours when directed at women.¹¹⁶ Nevertheless, lessening the unnecessary suffering of mostly male combatants has been the objective of international humanitarian law and asserting accountability for crimes committed against them has formed the bulk of the work of war crimes tribunals. However, other forms of

violence against men in armed conflict have remained less visible and accurate numbers of these offences will most probably never be known.

While acknowledging that the figures are nevertheless unlikely ever to equate to those relating to sexual violence against women, Sandesh Sivakumaran argues convincingly that this does not justify exclusive attention being given to female sexual violence.¹¹⁷ All sexual violence, whoever it is committed against, warrants attention from the international community. Indeed, breaking the silence about crimes committed against women has opened the door to the same with respect to men. As Sivakumaran notes '[i]n some respects, the situation facing male rape victims today is not so different from that which faced female victims, say, two centuries ago'.¹¹⁸ Further, sexual violence against males is part of the same context—gender dimensions of conflict—as that committed against females; understanding more about the causes, circumstances, and outcomes of one facilitates our greater understanding of, and therefore appropriate responses to, all kinds of sexual violence. In both manifestations of violence 'the constructions of masculinity and femininity and the (p. 699) stereotypes involved are similar'.¹¹⁹ Finally, this may assist in dispelling the stereotypes of women as victims and in need of protection and men only as perpetrators. Thus a more nuanced understanding of the role of gender in conflict can play a part in a transformation of gender relations.

These tensions demonstrate the complexity of gender-based crimes and crimes of sexual violence whether committed by or against women or men. It is evident that the somewhat blunt instruments of international humanitarian law and international criminal law are inadequate to address the multiple issues that are raised by their continuing commission. Nevertheless they are an important step and governments may find they cannot easily discount the formal legal commitments they have accepted. Without feminist critique and initiative, international criminal law would have continued to exonerate the most blatant gender-based crimes of sexual violence against women, thereby enhancing the expectation of impunity and allowing the unchallenged continuation of gender constructs.

Footnotes:

¹ J. Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa* (Cambridge: Cambridge University Press, 2001).

² The UN Committee on the Elimination of Discrimination against Women, defines gender-based violence against women as: 'violence that is directed against a woman because she is a woman or that affects women disproportionately'. The UN Committee on the Elimination of Discrimination against Women, General Recommendation No 19, 1992, Violence against Women.

³ *Prosecutor v Krstić*, IT-98-33-T, 2 August 2001 (TC), § 517.

⁴ *Krstić* (n 3), §§ 45, 46.

⁵ The ICTY Trial Chamber noted that 'military aged' 'should be understood in its broadest, non-technical sense as including the men and boys who were broadly defined by the Bosnian Serb authorities as being within the vicinity of military age.' *Prosecutor v Krstić*, IT-98-33-T, 2 August 2001 (TC), § 1, note 3. The victims were all defined by their gender.

⁶ OSCE, *Kosovo/Kosova As Seen, As Told* (Kosovo Verification Mission, 1999), Ch 15.

⁷ For example, *Prosecutor v Pauline Nyiramasuhuko*, ICTR-97-21.

⁸ For example, *Prosecutor v Biljana Plavšić*, IT-00-39&40/1-S. The accused was a member of the Bosnian-Serb leadership. In sentencing, a number of factors were taken into account

as both aggravating and mitigating factors, including her age and her behaviour after the conflict, but her sex was apparently irrelevant.

⁹ For examples of how such a link may be established, see Report of the Secretary-General on the implementation of Security Council Resolutions 1820 (2008) and 1888 (2009), A/65/592-S/2010/604, 24 November 2010, § 5.

¹⁰ L. Moreno-Ocampo, 'Sexual Violence as International Crime: Interdisciplinary Approaches to Evidence', 35 *Law and Social Inquiry* (2010) 839–46 at 841.

¹¹ For example, *Prosecutor v Brđanin*, IT-99-36 (male detainees forced to commit oral sex on each other); *Prosecutor v Mucic*, IT-96-21 (brothers forced to commit oral sex on each other and sexual abuse).

¹² S. Sivakumaran, 'Sexual Violence against Men in Armed Conflict', 18 *European Journal of International Law* (2007) 253–76 at 255. Sivakumaran notes its occurrence in El Salvador, Chile, Guatemala, Argentina, Greece, Northern Ireland, Chechnya, Turkey, former Yugoslavia, Sri Lanka, Iraq-Kuwait, Coalition-Iraq, Sino-Japanese war, Liberia, Sierra Leone, Kenya, Sudan, the Central African Republic, Burundi, Uganda, Rwanda, the Democratic Republic of the Congo, Zimbabwe, and South Africa.

¹³ M. Urban Walker, 'Gender and Violence in Focus: A Background for Gender Justice in Reparations', in R. Rubio-Marín (ed), *The Gender of Reparations* (Cambridge: Cambridge University Press, 2009), 18.

¹⁴ K. Bennoun, 'Do We Need New International Law to Protect Women in Armed Conflict?', 38 *Case Western Reserve Journal of International Law* (2006) 363–92 at 370.

¹⁵ UN Secretary-General, *Conflict-related Sexual Violence*, UN Doc A/66/657-S/2012/33, 23 February 2012, § 16.

¹⁶ UN Secretary-General, *In-depth Study on All Forms of Violence against Women*, UN Doc A/61/122/Add.1, § 145.

¹⁷ UN Doc A/61/122/Add.1, § 146.

¹⁸ UN Secretary-General, *Conflict-related Sexual Violence*, UN Doc A/66/657-S/2012/33, 23 February 2012.

¹⁹ Report of the independent international commission of inquiry on the Syrian Arab Republic, A/HRC/21/50, 16 August 2012, §§ 96–102.

²⁰ *Prosecutor v Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute, ICC-01/05-01/08, 15 June 2009, § 165.

²¹ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, ICC-01/04-01/07, 30 September 2008, § 443.

²² *Lubanga Dyilo* (n 22), §§ 70–3.

²³ *Prosecutor v Brima, Kamara, Borbor*, SCSL-2004-16-A, (AC) 22 February 2008, 190 (footnotes omitted).

²⁴ *Prosecutor v Kunarac, Kovač and Vuković*, IT-96-23-T and IT-96-23/1-T (TC) 22 February 2001 (also known as 'the Foča case').

²⁵ N. Puechguirbal, 'Greater Need, Fewer Resources: Ensuring Adequate Health Care For Women During Armed Conflict' (International Committee of the Red Cross, 3 March 2009) available at <<http://www.icrc.org/web/eng/siteeng0.nsf/html/women-health-interview-010309>>.

- ²⁶ ‘Sexual and gender-based violence is endemic, occurring too often and in every aspect of the lives of displaced women and girls and their families.’ UN High Commissioner for Refugees, *Survivors, Protectors, Providers: Refugee Women Speak Out Summary Report* (2011), 16.
- ²⁷ International Civil Society Action Network, *What the Women Say Voices from the Ground: Syria’s Humanitarian Crisis* (Winter 2013).
- ²⁸ UNSC Res 1820, 19 June 2008; UNSC Res 1960, 16 December 2010; UNSC Res 2106, 24 June 2013.
- ²⁹ C. Lindsey, ‘Women and War—An Overview’, 839 *International Review of the Red Cross* (2000) 561, lists issues relating to women combatants, missing persons and widowhood, displaced women, and women in detention as well as sexual violence in armed conflict.
- ³⁰ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, §§ 1275–9.
- ³¹ Report of the United Nations Fact-Finding Mission on the Gaza Conflict (n 30).
- ³² P. Viseur Sellers, ‘The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law’, in G.K. McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law*, vol 1 (The Hague: Kluwer Law International, 2000), 263.
- ³³ H. Grotius, *The Rights of War and Peace* Book III (ed Richard Tuck) (Indianapolis: Liberty Fund, 2005), 1301.
- ³⁴ General Orders No 100, 24 April 1863, Art 44.
- ³⁵ Regulations concerning the Laws and Customs of War on Land, 1899.
- ³⁶ Convention between the United States of America and Other Powers, relating to Prisoners of War, Geneva, 27 July, 1929.
- ³⁷ Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Art 14.
- ³⁸ Convention Relative to the Treatment of Prisoners of War (n 37), Art 25.
- ³⁹ Convention Relative to the Treatment of Prisoners of War (n 37), Art 29.
- ⁴⁰ Convention Relative to the Treatment of Prisoners of War (n 37), Arts 97 and 108.
- ⁴¹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945, Charter, Art 6; International Military Tribunal for the Far East (IMTFE) Tokyo, 19 January 1946 Charter, Art 5.
- ⁴² Control Council Law, No 10, 1945, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Art II(1)(c) includes rape.
- ⁴³ Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (GC IV).
- ⁴⁴ Lindsey points out that honour is more complex than simply a ‘value’ term but that it is women that must be protected; Lindsey (n 29), 567.
- ⁴⁵ GC IV, Arts 146, 147.
- ⁴⁶ J. Gardam, ‘Women and the Law of Armed Conflict: Why the Silence?’, 46 *ICLQ* (1997) 72.
- ⁴⁷ UNSC Res 820, 17 April 1993.

- ⁴⁸ ICTY Statute, UNSC Res 827, 25 May 1993, Art 5(g).
- ⁴⁹ ICTR Statute, UNSC Res 955, 8 November 1994, Art 3(g).
- ⁵⁰ Report of the Secretary-General on the implementation of Security Council Resolutions 1820 (2008) and 1888 (2009), UN Doc A/65/592-S/2010/604, 24 November 2010, § 4.
- ⁵¹ A much fuller definition is given by the Committee on the Elimination of Discrimination against Women, General Recommendation No 28, CEDAW/C/2010/47/GC.2, 19 October 2010, § 5.
- ⁵² Established by Agreement between the United Nations and Sierra Leone under UNSC Res 1315, 14 August 2000.
- ⁵³ Stability Pact, 2006, Art 11.
- ⁵⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted UNGA Res 55/25, 15 November 2000.
- ⁵⁵ Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003.
- ⁵⁶ CETS No 210, 11 May 2011 (Istanbul Convention).
- ⁵⁷ See also the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Maputo, 11 July 2003, Art 11.
- ⁵⁸ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Art 1(2).
- ⁵⁹ Moreno-Ocampo (n 10), 843.
- ⁶⁰ UN Department of Peacekeeping Operations, *Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820* (New York, 2010), 29, 46, 59.
- ⁶¹ UN Department of Peacekeeping Operations (n 60), 25.
- ⁶² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1984), Art 1; Elements of Crime, ICC-ASP/1/3 (part II-B), 9 September 2002, Art 7(1)(f).
- ⁶³ Convention on the Prevention and Punishment of the Crime of Genocide (1948).
- ⁶⁴ *Kunarac*, (n 24).
- ⁶⁵ *Kunarac* (n 24), §§ 542-3.
- ⁶⁶ *Kunarac* (n 25), § 539.
- ⁶⁷ *Kunarac* (n 24), § 740.
- ⁶⁸ G. Hicks, *The Comfort Women: Japan's Brutal Regime of Enforced Prostitution in the Second World War* (New York: W.W. Norton & Co, 1995); C. Chinkin 'Peoples' Tribunals: Legitimate or Rough Justice?', 24 *Windsor Yearbook of Access to Justice* (2006) 201-20.
- ⁶⁹ *Kunarac* (n 65), § 523.
- ⁷⁰ *Prosecutor v Brima, Kamara and Kanu*, SCSL-04-16-T, 20 June 2007.
- ⁷¹ *Brima, Kamara and Kanu* (n 70), §§ 27-36 (sep op J Doherty).
- ⁷² *Brima, Kamara and Kanu* (n 70), §§ 190-5.

- ⁷³ Genocide Convention, Art II(d).
- ⁷⁴ *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998, §§ 507–8.
- ⁷⁵ *Prosecutor v Jean-Paul Akayesu*, (n 74), § 507.
- ⁷⁶ For a discussion of ‘rape myths’ see *Vertido v the Philippines*, Communication No 18/2008, 1 September 2010, CEDAW/C/46/18/2008.
- ⁷⁷ *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998, § 598.
- ⁷⁸ *Prosecutor v Furundžija*, IT-95-17/1-T, 10 December 1998, § 185.
- ⁷⁹ *Prosecutor v Furundžija*, IT-95-17/1-T, 10 December 1998, § 183.
- ⁸⁰ *Kunarac and others* (n 24), § 440.
- ⁸¹ *Kunarac and others* (n 24), § 460.
- ⁸² *Prosecutor v Kunarac and others*, IT-96-23/1-A, 12 June 2002, §§ 128–33.
- ⁸³ *Gacumbitsi v Prosecutor*, ICTR-01-64 –A, 7 July 2006, §§ 147–57.
- ⁸⁴ In February 2010 Margot Wallström from Sweden was appointed to this post; in 2012 Zainab Bangura from Sierra Leone took up the position.
- ⁸⁵ The 2012 report of the Special Representative on sexual violence in armed conflict lists a number of armed groups as parties to armed conflicts in the Central African Republic, Côte d’Ivoire, the DRC and names a leader (n 18); Annex, List of parties that are credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict on the Security Council agenda. See also UNSC Res 2078, 28 November 2012 (financial and travel measures applicable to individuals in the DRC committing serious violations involving children or women in armed conflict, including killing and maiming, sexual violence, abduction, and forced displacement). UNSC Res 2106, 24 June 2013, § 13 urges sanctions committees to apply targeted sanctions against perpetrators.
- ⁸⁶ UN Doc S/PRST/2012/3, 23 February 2012.
- ⁸⁷ For example, UNSC Res 2085, 20 December 2012 (Mali); UNSC Res 2062, 26 July 2012 (Côte D’Ivoire); UNSC Res 2121, 10 October 2013 (Central African Republic).
- ⁸⁸ UN Doc S/PRST/2013/2, 12 February 2013.
- ⁸⁹ The Security Council has repeated its condemnation of ‘sexual and other forms of violence committed against civilians in armed conflict, in particular women and children’ in other resolutions; eg UNSC Res 1674, 28 April 2006, on Protection of civilians in armed conflict.
- ⁹⁰ For example, UNSC Res 2086, 21 January 2013, United Nations Peacekeeping Operations.
- ⁹¹ UN Doc S/PRST/2013/2, 12 February 2013.
- ⁹² On the limited impact of UNSC Res 1325, see C. Bell and C. O’Rourke, ‘Peace Agreements or Pieces of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and their Agreements’, 59 *ICLQ* (2010) 941–80. UNSC Res 2122, 18 October 2013 emphasizes the importance of implementation of Resolution 1325.
- ⁹³ Beijing Platform for Action, § 143.
- ⁹⁴ J. Halley, ‘Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict’, 9 *Melbourne Journal of International Law* (2008) 78, 83.

- ⁹⁵ UNSC Res 1960, 16 December 2010.
- ⁹⁶ Statute of the ICC, Art 1.
- ⁹⁷ For example, while celebrating the indictment in *Kunarac* as ‘unparalleled in international, regional or national courts’, Kelly Askin considered omission of ‘appropriate charges of genocide’ as a shortcoming; K. Askin, ‘Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status’, 93 *AJIL* (1999) 97–123 at 118; Askin also regretted that the decision did not use the term ‘sexual slavery’ referring only to enslavement; K. Askin, ‘Prosecuting Wartime Rape and other Gender-related Crimes under International Law: Extraordinary Advances, Enduring Obstacles’, 21 *Berkeley Journal of International Law* (2003) 288–349 at 340.
- ⁹⁸ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment of 14 March 2012.
- ⁹⁹ *Thomas Lubanga Dyilo* (n 98), separate and dissenting opinion, Judge Odio-Benito, §§ 15–20.
- ¹⁰⁰ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, 7 August 2012, Decision establishing the principles and procedures to be applied to reparations, §§ 207–8.
- ¹⁰¹ *Lubanga Dyilo* (n 22), 40ff.
- ¹⁰² *Prosecutor v Mathieu Ngudjolo Chui*, ICC-01/04-02/12-4, Judgment of 18 December 2012.
- ¹⁰³ Press statement by Brigid Inder, Women’s Initiatives for Gender Justice, 18 December 2012.
- ¹⁰⁴ Parliamentary Debates, House of Commons, 14 February 2013, col 1141, available at <<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130214/debtext/130214-0003.htm#13021465000003>> The Declaration was adopted by the G8, 11 April 2013.
- ¹⁰⁵ R. Dixon, ‘Rape as a Crime in International Humanitarian Law: Where to From Here?’, 13 *European Journal of International Law* (2002) 697–720 at 705.
- ¹⁰⁶ UNGA Res 40/34, 29 November 1985, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; UNGA Res 60/147, 16 December 2005, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.
- ¹⁰⁷ Cf S. Marks, ‘Human Rights and Root Causes’, 74 *Modern Law Review* (2011) 57–78.
- ¹⁰⁸ Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, 2007, § 3H, available at <http://www.womensrightscoalition.org/site/reparation/signature_en.php>.
- ¹⁰⁹ K. Engle, ‘Feminism and its (Dis)contents: Criminalizing Wartime Rape’, 99 *American Journal of International Law* (2005) 778–816 at 780.
- ¹¹⁰ Anonymous, *A Woman in Berlin* (Virago, 2005), 83.
- ¹¹¹ H. Charlesworth, ‘Talking to Ourselves: Should International Lawyers Take a Break from Feminism?’, in S. Kouvo and Z. Pearson (eds), *Between Resistance and Compliance? Feminist Perspectives on International Law* (Oxford: Hart Publishing, 2011), 17–33.
- ¹¹² D. Otto, ‘The Exile of Inclusion: Reflections on Gender issues in International Law over the Last Decade’, 10 *Melbourne Journal of International Law* (2009) 11–26.

- 113** D. Otto, 'Making Sense of Zero Tolerance Policies in Peacekeeping Sexual Economies', in V. Munro and C.F. Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Oxon: Glass House Press, 2007).
- 114** D. Otto, 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade', 10 *Melbourne Journal of International Law* (2009) 11–26 at 24.
- 115** A. Jones, 'Gendercide and Genocide', 2 *Journal of Genocide Research* (2000) 185–211 at 186.
- 116** Jones (n 115), discussing M. Warren, *Gendercide: The Implications of Sex Selection* (Totowa, NJ: Rowman & Allanheld, 1985).
- 117** S. Sivakumaran, 'Sexual Violence against Men in Armed Conflict', 18 *European Journal of International Law* (2007) 253–77 at 260.
- 118** Sivakumaran (n 117), 253.
- 119** Sivakumaran (n 117), 260.

(p. 700) Chapter 28 Armed Conflict and Forced Migration

A Systemic Approach To International Humanitarian Law, Refugee Law and Human Rights Law

1 Introduction

ALTHOUGH armed conflicts constitute the main cause of forced migrations, the applicable normative framework is plagued by recurrent ambiguities and controversies. Three decades ago, Dinstein asserted that ‘in its present form international law does not deal in a systematic fashion with the whole spectrum of the problem of refugees in armed conflict. [...] Still there are several provisions relevant to the issue which are dispersed in various legal instruments’.¹ These instruments are scattered throughout three main branches of international law: international humanitarian (p. 701) law, refugee law, and human rights law. Their concurrent applicability in times of armed conflict is arguably both the solution and the problem. On the one hand, the great variety of applicable instruments reflects the multifaceted dimensions of forced migration and its cross-cutting character. On the other hand, such a fragmentation undermines the understanding and cogent application of the existing legal norms.

While sharing the same purpose of protecting individuals against abuses, international humanitarian law, refugee law, and human rights law have largely evolved around their own specific sources, institutions, and ethos. Meanwhile, the academic literature has mainly focused on the interfaces between refugee law and humanitarian law to the detriment of a more holistic approach,² thereby excluding human rights law as a source of refugee protection in armed conflict.³

Scholars’ discussions about the applicable legal regime have been further biased by the natural temptation of specialists to celebrate the virtues of their own discipline. Humanitarian and refugee lawyers have thus been keen to highlight the centrality of their respective fields by relying ironically on the same argument: *lex specialis* (p. 702) *derogat lex generalis*, though they are not always clear about the exact meaning and impact of this maxim.⁴ From a systemic perspective, this superficially attractive maxim is, however, too simplistic to provide a cogent and predictable frame of analysis. It raises more questions than it actually solves for two main reasons. First, resort to *lex specialis* presupposes a conflict of norms which proves to be extremely rare between international humanitarian law, human rights law, and refugee law. As will be shown later, when this arises, such a conflict is resolved in favour of the most protective treatment essentially provided by human rights law, without regard to the alleged speciality of the prevailing norm. Secondly, the *lex specialis* maxim says nothing about what should be ‘general’ or ‘special’, and how to interpret these vague terms.⁵ The subjectivity inherent to such assessment is exemplified by the contradictory interpretations raised by the position of the International Court of Justice on this issue.⁶ There are now as many possible criteria for determining the special or general nature of a particular norm as the number of authors undertaking such an exercise. Some attempt to combine the precision of a norm with the ‘systemic goals of the international legal order’,⁷ whereas others encapsulate ‘the operation of *lex specialis* as an aspect making pragmatic judgements about relative “generality” and “speciality”, about what is “normal” and what “exceptional”’.⁸

Given the weakness of this approach, the normative interaction between international humanitarian law, refugee law, and human rights law is more convincingly understood through the complementarity approach as notably endorsed by the United Nations (UN) Human Rights Committee.⁹ This last approach differs from (p. 703) the *lex specialis* approach in two essential respects. It first posits the cumulative application of overlapping norms on a same-subject matter, instead of the exclusive application of one specific norm overriding another. This approach favouring the simultaneous application of humanitarian law, refugee law, and human rights law is more in line with the prevailing interstate practice. Alongside the General Assembly,¹⁰ and the Human Rights Council,¹¹ the Security Council has steadily reaffirmed that 'parties to armed conflict comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law'.¹²

The second key difference with the *lex specialis* approach relies on the criteria to be used in resorting to the complementarity approach. Reflecting the ultimate objective of these three branches of international law, the cumulative application of humanitarian law, refugee law, and human rights law requires the most protective norm to be implemented. The most favourable treatment further constitutes a well-established feature of both human rights law and refugee law.¹³ While this last principle is also occasionally endorsed by some provisions of humanitarian law,¹⁴ the Martens Clause is apt to play a similar function.

From this angle, a strict compartmentalization of the three branches of international law is artificial and even counterproductive for the purpose of ensuring effective protection. Contrary to the common belief of many humanitarian and refugee law specialists, the most specific norm is not always the most protective one. In fact, rather the contrary is true. The present Chapter will show that the complementarity approach not only constitutes the most cogent frame of analysis for capturing the multifaceted interactions between humanitarian law, refugee law, and human rights law. It also paves the way for a human rights-based approach to armed conflicts.

Three scenarios are identified in this Chapter: (i) refugees in war, (ii) refugees fleeing war, and (iii) refugees in post-war contexts. For each scenario a comparative assessment of the three branches of international law comes to the same conclusion: while humanitarian and refugee law still play a non-negligible role, they are not the panacea in terms of protection. By contrast, human rights law fulfils the central function of filling the gaps in protection left by humanitarian and refugee law.(p. 704)

2 Refugees in War

Refugees caught in armed conflicts represent an archetypal case for testing the potential of the complementarity approach. The overlapping between international humanitarian law, refugee law, and human rights law is not disputable in this particular situation and their cumulative application reveals some unexpected conclusions. Although international humanitarian law is supposed to be the main branch of international law applicable in times of armed conflict, closer scrutiny of its specific norms proves rather frustrating (Section A). Indeed, international humanitarian law has little to provide for protecting the specific needs of refugees caught up in armed conflicts. The simultaneous application of refugee law and human rights law accordingly proves to be a crucial source of protection (Section B).

A. International humanitarian law and the limits of protection

The impact of international humanitarian law on the refugee protection regime is particularly complex and ambiguous. On the one hand, its primary function in the field of forced migration is a preventive one. The explicit prohibition of forced displacement aims to prevent civilians from becoming refugees.¹⁵ On the other hand, international humanitarian

law is relatively indifferent to the specific needs of refugees who are in the territory of a party to an armed conflict.

Among the 576 articles of the Geneva Conventions and their Protocols, only three provisions explicitly refer to refugees.¹⁶ Furthermore, all of them are exclusively applicable in times of international armed conflict and occupation. By contrast, international humanitarian law does not contain any specific provision on refugees in non-international armed conflicts despite these representing the majority of armed conflicts around the world. Neither Common Article 3 of the Geneva Conventions and AP II, nor the International Committee of the Red Cross (ICRC) Customary Study specifically addresses refugees.¹⁷ This curious omission does not mean that refugees are left without protection by international humanitarian law. (p. 705) They are still protected as civilians provided they are not directly participating in hostilities. Nevertheless, besides the general protection of the civilian population as a whole, refugees are not conceived by international humanitarian law as persons in need of specific protection in non-international armed conflicts.

Even in international armed conflicts, international humanitarian law still apprehends refugees through the particular prism of its own concepts and categorization schemes. From this angle, the distinction between combatants and non-combatants is one of 'the cardinal principles [...] constituting the fabric of humanitarian law'.¹⁸ Though it is frequently assumed that 'one cannot be a refugee and a fighter at the same time',¹⁹ this question remains open both in law and practice. It even constitutes the prerequisite for identifying the relevant applicable norms under international humanitarian law.

Refugees may fall within the definition of 'combatant' under Article 4 of GC III as supplemented by Article 43(1) of AP I, when they belong to a party to the conflict—other than their country of origin—fighting against the latter or any other states.²⁰ If not, refugees are civilians and accordingly benefit from the protection against the effect of hostilities. The crux of the matter is then whether refugees are 'protected persons' under international humanitarian law. There is, however, no unequivocal answer to this question. International humanitarian law instead provides a piecemeal frame of protection which depends on a complex set of various factors, including the ratification of AP I, the nationality of refugees, and the time of their arrival on the territory of states parties. While some are protected persons under AP I, the great majority of refugees caught in international armed conflicts are not covered by this last instrument. In such a case, they must accordingly fulfil the ordinary conditions required by international humanitarian law to be considered as protected persons.(p. 706)

(i) Refugees as protected persons under AP I

The question whether refugees are as such 'protected persons' remained surprisingly unclear until 1977 with the adoption of AP I. Its Article 73 explicitly acknowledges that refugees are protected persons 'within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction'.²¹ As protected persons, they benefit from a substantial range of fundamental guarantees, including most notably the right to leave,²² the grounds and procedures governing their internment or assigned residence,²³ as well as protection against deportation and forcible transfer.²⁴

However, Article 73 subordinates their status of protected persons to the fulfilment of two cumulative conditions. First, they must have been recognized as refugees 'under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence'. The relevant international instruments obviously include the Geneva Convention relating to the Status of Refugees as amended by its Protocol, the Organization of African Unity (OAU) Convention governing the Specific Aspects of Refugee Problems in Africa, and the European Union Qualification

Directive. According to the ICRC Commentary, they also cover non-binding resolutions,²⁵ including notably the 1984 Cartagena Declaration on Refugees.²⁶

The second condition required by Article 73 to be recognized as a protected person is much more significant and restrictive: they must have been considered as refugees 'before the beginning of hostilities'. Those who have become refugees after the outbreak of hostilities, and most probably because of them, are thus excluded. From a refugee protection perspective, this represents the major shortcoming of international humanitarian law which has been criticized as introducing 'an arbitrary and unnecessary distinction, in direct contradiction to the humanitarian principles of protection of the Geneva Conventions'.²⁷(p. 707)

Such a difference in treatment between those recognized as refugees before the beginning of hostilities and those recognized after is apparently based on the fear of many states that a more protective role would encourage desertion and treason.²⁸ The rationale behind such far-reaching exclusion is, however, not convincing for two main reasons. First, the alleged risk of desertion is hardly relevant since refugees must be civilians to be considered as protected persons under GC IV as supplemented by Article 73. Secondly, it is precisely when civilians are fleeing their own country because of hostilities that the need for protection is at its greatest.

(ii) Refugees as non-nationals of a party to the conflict

If refugees do not fulfil the conditions imposed by Article 73, or if they are in the hands of a state not party to AP I, they may fall under the general definition of protected persons contained in Article 4 of GC IV. This last provision covers most—but not all—refugees once they are 'in the hands of a Party to the conflict or Occupying Power of which they are not nationals'. In such cases, they will benefit from the full range of guarantees contained in GC IV as well as the specific protection granted by Article 44. This last provision acknowledges that refugees who are by definition not protected by their state of origin cannot be treated as an 'enemy alien' because they simply have the nationality of the other party to the conflict.²⁹ Article 44 thus mitigates the traditional criterion of nationality, which determines the applicability of GC IV, in order to take into account the particular situation of refugees.

Though limited to nationals of the other state party to an international armed conflict, the *rationae personae* scope of Article 44 is more inclusive than Article 73 of AP I. Contrary to the latter, the former is not confined to those who were recognized as refugees before the beginning of hostilities, but also covers those who fled their own country during the conflict. Furthermore, Article 44 retains a broad and factual definition of the term 'refugee' as referring to all nationals of an enemy state 'who do not, in fact, enjoy the protection of any government'. It is thus not limited to the refugees under the UN Convention relating to the Status of Refugees which was adopted two years after GC IV and then amended in 1967 by the New York Protocol. Article 44 also includes beneficiaries of other complementary forms of protection in the state of asylum, whether such protection is based on its domestic law or other international instruments.³⁰(p. 708)

However, the potentially significant number of persons covered by Article 44 is undermined by the vague and permissive obligation contained therein. As confirmed by the drafting history,³¹ the ICRC Commentary,³² and the legal doctrine,³³ the provision's loose wording recommends that belligerents do not consider refugees as enemies exclusively because of their nationality. The Detaining Power thus retains a particularly broad discretion in considering whether or not refugees should be treated as enemy nationals. Hence, Article 44 does not prevent the Detaining Power from taking security measures, such as internment, against refugees who are considered as a danger to its own security.

(iii) Refugees as nationals of neutral, co-belligerent, or occupying state

The general definition of 'protected persons' under GC IV does not include all refugees who are non-nationals of a party to an international armed conflict. Article 4(2) explicitly excludes nationals of a neutral or co-belligerent state which has 'normal diplomatic representation' in the belligerent state on whose territory they are located or nationals of a co-belligerent state with diplomatic relations with the occupying state in whose hands they are.³⁴ In such cases, refugees who have fled from neutral or co-belligerent states will only benefit from the general protection afforded to the civilian population, unless the concerned state has ratified AP I and the refugees have been recognized as such before the outbreak of the hostilities.

Furthermore, nationals of an Occupying Power who are in the territory of the occupied state are not covered by the definition of protected person because Article 4 is circumscribed to non-nationals. Though not considered as protected persons, refugees who are nationals of the Occupying Power are specifically addressed by Article 70(2) of GC IV. The wording of this last provision is again not a model of clarity and needs to be quoted *in extenso*:

Nationals of the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

(p. 709)

Article 70(2) is the only provision in the whole Fourth Geneva Convention which explicitly applies to nationals of a state party to an international armed conflict. Such a departure from the traditional stance of international humanitarian law remains nevertheless in line with the general duty of the Occupying Power to respect the laws in force in the occupied country. As stressed by the ICRC Commentary, the rationale of Article 70(2) 'is derived from the idea that the right to asylum enjoyed by them [ie refugees] before the occupation began must continue to be respected by their home country, when it takes over control as Occupying Power in the territory of the country of asylum'.³⁵

However, the protection granted by international humanitarian law should not be overestimated. Article 70(2) suffers from three main drawbacks. First, the prohibition expressed in this provision is limited to some specific measures only: arrest, prosecution, conviction, and deportation. As observed by Dinstein, it says nothing about the other measures which may be taken against refugees (such as confiscation of property or denial of religious freedom).³⁶ This represents a considerable lacuna where Article 73 of AP I does not apply.

Secondly, similarly to Article 73 of AP I, Article 70(2) of GC IV is confined to refugees who reached the occupied territory 'before the outbreak of the hostilities'.³⁷ This *rationae temporis* qualification creates a dangerous protection gap. Indeed, nationals who fled from their own country during a conflict are the most vulnerable to acts of revenge by their state of origin when the latter occupies the territory of the asylum state.³⁸ States' obsession not to encourage desertion and treason is further confirmed by this last limitation.

Thirdly, the prohibition contained in Article 70(2) is not absolute. It may be exposed to two significant exceptions which reflect the conflicting interests at stake. First, refugees can be arrested, prosecuted, convicted, and deported for non-political offences committed before the hostilities, provided that these offences would have justified extradition in time of peace under the law of the occupied territory. This subtly qualified exception endorses the

traditional distinction made in refugee law between ordinary criminals and refugees.³⁹ It is aimed at ensuring that refugees are not sanctioned for the reasons they have fled their own state when it becomes (p. 710) the Occupying Power. However, the risk of abuse is still apparent since Article 70(2) says nothing about the procedure to be followed, and in particular whether this is up to the Occupying Power or the occupied authorities to interpret and apply the conditions laid down therein.

The other exception is even more straightforward, as it refers to any 'offences committed after the outbreak of hostilities' without any other qualifications. From the angle of international humanitarian law, the refugee is still considered as a national of the Occupying Power. He retains, as such, some duties of allegiance towards his own country in times of armed conflict and must abstain from activities which may be construed as treason.⁴⁰ In an echo of the concern of states, the ICRC Commentary assumes that 'once war has broken out, [...] the higher interest of the State take precedence over the protection of individual'.⁴¹

As exemplified by Article 70(2), the reach of international humanitarian law is equivocal to say the least. Overall, while providing a vital protection to civilians, it has little to offer to refugees as a specific group of concern. Refugee protection under international humanitarian law thus remains incomplete and fragmented. Under both treaty and customary law, international humanitarian law offers no specific protection to refugees caught in non-international armed conflicts. Even in international armed conflict, it does not provide a tailored, specific, and comprehensive regime of refugee protection. International humanitarian law attempts instead to encapsulate refugees within its own notion of protected persons. By doing so, it gives the impression of trying to resolve a problem it has itself created.

More fundamentally, enclosing refugees under the generic label of protected person fails to address their specific needs. On the one hand, the definition of protected persons under international humanitarian law does not include all refugees and other persons in need of protection. Beside the cases mentioned before, it excludes all nationals of a belligerent state who flee to a state that is not a party to the conflict during and/or because of the hostilities. On the other hand, even if refugees correspond to the definition of protected persons, they benefit as such from the same guarantees as ordinary aliens within the territory of a party to the conflict. As demonstrated above, the only two provisions specifically devoted to refugees in GC IV are conspicuously weak and ambiguous.

B. International refugee law and human rights law as a vital source of protection in armed conflicts

Because of the limited protection offered by humanitarian law, refugee law and human rights law are bound to play essential roles. This is not only the case in (p. 711) non-international armed conflicts but also in international armed conflicts, where refugees are not protected persons under international humanitarian law or, even when they are, because of the relative lack of a tailored and specific protection granted by this last branch of international law. The concurrent application of refugee law and human rights law highlights the crucial importance of the complementarity approach for ensuring effective protection in armed conflicts. The reach and degree of protection offered by the two branches of law are nevertheless quite different from one another. Thus as we saw with humanitarian law, the most specific norms enshrined in refugee law are not necessarily the most protective ones when compared to human rights law.

(i) International refugee law in times of armed conflict: between legal mimicry and emancipation from international humanitarian law

International refugee law is as indifferent to armed conflict as international humanitarian law is to refugees. This comes as no surprise as it reflects the segmented approach which prevailed at the end of World War II when the first universal treaties for the protection of individuals were adopted. As a result of such compartmentalization, refugees are approached by humanitarian law within the interstices of its particular norms, whereas refugee law refers to armed conflicts in a transversal and occasional manner.

Nevertheless, the few references to armed conflict in the 1951 Convention relating to the Status of Refugees (Refugee Convention) epitomize the cross linkages and the mutually supportive interactions between refugee law and humanitarian law. The provisions specifically addressing armed conflict in the Refugee Convention are clearly informed by international humanitarian law. The first and most obvious reference appears in the refugee definition.⁴² Article 1(F)(a) excludes from the benefit of the Refugee Convention a refugee who 'has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes'. The grave breaches of GC IV and AP I are instrumental for defining war crimes under the exclusion clause of the refugee definition.⁴³ Though less ratified than the former international instruments, the Rome Statute of the ICC is also bound to play a substantial role in defining the crimes covered by Article 1(F)(a). (p. 712)

Another implicit reference to international humanitarian law may be found in Article 8 of the Refugee Convention⁴⁴ which reproduces in substance Article 44 of GC IV.⁴⁵ Their respective scope nevertheless differs slightly. On the one hand, exemption from exceptional measures under international refugee law is broader than its humanitarian law counterpart, since Article 8 applies both in time of armed conflict and peace.⁴⁶ On the other hand, as mentioned above, the *rationae personae* scope of Article 44 is not circumscribed by the refugee definition under the Refugee Convention.⁴⁷

In any event, under both branches of international law, the relevant provisions suffer from the same weakness: exceptional measures may be taken against refugees provided that they are not applied on the sole ground of their nationality. As underlined during the drafting of the Refugee Convention, 'States would be at liberty to advance a variety of reasons, other than that of nationality, why refugees should be subjected to the measures in question'.⁴⁸ According to commentators, this would be notably the case when 'a refugee, in spite of his genuine fear of persecution by the regime in power in his country of origin, contributes or has contributed to the war effort of that country, or otherwise carries on or has been participating in activities which the measure in question aims at suppressing'.⁴⁹ The main concern of the drafters was clearly the fear of fifth columnists, namely 'enemy aliens professing to be refugees',⁵⁰ carrying out sabotage, espionage and other related activities against the asylum state. (p. 713)

States' reduced concern towards refugees in times of armed conflict is further displayed by the particularly broad derogation clause contained in Article 9 of the Refugee Convention:

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Article 9 is clearer on what it does not say than on what it does. It does not provide any particular procedure to be followed for invoking such a derogation clause. It does not identify nonderogable rights, nor specify the types and the limits of the measures which can be taken under Article 9. Though virtually applicable to all provisions of the Refugee Convention, this derogation clause has raised considerable debates about its exact scope and content. Authors are divided as to whether it applies in individual cases or in massive influx, and whether it concerns only asylum-seekers during the examination of their request, or all refugees formally recognized as such.⁵¹

In any event, the vague and permissive wording of this provision offers a considerable margin of appreciation. Davy even argues that 'Article 9 provides a *carte blanche*: contracting States may introduce measures of control as they see fit in order to contain the threat to national security'.⁵² In practice, however, although several proposals have been made for using the derogation clause in a refugee context,⁵³ Article 9 has hardly ever been invoked by states parties.

If the derogation clause is not applied the whole Refugee Convention remains plainly applicable even in times of armed conflict. This does not mean, however, that national security concerns are totally ignored in such exceptional circumstances. They are in fact incorporated into three major provisions which echo the main concerns of asylum states in times of armed conflict.⁵⁴ First, under Article 28, states parties are no longer bound to deliver travel documents to refugees wishing to leave their asylum state when 'compelling reasons of national security or public order otherwise require'. Secondly, Article 32(1) of the Refugee Convention restates (p. 714) that '[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order'. When expulsion is resorted to on these two grounds, the procedural guarantees specified in Article 32(2) can also be suspended for 'compelling reasons of national security'.⁵⁵ Thirdly, the cornerstone of international refugee law—the principle of *non-refoulement*—may be derogated from on the ground of the two exceptions contained in Article 33(2). The first exception specifically refers to 'a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is'.

However, the tribute paid by the Refugee Convention to national security does not give free rein to asylum states caught in an armed conflict. On the one hand, concerns of national security are incorporated within the Refugee Convention as an exception to the basic guarantees contained therein. As a result, they call for a restrictive interpretation with due regard to the circumstances of each particular case. On the other hand, even when exceptions are clearly justified on the ground of national security, this does not suspend the basic guarantees granted by international humanitarian law and human rights law. Indeed, the three branches of international law must be applied cumulatively so that possible restrictions and exceptions permitted by one of them—can be overridden or conditioned by the rules and guarantees under the other branches.

(ii) International human rights law as the residual source of refugee protection in armed conflicts

The continuing applicability of human rights law in times of armed conflict is beyond any doubt. In fact, 'the question is no longer *whether* international human rights law applies in armed conflict but *how* it applies'.⁵⁶ Similarly to the Refugee Convention, the answer mainly depends on whether the derogation clause applies or not.

Compared to its refugee law counterpart, derogation clauses under human rights law contain five substantive conditions. First, there must be an emergency threatening the life of the nation.⁵⁷ Secondly, the derogation must be limited to, and go no further than that 'strictly required by the exigencies of the situation' in due respect (p. 715) with the principle of proportionality. Third that the derogating measures must not be inconsistent with the state's other obligations under international law, thus including international

humanitarian law and refugee law. Lastly, derogating measures must not involve discrimination on the ground of race, colour, sex, language, religion, or social origin.⁵⁸

Further to the substantive conditions, some rights cannot be subject to derogation notwithstanding the existence of a public emergency threatening the life of the nation. While the list of these nonderogable rights varies from one instrument to another,⁵⁹ some are common to all, namely: the right to life; the prohibition of torture, inhuman, cruel or degrading treatment; prohibition of slavery and servitude; and the prohibition of criminal conviction or punishment not based on a pre-existing law.⁶⁰ As basic as they are, these rights are not mentioned at all in the Refugee Convention. Refugee status is indeed relatively weak with regard to civil and political rights; here human rights law provides a vital source of protection.

Finally, a state seeking to invoke the derogation clause, must fulfil the procedural requirement of immediately informing other states parties and the Secretary General of the relevant organization of the provision from which it wishes to derogate from. Such notice should, at the very least, explain the reasons for the derogation,⁶¹ although General Comment 29 of the Human Rights Committee, and the *Siracusa Principles*, call for more detailed information to be provided.⁶²

Overall, the conditions required by human rights treaties for a derogation to be valid substantially circumscribe the vast margin of appreciation granted by Article 9 of the Refugee Convention, when the relevant exceptional measures interfere with human rights. From this angle, one could even assert with Davy that 'provisional measures under art. 9 of the 1951 Convention have, over time, become outdated by human rights law'.⁶³

The centrality of human rights law in times of armed conflict is even more obvious when the derogation clause under this branch of law does not apply. This may (p. 716) happen for a variety of political and legal reasons, mainly when states abstain from using the derogation clause or when such a possibility is not permitted by the relevant instrument. As far as the first is concerned, states frequently abstain from using the derogation clause in order to avoid any sort of recognition that a rebel group is involved in an internal armed conflict. As notably confirmed by the European Court of Human Rights in the leading case *Issayeva v Russia*, when 'no derogation has been made under Article 15 of the Convention [...], the operation in question therefore has to be judged against a normal legal background'.⁶⁴

The same conclusion must be drawn for the great majority of treaties which do not contain any derogation clause. Such a clause remains a purely conventional mechanism established for the exclusive purpose of the relevant treaty. In fact, it is enclosed in a very limited number of six instruments, whereas the vast majority of human rights treaties contain no derogation clause. As confirmed by international courts and treaty-bodies,⁶⁵ these conventions remain applicable in armed conflicts. This notably concerns the ten core UN instruments (with the only exception of the ICCPR) as well as a substantial number of regional treaties (including for example the ACHPR, or the European Convention on Action against Trafficking in Human Beings).

In short, even if a state uses its right to derogate from the Refugee Convention and/or the relevant human rights treaties, a broad range of human rights obligations still applies concurrently with humanitarian law. Nevertheless, most human rights are not absolute, and can be restricted with due regard to the conditions spelled out in the relevant treaties. Against such a normative framework, a contextualized approach to human rights law is required in order to take into account the particular situation of armed conflict. While a comprehensive comparison of all applicable norms under humanitarian law, refugee law, and human rights law is beyond the scope of this Chapter, a typical example may be found

in the right to leave which constitutes a common guarantee enshrined in the three branches of international law.

Following our frame of analysis, the legal regime governing the right to leave depends on whether the concerned state derogates from the Refugee Convention and all the relevant human rights treaties. If yes, humanitarian law constitutes an important safeguard. Yet, even in such a case, the parallel obligation under human rights law remains utterly applicable as the right to leave is reinforced in a wide range of universal and regional conventions without any possibility of derogation.⁶⁶ The (p. 717) normative prevalence of human rights law is more apparent when the state refrains from using the derogation clause under the few relevant instruments. The personal scope of this basic freedom and the permissible restrictions to it clearly underline the crucial protection provided by this last branch of international law. Under humanitarian law, freedom to leave is limited to non-nationals in the hands of a party to an international armed conflict,⁶⁷ whereas refugee law confines its benefit to 'refugees lawfully staying in [the] territory' of asylum states.⁶⁸ In stark contrast to humanitarian law, human rights law does apply to everyone including nationals of belligerent states. Furthermore, contrary to refugee law, the human right to leave any country also applies to all non-nationals without regard to their legal status and documentation in the concerned state.⁶⁹

Besides its broad personal scope, human rights law substantially delineates and conditions the permissible restrictions on the right to leave. Both international humanitarian law and refugee law offer a large discretion for prohibiting departure: under the former, leaving the country can be 'contrary to the national interests of the State',⁷⁰ whereas, under the latter, 'compelling reasons of national security or public order [may] otherwise require'.⁷¹ By contrast, under human rights law, restrictions are only permissible when the three following conditions are duly fulfilled: (1) permissible restrictions must have a legal basis; (2) they must be necessary to protect national security, public order, public health, morals, or the rights and freedoms of others; and (3) such restrictions must be consistent with the other rights recognized in the relevant instruments.⁷²(p. 718)

One should further add that, contrary to refugee law, both humanitarian law and human rights law provide procedural guarantees governing restrictions to the right to leave. According to Article 35(1) of GC IV, any refusal to leave the country must be reviewed by 'an appropriate court or administrative board designated by the Detaining Power for that purpose'. Human rights law achieves the same result through the right to an effective remedy as applied in connection with the right to leave.

3 Refugees from War

When refugees and other victims of armed conflicts have left the belligerent state, the crucial issue is then to find protection in another state. This is primarily governed by the principle of *non-refoulement* which is a common feature of international humanitarian law, refugee law, and human rights law. Its application to refugees from war nonetheless raises two major questions: first, the access to protection and more specifically entry to the territory of an asylum state in a situation of massive influx (Section A); and secondly, the type of protection granted to these persons (Section B).

A. Access to protection: the principle of non-refoulement and the spectre of massive influx

Although the principle of *non-refoulement* clearly encompasses rejection at the frontier, its applicability in case of massive influx represents the most vexed controversy of international refugee law.⁷³ While states' anxiety towards mass influx is (p. 719) palpable, international refugee law does not provide a clear-cut answer in favour of one or another

interpretation. In fact, the two opposite views can be equally justified by sensible arguments.

On the one hand, state delegates made clear during the drafting of the Refugee Convention that 'the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33'.⁷⁴ This interpretation has then been endorsed as an exception to the principle of *non-refoulement* in the Declaration on Territorial Asylum adopted by the General Assembly in 1967. According to its Article 3(2), 'exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons'. This resurfaced ten years later, in 1977, at the abortive Conference on Territorial Asylum. Turkey proposed an amendment whereby *non-refoulement* could not be claimed 'in exceptional cases, by a great number of persons whose massive influx may constitute a serious problem to the security of a Contracting State'.⁷⁵

On the other hand, nothing in the text of Article 33 arguably precludes its application to mass influx. Its wording is particularly inclusive as it prohibits 'in any manner whatsoever' any act of forcible removal or rejection towards a country of persecution.⁷⁶ The plain applicability of the principle in situations of mass influx has been further acknowledged by the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR).⁷⁷ By contrast, the two exceptions endorsed in Article 33(2) do not envisage massive influx: they are instead limited to an individual refugee who is a danger to the security or to the community of the state. Even assuming that the notion of national security has in fact been enlarged to cover similarly exceptional threats arising from massive influxes, effective refusals of entry based on such a ground are relatively rare,⁷⁸ when compared (p. 720) to the longstanding state practice of granting temporary protection in a situation of massive influx.⁷⁹

Whatever the respective merits of the two possible interpretations, human rights law compensates for the uncertainty surrounding Article 33 of the Refugee Convention. Two main arguments may be invoked to justify such a stance. First, the principle of *non-refoulement* under human rights law is absolute; it does not permit any exceptions or derogations when there is a real risk of torture, inhuman, or degrading treatment.⁸⁰ As a result, a danger to national security arising from a massive influx does not exempt states from their human rights duty of *non-refoulement*. Secondly, the prevalence of human rights law in situations of mass influx finds additional support in its prohibition of collective expulsion. This absolute prohibition is endorsed in all regional human rights treaties.⁸¹ Though not explicitly mentioned in the ICCPR, the Human Rights Committee has also construed Article 13 as implicitly prohibiting collective expulsion.⁸² Likewise, the Committee on the Elimination of Racial Discrimination comes to the conclusion that collective expulsions violate the prohibition of racial discrimination.⁸³

A parallel prohibition of mass transfers and deportations can be found in international humanitarian law within Article 49(1) of GC IV.⁸⁴ Its applicability is nevertheless confined to protected persons in the hands of an Occupying Power. Its content is further qualified by the possibility of undertaking evacuation of a given area 'if the security of the population or imperative military reasons so demand'.⁸⁵ (p. 721) Besides such a margin of appreciation, the exact scope and content of Article 49(1) has also raised some longstanding controversies.⁸⁶

In any event, the continuing applicability of human rights law in times of armed conflict obviates the limits and ambiguities of both refugee law and humanitarian law. The human rights prohibition of collective expulsion suffers from no exception or derogation. It further applies to any non-citizens—whether documented or not—who are within the jurisdiction of the state and without regard to the risk of ill-treatment in the country of destination. One could still contend that the prohibition of collective expulsion does not apply to massive

influx, because the term 'expulsion' does not cover 'refusal of entry' or 'rejection at the border'. Such a line of reasoning is, however, not convincing. Although expulsion may have a particular understanding in domestic law, under international law this notion has an autonomous meaning determined by the object and purpose of the relevant treaty and in due accordance with the principle of effectiveness. This has been restated by the European Court of Human Rights in the leading case *Hirsi v Italy*. The Court dismissed the argument of the Italian Government according to which the contested measure (maritime interception) was a 'refusal to authorize entry into national territory rather than "expulsion"'.⁸⁷ By doing so, the Grand Chamber unambiguously confirmed that the prohibition of collective expulsion generally applies to any measure 'the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State'.⁸⁸

As a result of this general prohibition, expulsion and other related measures of *refoulement* can only take place after an individual examination of each particular case.⁸⁹ In sum, under international human rights law, the general prohibition of collective expulsion combined with the principle of *non-refoulement* converges in ensuring that, even in situations of mass influx, asylum-seekers shall have temporary asylum during the examination of their request. The next issue is then to identify on which grounds victims of armed conflict may be protected in asylum states.(p. 722)

B. The grounds of protection: between a rock and a hard place?

The grounds of protection for victims of armed conflicts provide for another paradigmatic illustration of the complementarity approach. Indeed, each of the three branches of international law virtually covers war refugees, though their respective scope significantly varies from one to another.

Under international refugee law, the definition spelled out in Article 1A(2) of the Refugee Convention (as amended by its 1967 Protocol) is normally apt to cover most victims of armed conflicts.⁹⁰ Eligibility for refugee status depends on three cumulative conditions: (1) a well-founded fear of (2) being persecuted (3) for reasons of race, religion, nationality, membership to particular social group and political opinion. In fact, each of these requirements is plainly relevant when applied to the particular context of armed conflicts. With regard to the first condition, the very notion of 'well-founded fear' requires a prospective assessment grounded on two prognostic factors: the personal circumstances of the applicant as well as the general situation prevailing in the destination country. Clearly, the existence of an armed conflict is a key consideration for assessing the general situation in the state of origin and thus the risk of ill-treatment in case of return.

Furthermore, even if the fear is individual by nature, such a fear might find its origin in a collective phenomenon affecting a whole group of persons indistinctively. Indeed a distinction must be drawn between the individual nature of the fear and the collective character of the persecution: the former does not exclude the latter. On the contrary, in some circumstances, the collective character of the persecution may even presume the individual nature of the fear. The very notion of collective persecution is further confirmed by the wording of the Refugee Convention. The five grounds of persecution are primarily identified by reference to membership to a group of persons (whether racial, religious, national, social, or political). They further coincide with the typical causes of most contemporary armed conflicts.(p. 723)

Against such a framework, acts of war perpetrated against civilians on account of their race, religion, nationality, political opinion, or membership to a particular social group arguably constitute the archetype of persecution. In this regard, several commentators have further suggested that international humanitarian law should provide guidance for construing the refugee definition under Article 1A(2) of the Geneva Convention.⁹¹ Such a possibility may nevertheless be counterproductive. On the one hand, defining persecution

as a violation of humanitarian law may distract the attention of decision-makers in placing too much emphasis on peripheral issues which are not crucial for assessing an asylum request (eg whether the situation in the state of origin corresponds to the legal definition of an armed conflict, whether the applicant is a protected person, or whether the balance between humanitarian considerations and military necessity has been adequately applied by the belligerents ...). On the other hand, the notion of persecution under the Refugee Convention already benefits from a well-established definition as a serious violation of human rights.⁹² With the continuing applicability of human rights law in armed conflicts, there is no need to further complicate the assessment of asylum requests by resorting to another branch of law. In any event, any grave violation of humanitarian law already corresponds in substance to a serious violation of human rights for the purpose of the refugee definition.⁹³

In practice, however, the potential of the refugee definition for victims of armed conflicts starkly contrasts with the reticence of states parties to the Geneva Convention. Though nothing precludes the application of the refugee definition to persons fleeing armed conflicts, states' interpretations remain highly divergent and frequently restrictive.⁹⁴ This is exemplified by the wide disparity in refugee (p. 724) recognition rates concerning persons coming from the same countries plagued by conflicts.⁹⁵ The most common ground for refusing protection is to require a so-called 'differentiated risk' over and above that of other civilians caught up in the armed conflict.⁹⁶

The uncertainty surrounding the applicability of the refugee definition and the correlative gap of protection have been partially mitigated by some regional instruments following two different approaches. In the Global North, the European Union has consecrated a specific regime of subsidiary protection based, inter alia, on 'indiscriminate violence in situations of international or internal armed conflict'.⁹⁷ Subsidiary protection appears as an additional—and arguably concurrent—device to the Refugee Convention. It indirectly gives a pretext for justifying the restrictive interpretation of the refugee definition in the context of armed conflicts. Resort to subsidiary protection for victims of armed conflict has proved to be disappointing and its application has raised many controversies regarding its exact scope and content.⁹⁸(p. 725)

Regional endeavours carried out in the Global South have followed a different approach, ultimately less convoluted and more protective: the refugee definition under the Geneva Convention has been explicitly extended to any person fleeing armed conflicts. The pioneer regional instrument in this area was adopted in 1969 by the Organization of African Unity. Article 1(2) of the Convention Governing the Specific Aspects of Refugee Problems in Africa states:

The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside of his country of origin or nationality.

The African model of refugee protection has been further endorsed in Latin America with the 1984 Declaration of Cartagena.⁹⁹

At the universal level, however, human rights law still remains the most clear-cut avenue for compensating the restrictive interpretation of the refugee definition. Under this branch of law, the principle of *non-refoulement* unequivocally prohibits states from sending back persons who are exposed to a real risk of torture or inhuman and degrading treatment in the midst of an armed conflict.¹⁰⁰ Compared to the Refugee Convention, its large and objective scope highlights two main characteristics: its absolute character impedes any

possible derogation and the notion of inhuman or degrading treatment is not qualified by one of the five limitative grounds of persecution.

Furthermore, the human rights principle of *non-refoulement* has been construed as establishing a presumption of inhuman or degrading treatment in some cases of generalized violence. As underlined by the European Court of Human Rights, (p. 726) 'a general situation of violence in a country of destination [can] be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention'.¹⁰¹ Though such a level of intensity remains exceptional by nature,¹⁰² the Court has also made clear that membership of a group systematically exposed to ill-treatment is sufficient on its own to trigger the duty of *non-refoulement* without any further distinguishing features.¹⁰³

Protection against forced return in times of armed conflict finds an additional support in international humanitarian law. According to Article 45(4) of GC IV, '[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs'. Although this provision has been partially reproduced in the refugee definition endorsed two years later in the 1951 Convention,¹⁰⁴ it has subsequently been overtaken by human rights law for three main reasons.

First, the notion of torture, degrading and inhuman treatment is broader than the one of persecution on account of political opinions or religious beliefs, even if they may overlap in practice.¹⁰⁵ Secondly, though worded in categorical terms, the prohibition of transfer does not prejudice extradition provided that this is done 'in pursuance of extradition treaties concluded before the outbreak of hostilities' and for 'offences against ordinary criminal law'.¹⁰⁶ By contrast, the human rights principle of *non-refoulement* applies to all measures of removal (including extradition) and without regard to the criminal record of the person at risk of torture, degrading, or inhuman treatment.¹⁰⁷ Thirdly, the scope of the prohibition contained in international humanitarian law is confined to protected persons on the territory of a state party to an international armed conflict.(p. 727)

4 Refugees in Post-War Contexts

Refugees in post-war contexts constitute another case for highlighting the centrality of human rights law. The termination of hostilities inevitably begs the question of the end of refugee protection and the correlative return to the state of origin. This highlights in turn a dilemma inherent to any process of post-conflict peacebuilding: can one consider that the end of a conflict constitutes, in and of itself, a fundamental change of circumstances justifying the withdrawal of refugee protection, when a sustained peace has not yet been established, and the massive return of refugees may serve as an additional source of destabilization? On the other hand, return and reintegration of refugees can be a decisive factor in the reconstruction of a country.

An empirical solution to this normative and political dilemma has been found through the notion of voluntary repatriation. While voluntary repatriation is commonly referred to as 'the ideal solution to refugee problems',¹⁰⁸ international refugee law is rather silent on this (Section A). Instead, it is human rights law which gives voluntary repatriation its full normative scope and content, even when international humanitarian law provides for more specific norms in relation to prisoners of war and civilian internees (Section B).

A. Voluntary repatriation: the human right to return filling the silence of international refugee law

With the promotion of voluntary repatriation entrusted to UNHCR,¹⁰⁹ one could legitimately expect its normative framework to be settled by international refugee law. Voluntary

repatriation has, however, evolved quite outside the refugee law framework to become both a practice of states and an institutional policy of UNHCR.¹¹⁰(p. 728)

The Refugee Convention is indeed silent on voluntary repatriation. The reason for this can be found in its primary rationale: it exclusively focuses on the obligations of asylum states without envisaging refugee protection from a more holistic perspective encapsulating both states of origin and asylum. Following its specific stance, the Refugee Convention implicitly favours integration in the country of asylum. It associates refugee status with a substantial range of basic guarantees and social benefits,¹¹¹ and calls for facilitating naturalization of refugees in asylum countries.¹¹² The only references to return to country of origin are made in prohibitive terms: Article 32 bars expulsion of refugees, except for exceptional circumstances, and Article 33 lays down the fundamental principle of *non-refoulement*. This focus on prohibiting return comes as no surprise for ‘refugees are by definition “unrepatriable”’¹¹³ because of their well-founded fear of being persecuted in their country of origin.

Voluntary repatriation is understood in a similarly oblique way through the cessation clause of Article 1.C(4). According to this provision, the Refugee Convention is no longer applicable when the refugee ‘has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution’. But even in such an instance, voluntary repatriation does not justify, on its own, withdrawal of refugee status.¹¹⁴ This is possible only when the refugee is re-established in his/her country of origin.

While voluntary repatriation is not addressed as such by the Refugee Convention, some regional instruments (including most notably the OAU Convention)¹¹⁵ have endorsed it as a key principle of refugee protection. By contrast, human rights law provides a solid and universal legal basis with the right to enter one’s own country.¹¹⁶ In this regard, the Human Rights Committee underlines that ‘the right of a person to enter his or her own country [...] includes [...] the right to return after having left one’s own country’ which ‘is of the utmost importance for refugees seeking voluntary repatriation’.¹¹⁷ The human right to return is thus crucial for ensuring both (p. 729) the voluntary nature of repatriation and the correlative obligation of states of origin to admit their nationals.¹¹⁸

This contextual understanding of the human right to return has been further developed by the Committee on the Elimination of Racial Discrimination in its *General Recommendation No 22: Article 5 and Refugees and Displaced Persons*:

- (a) All such refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety;
- (b) States parties are obliged to ensure that the return of such refugees and displaced persons is voluntary and to observe the principle of non-refoulement and non-expulsion of refugees;
- (c) All such refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void;
- (d) All such refugees and displaced persons have, after their return to their homes of origin, the right to participate fully and equally in public affairs at all levels and to have equal access to public services and to receive rehabilitation assistance. ¹¹⁹

This human rights-based approach has also been refined through *The Principles on Housing and Property Restitution for Refugees and Displaced Persons*, endorsed by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2005.¹²⁰ Known as the Pinheiro Principles, they elaborate key human rights relating to the equitable restitution of housing and property and provide guidelines to states and international actors for ensuring access to these rights.

In short, human rights law provides an indispensable yardstick for framing the legal content of both return and reintegration of displaced persons in their own countries. Although much remains to be done for ensuring their basic rights in peacebuilding processes,¹²¹ it contributes to fill the silence in the Refugee Convention, highlighting the vital interplay between these two branches of international law for the purpose of promoting a holistic approach to refugee protection. (p. 730)

B. How voluntary is repatriation? International humanitarian law versus international human rights law

In post-conflict situations, repatriation is nonetheless not solely governed by human rights law but also by international humanitarian law. This last branch provides states with the obligation to repatriate prisoners of war and civilian internees at the end of hostilities. Such a reliance on humanitarian law understanding of repatriation is, however, unable to promote the voluntary nature of reparation, thereby demanding recourse to human rights law.

Under humanitarian law, the obligation to repatriate is framed in categorical terms without reference to the willingness of the concerned person to be so returned. Article 118 of GC III requires that '[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities'.¹²² In fact, during the 1949 Diplomatic Conference, an Austrian amendment was introduced to grant prisoners of war a right 'to apply for their transfer to any other country [than their country of origin] which is ready to accept them'.¹²³ The proposal was, however, rejected by a large majority of delegations for fear that prisoners might not have the free will to so decide.¹²⁴ Moreover, the absolute obligation of repatriation is further reinforced by the inalienability of a prisoner of war's rights, which cannot be renounced under any circumstances.¹²⁵

While the obligation to repatriate civilian internees under Article 134 of GC IV may sound less categorical,¹²⁶ the ICRC study reaffirms its unconditional nature under customary international law for both types of protected persons.¹²⁷ It even reminds that '[a]n "unjustifiable delay in the repatriation of prisoners of war or civilians" constitutes a grave breach of Additional Protocol I'.¹²⁸ Ultimately, such categorical obligations not only require states to enforce repatriation at any price—even on an involuntary basis—but may also conflict in practice with the principle of *non-refoulement*.

This is probably the only case of a true conflict of norms between international humanitarian law, refugee law, and human rights law. The absolute duty to repatriate prisoners of war without delay is in contradiction with, and superseded by, (p. 731) international refugee law when these prisoners have a well-founded fear of being persecuted in the destination state. This refugee law prohibition of forcible repatriation does not apply when prisoners of war have committed war crimes or any other acts falling under the exclusion clause of Article 1F or under the exceptions of the *non-refoulement* duty of Article 33(2). Yet, even in such a case, human rights law still prevails over the humanitarian law obligation of repatriation as it bans any forcible return where there is a real risk of torture, degrading or inhumane treatment.

Instead of a conflict of norms, such a divergence could be simply understood as the successive application of humanitarian law, refugee law, and human rights law.¹²⁹ In any event, the result is the same: contrary to Article 118 of GC III, prisoners of war shall not be repatriated without delay after the cessation of active hostilities, when they fall under the refugee definition, or are otherwise exposed to a real risk of degrading treatment.

It is true that, in subsequent practice, Article 118 of GC III has rarely been applied in the automatic way suggested by its categorical wording. Since the Korean War,¹³⁰ and especially since the two Gulf wars,¹³¹ the common stand is that of not repatriating prisoners unwilling to return home for fear of mistreatments therein. Such practice has been endorsed by the ICRC¹³² and it is even advanced as a norm of customary international law for both prisoners of war and civilian internees.¹³³

For the ICRC, the customary law obligation of repatriation should thus be interpreted as including an additional duty of taking into account the wish of the concerned person. While this unapparent conclusion could be grounded on Article 45 of GC IV with regard to civilian detainees, the argument advocated in favour of a similar guarantee for prisoners of war is particularly weak. Though the ICRC (p. 732) recognizes that such provision is absent from GC III, it underlines that every repatriation in which it has been involved as a neutral intermediary has been conducted after a prior interview ascertaining the person's wish to be so repatriated. One would expect more than ICRC practice for grounding such a customary law interpretation clearly contradicting the unconditional wording of Article 118 of GC III. By contrast, the lack of any reference to the human rights principle of *non-refoulement* is odd to say the least.

State practice may indeed have evolved into a customary norm but, if so, this development has itself been framed by, and grounded in human rights law, rather than humanitarian law. First, international humanitarian law was originally conceived as a set of inter-state obligations (eg the obligation of repatriation); it is thanks to human rights law that the focus has been further placed on individuals as bearers of rights and obligations under international law (eg the right to repatriation).¹³⁴ Secondly, this customary norm of international law is nothing else but the acknowledgment of the human rights principle of *non-refoulement*.¹³⁵ Prisoners of war and civilian internees cannot be repatriated where they would be at risk of torture or inhumane or degrading treatment upon return.

5 Conclusion

Though this has not always been the case, the simultaneous application of international humanitarian law, human rights law, and refugee law is no longer contested. This common assumption nevertheless belies the complexity of the relationship between the three legal regimes and the difficulties arising from the identification, interpretation, and application of the relevant norms. Undoubtedly, no single branch offers a definitive answer to the contemporary challenges of armed conflicts: the reach of international protection can only be apprehended through a complementary, and thereby cumulative, approach of the branches of international law applicable in times of armed conflicts.(p. 733)

Furthermore, while international humanitarian law, refugee law, and human rights law are clearly the three pillars of the refugee protection regime, their multifaceted interactions constitute a fertile ground for apprehending forced migration through a holistic and systemic approach. From a comparative perspective, international refugee law has more in common with international humanitarian law than it has with international human rights law. The reasons for this are both historical and structural.

The four Geneva Conventions of 1949 and their refugee sister adopted two years later are children of their times. Though both refugee law and humanitarian law have been amended (and partially updated) in the 1960s and 1970s, they have still retained some common distinctive features which arguably reflect their stage of development. The normative structure of international humanitarian law and refugee law converges on three major components. First, the two legal regimes are primarily framed as obligations of states, instead of individual rights. Secondly, under each branch of international law, the traditional distinction between nationals and non-nationals remains a foundation stone for identifying and framing the applicable norms. Thirdly, both international humanitarian law and refugee law rely on a decentralized scheme of implementation without a proper supervisory mechanism. Though the ICRC and the UNCHR are the key humanitarian actors in their respective field, they are not monitoring bodies in charge of supervising states' conduct. Overall, the basic principle underlying the three common attributes of international humanitarian law and refugee law is the tribute paid to the sacrosanct sovereignty of states.

While international human rights law does not fundamentally depart from the state-centric approach to international law, it diverges on each of the three above characteristics of international humanitarian law and refugee law. The human rights-based approach to the law of armed conflict proves to be essential in compensating for the limits inherent to the other applicable legal regimes.

Though international humanitarian law is supposed to be the tailor-made regime applicable in times of armed conflict, it does not endorse the most protective norms. It provides instead a minimum standard within the strict limits of its particular scope (namely the treatment of non-nationals in the hands of a party to the conflict). The minimum, if not minimalist, protection granted by international humanitarian law is upgraded by the cumulative application of the other applicable branches of international law. Nevertheless, even through this approach, international refugee law does not provide the most specific frame of protection for those fleeing armed conflicts.

Even worse, both international humanitarian law and refugee law appear to be relatively indifferent to the specific needs of refugees in war, from war and in post-war contexts. As observed by Kälin,

[A] traditional understanding of the relationship between international humanitarian law and refugee law maintains that refugee law was not really made to address the plight of those who had to flee the dangers of war and seek refuge abroad. At the same time, international (p. 734) humanitarian law does not provide any protection for this large category of persons in need of international protection.¹³⁶

Against such a background, international human rights law is bound to play a vital role for compensating and arguably updating international humanitarian law and refugee law. Human rights law must thus be taken seriously by humanitarian and refugee lawyers. Though every specialist is naturally inclined to comprehend the world through the myopic lens of his/her own discipline, some substantial progress has been made during the last decade for facilitating cross-disciplinary dialogue. It is true that the professional culture and the particular ethos of each discipline are still very present in governmental, non-governmental, and academic circles. However, there is, after all, nothing insurmountable in ensuring that international humanitarian law, refugee law, and human rights law are no longer competitors but brothers in arms.

Besides all their differences, the three branches of international law share the same fundamental objective, notably restated by the International Tribunal for the former Yugoslavia:

The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.¹³⁷

Similarly, the very function of international refugee law is to ensure the effective respect for human dignity when victims of abuses have no other option than to leave their own country. From this stance, international refugee law cogently constitutes 'a right to have rights'¹³⁸ following Arendt's terminology:

The new refugees were persecuted not because of what they had done or thought, but because of what they unchangeably were—born into the wrong kind of race or the wrong kind of class or drafted by the wrong kind of government [...] but [...] they were and appeared to be nothing but human beings whose very innocence—from every point of view, and especially that of the persecuting government—was their greatest misfortune.¹³⁹

Footnotes:

¹ Y. Dinstein, 'Refugees and the Law of Armed Conflict', 12 *Israel Yearbook on Human Rights* (1982) 94.

² See most notably: M. Jacques, *Armed Conflict and Displacement. The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012); P.A. Fernández-Sánchez, 'The Interplay Between International Humanitarian Law and Refugee Law', 1(2) *Journal of International Humanitarian Legal Studies* (2010) 329–81; K. Hulme, 'Armed Conflict and the Displaced', 17(1) *International Journal of Refugee Law* (2005) 91–116; F. Bugnion, 'Humanitarian Law and the Protection of Refugees', 24(4) *Refugee Survey Quarterly* (2005) 36–42; F. Bugnion, 'Refugees, Internally Displaced Persons, and International Humanitarian Law', 28(5) *Fordham International Law Journal* (2005) 1397–1420; O. Casanovas, 'La protection internationale des réfugiés et des personnes déplacées dans les conflits armés', 306 *Recueil des cours de l'Académie de droit international* (2003) 9–176; R. Brett and E. Lester, 'Refugee Law and International Humanitarian Law: Parallels, Lessons and Looking Ahead. A Non-Governmental Organization's View', 83(843) *International Review of the Red Cross* (2001) 713–26; W. Kälin, 'Flight in Times of War', 83(843) *International Review of the Red Cross* (2001) 629–50; S. Jaquemet, 'The Cross-Fertilization of International Humanitarian Law and International Refugee Law', 83(843) *International Review of the Red Cross* (2001) 651–74; J. Patrlogic, 'Thoughts on the Relationship Between International Humanitarian Law and Refugee Law, their Promotion and Dissemination', 28(265) *International Review of the Red Cross* (1988) 367–78; K.J. Partsch, 'The Protection of Refugees in Armed Conflicts and Internal Disturbances by Red Cross Organs', 2234 *Revue de droit pénal militaire et de droit de la guerre* (1983) 419–38. By contrast, inclusive approaches tackling with the three applicable branches of international law are conspicuously rare. See essentially: A. Edwards, 'Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the "International Protection" of Refugees', in R. Arnold and N. Quenivet (eds), *International Humanitarian Law and International Human Rights Law: Towards a New Merger in International Law* (Leiden and Boston: Martinus Nijhoff, 2008). For more specific case-studies focusing on the refugee definition or a particular country, see also: M.R. Von Sternberg, *The Grounds of Refugee Protection in the Context of*

International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared (The Hague: Martinus Nijhoff, 2002); and A.C. Helton, 'The Role of Refugee, Humanitarian and Human Rights Law in Planning for Repatriation of Kampuchean Asylum Seekers in Thailand', 3 *International Journal of Refugee Law* (1991) 547-63.

³ For a general overview of the role and potential of human rights law, see V. Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning on the Relations between International Refugee Law and International Human Rights Law', in R. Rubio Marin (ed), *Migrations and Human Rights* (Oxford: Oxford University Press, 2014) and the bibliographical references quoted therein.

⁴ See for instance: Jacques (n 2), 13-14; H. Storey, 'Armed Conflict in Asylum Law: The "War-Flaw"', 31(2) *Refugee Survey Quarterly* (2012) 1-32 at 14-18; Edwards (n 2), 429. See *contra* Fernández-Sánchez (n 2), 329-81.

⁵ For a similar account see: N. Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?', 40 *Israel Law Review* (2007) 355-95 at 369-70; A. Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis', 74 *Nordic Journal of International Law* (2005) 27-66 at 65.

⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports* 1996, 226; *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *ICJ Reports* 2004, 178.

⁷ M. Sassòli, 'Le droit international humanitaire, une *lex specialis* par rapport aux droits humains?', in A. Auer, A. Flückiger, and M. Hottelier (eds), *Les droits de l'homme et la constitution: études en l'honneur du Professeur Gorgio Malinverni* (Geneva: Schulthess, 2007), 375-95 at 383.

⁸ M. Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (2006), 57, § 105. Among many other instances, see also H. Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study', 11 *Journal of Conflict and Security Law* (2006) 265-91 at 273 ('the relation between two norms depends on an interpretation of the purposes of each norm and of the normative context').

⁹ *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), § 11. For further discussions, see W. Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus ad Bellum*', 40(2) *Israel Law Review* (2007) 592-613.

¹⁰ See notably UN Doc A/RES/64/77 (2010), § 2; UN Doc A/RES/57/230 (2002), § 3(b).

¹¹ See eg HRC Res S-8/1 (2008), § 1.

¹² UNSC Res 1894 (2009), § 1. Among many other similar restatements, see UNSC Res 2085 (2012), §§ 10, 16, and 18; UNSC Res 2062 (2012), § 17; UNSC Res 1973 (2011), § 3; UNSC Res 1856 (2008), § 23; UNSC Res 1843 (2008), preambular § 8; UNSC Res 1790 (2007), preambular § 19.

¹³ See for instance Art 5 of the Geneva Convention relating to the Status of Refugees and Art 5(2) of the ICCPR.

¹⁴ See most notably Art 75(8) of AP I ('No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1'). See also Art 72 of AP I ('The provisions of this Section are additional to [...] other applicable

rules of international law relating to the protection of fundamental human rights during international armed conflict’).

15 See Art 49 of GC IV and Art 17 of AP II.

16 Article 44 of GC IV deals with the relations between the state of asylum and refugees who are nationals of a belligerent state; Art 70 of the same Convention addresses the relations with their state of origin when the latter is occupying the asylum state; and, finally, Art 73 of AP I concerns refugees who have been recognized as such before the armed conflict. See also implicitly at least, Art 45(4) of GC IV.

17 For a critical account of the ICRC study with regard to forced displacement, see R. Piotrowicz, ‘Displacement and Displaced Persons’, in E. Wilmschurst and S.C. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge and New York: Cambridge University Press, 2007), 337–53.

18 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (n 6), § 79.

19 S. Jaquemet, *Under What Circumstances Can a Person Who Has Taken an Active Part in the Hostilities of an International or a Non-International Armed Conflict Become an Asylum Seeker?* (Geneva: UNHCR Legal and Protection Policy Research Series, Department of International Protection, PPLA/2004/01, 2004), 21.

20 If captured by the enemy state, refugee combatants benefit from the status of prisoners of war. If they are instead within the territory of a neutral state, the latter must disarm and intern them as far as possible at a distance from the theatre of hostilities: Art 11 of the Hague Convention V and Art 4B(2) of GC III. For further discussions about the principle of distinction and its relevance for refugees, see notably Jacques (n 2), 217–44; R. Da Costa, *Maintaining the Civilian and Humanitarian Character of Asylum* (Geneva: UNHCR Legal and Policy Research Series, Department of Protection, PPLA/2004/02, 2004); C. Beyani, ‘International Legal Criteria for the Separation of Members of Armed Forces, Armed Bands and Militia from Refugees in the Territories of Host States’, 12 *International Journal of Refugee Law* (2000) 251–71; M. Othman-Chande, ‘International Law and Armed Attacks in Refugee Camps’, 59(2)–(3) *Nordic Journal of International Law* (1990) 153–77.

21 Part II of the Fourth Convention already applies to refugees as member of the civilian population.

22 Articles 35–37 and 48 of GC IV.

23 Articles 41–43 and 78–133 of GC IV.

24 Articles 45 and 49 of GC IV.

25 Commentary AP I and II, § 2951.

26 Whether binding or not, all these international instruments must have been ‘accepted by the Parties concerned’ in order to make sure that states would not be indirectly bound by instruments they are not parties to by virtue of AP I (see Commentary AP I and II, § 2952). Despite its broad understanding of the term ‘international instruments’, the ICRC commentary construes this last requirement as referring to ‘States which are Parties to them if they are treaties, or States which have given them binding force, or which recognize their binding force, if they are resolutions’ (Commentary AP I and II, § 2952). In any event, however, the decision taken by the asylum state to grant the refugee status or any other forms of complementary protection is binding upon all parties to the conflict whether such decision has been taken under its own domestic law and/or under international instruments it has accepted (Commentary AP I and II, § 2952).

- ²⁷ Jacques (n 2), 162. See also among others K. Obradovic, 'La protection des réfugiés dans les conflits armés internationaux', in *The Refugee Problem on Universal, Regional and National Level, Thesaurus Acroasium*, vol 13 (Thessaloniki: Institute of International Public Law and International Relations of Thessaloniki, 1987), 147-61 at 150.
- ²⁸ Obradovic (n 27), 147.
- ²⁹ 'In applying the measures of control mentioned in the present Convention, the Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure of an enemy State, refugees who do not, in fact, enjoy the protection of any government.'
- ³⁰ With such a factual focus on the absence of protection, Art 44 might also well cover the significant number of persons in need of protection who fall under the protection mandate of the UNHCR regardless of their official recognition as refugees by the asylum state.
- ³¹ Report of the Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva, vol 2A, 826.
- ³² Commentary GC IV, 264-5.
- ³³ See among others: Jacques (n 2), 168-9; Obradovic (n 27); and Dinstein (n 1), 96-7.
- ³⁴ The same applies to refugees who are nationals of a state which has not ratified GC IV but such a case is particularly rare given its almost universal ratification.
- ³⁵ *Commentary GC IV*, 351.
- ³⁶ Dinstein (n 1), 104.
- ³⁷ One should add that, though circumscribed to nationals of the Occupying Power, the personal scope of Art 70 is slightly broader than Art 73, since it does not require that refugees have been recognized as such by the state of asylum. Although this specificity is rarely underlined, Art 70 refers instead to persons who 'have sought refuge in the territory of the occupied State', including thus not only refugees but also asylum-seekers (who asked for protection but have not been formally recognized as refugees).
- ³⁸ For a similar account, see notably: Jacques (n 2), 176.
- ³⁹ For further discussions about the origins and rationale of this well-known distinction of international refugee law, see V. Chetail, 'Théorie et pratique de l'asile en droit international classique: étude sur les origines conceptuelles et normatives du droit international des réfugiés', 115 *Revue générale de droit international public* (2011) 625-52.
- ⁴⁰ *Commentary GC IV*, 351; Dinstein (n 1), 104.
- ⁴¹ *Commentary GC IV*, 351.
- ⁴² For further discussion on the inclusion clauses of the refugee definition with regards to victims of armed conflict see Section 2.B.
- ⁴³ For an overview, see C. Bauloz, 'L'apport du droit international pénal au droit international des réfugiés: l'article 1F(a) de la Convention de 1951', in V. Chetail and C. Laly-Chevalier (eds), *Asile et extradition: théorie et pratique des clauses d'exclusion au statut de réfugié* (Brussels: Bruylant, 2014) and the bibliographical references contained therein.
- ⁴⁴ 'With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying

the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.'

⁴⁵ The influence of international humanitarian law is further confirmed by the fact that no similar provision was contained in the previous arrangements and conventions relating to the status of refugees adopted during the inter-war period. Article 44 of GC IV was adopted as a result of the experiences of World War II in order to take into account the observations made by the International Refugee Organization and the Israel Delegation during the 1949 Diplomatic Conference: Commentary GC IV, 263.

⁴⁶ Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons—Memorandum by the Secretary-General, 1950, 48 ('if this rule is to be applied in time of war, a similar rule must a fortiori be applied in time of peace').

⁴⁷ The added value of Art 8 is further mitigated by its second sentence which enlarges the—already substantial—margin of discretion in implementing this provision.

⁴⁸ UN Doc A/CONF.2/SR.27 (1961), 31-2 (Sweden). For similar acknowledgements, see notably the declarations of the United States, Turkey, and Canada: UN Doc E/AC.32/SR.21 (1950), 7-8.

⁴⁹ A. Grahl-Madsen, *Commentary on the Refugee Convention 1951* (Geneva: UNHCR, 1963), 25-6. See also U. Davy, 'Article 8', in A. Zimmerman (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (Oxford: Oxford University Press, 2011), 774; J.C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 273; N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (New York: Institute of Jewish Affairs, 1953), 76.

⁵⁰ UN Doc E/AC.32/SR.34 (1950). See also UN Doc E/AC.31/SR.21 (1950), § 33.

⁵¹ Compare for instance: Jacques (n 2), 167 and Hathaway (n 49), 266-7 with U. Davy, 'Article 9', in A. Zimmerman (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (Oxford: Oxford University Press, 2011), 799-801; A. Edwards, 'Temporary Protection, Derogation and the 1951 Refugee Convention', 13 *Melbourne Journal of International Law* (2012) 623-4.

⁵² Davy (n 51), 784.

⁵³ It is noteworthy that such proposals have been made by refugee lawyers for reasserting the centrality of the Refugee Convention through the use of derogation clause in case of mass influx. J.-F. Durieux and J. McAdam, 'Non-Refoulement Through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies', 16(4) *International Journal of Refugee Law* (2004) 5-24; Edwards (n 51), 595-635.

⁵⁴ This probably explains why Art 9 has been so rarely invoked by states parties as their concerns are already taken into account in the key provisions of the Refugee Convention.

⁵⁵ This does not concern, however, the additional guarantees granted by Art 32(3). Thus, even in times of armed conflicts and provided that Art 9 is not invoked by the states parties, they 'shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary'.

⁵⁶ S. Sivakumaran, 'International Humanitarian Law', in D. Moeckli, S. Shah, and S. Sivakumaran (eds), *International Human Rights Law* (Oxford: Oxford University Press, 2010), 538.

⁵⁷ Article 4(1) of ICCPR; Art 15(1) of ECHR; Art 27(1) of ACHR; Art 4(1) of the Arab Charter on Human Rights; Art 35(1) of the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (CIS Convention); Art 30(1) of the European Social Charter. Note that the American Convention uses slightly different terminology: ‘in a time of war, public danger or other emergency that threatens the independence or security of a State Party’.

⁵⁸ Article 15(1) of ECHR; Art 4(1) of ICCPR; Art 27(1) of ACHR; Art 35(1) of the CIS Convention; Art 4(1) of the Arab Charter on Human Rights; Art 30(1) of the European Social Charter.

⁵⁹ The European Convention and the CIS Convention contain the most restrictive list of underogable rights, while the Arab Charter enumerates the most extensive one. It is noteworthy that the Arab Charter consecrates as underogable rights the following key guarantees: freedom to leave any country, prohibition to be compelled to reside in any part of the country, and prohibition of exile and return in his own country (Art 27); the right to seek asylum (Art 28); and the right to nationality (Art 29).

⁶⁰ Article 15(2) of ECHR; Art 4(2) of ICCPR; Art 27(2) of ACHR; Art 35(2) of the CIS Convention; Art 4(2) of the Arab Charter.

⁶¹ *Lawless v Ireland (No 3)* [1961] ECHR 2 (ECtHR), § 47.

⁶² Human Rights Committee, *General Comment 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (2001), §§ 5, 16, and 17; UN Economic and Social Council Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (1985), § 45.

⁶³ Davy (n 51), 803.

⁶⁴ ECtHR, *Issayeva v Russia*, Judgment of 24 February 2005, App No 57950/00, § 191.

⁶⁵ See eg ICJ, *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory* (n 6), § 112; African Commission on Human and Peoples’ Rights, *Commission Nationale des Droits de l’Homme et des Libertés v Chad*, Com No 74/92 (1995), § 21.

⁶⁶ 1965 International Convention on the Elimination of all Forms of Racial Discrimination (Art 5(d)(i)); 1973 Convention on the Suppression and Punishment of the Crime of Apartheid (Art 2(c)); 1989 International Convention on the Rights of the Child (Art 10(2)); 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Art 8(1)); 2006 International Convention on the Rights of Persons with Disabilities (Art 18(1)(c)); ACHPR (Art 12(2)); and Arab Charter (Arts 4(2) and 27).

⁶⁷ Article 35 and 48 of GC IV.

⁶⁸ Article 28 of the Refugee Convention.

⁶⁹ *General Comment No 27: Freedom of movement (Art 12)*, UN Doc CCPR/C/21/Rev.1/Add.9 (1999), § 8.

⁷⁰ Article 35(1) of GC IV. According to the ICRC Commentary, “national interests” is broader than “security considerations.” [...] With this wording the belligerents may object to someone’s departure not only when it would endanger their security but also when the national economy would suffer as a result. [...] A great deal is thus left to the discretion of the belligerents, who may be inclined to interpret “national interests” as applying to many different spheres’: Commentary GC IV, 236.

⁷¹ Article 28(1) of the Refugee Convention. For further discussions about the margin of appreciation granted to states parties when applying this exception, see J. Vedsted-Hansen, 'Article 28', in A. Zimmerman (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (Oxford: Oxford University Press, 2011), 1206–7.

⁷² The Human Rights Committee has recalled that 'Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected. [Moreover] the application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination': *General Comment No 27* (n 69), §§ 14 and 18.

⁷³ For an overview of the issues at stake and the conflicting interpretations raised in the refugee law doctrine, see W. Kälin, M. Caroni, and L. Heim, 'Article 33, para. 1', in A. Zimmerman (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (Oxford: Oxford University Press, 2011), 1327–96 at 1377–80; J.-Y. Carlier, 'Droit d'asile et des réfugiés: de la protection aux droits', 332 *Recueil des cours de l'Académie de droit international* (2008) 93–101; G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn, Oxford: Oxford University Press, 2007), 242–3; Hathaway (n 49), 355–63; J.-F. Durieux and A. Hurwitz, 'How Many is Too Many? African and European Legal Responses to Mass Influxes of Refugees', 47 *German Yearbook of International Law* (2004) 105–59; E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 119–21; M. Barutciski, 'Le militantisme juridique et le néo-naturalisme face au droit international positif: les flux massifs de réfugiés et la sécurité nationale', 14(1) *Revue québécoise de droit international* (2002) 37–54; A. Vibeke Eggli, *Mass Refugee Influx and the Limits of Public International Law* (The Hague: Martinus Nijhoff, 2002), 168–72; V. Chetail, 'Le principe de non refoulement et le statut de réfugié en droit international', in V. Chetail and J.-F. Flauss (eds), *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés—50 ans après: bilan et perspectives* (Brussels: Bruylant, 2001), 55–61.

⁷⁴ UN Doc A/CONF.2/SR.35 (1951), 21. See also A/CONF.2/SR.16 (1951), 6.

⁷⁵ UN Doc A/Conf.78/C.1/L.28/Rev.1, adopted in the Committee of the Whole by 24 votes to 20 with 40 abstentions.

⁷⁶ One should further add that Art 33 applies whether asylum-seekers enter the territory legally or illegally. This basic protection is further reinforced by Art 31(1) of the Geneva Convention. This provision prohibits the imposition of penalties on account of their illegal entry provided that: they come directly from a country of persecution; they present themselves without delay to the national authorities; and they show good cause for their illegal entry.

⁷⁷ Among a plethora of similar conclusions, see Executive Committee (ExCom) Conclusions Nos 15 XXX (1979), [f]; 22 XXXII (1981), [A.1, 2]; 79 (XLVII) (1996), (i); 100 LV (2004), [i]; 103 LVI (2005), [I].

⁷⁸ For a survey of the main closure borders, see K. Long, *No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx* (Geneva: UNHCR Policy Development and Evaluation Service, 2010).

- ⁷⁹ For an overview of the state practice in the field of temporary protection, see notably: I.C. Jackson, *The Refugee Concept in Group Situations* (The Hague: Martinus Nijhoff, 1999); J. Fitzpatrick, 'The Principle and Practice of Temporary Refuge: A Customary Norm Protecting Civilians Fleeing Internal Armed Conflict', in D.A. Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Dordrecht: Martinus Nijhoff, 1988), 87-101; D. Perluss and J.F. Hartman, 'Temporary Refuge: Emergence of Customary Norm', 26 *Virginia Journal of International Law* (1986) 558-75; G.J.L. Coles, 'Temporary Refuge and the Large Scale Influx of Refugees', 8 *Australian Yearbook of International Law* (1978-80) 190-212. At the regional level, temporary protection has been in the EU with the Temporary Protection Directive 2001/55/EC, OJ L 212/12 (2001).
- ⁸⁰ Among many other restatements see *Chahal v United Kingdom*, ECHR (1996) Reports 1996-V, § 80; CAT, *Tapia Paez v Sweden*, UN Doc CAT/C/18/D/39/1996 (1996), § 14.5.
- ⁸¹ Article 22(9) of ACHR; Art 12(5) of ACHPR; Art 4 of Protocol No 4 of ECHR; Art 26(b) of the Arab Charter; Art 25(4) of the CIS Convention; and Art 19(1) of the Charter of Fundamental Rights of the European Union.
- ⁸² *General Comment No 15: The Position of Aliens under the Covenant*, UN Doc HRI/GEN/1/Rev.1 at 18 (1986), § 10. Though much less ratified, see also for an explicit restatement of this well-established prohibition, Art 22(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
- ⁸³ *Concluding Observations on Dominican Republic*, UN Doc CERD/C/DOM/CO/12 (2008), § 13; *General Recommendation 30: Discrimination Against Non-Citizens*, UN Doc HRI/GEN/1/Rev.7/Add.1 at 2 (2005), § 26.
- ⁸⁴ 'Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.'
- ⁸⁵ Article 49(2).
- ⁸⁶ For an overview of these controversies, see: Y. Arai-Takahashi, *The Law of Occupation. Continuity and Change of International Humanitarian Law and its Interaction with International Human Rights Law* (Leiden: Martinus Nijhoff, 2009), 332-45; J.-M. Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1995), 143-78; Y. Dinstein, 'The Israel Supreme Court and the Law of Belligerent Occupation: Deportations', 23 *Israel Yearbook on Human Rights* (1993) 1-26; R. Lapidot, 'The Expulsion of Civilians from Areas which Came under Israeli Control in 1967: Some Legal Issues', 2 *European Journal of International Law* (1990) 97-109.
- ⁸⁷ ECtHR, *Hirsi Jamaa and Others v Italy*, Judgment of 23 February 2012, App No 27765/09, § 160.
- ⁸⁸ *Hirsi Jamaa and Others v Italy* (n 87), § 180.
- ⁸⁹ See notably in this sense: ECtHR, *Andric v Sweden*, ECHR (1999), App No 45917/99, § 1; *General Comment No 15* (n 82), § 10; CERD, *General Recommendation 30* (n 83), § 26; IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc 5 rev 1 corr (2002), § 404.
- ⁹⁰ This view corresponds to the mainstream doctrine on refugee law. See especially V. Holzer, *Protection of People Fleeing Situations of Armed Conflict and Other Situations of Violence and the 1951 Refugee Convention* (Geneva: UNHCR Legal and Protection Policy Research Series, 2012); J.-F. Durieux, 'Of War, Flows, Laws and Flaws: A Reply to Hugo Storey', 31(3) *Refugee Survey Quarterly* (2012) 161-76 at 163-4; C.M. Bailliet, 'Assessing Jus Ad Bellum and Jus in Bello within the Refugee Status Determination Process: Contemplations on Conscientious Objectors Seeking Asylum', 20(1) *Georgetown*

Immigration Law Journal (2005) 337–84; Von Sternberg (n 2), 5; M. Kagan and W.P. Johnson, ‘Persecution in the Fog of War: The House of Lords’ Decision in Adan’, 23 *Michigan Journal of International Law* (2002) 247–64; H. Storey and R. Wallace, ‘War and Peace in Refugee Law Jurisprudence’, 95 *American Journal of International Law* (2001) 349–66 at 353; W. Kälin, ‘Refugees and Civil Wars: Only a Matter of Interpretation?’, 3 *International Journal of Refugee Law* (1991) 435–51; S. Bodart, ‘Les réfugiés apolitiques: guerre civile et persécution de groupe au regard de la Convention de Genève’, 7(1) *International Journal of Refugee Law* (1995) 39–59; P. Butcher, ‘Assessing Fear of Persecution in a War Zone’, 5(1) *Georgetown Immigration Law Journal* (1991) 435–74.

⁹¹ See notably Holzer (n 90), 19–22; Storey (n 4), 19–21; Edwards (n 2), 433–4; Von Sternberg (n 2), 320; Jaquemmet (n 2), 665–9; Storey and Wallace (n 90), 359; B. Rutinwa, ‘Refugee Claims Based on Violation of International Humanitarian Law: The “Victims” Perspective’, 15 *Georgetown Immigration Law Journal* (2000) 497–517.

⁹² See most notably: *Canada v Ward* (1993) 103 DLR 4th 1; *Horvath v Secretary of State for the Home Department* (2000) 3 All ER 577; *K v Refugee Status Appeals Authority* (2005) NZAR 441 (2004); Art 9 of the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12 (2004).

⁹³ One should further add that the definition of persecution under international criminal law also converges with its refugee law counterpart as referring to a serious violation of human rights. According to Art 7(2)(g) of the Rome Statute, “‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”. This definition nevertheless contrasts with the one under refugee law with regard to its collective nature. This last characteristic is required by international criminal law simply because, according to the definition of the crime against humanity, persecution is ‘part of a widespread or systematic attack directed against any civilian population’. By contrast, in international refugee law, persecution may be either collective or individual depending on the specific context of the case.

⁹⁴ The position of UNHCR has also not always been clear. In its Handbook first published in 1979, it considered: ‘Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or Protocol. However, foreign invasion or occupation of all or part of a country can result—and occasionally has resulted—in persecution for one or more of the reasons enumerated in the 1951 Convention’: UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva: UNHCR, 1979), §§ 164–5. UNHCR has since clarified that, in many situations, persons fleeing conflicts may have a well-founded fear of persecution for a 1951 Convention ground: UNHCR, *Note on International Protection*, UN Doc A/AC.96/850 (1995), § 11.

⁹⁵ Such a disparity has been highlighted by the UNHCR in the case of asylum-seekers from Afghanistan, Iraq, and Somalia in EU host countries. According to the Refugee Agency, ‘The variation extends to as much as 33 percent with regard to first instance decisions relating to Afghanistan in 2010, 50 percent with regard to Iraq and 72 percent with regard to Somalia’. UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence* (Geneva: UNHCR, 2011), 17, see also tables at 17–18.

⁹⁶ See eg *Mohamed v Ashcroft* (2005) 396 F.3d 999, 1006 (8th Cir); *Adan v Secretary of State for the Home Department* (1998) 2 WLR 702, per Lord Slynn of Hadley; *Isa v Canada* (Secretary of State) (1995) FCJ No 354, 72. For further discussions about the state practice, see the doctrinal references mentioned above.

⁹⁷ Article 15(c) of the Qualification Directive 2004/83/EC.

⁹⁸ In particular, the determination of the very existence of an ‘armed conflict’ has led to diverging interpretations among member states. For instance, the situation in Iraq has been recognized as a non-international armed conflict in France and the United Kingdom, while other member states (such as Romania and Sweden) have refused to come to this obvious conclusion: UNHCR, *Asylum in the European Union, A Study of the Implementation of the Qualification Directive* (Geneva: UNHCR, 2007), 76–8. For a critical account of the irrelevance of humanitarian law in construing subsidiary protection, see also C. Bauloz, ‘The (Mis)Use of International Humanitarian Law under Article 15(c) of the EU Qualification Directive’, in J.-F. Durieux and D. Cantor (eds), *Refuge from Inhumanity: Enriching Refugee Protection Standards Through Recourse to International Humanitarian Law* (The Hague: Martinus Nijhoff, 2014). For further discussions about the controversies raised by subsidiary protection, see also: H. Battjes, ‘Subsidiary Protection and Other Alternative Forms of Protection’, in V. Chetail and C. Bauloz (eds), *Research Handbook on Migration and International Law* (Cheltenham: Edward Elgar Publishing, 2014); S.S. Juss, ‘Problematizing the Protection of “War Refugees”: A Rejoinder to Hugo Storey and Jean-François Durieux’, 32(1) *Refugee Survey Quarterly* (2013) 122–47; P. Tiedemann, ‘Subsidiary Protection and the Function of Article 15(c) of the Qualification Directive’, 31(1) *Refugee Survey Quarterly* (2012) 123–38; R. Errera, ‘The CJEU and Subsidiary Protection: Reflections on Elgafaji and After’, 23(1) *International Journal of Refugee Law* (2011) 93–110; V. Chetail and C. Bauloz, *The European Union and the Challenges of Forced Migration: From Economic Crisis to Protection Crisis?* (San Dimenico di Fiesole: European University Institute, Robert Schuman Centre for Advanced Studies, EU-US Immigration Systems 2011/07, 2011), 17; H. Lambert and T. Farrell, ‘The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence’, 22(2) *International Journal of Refugee Law* (2010) 237–73; J. McAdam, ‘The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime’, 17 *International Journal of Refugee Law* (2005) 461–516; R. Piotrowicz and C. Van Eck, ‘Subsidiary Protection and Primary Rights’, 53 *International and Comparative Law Quarterly* (2004) 107–38.

⁹⁹ Though a non-binding resolution, the Cartagena Declaration has been endorsed in the domestic law of several states and is considered as a primary instrument of protection in the region. For further discussions about the OAU Convention and the Cartagena Declaration, see G. Okoth-Obbo, ‘Thirty Years On: A legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa’, 20(1) *Refugee Survey Quarterly* (2001) 79–138; E. Arboleda, ‘Refugee Definition in Africa and Latin America: The Lessons of Pragmatism’, 3 *International Journal of Refugee Law* (1991) 185–207; P. Nobel, ‘Refugee, Law, and Development in Africa’, 3 *Michigan Yearbook of International Legal Studies* (1982) 255–88.

¹⁰⁰ See eg UN Human Rights Committee, *Warsame v Canada*, UN Doc CCPR/C/102/D/1959/2010 (2011); Committee against Torture (CAT), *K.H. v Denmark*, UN Doc CAT/C/49/D/464/2011 (2012); CAT, *Sadiq Shek Elmi v Australia*, UN Doc CAT/C/22/D/120/1998 (1999).

¹⁰¹ *N.A. v United Kingdom*, 17 July 2008, App No 25904/07, § 115.

102 *N.A. v United Kingdom* (n 101), § 115. Such a situation has been nevertheless acknowledged by the Court as regards Mogadishu, Somalia: *Sufi and Elmi v United Kingdom*, 28 June 2011, App Nos 8319/07 and 11449/07, § 248.

103 *Salah Sheekh v The Netherlands*, 11 January 2007, App No 1948/04, § 149; *N.A. v United Kingdom* (n 101), § 116.

104 As mentioned before, besides religion and political opinion, three other grounds of persecution have been added in the Refugee Convention (race, nationality, and membership of a particular social group).

105 One could argue, however, that Art 45(3) further prohibits any transfer when the destination state is unable or unwilling to apply the Fourth Geneva Convention, thereby triggering the risk of violation of any rights and guarantees granted by this Convention. This extensive scope of application is nevertheless mitigated by the fact that it only applies to civilian detainees. See also for prisoners of war, Art 12(2) of GC III.

106 Article 45(6) of GC IV.

107 See most notably: *Soering v United Kingdom*, 7 July 1989, App No 1/189/161/217, § 88.

108 UN Doc A/RES/39/169 (1994). Since then, the General Assembly has constantly referred to voluntary repatriation as ‘the preferred solution’ by contrast to the other possible solutions provided by local integration or resettlement in a third country. See also among the numerous and somewhat repetitive Excom Conclusions Nos: 109 (LXI) (2009), preambular § 16; 108 (LIX) (2008), (l); 104 (LVI) (2005), preambular § 1; 101 (LV) (2004), preambular § 5; 95 (LIV) (2003), (i); 90 (LII) (2001), (j); 87 (L) (1999), (r); 85 (XLIX) (1998), (g); 81 (XLVIII) (1997), (q); 79 (XLVII) (1996), (q); 74 (XLV), 1994 (v).

109 Articles 8(c) and 9 of UNHCR Statute.

110 For an overview see notably: Hathaway (n 49), 917–63; V. Chetail, ‘Voluntary Repatriation in Public International Law: Concepts and Contents’, 23 *Refugee Survey Quarterly* (2004) 1–32; M. Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (The Hague/Boston/London: Martinus Nijhoff, 1997); S. Takahashi, ‘The UNHCR Handbook on Voluntary Repatriation: The Emphasis of Return over Protection’, 9(4) *International Journal of Refugee Law* (1997) 593–612; B.S. Chimni, ‘The Meaning of Words and the Role of UNHCR in Voluntary Repatriation’, 5(3) *International Journal of Refugee Law* (1993) 442–60; G.S. Goodwin-Gill, ‘Voluntary Repatriation: Legal and Policy Issues’, in G. Loescher and L. Monahan (eds), *Refugees and International Relations* (Oxford: Oxford University Press, 1989), 255–85; R. Hofmann, ‘Voluntary Repatriation and UNHCR’, *Zeitschrift für ausländisches und öffentliches Recht* (1984) 327–35.

111 Refugees lawfully established in the territories of states parties are notably thus entitled to access to courts (Art 16), the right to work (Art 17), access to public education (Art 22), and the right to social security (Art 24).

112 Article 34.

113 Zieck (n 110), 101–2.

114 Hathaway (n 49), 918–19.

115 Article 5. See also Cartagena Declaration, § 12 and Council Directive 2001/55/EC on Temporary Protection, Art 22.

116 Article 12(4) of ICCPR; Art 5 of CERD; Art 2 of the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid; Art 10(2) of the 1989 Convention on the Rights

of the Child; Art 3(2) of the 1963 Protocol No 4 to the ECHR; Art 22(5) of ACHR; Art 12(2) of ACHPR; and Art 27(a) of the Arab Charter.

117 *General Comment No 27* (n 69), § 19.

118 See UNHCR, *Handbook on Voluntary Repatriation* (Geneva: UNHCR, 1996), § 2.1 considering the right to return as ‘the basic principle underlying voluntary repatriation’. For further discussions, see: Chetail (n 110), and the bibliographical references mentioned therein.

119 UN Doc A/51/18 (1996).

120 UN Doc E/CN.4/Sub.2/2005/17 (2005).

121 See generally, V. Tennant, ‘Return and Reintegration’, in V. Chetail (ed), *Post-Conflict Peacebuilding: A Lexicon* (Oxford: Oxford University Press, 2009), 307–19 and the special issue on ‘Displacement, Peace Processes and Post-Conflict Peacebuilding’ in 28 *Refugee Survey Quarterly* (2009).

122 This provision curiously contrasts with the legal regime applicable during armed conflicts for, according to Art 109(3) of GC III, ‘no sick or injured prisoner of war [...] may be repatriated against his will during hostilities’.

123 Commentary GC IV, 542.

124 Commentary CG III, 542.

125 Article 7 of GC III.

126 ‘The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.’

127 Customary International Humanitarian Law, Rule 128.

128 Customary International Humanitarian Law, Rule 128; see Art 85(4)(b) of AP I.

129 Jaquemet (n 2), 663–4.

130 For further details, see: A.J. Esgain and Colonel W.A. Solf, ‘The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations and Deficiencies’, 41 *North Carolina Law Review* (1963) 537–96 at 590–3; S.A. Pasha, ‘The Repatriation Problem of the Korean Prisoners of War and India’s Contribution in its Solution’, 2 *The Indian Journal of International Law* (1962) 1–47; G. Attia, *Le rapatriement des prisonniers de guerre* (Beirut: Dar el Fath, 1960); R.R. Baxter, ‘Asylum to Prisoners of War’, 30 *British Yearbook of International Law* (1953) 489–98.

131 For instance, about 15,000 Iraqi prisoners of war refused their repatriation to Iraq after the second Gulf War. H. Fischer, ‘Protection of Prisoners of War’, in D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), 321–67 at 366. See also J. Quigley, ‘Iran and Iraq and the Obligations to Release and Repatriate Prisoners of War after the Close of Hostilities’, *American University Journal of International Law and Policy* (1989) 82.

132 Commentary GC III, 546–7: ‘1. Prisoners of war have an inalienable right to be repatriated once active hostilities have ceased. [...] 2. No exception may be made to this rule unless there are serious reasons for fearing that a prisoner of war who is himself opposed to being repatriated may, after his repatriation, be subject of unjust measures afflicting his life or liberty, especially on grounds of race, social class, religion or political views, and that consequently repatriation would be contrary to the general principles of international law for the protection of the human being. Each case must be examined individually.’ The ICRC has taken action according to these principles in a number of conflicts, including the Iran-Iraq eight years conflict (20 ICRC Annual Report 1989, 87), the

Gulf War (ICRC Annual Report 1991, 100), and the Ethiopia-Eritrea armed conflict (ICRC Annual Report 2007, 102).

133 See Rule 128.

134 See Major V.A. Ary, 'Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements', 148 *Military Law Review* (1995) 186-273 at 222; and J.E. Rockwell, 'The Right of Nonrepatriation of Prisoners of War Captured by the United States', 83(2) *The Yale Law Journal* (1973) 358-84 at 377-8.

135 See J.P. Charmatz and H.M. Wit, 'Repatriation of Prisoners of War and the 1949 Geneva Convention', 62 *The Yale Law Journal* (1952-53) 391-415 at 406-8 who already contemplated the potential of international human rights law for repatriation to be conducted on a voluntary basis. See also C. Shields Dellessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities*, vol 5 (Zürich: Société Suisse de droit international, Schulthess, 1977), 194-9; Rockwell (n 134), 378-82.

136 Kälén (n 2), 637.

137 *Prosecutor v Furundžija*, Trial Judgment, Case No IT-95-17/1, 10 December 1998, § 183.

138 H. Arendt, *The Origins of Totalitarianism* (San Diego: Harcourt, 1958), 296.

139 Arendt (n 138), 294-5.

(p. 351) 11 Humanitarian Assistance

This Chapter describes the overall approach of international humanitarian law to humanitarian assistance. Sections 9.38–9.41 deal more specifically with supplies for the civilian population in situations of occupation.

11.01

The basic needs of the population must be met by the parties to the armed conflict (Article 27, 55 GC IV, Article 69 AP I, common Article 3 GC I–IV).

1. The notion of humanitarian assistance is intrinsically linked to the primary obligation of the parties to the armed conflict to ensure that the basic needs of the population under their control are fulfilled (*see infra* 11.03).¹ The fact that international humanitarian law foresees that other actors such as impartial humanitarian organizations can step in under certain circumstances (*see infra* 11.02) in order to offer relief to populations affected by armed conflict does not diminish the extent of the primary obligation of the parties to the armed conflict (Article 60 GC IV).²

2. This obligation is expressly mentioned in Article 55 GC IV and Article 69 AP I defining the scope of the occupying power's responsibilities vis-à-vis the civilian population of the occupied territory. These provisions oblige—to the extent possible—the occupying power to make available to the occupied population various supplies essential for its survival (food, medicines, clothes, means of shelter for instance).

3. Outside occupation law, no specific rule of international humanitarian law contains such an express obligation. However, this does not mean that the obligation of a party to an armed conflict to ensure the basic needs of the population does not exist. On the contrary, this obligation derives from the broader obligation to treat humanely persons who are in the power of a party to the armed conflict.³ Therefore, Article 27 GC IV for international armed conflict and common Article 3 for non-international armed conflict can also be interpreted as requiring all belligerents (including the non-state parties to a non-international armed conflict) to ensure that the basic needs of the population under their control are met.⁴ The right to humane treatment is at the very core of international humanitarian law protecting persons in war. With respect to civilians it is Article 27 GC IV which codifies this basic obligation of parties to an international armed conflict. Common Article 3 expresses the same idea for non-international armed conflicts. The obligation to treat civilians in a humane way not only means the prohibition of certain behaviour but expresses also an obligation to act in favour of the civilian population.

(p. 352) 4. Over time, the notion of 'basic needs' has been expanded, notably by AP I. Initially limited to food and medical supplies in GC IV (Article 55 GC IV),⁵ the notion of basic needs of the civilian population has been broadened by the APs (Article 69, 70 AP I, Article 18 para. 2 AP II), which have extended the list of supplies to be provided by belligerents to all those essential to the survival of the civilian population.⁶

5. The obligation of the parties to the armed conflict to ensure that the basic needs of the population under their control are met can also be derived from human rights law that remains applicable in situations of armed conflict.⁷

11.02

Impartial humanitarian organizations are entitled to offer their services in order to undertake humanitarian activities in favour of persons affected by

armed conflicts (common Article 3 GC I-IV, Article 9 GC I, Article 9 GC II, Article 9 GC III, Article 10 GC IV).

1. The right to humanitarian actors to offer their services to the parties to an armed conflict finds its legal basis in common Article 3 for non-international armed conflicts and in Articles 9/9/9/10 GC I-IV for international armed conflicts. These articles spell out the so-called 'right of initiative'. This right of initiative has been defined as the legal entitlement given to impartial humanitarian organizations to propose their humanitarian activities to a party to the armed conflict.⁸

2. The right of initiative as foreseen under international humanitarian law only belongs to organizations which qualify as 'impartial humanitarian organizations'.⁹ Therefore, the quality and the *modus operandi*—both being intrinsically connected—of the humanitarian actor concerned are key for the latter to qualify as an impartial humanitarian organization for the purposes of international humanitarian law. This means that only such 'organizations' (i.e. entities which are sufficiently structured to qualify as such) which deliver humanitarian activities (i.e. those which seek to preserve the life, security, dignity, and physical and mental well-being of persons affected by an armed conflict, or which seek to restore the well-being if it has been infringed upon) and which operate on the basis of the principle of impartiality (i.e. to bring relieve to the suffering of individuals, while being guided solely by their needs, to give priority to the most urgent cases of distress) can be considered as impartial humanitarian organization within the meaning of international humanitarian law.¹⁰ This qualification is an important element of the humanitarian access equation as it has direct consequences on the conditions under which the offer must be accepted or may be rejected.

2. In this regard, an offer of services emanating from an actor that does not qualify as an impartial humanitarian organization under international humanitarian law meaning (p. 353) could be lawfully turned down simply because of the lack of quality of its author (*see below* Section 11.03).¹¹ International humanitarian law does not preclude other actors, such as states or intergovernmental organizations, which do not qualify as impartial humanitarian organizations, to offer their services to parties to an armed conflict. Such offers of services are however not regulated by international humanitarian law *per se* and such other actors cannot claim that these are based on a corresponding right of initiative based on international humanitarian law.¹²

4. The right of initiative gives impartial humanitarian organizations the right to offer their services and to perform humanitarian activities without states regarding this as unlawful interference in their domestic affairs or as unfriendly acts.¹³

5. Nothing in international humanitarian law restricts the right of impartial humanitarian organizations to offer their services. Neither common Article 3 nor Article 9/9/9/10 GC I-IV, which form the only provisions on which the right of initiative under international humanitarian law is grounded, require any condition to be fulfilled for an impartial humanitarian organization to offer its services in a situation of an armed conflict.¹⁴ In particular, the exercise of the right of initiative is not conditioned by the fact that the civilian population would not be provided with supplies essential for its survival.¹⁵ Such a condition might risk generating adverse effects for an impartial humanitarian organization from an operational perspective as it would provide the parties to the armed conflict a ground not foreseen by law to turn down a valid offer of services and could prevent impartial humanitarian organizations to pre-position, for instance, logistic assets and humanitarian personnel in the territory affected by the armed conflict before the humanitarian situation reaches a critical point.

5. The right of initiative granted to impartial humanitarian organizations raises also the question of which humanitarian activities may form part of the offer. International humanitarian law does not specifically define the notion of 'humanitarian activities' which impartial humanitarian organizations may offer to the parties to an armed conflict. Common Article 9/9/9/10 of the Geneva Conventions applicable to international armed conflict specifies that the ICRC and any other impartial humanitarian organization can offer to undertake humanitarian activities for the 'protection' and the 'relief' of those affected by armed conflict. Common Article 3 only refers to 'services' but one should consider that the right of initiative in non-international armed conflict also includes all humanitarian activities as understood under common Article 9/9/9/10. Therefore, in terms of scope, offers of services made by impartial humanitarian organizations should be interpreted to encompass humanitarian activities writ large. These should be interpreted as including both an assistance and a protection dimension. This has been made clear notably by Article 81 AP I requiring the parties to an AC to 'grant all facilities to the (p. 354) ICRC to carry out its humanitarian functions in order to ensure protection and assistance to victims of armed conflicts'. Humanitarian activities in the sense of international humanitarian law should therefore include all those activities aimed at preserving life and security or seeking to restore or maintain the mental and physical well-being of persons affected by armed conflict.¹⁶

6. The category of persons for whom the said activities may be undertaken differs in each Geneva Convention. In GC I it is 'wounded and sick, medical personnel and chaplains'; in GC II it is 'wounded, sick and shipwrecked persons, medical personnel and chaplains'; in the GC III it is 'prisoners of war'; and lastly, in GC IV it is 'civilian persons'. The difference in wording merely reflects the distinct categories of persons protected by each Convention. That is the case, at least, for GC I-III. In GC IV, however, the category of persons benefiting from the provision in Article 10 ('civilian persons') is wider in scope than the category of persons who qualify as 'protected persons' as defined in Article 4. Article 68 AP I extends the scope of its provisions to the civilian population as defined in the Protocol (Article 50 AP I). While the categories of persons referred to in the four Conventions are somewhat limited by the terms of the Conventions, international humanitarian law has evolved to the point where the right to offer services can be exercised for all persons affected by an armed conflict. Under international humanitarian law, humanitarian activities must benefit all persons who may need of assistance and/or protection as a result of an armed conflict. This means that states cannot limit activities to only one category of persons alone, e.g. civilians.¹⁷

11.03

Humanitarian activities carried out by impartial humanitarian organizations can only be undertaken with the consent of the parties concerned (common Article 3 GC I-IV, Article 70 AP I, Article 18 AP II). Under certain circumstances, exclusively humanitarian activities undertaken by impartial humanitarian organizations must be authorized (Article 59 GC IV).

1. This rule is the cornerstone of the rules governing humanitarian access. In this regard, international humanitarian law appears clear: the right of initiative described above (Section 11.02) does not translate into an unrestrictive right of access given to humanitarian actors. Impartial humanitarian organizations operating in situations of armed conflict must seek and obtain the consent of the parties to the conflict concerned.

2. The key question as to whose consent is required is who qualifies as the party concerned for the purposes of international humanitarian law?¹⁸ In this regard, rules governing consent vary in their wording and scope.

3. In *international armed conflicts*, the relevant provisions specify that consent only needs to be obtained from the states that are a party to the conflict and are 'concerned' by virtue of the fact that the proposed humanitarian activities are to be undertaken in their territory or in areas under their effective control. It is understood that the opposing party does not need to be asked to consent to relief operations that take place in the former party's territory or in territory controlled by it.¹⁹

(p. 355) 4. Common Article 3 is silent on who should consent to humanitarian relief operations in *non-international armed conflicts*. It has been argued—in relation to some recent cases—that humanitarian action undertaken in areas controlled by non-state armed groups requires only their consent, and not the one of the government of the state in whose territory such action is to take place. However, Article 18 (2) AP II expressly requires the consent of the High Contracting Party concerned.²⁰ The issue of consent cannot be dissociated from the notion of state sovereignty.²¹ Consent should therefore be sought from the state (through its effective government) in whose territory a non-international armed conflict is taking place, including for relief activities in areas over which the State has lost control.²² In any case, for practical reasons, some impartial humanitarian organizations such as the ICRC would also seek the consent of all parties to the specific conflict (including non-state armed groups party to it) before carrying out its humanitarian activities. It is clear from the logic underpinning international law in general and international humanitarian law in particular that, in principle, an impartial humanitarian organization will only be able to carry out the proposed humanitarian activities lawfully if it has consent to do so.

5. However, consent to humanitarian operations is not discretionary. International humanitarian law is not entirely deferential to state sovereignty when it comes to humanitarian operations. The question of whether a party to an armed conflict may lawfully turn down an offer of humanitarian services is intrinsically linked to its obligations vis-à-vis the population under its control, notably its ability to fulfil its primary obligation to meet the basic needs of that population. It has been argued that, if a belligerent is not in a position to fulfil its primary obligation to meet the basic needs of the population under its control, it must consent to the humanitarian activities of impartial humanitarian organizations.²³ When the relevant party is unable or unwilling to fulfil this obligation and when an offer of services has been made by an impartial humanitarian organization, there would appear to be no valid/lawful ground for withholding or denying consent. There may thus be circumstances under which, as a matter of international humanitarian law, a party to a conflict may be obliged to accept an offer of services.

6. There are only two grounds that may be invoked to turn down such an offer of services: (1) when an offer of services comes from an organization that does not qualify as impartial or the activities of which are not humanitarian in nature; or (2) when there are simply no needs to meet in the area in question, because, for instance, the party to an armed conflict has the capacity and is willing to fulfil its primary obligation itself. (p. 356) International humanitarian law does not foresee other grounds justifying to negatively respond to an offer of services.

7. It is important to underline that invoking military necessity would not be a valid ground to definitively turn down an offer of services and to deny the humanitarian activities proposed by impartial humanitarian organizations in their entirety. The military necessity argument can only be invoked to regulate humanitarian access, but not to completely prohibit the possibility for an impartial humanitarian organization to operate in a specific

territory. Consequently, this means that military necessity may only justify restrictions geographically and temporally.²⁴

8. International law as informed by subsequent state practice in the implementation of the Geneva Conventions has now evolved to the point where consent may not be refused on unlawful grounds. Thus, any rejection of humanitarian activities must be based on valid and lawful reasons, and the party to the conflict whose consent is sought must assess any offer of services in good faith and in line with its international legal obligations in relation to the humanitarian needs of the persons affected by the non-international armed conflict.²⁵

In this regard, a refusal to grant consent resulting in a violation of the party's own obligations may constitute an unlawful denial of access for the purposes of international humanitarian law. This would be the case, for instance, when a party's refusal results in the starvation of civilians as prohibited by Article 54 AP I in international armed conflicts (Article 14 AP II in non-international armed conflicts) or when the party is incapable of providing humanitarian assistance to a population under its control (including in the field of health) as required by the relevant rules.²⁶ A refusal to grant consent may also be considered unlawful for instance when the refusal is based on adverse distinction, i.e. when it is designed to deprive persons of a certain nationality, race, religious belief, class, or political opinion of the needed humanitarian relief or protection. International humanitarian law does not regulate the consequences of a denial of consent and does not spell out a general right of access that can be derived from an 'arbitrary'/'unlawful' denial/withholding of consent.

9. On various occasions, in such situations, where the party concerned did not consent, the UN Security Council took action and adopted resolutions calling upon the parties to an armed conflict to allow unimpeded delivery of humanitarian supplies to civilian population. Such resolution must be analysed carefully. Often, they were formulated in terms of recommendations, in which case they do not introduce any change in the legal situation, i.e. they were essentially recalling obligations under international humanitarian (p. 357) law, namely to grant consent, but were as such not an entitlement for the delivery of humanitarian supplies absent consent by the party.²⁷ But at times, notably in situation of extreme humanitarian crisis, the Security Council resorted to binding language, referring expressly to chapter VII of the Charter of the United Nations.²⁸ As a consequence, the rights and obligations of the parties to the conflict concerning humanitarian access have been modified. For example, in response to the humanitarian crisis caused by the conflict in Syria, the Security Council adopted Resolution 2139 (2014) and demanded the parties to the conflict in Syria and other relevant parties to allow humanitarian relief operations, effectively requiring them to consent to them. Later on, in Resolution 2165 (2014) the Council adopted a more intrusive and binding decision using 'decides' language²⁹ according to which UN humanitarian agencies and their implementing partners were 'authorized' to use a cross border approach to provide humanitarian assistance to people in need without seeking and obtaining the consent of the party to the armed conflict concerned, modifying rules requiring such consent.³⁰

11.04

Once impartial humanitarian relief schemes have been agreed to, the parties to the armed conflict, as well as other states concerned, are expected to allow and facilitate the rapid and unimpeded passage of the relief schemes, subject to their right of control (Articles 23, 59 GC IV, Article 70 AP I).

1. International humanitarian law distinguishes between the requirement to obtain consent from a party to a conflict following an offer of services on the one hand, and the obligation to allow and facilitate relief schemes, which serves to implement the acceptance of the offer, on the other hand.³¹

2. Once relief actions are accepted in principle, the states parties to an armed conflict are under an obligation to co-operate, and to take positive action to facilitate humanitarian operations. The parties must facilitate the tasks of relief personnel. This may include simplifying administrative formalities as much as possible to facilitate visas or other immigration issues, financial/taxation requirements, import/export regulations, field-trip approvals, and possibly privileges and immunities necessary for the organization's work. In short, the parties must enable 'all facilities' needed for an organization to carry out its agreed humanitarian functions appropriately. Measures should also be taken to enable the overall efficacy of the operation (e.g. time, cost, safety, appropriateness). This is an obligation of result whose content and realization are largely left to the parties to the armed conflict concerned.³²

3. This obligation to 'allow and facilitate' is expressed in rules regulating humanitarian activities in situations of international armed conflict (including occupation).³³ Neither common Article 3 (2) GC I-IV nor Article 18 (2) AP II address this aspect of humanitarian activities, but the rules applicable in international armed conflict on this issue are considered customary and applicable in both international and non-international armed conflicts.³⁴

(p. 358) 4. In *international armed conflicts*, the obligation to allow and facilitate relief operations applies not only to the parties to an armed conflict but to all States concerned. This means that States not party to the conflict through whose territory impartial humanitarian organizations may need to pass in order to reach conflict zones must authorize such transit (Article 70 AP I). However, international humanitarian law is silent on the consent of such third countries concerned. Does this mean that impartial humanitarian organizations are exempted from seeking and obtaining their consent? The answer should be negative. Consent of third States must be sought and obtained as matter of public international law. But, as a matter of international humanitarian law (Article 23 GC IV and Article 70, para. 2, AP I), those States are obliged to give their consent as well as to allow and facilitate relief schemes.

5. International humanitarian law does not expressly contain a similar obligation in *non-international armed conflicts*. There is, nevertheless, an expectation that states not party to the conflict will not oppose transit through their territory of impartial humanitarian organizations seeking to reach the victims of the conflict. The humanitarian spirit underpinning international humanitarian law should encourage non-belligerent states to facilitate humanitarian action that has already been accepted by the parties to a conflict. It could also be argued that this obligation incumbent upon third states can be inferred from the obligation to ensure respect for international humanitarian law (third states' refusal would lead to the impossibility of parties to the conflict to fulfil their primary obligation to meet the basic needs of the population).³⁵

6. Finally, the obligation to allow and facilitate humanitarian activities is without prejudice to the entitlement of the parties concerned to control them. As such the expression 'right of control' is not found as a treaty term in international humanitarian law, but is inherent in several provisions.³⁶ Measures of control authorized by international humanitarian law may serve a number of purposes: they may allow parties to an armed conflict to assure themselves, in particular through searches, that relief consignments are exclusively humanitarian; they may prevent humanitarian relief convoys from being endangered; they may ensure that they hamper military operations; and they may ensure that humanitarian relief supplies and equipment meet minimum health and safety standards.³⁷ Under

international humanitarian law, the obligation to allow and facilitate—to which the right of control is a corollary—is an obligation of result, not an obligation of means. Thus, even though the holders of the obligation to allow and facilitate have a related right of control, the implementation of the latter must be made in good faith and should never result in unduly delaying or rendering impossible the delivery of the humanitarian relief. This may well amount to an abuse of law and may, if it renders delivery of humanitarian relief impossible, be tantamount to an unlawful denial of consent.

11.05

Humanitarian relief personnel, and objects used for humanitarian relief operations, must be respected and protected (Article 71 AP I).

(p. 359) **1.** Humanitarian personnel and objects used for humanitarian relief operations must be respected and protected at all times. This means first and foremost that they must not be attacked. Intentionally directing attacks against personnel involved in humanitarian assistance missions, as long as they are entitled to the protection given to civilians by international humanitarian law, is a war crime under the ICC Statute in international and non-international armed conflicts.³⁸ Similarly, intentionally directing attacks against installations, material, units, or vehicles involved in a humanitarian assistance mission, as long as they are entitled to the protection given to civilian objects under international humanitarian law, is a war crime under the ICC Statute in international and non-international armed conflicts.³⁹

2. The parties must also do their utmost to prevent relief from being diverted or looted, and to ensure the safety of convoys. In other words, the obligation to protect humanitarian personnel and objects entails an obligation of due diligence incumbent upon the belligerent concerned that would create the circumstances allowing impartial humanitarian organization to efficiently reach victims of armed conflicts. This protection allows humanitarian personnel to act effectively for the benefit of persons in need. To this end, the parties should provide clear and strict instructions to their armed forces to protect humanitarian relief and personnel: Relief personnel, for their part, must take account of the national legislation and the security requirements of the Party in whose territory they are carrying out their duties (e.g. route, curfews) and the agreements negotiated with the parties. As explained above, their movement and activities may be temporarily restricted only in the case of imperative military necessity.⁴⁰

3. The obligation to respect and protect humanitarian relief personnel and objects is often associated with the idea of 'safe access' (which in international humanitarian law is not itself a term of art) which is frequently used in UN resolutions or other reference texts concerning humanitarian access. However, the obligation to provide security to humanitarian personnel must not be abused by the belligerent concerned in a way that the activities of an impartial humanitarian organization whose activities were initially consented-to would be wholly rendered impossible under the pretext of ensuring its security. While humanitarian personnel require a minimum of security in order to access persons affected by conflicts and to carry out their activities, impartial humanitarian organizations do not expect full security guarantees as this would be unrealistic. Humanitarian personnel, by the nature of their functions, are prepared to take a reasonable amount of risk in an insecure environment.

11.06

Whenever circumstances permit, belligerent parties ought to suspend air or missile attacks in order to permit the distribution of humanitarian assistance (Rule 103 HPCR Manual).

This is an application of the general rule which obliges parties to the conflict to respect the adversary's civilian population under all conditions, including allowing distribution of relief to civilians in need.

Footnotes:

- ¹ E.C. Gillard, 'The Law Regulating Cross-border Relief Operations' (2013) 95 *IRRC* 890, 355.
- ² ICRC, 'Q&A and Lexicon on Humanitarian Access' (2014) 96 *IRRC* 893, 366.
- ³ In addition, protected persons aliens in enemy territory will continue to benefit from the law applicable in peace time and the protections afforded under Article 38 GC IV.
- ⁴ E.C. Gillard and D. Akande, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, commissioned by the United Nations Office for the Coordination of Humanitarian Affairs, October 2016, 12.
- ⁵ However, Article 23 GC IV foresees that additional items (essential foodstuff, clothing, and tonics) will benefit from free passage when intended for children under fifteen, expectant mothers, and maternity cases.
- ⁶ Y. Dinstein, 'The Right to Humanitarian Assistance' (Autumn 2000) 53 *Naval War College Review* 8.
- ⁷ For example, the ICESCR provides for the right to food and water, and the Committee on Economic, Cultural, and Social Rights has noted, that whenever an individual or group are unable, for reasons beyond their control, for example in situations of natural or other disasters, to enjoy the rights to adequate food and water by the means at their disposal, states must provide those rights directly. Similar positive obligations form part of states' duty to protect the rights to life and to security of the person. See E.C. Gillard & D. Akande, *above* (n. 4), at 11.
- ⁸ ICRC, *Commentary of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I)*, Article 3, Geneva, ICRC, 2016, para. 784.
- ⁹ *Ibid.*, Article 9, paras 1153 ff.
- ¹⁰ *Ibid.*, Article 3, paras 788 ff.
- ¹¹ K. Macák, 'A Matter of Principle(s): The Legal Effects of Impartiality and Neutrality on States as Humanitarian Actors' (2016) 97 *IRRC* 897-8, 168. See also Section 11.03.
- ¹² ICRC, *Report on IHL and the challenges of temporary armed conflict*, Geneva, October 2015, 32nd International Conference of the Red Cross and Red Crescent, 27.
- ¹³ Article 70(1), 2nd sentence, AP I. See also, ICJ, *Military and paramilitary activities in and against Nicaragua case*, merits, Judgment 1986, para. 242.
- ¹⁴ ICRC, *Report on IHL and the challenges of temporary armed conflict*, Geneva, October 2015, 32nd International Conference of the Red Cross and Red Crescent, 27-8
- ¹⁵ See Gillard/Akande, *above* (n. 4), at 14-15.
- ¹⁶ *Ibid.*, 29.

- ¹⁷ ICRC, *Commentary of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I)*, Article 9, para. 1122.
- ¹⁸ Gillard, above (n. 1), at 363–7.
- ¹⁹ ICRC, *Commentary of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I)*, Article 9, paras 1165 and ff.
- ²⁰ For another view underlining that under such circumstances only the consent of the non-State armed group counts which controls the territory in which humanitarian activities will take place, see M. Sassoli, ‘When are States and Armed Groups obliged to accept humanitarian assistance?’, *International Association of Professionals in Humanitarian Assistance and Protection (PHAP)*, 6 November 2013, <http://phap.org/articles/when-are-states-and-armed-groups-obliged-to-accept-humanitarian-assistance>; F. Boucher-Saulnier, ‘Consent to Humanitarian Access: An Obligation Triggered by Territorial Control, not States’ Rights’ (2014) 96 *IRRC* 893, 207–17; F. Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (Macmillan, Oxford, 2003), 448 ff.
- ²¹ K. Okimoto, ‘Humanitarian Activities Carried Out Across Borders in Times of Armed Conflict in the light of State Sovereignty and International Humanitarian Law’ (2014) 17 *YIHL* 121–43, at 132 ff.
- ²² Gillard/Akande, above (n. 4), at 17.
- ²³ ICRC, *Report on IHL and the challenges of temporary armed conflicts*, Geneva, October 2015, 32nd International Conference of the Red Cross and Red Crescent, 29.
- ²⁴ ICRC, ‘Q&A and a Legal Lexicon on Humanitarian Access’ (2014) 96 *IRRC* 893, 374. See also ICRC, *Report on IHL and challenges of contemporary armed conflicts* (2015), 28.
- ²⁵ To describe a situation in which a party to an armed conflict unlawfully rejects a valid offer of humanitarian services some have used the expression ‘arbitrary denial/withholding of consent to relief operations’, even though the expression is not found in any treaty and international law does not provide authoritative clarification on how to interpret the criterion of ‘arbitrariness’. The expression ‘unlawful denial of consent’ seems to catch the situation more appropriately insofar as the unlawfulness of such denial of consent is intrinsically linked to the potential violations of IHL obligations incumbent upon the party concerned. In any case, the assessment remains context-specific, see ICRC, *Report on IHL and the challenges of temporary armed conflict*, Geneva, October 2015, 32nd International Conference of the Red Cross and Red Crescent, 29. For more details on the notion of arbitrary denial of consent, see Gillard/Akande, above (n. 4), at 21–5.
- ²⁶ Article 55 GCIV, Article 69 and 70 AP I, Article 18 AP II.
- ²⁷ Y. Dinstein, ‘The Right to Humanitarian Assistance’ (Autumn 2000) 53 *Naval War College Review* 10.
- ²⁸ In relation to northern Iraq, by SC Res. 688 (1991); in relation to Bosnia-Herzegovina, by SC Res. 770 (1992) and SS Res. 781 (1992); and in relation to Somalia, by SS Res. 794 (1992).
- ²⁹ SC Res. 2165 (2014), operative para. 2.
- ³⁰ Gillard/Akande, above (n. 4), at 19.
- ³¹ ICRC, *Report on IHL and the challenges of temporary armed conflict*, Geneva, October 2015, 32nd International Conference of the Red Cross and Red Crescent, 29–30.
- ³² Gillard/Akande, above (n. 4), at 26.

- 33** Article 59 para. 3 GC IV and Article 70 para. 2 AP I.
- 34** See *CIHL*, Vol. I, Rules 55 and 56.
- 35** In support of the argument, see Gillard/Akande, above (n. 4), at 44.
- 36** See Art. 23 GC IV and Art. 70 (3) AP I.
- 37** See ICRC, 'IHL Rules on Humanitarian Access and Covid-19' (19 April 2020), <https://logcluster.org/document/icrc-ihl-rules-humanitarian-access-and-covid-19-april-2020>. See also Gillard/Akande, above (n. 4), at 28.
- 38** Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute of the International Criminal Court, 17 July 1998 (ICC Statute).
- 39** Articles 8(2)(b)(iii) and 8(2)(e)(iii) ICC Statute.
- 40** ICRC, 'Q&A and Lexicon on Humanitarian Access' (2014) 96 *IRRC* 893, 372, 375.

(p. 277) 12 Detention in Armed Conflict

1. Introduction

Deprivation of liberty—detention—is a regular occurrence in armed conflict. Along with the conduct of hostilities it is one of the ways in which a belligerent attempts to weaken—and ultimately defeat—an adversary. Detention is regulated by a large number of provisions of international humanitarian law (IHL), the underlying and overarching purpose of which is to ensure the humane treatment of persons deprived of liberty. Apart from the relevant IHL treaty provisions,¹ some of which will be mentioned in this chapter, rules on various aspects of detention in armed conflict are also found in customary IHL, domestic law, and human rights law. The chapter focuses on IHL rules on detention related to armed conflict without elaborating on the relationship between IHL and other legal frameworks, except where it highlights the specificity of particular IHL norms.

Similar to other submissions in this book, the chapter cannot identify or respond to all of the open issues related to the topic. Its purpose, within the space available, is to outline some of the main principles and rules governing certain aspects of detention and to flag a few points of controversy. The following issues are briefly addressed: treatment and conditions of detention; procedural safeguards in internment; fair trial rights; and the transfer of detainees. A few remarks looking towards the future are offered in conclusion.

Before turning to the substantive law, several points of a preliminary nature are useful. IHL rules govern only detention related to an armed conflict. Where a deprivation of liberty is not related to an armed conflict, even if it takes place within it, IHL provisions are not applicable. The term ‘detention/deprivation of liberty’ in this chapter is always intended to mean ‘detention/deprivation of liberty in relation to an armed conflict’, but the full phrase is not repeated each time.

The treaties of IHL do not expressly include the term ‘arbitrary’ detention. It is nevertheless generally accepted, and it is a rule of customary IHL, that arbitrary detention is prohibited.² This proscription, like most other norms of customary law, is necessarily general in nature and does not provide specific guidance that would allow an assessment of when a deprivation of liberty in armed conflict may be deemed arbitrary. This will depend on a careful examination of the facts and on the proper application of the relevant law to the facts in any given case.

(p. 278) IHL treaties contain the terms ‘capture’, ‘arrest’, ‘detention’, and ‘internment’ to denote deprivation of liberty related to armed conflict, but do not define them, and occasionally use them in an interchangeable manner. The omission of definition(s) of the relevant terms is not only of conceptual interest, but can give rise to uncertainty with regard to the extent of legal protections owed in a given situation. By way of example, IHL treaties do not specifically establish when ‘detention’ becomes ‘internment’ in either international armed conflict (IAC) or non-international armed conflict (NIAC), thus triggering the application of the specific provisions making up this detention regime. Given the occasional reluctance of states to recognize that their detention operations include internment, particularly in situations of NIAC with an extra-territorial element (see section 2 ‘Procedural Safeguards in Internment’ below), it appears that an answer to this query is needed.

Detention by non-state armed groups (NSAGs) that are party to NIAC is not as common as detention by states, but, when it does occur, it poses more questions of a legal, policy, and practical nature than detention carried out by states. Challenges arise not only because of the general paucity of IHL rules governing certain aspects of deprivation of liberty in NIACs—discussed in section 2 ‘Procedural Safeguards in Internment’ below—but also because of

the great variety of NSAGs and the circumstances in which they operate. A key issue is the feasibility for NSAGs to apply some of the relevant IHL rules on detention. The NIAC-related sections on detention that follow should thus be read keeping in mind that the manner in which certain provisions will be applied will inevitably depend on the context.

2. Treatment and Conditions of Detention

A. Treatment

As noted in section 1 'Introduction', the principle of humane treatment underlies all IHL provisions on detention. While IHL encapsulates a balance between the principles of military necessity and humanity, it is obvious, and may be said to be beyond discussion, that there can be no justification of military necessity by a belligerent for inhumane behaviour towards a person, or persons, whom it has in its power. Humane treatment is explicitly reflected in key provisions of IHL treaties and cannot be modified by reference to the exigencies of military necessity.³

With respect to prisoners of war (POWs) in IAC, the Third Geneva Convention (GCIII), *inter alia*, states that:

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present (p. 279) Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.⁴

The treaty further provides that POWs are 'entitled in all circumstances to respect for their persons and their honour', and that 'Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.'⁵

In order to underline responsibility for the implementation of these provisions, GCIII expressly stipulates that POWs 'are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.'⁶ Prohibited acts that will give rise to individual criminal responsibility, within a regime of universal jurisdiction, are outlined in the Convention's grave breaches provisions.⁷

The Fourth Geneva Convention (GCIV) on the protection of civilians, also applicable to IAC, contains similar and even more detailed prescriptions. It provides, *inter alia*, that persons protected by this treaty, including detained civilians, are:

[E]ntitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.⁸

The treaty prohibits the parties from taking any measure which would:

[C]ause 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 (p. 280) person, but also to any other measures of brutality whether applied by civilian or military agents.⁹

The treaty also states that 'no protected person may be punished for an offence he or she has not personally committed' and that 'collective penalties and likewise all measures of intimidation or of terrorism are prohibited'.¹⁰

Similar to GCIII, GCIV stresses that the party in whose hands protected persons may be 'is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred'.¹¹ Prohibited acts which will give rise to individual criminal responsibility, within a regime of universal jurisdiction, are outlined in the Convention's grave breaches provisions.¹²

In the context of the rules on treatment, it is sometimes said that GCIII protects POWs from coercive interrogation in a way that GCIV does not protect detained civilians. This interpretation is based on the provisions of GCIII according to which POWs, when questioned, are bound to give 'only' their 'surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information'.¹³ It is submitted that there is no justification for this view. The fact that POWs are not bound upon questioning to provide the adversary with information of potential intelligence value, and may not be forced in any way to do so (see section 3 'Procedural Safeguards in Internment' below), is a logical consequence of the drafters intending to avoid giving a possible military advantage to the capturing side. What is overlooked is that both Conventions, albeit in different wording, essentially prohibit the same behaviour. According to GCIII:

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.¹⁴

Pursuant to GCIV:

'No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.'¹⁵

Additional Protocol I to the Geneva Conventions (API) further reinforces the centrality of the principle of humane treatment. Its 'Fundamental Guarantees'¹⁶ provisions are meant to serve as a legal safety net, covering any person, including those who may be detained in (p. 281) relation to an IAC, who does not already benefit from more favourable treatment under the Geneva Conventions. Article 75 of the Protocol provides that such persons 'shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this article without any adverse distinction'.¹⁷ It also lists specific acts that are prohibited 'at any time and in any place whatsoever, whether committed by civilian or by military agents'.¹⁸

While IHL treaty provisions governing detention in NIACs are generally far less developed than those relative to IACs, this does not apply to the principle of humane treatment and its elaboration in either Common Article 3 of the four Geneva Conventions or Additional Protocol II to the Geneva Conventions (APII). Half of Common Article 3, which also covers detainees, is devoted to the obligation of humane treatment and the list of specific acts that are prohibited 'at any time and in any place whatsoever' are:

- 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 judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.¹⁹

The proscriptions of Common Article 3 with regard to treatment have been supplemented by customary IHL, as reflected in the ICRC's 2005 Study on customary IHL (CIHL).²⁰

For its part, APII stipulates that, inter alia, the persons covered, including those whose 'liberty has been restricted', are 'entitled to respect for their person, honour and convictions and religious practices' and that they shall 'in all circumstances be treated humanely, without any adverse distinction'.²¹ It contains a longer enumeration of prohibited acts than that in Common Article 3.²²

(p. 282) B. Conditions of Detention

The principle of humane treatment is expressed in the prohibited acts outlined above, but must also be observed with respect to the conditions of detention. Persons deprived of liberty are in a position of vulnerability because the preservation of their physical and mental health, and of their very life, depends on the detaining authority. In this context, humane treatment means that such authority must provide an adequate response to both the physical needs (accommodation, food, clothing, hygiene, medical attention, etc), and the psychological needs (family contacts, relations with the outside world, religious and other activities, etc), of persons detained.

GCIII and GCIV include a detailed set of provisions on conditions of detention for POWs and civilians, and elaborate a range of other aspects of the respective internment regimes. The number of provisions is such that justice cannot be done to them here.²³ What should be noted is that internment is a non-punitive form of detention which is designed, with very few exceptions,²⁴ to allow detainees to live in a communal setting,²⁵ and to have contacts with the outside world, including with members of their families.²⁶

Common Article 3 does not include any provisions on conditions of detention in NIACs. APII rectifies this somewhat for situations in which it is applicable, by means of provisions which are to be applied 'as a minimum' with regard to persons deprived of liberty for reasons related to the armed conflict, 'whether they are interned or detained'.²⁷ The Protocol thus provides that such persons shall, 'to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict'.²⁸ They shall be 'allowed to receive individual or collective relief' and to 'practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions'.²⁹

The Protocol also specifies that those responsible for internment or detention shall also, 'within the limits of their capabilities',³⁰ ensure that: except where families are housed together, women are held in quarters separated from those of men and are under the immediate supervision of women; that persons deprived of liberty shall be allowed to send and receive letters and cards; that places of internment and detention shall not be located close to the combat zone; and that the persons involved shall have the benefit of medical examinations.³¹ APII likewise stipulates that the physical or mental health and integrity of

persons deprived of liberty shall not be endangered by any unjustified act or omission, and that it is prohibited to subject such persons to any medical procedure which is not indicated by their state of health and is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.³²

(p. 283) While customary IHL rules have to some extent filled the gap as regards conditions of detention in NIACs,³³ it remains a fact that IHL lacks a sufficiently detailed catalogue of norms on conditions of detention in this type of armed conflict.

Provided below, in keeping with the purpose of this chapter, is an enumeration of a number of basic rules that could serve as a guide to assessing the lawfulness of conditions of detention in NIACs.³⁴ The list is drawn from rules of customary IHL, specific provisions of IHL treaties, provisions of human rights 'soft law' on detention,³⁵ and best practices. The rules are by no means exhaustive and do not purport to define the parameters of humane conditions of detention.

1. Dignity and respect

Detention regimes for particular detainee populations should take due account of the customs and social relations of the communities to which the detainees belong. Detention regimes and conditions of detention must be adapted to a detainee's age, sex, and health status.

2. Safety

No detainee may at any time be sent to, or detained in areas where s/he may be exposed to the dangers of the combat zone, nor may his or her presence be used to render certain points or areas immune from military operations. Detainees must benefit from all available protective systems, such as shelters against aerial bombardment. Detainees are under the protection of the detaining authority. Detainees must be protected from other inmates or from external attacks that may be directed against them.

3. Food and drinking water

Detainees must be provided with adequate food and drinking water; consideration shall also be given to the detainees' customary diet, with expectant and nursing mothers and children being given additional food.

4. Hygiene and clothing

Detainees must be provided with adequate clothing to preserve their dignity and be protected from the adverse effects of the climate and/or be allowed to keep their own clothing. They shall be provided with the means to maintain personal hygiene, as well as to wash and dry their clothes. Access to sanitary facilities must be available to detainees at all times and organized in a way that ensures respect for dignity.

5. Personal belongings

Pillage of the personal belongings of detainees is prohibited.

(p. 284) 6. Accommodation

Detainees must be provided with adequate accommodation; sleeping and living accommodation shall meet all the requirements of health, with due regard being paid to climatic conditions.

7. Medical care

Detainees must be provided with adequate medical care, in keeping with recognized medical ethics and principles; patients should be provided with all relevant information

concerning their condition, the course of their treatment, and the medication prescribed for them. Every patient must be free to refuse treatment or any other intervention.

8. Humanitarian relief

Detainees must be allowed to receive individual or collective relief.

9. Religion

The personal convictions and religious practices of detainees must be respected.

10. Open air and exercise

Detainees must have sufficient access to the open air daily, in order to practice suitable exercise if they so wish.

11. Women

Women must be held in quarters separate from those of men, except where families are accommodated as family units. Women must be under the immediate supervision of women and benefit from treatment and facilities appropriate to their specific needs.

12. Minors

Children under eighteen years of age must be held in quarters separate from those of adults, except where families are accommodated as family units.

13. Work and recruitment

No detainee shall be forced/requested to take part in military operations, directly or indirectly, or to contribute through his/her work to the war effort. Detainees must, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

14. Family contact

Detainees must, subject to reasonable conditions, be allowed to be in contact with their family, through correspondence, visits, or other means of communication available.

15. Discipline and punishment

Disciplinary proceedings must be clearly established for defined disciplinary offences and be limited in time. No more restriction than is necessary to maintain order and security in the place of detention shall be applied. In no circumstances may disciplinary measures be inhuman, degrading, or harmful to the mental and physical health and integrity of the detainees. Account must, inter alia, be taken of a detainee's age, sex, and state of health. (p. 285) Punishment may be imposed only on detainees personally responsible for disciplinary offence(s) and must be limited in time. Solitary confinement is an exceptional and temporary disciplinary measure of last resort. Instruments of restraint such as shackles, chains, and handcuffs may be used only in exceptional circumstances and may never be applied as punishment.

16. Records

The personal details of detainees must be properly recorded.

17. Public curiosity

Detainees may not be exposed deliberately or through negligence to public curiosity or to insults or condemnation on the part of the public.

18. Death

In case of death, the family of the deceased detainee must be informed of the circumstances and causes of death. Deceased detainees must be handed over to their next of kin as soon as practicable. Where handover to family is not practicable, the body must be temporarily interred according to the rites and traditions of the community to which the deceased belonged; the grave must be respected, and marked in such a way that it can always be recognized.

19. Complaint mechanism

A complaint process must be clearly established. Detainees must be allowed to present to the detaining authority any complaint on treatment or conditions of detention, or express any specific needs they may have.

20. Foreigners

Foreign nationals must be allowed to inform the diplomatic and consular representatives of the state to which they belong of their detention. Such information may also be conveyed through intermediaries such as the ICRC.

21. Oversight

Independent monitoring bodies, such as the ICRC, must be given access to all detainees in order to monitor treatment and conditions of detention and perform other tasks of a purely humanitarian nature.

3. Procedural Safeguards in Internment

In armed conflict, 'internment' denotes the non-criminal detention of a person based on the serious threat that his or her activity poses to the security of the detaining authority in relation to the conflict.³⁶ It is with respect to the regulation of the grounds and process for (p. 286) internment that dissimilarities emerge between IHL applicable in IACs and NIACs, and between IHL and the corresponding rules of human rights law. This is one of the areas in which the question of the interplay between the two branches of international law arises, and has triggered controversy, due to divergences between the relevant provisions.

Outside armed conflict, deprivation of liberty should, in the great majority of cases, occur because a person is suspected of having committed a criminal offence. Additionally, in guaranteeing the right to liberty of person, the International Covenant on Civil and Political Rights (ICCPR)³⁷ and equivalent provisions of regional human rights treaties³⁸ provide that anyone detained, for whatever reason, has the right to judicial review of the lawfulness of his or her detention³⁹ (also known in some legal systems as the right to *habeas corpus*). While this right is not explicitly included as non-derogable in the ICCPR,⁴⁰ it is being increasingly viewed as such.⁴¹

Situations of armed conflict often constitute a different reality from peacetime, as a result of which IHL incorporates different rules related to non-criminal detention for security reasons to those of human rights law. International human rights bodies and regional courts seem to have accepted that IHL provides the appropriate procedural framework for internment in IACs,⁴² but have either not yet pronounced on or have taken another view with respect to internment in NIACs.⁴³

The focus of this section of the chapter is on the group of rules related to internment in armed conflict, their rationale, and relevant procedural safeguards.

A. IAC

In IAC, which may include situations of occupation, IHL permits the internment of POWs and, under certain conditions, of civilians.

(p. 287) 1. POW internment

POWs⁴⁴ include combatants captured by the adverse party in an international armed conflict. As a term of art, ‘combatant’ denotes a legal status that, as such, exists only in this type of conflict. Under IHL rules on the conduct of hostilities, a combatant is a member of the armed forces of a party to an international armed conflict who has ‘the right to participate directly in hostilities’.⁴⁵ This means that he or she may use force against (ie target and kill or injure) other persons taking a direct part in hostilities, and attack military objectives. Because such activity is obviously prejudicial to the security of the adverse party, the GCIII provides that a detaining state ‘may subject prisoners of war to internment’.⁴⁶

In case of doubt about the entitlement to POW status of a captured belligerent, article 5 of the GCIII provides that such person shall be protected by the Convention until his or her status has been determined by a competent tribunal.⁴⁷ This provision is sometimes understood as requiring judicial review, which is not the case. Article 5 tribunals are meant to operate in or near the zone of combat; they only determine status, and no other issue.⁴⁸

It is generally uncontroversial that GCIII provides a sufficient legal basis for POW internment and that an additional domestic law basis is not required. The detaining state is not obliged to provide review, judicial or other, of the lawfulness of POW internment as long as active hostilities are ongoing,⁴⁹ because POWs are *ipso facto* considered to pose a security threat. POW internment must end, and POWs must be released, without delay after the cessation of active hostilities,⁵⁰ unless they are subject to criminal proceedings or are serving a criminal sentence.⁵¹ They may also be released earlier on medical grounds⁵² or on their own cognizance.⁵³ Unjustifiable delay in the repatriation of POWs after the cessation of active hostilities is a grave breach of API.⁵⁴

2. Internment of civilians

Under GCIV, internment—and assigned residence—are the most severe ‘measures of control’⁵⁵ that may be taken by a state with respect to civilians whose activity is deemed to pose a serious threat to its security. It is undisputed that the direct participation of civilians in hostilities falls into that category, as do other acts that meet the same threshold.⁵⁶ Civilians who take a direct part in hostilities are colloquially called ‘unprivileged belligerents’ (or incorrectly referred to as ‘unlawful combatants’).

(p. 288) GCIV provides different standards in terms of permissible grounds for internment depending on whether an internee is detained in a state party’s own territory (‘if the security of the Detaining Power makes it absolutely necessary’)⁵⁷ or is held in occupied territory (‘imperative reasons of security’).⁵⁸ It has been suggested that the difference in wording only indicates that internment in occupied territory should in practice be more exceptional than in the territory of a party to the conflict.⁵⁹

The internment review process in the two IAC scenarios would also appear to differ somewhat. In a state party’s own territory internment review is to be carried out by an ‘appropriate court or administrative board’,⁶⁰ while in occupied territory GCIV refers to a ‘regular procedure’ that is to be administered by a ‘competent body’.⁶¹ Despite these and other textual differences, the rules are in essence the same. A person interned in IAC has the right to submit a request for review of the decision on internment (to challenge it), the review must be expeditiously⁶² conducted either by a court or an administrative board, and

periodic review is thereafter to be automatic, on a six-monthly basis.⁶³ GCIV is silent on the issue of legal assistance.

It is sometimes queried why IHL provides procedural safeguards to civilians interned in IAC, and not to POWs. The simple answer is that, in reality, there is far less certainty as to the threat that a captured enemy civilian actually poses than is the case with a combatant who is, after all, a member of the adversary's armed forces. In contemporary warfare civilians are, for example, often detained not only in direct combat, but also on the basis of intelligence information suggesting that they represent a security threat. The purpose of the review process is to enable a determination of whether such information is reliable and whether the person's activity meets the high legal standard that would justify internment and its duration.

Civilian internment must cease as soon as the reasons which necessitated it no longer exist.⁶⁴ It must in any event end 'as soon as possible after the close of hostilities'.⁶⁵ Unjustifiable delay in the repatriation of civilians is also a grave breach of API.⁶⁶

There is some debate among experts whether, on its own, GCIV constitutes a sufficient legal basis for the internment of civilians in IAC or whether it must be accompanied by domestic law of a statutory nature (legislation). It is not clear why this question is posed only in relation to the GCIV and not the GCIII, for there is no reason to conclude that the treaties differ in the legal authority provided. It is submitted that GCIV constitutes a sufficient legal basis for internment, which means that states do not have to enact additional domestic legislation to provide for a legal basis.⁶⁷

(p. 289) B. NIAC

IHL does not contain rules on procedural safeguards for persons interned in NIAC, in which, it should be recalled, there is no POW or protected person status within the meaning of GCIII and GCIV, respectively. Common Article 3 does not explicitly provide a legal basis for detention and is silent on the possible grounds for and process in internment, even though this form of detention is practiced by both states and NSAGs. APII explicitly mentions 'internment',⁶⁸ thus confirming that this type of deprivation of liberty is inherent to NIAC, but likewise does not incorporate an explicit legal basis, grounds, or process. The lack of sufficient IHL rules on these issues has generated a range of views on how the gap may be filled.

1. Legal basis for internment

According to one view, the legal basis for internment must be explicit, as it is for example in the GCIV; in its absence IHL cannot be interpreted to implicitly provide it.⁶⁹ Pursuant to this position, only domestic law, limited by human rights law (which does not contain an explicit legal basis for any type of detention), can provide the requisite legal authority for internment in NIAC. According to another view, to which this contributor subscribes, IHL should be interpreted as containing an inherent power to intern.

Several cogent reasons may be advanced,⁷⁰ but only one will be briefly mentioned here. It is a fact that, unless IHL is interpreted as incorporating such an inherent power, the deprivation of liberty by NSAGs would be completely outside of any legal authority. Domestic law does not allow NSAGs to detain and moreover, states may criminalize all acts including detention by the non-state party in a NIAC. The lack of a stand-alone legal authority for detention under human rights law has been noted at the start of this section, but this body of norms also does not bind NSAGs *de iure*. Given that IHL does bind them,⁷¹ it is not logical to claim that NSAGs are legally obliged to implement the specific provisions of Common Article 3 and APII (some of which explicitly regulate treatment and conditions

in internment as outlined above), but also that IHL does not even provide an inherent power for deprivation of liberty to begin with.

The controversy over legal basis may in any event be said to be somewhat of a ‘red herring’ in the case of a ‘traditional’ NIAC, occurring in the territory of a state between its armed forces and one or more NSAGs. Regardless of a possible separate basis to intern under IHL, states will in practice be guided by their domestic law authority, informed by their human rights obligations, and the relevant norms of IHL, in determining the legal framework—including grounds and process—for the possible internment of persons whose activity (p. 290) presents a serious security threat. This will require a careful examination of the interplay between national law and the applicable international legal regimes.

Identifying the legal framework governing internment is more complex in NIACs with an extraterritorial element, ie those in which the armed forces of one or more states, or of an international or regional organization, fight alongside the armed forces of a host state, in its territory, against one or more organized NSAG. Several legal issues, which cannot be expounded on here, will arise.⁷² It is submitted that, along with the recognition of an inherent power to intern in NIAC, a practically feasible legal approach⁷³ would be to require that the grounds and process for internment in this scenario be specifically provided for in one of the following ways: first, an international agreement concluded between an assisting state(s), or international or regional forces, and the host state; second, in the domestic law of the host state or, in exceptional circumstances, of the assisting state(s); third, in the Standard Operating Procedures or other equivalent document of the assisting states(s), or of international or regional forces, which must be of a legally binding nature.⁷⁴ The aim of the legal ‘package’ suggested above would be to prevent arbitrary detention by intervening forces in situations of extraterritorial NIAC.

In this context it should be recalled that a UN Security Council Resolution adopted under Chapter VII of the UN Charter may also provide a legal basis for internment in an ‘extraterritorial NIAC’. Legal experts differ as to whether such a resolution must expressly authorize internment or whether the standard formula of authorization—to use ‘all necessary means’ (to accomplish a mission)—is sufficient. Such resolutions, however, do not elaborate on the grounds and process for internment. It is submitted that, in such a case, these will still need to be specified in one of the ways outlined above.⁷⁵

2. Grounds and process for internment

As already mentioned, IHL applicable in NIAC does not specify permissible grounds for internment. The ICRC has relied on ‘imperative reasons of security’ as the legal standard that should inform internment decisions in NIAC.⁷⁶

The exact meaning of ‘imperative reasons of security’ has not been sufficiently elaborated in international or domestic law to enable a determination of the specific type of conduct that would meet that threshold. As noted in the Commentary to GCIV:

It did not seem possible to define the expression ‘security of the State’ in a more concrete fashion. It is thus left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies internment or assigned residence.⁷⁷

(p. 291) The Commentary nevertheless adds that, ‘[i]n any case such measures can be ordered for real and imperative reasons of security, their exceptional character must be preserved’.⁷⁸

While states are thus left a margin of appreciation in deciding on the specific activity deemed to represent a serious security threat, there are pointers in terms of what activity would or would not meet that standard. It is uncontroversial that direct participation in hostilities is an activity that would meet the imperative reasons of security standard.⁷⁹ Conversely, internment cannot be resorted to for the sole purpose of interrogation or intelligence gathering, unless the person in question is deemed to represent a serious security threat based on his or her own activity. Internment may also not be resorted to in order to punish a person for past activity, or to act as a general deterrent to the future activity of another person.

As a general matter, internment should not be used in lieu of criminal prosecution in individual cases when criminal process is in fact feasible. It must in any event be recognized that the imperative reasons of security standard is high, and a careful evaluation of whether it has been met must take place in relation to each person detained.

The absence of IHL rules on the process for internment has proven to be a significant legal—and protection—issue, particularly in NIACs with an extraterritorial element. It prompted the ICRC to attempt to fill the gap by means of institutional guidelines issued in 2005, entitled ‘Procedural Principles and Safeguards for Internment/Administrative Detention⁸⁰ in Armed Conflict and Other Situations of Violence’⁸¹ (Guidelines). The ‘rules’ are based on law and policy,⁸² and are meant to be implemented in a manner that takes into account the specific circumstances at hand. They are briefly discussed here as there is currently no other elaboration of this particular subject matter which could be applied in NIAC.⁸³

The Guidelines provide that a person must, among other things, be informed promptly, in a language he or she understands, of the reasons for internment. An internee likewise has the right to challenge, with the least possible delay, the lawfulness of his or her internment, and the review of lawfulness must be carried out by an independent and impartial body. Where internment review is administrative rather than judicial in nature, ensuring the requisite independence and impartiality of the review body will require particular attention. Assistance of counsel should be provided whenever feasible, but other modalities to ensure expert legal assistance may be considered as well.

The right to periodical review of the lawfulness of continued internment is also provided for in the Guidelines. It obliges the detaining authority to ascertain whether the internee (p. 292) continues to pose an imperative threat to security and to order release if that is not the case. It should be noted that the longer internment lasts, the greater the burden on the detaining authority to show that the concerned person remains an imperative threat to security. The safeguards that apply to initial review are also to be applied at periodical review.

IHL in NIAC is silent as regards the outer temporal limit of internment. It is, however, widely accepted that this form of detention is to cease, as a matter of IHL, at the end of the armed conflict in relation to which a person was interned. The end of a NIAC is a factual matter that is determined on a case-by-case basis.⁸⁴

4. Transfer of Detainees

The transfer among states of persons deprived of liberty has emerged as one of the key legal and practical challenges linked to detention in armed conflict. The legal debate has focused on the meaning and scope of the principle of *non-refoulement*, while the principal challenge in practice has arisen in NIAC with an extraterritorial element. The question is: are assisting states, or international or regional forces, who may be detaining persons in

the territory of a host state, allowed to hand them over to the authorities of the latter and, if so, under what circumstances?

By way of reminder, the principle of *non-refoulement* prohibits a state from transferring a person to another state if there are substantial grounds to believe that he or she runs a real risk of being subjected to certain violations of fundamental rights. These include, in particular, torture or other cruel, inhuman, or degrading treatment or punishment, arbitrary deprivation of life, and persecution on account of race, religion, nationality, membership of a particular social group, or political opinion. According to some views, an even broader list could be drawn up.⁸⁵

Non-refoulement is found, with variations in scope, in IHL, human rights law,⁸⁶ and refugee law,⁸⁷ and is also contained in a number of extradition treaties.⁸⁸ The exact coverage (p. 293) of the principle and the violations that must be taken into account will depend on the specific norms applicable in a given context, ie on the relevant treaties and customary law.

The Geneva Conventions do not mention the term *non-refoulement* as such, but incorporate specific substantive provisions to that effect for situations of IAC. Pursuant to GCIII and GCIV, POWs and civilians may only be transferred by the detaining state to a state that is a party to the respective Convention, and after it has 'satisfied itself' of the 'willingness and ability' of such transferee state to apply the Convention.⁸⁹ The Conventions also provide that the transferring state must take corrective measures or request the return of POWs, or civilians, if it determines that the receiving state fails to fulfil its obligations under the treaty.⁹⁰ GCIV also stipulates that a protected person may 'in no circumstances' be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.⁹¹

There are no IHL norms on *non-refoulement* in NIAC. However, as discussed above, a party to such an armed conflict is bound by Common Article 3 in all circumstances. It may be argued that it would contravene the provisions of this article if a party were to transfer a person in its power to another party if there are substantial grounds to believe that he or she runs a real risk of being tortured or otherwise ill-treated, or arbitrarily deprived of life. Put differently, similar to IHL in IAC—which prohibits the circumvention of safeguards owed to protected persons by means of handover to a non-compliant party—IHL applicable in NIAC should also not be side-stepped by the transfer of detainees to a party that will not respect its Common Article 3 obligations.

The issue of whether the principle of *non-refoulement* applies only where a transferred person crosses an international border, or may also apply to transfers between states within the same country, remains unsettled.⁹² While this question has not yet been conclusively decided as a matter of international law, protection concerns leave no doubt that the latter interpretation should be preferred. This view is not meant to suggest a lack of awareness of the very real practical problems posed by the implementation of the principle of *non-refoulement* to transfers within the territory of a (host) state. Depending on the circumstances, feasible solutions may include: prolongation of detention by the state of custody; transfer to a third state; transfer to select places of detention within the host state in which there is no risk of violations; monitoring of the treatment of transferred detainees in host state facilities; or joint administration of places of detention in the host state for the purpose of enabling individual follow-up of transferees. It should be noted that due to the narrow range of rights protected, observance of the principle of *non-refoulement* is not likely to impede the transfer of thousands of persons in practice; rather, it will stand in the way of the transfer of specific individuals who face a real risk.

One of the most contentious issues related to the transfer of detainees concerns the procedural safeguards that should precede a transfer decision.⁹³ While neither treaty nor (p. 294) customary IHL—or human rights law—provide for procedural safeguards that must be applied before transfer, an obligation to provide them may be derived from the general international law principle that a person whose rights may be, or have been, violated has the right to an effective remedy.⁹⁴ In the context of *non-refoulement*, this may be interpreted to mean that a process should be put in place enabling the review of a transfer decision if and when the person involved alleges a real risk of abuse in the receiving state. A number of procedural safeguards may be envisaged, such as: (i) timely information to the concerned person of the intended transfer; (ii) the opportunity for the person concerned to express fears he or she may have about the transfer and to challenge the transfer before a body that is independent of the one that took the transfer decision; (iii) the possibility for the person in question to make representations before the review body in order to explain the reasons he or she would be at risk in the receiving state; and (iv) suspension of transfer during the review because of the irreversible harm that would be caused if the person was transferred. Where possible, the person should also have legal assistance.

The process outlined above has been followed in practice by states in cases of expulsions, extraditions, deportations, or other measures of removal of individuals from their territory. Typically, the remedy is before national courts. The phenomenon of transfers linked to NIACs with an extraterritorial element is, however, relatively new and obviously involves different circumstances. State practice has therefore, not surprisingly, been conflicting. In this context, it should be borne in mind that a review of transfer need not be exclusively judicial in nature. As with procedural safeguards in internment, the key issue is whether the remedy is effective, ie whether the concerned person has a meaningful chance to obtain an independent and impartial decision to prevent a transfer that would be contrary to the principle of *non-refoulement*.

It may be concluded that while the law and policy are a work in progress, it is clear that transfers between states occurring outside of the transferring state's territory require urgent practical responses at the international level. Workable solutions need to be devised that would address the material limitations of states or of international or regional organizations participating in extraterritorial operations, and their obligation to protect transferees from torture and ill-treatment or arbitrary deprivation of life.

5. Fair Trial Rights

Fair trial rights, referred to as 'judicial guarantees', are a prominent feature of IHL in both IAC and NIAC. The aim is to ensure that any proceedings undertaken against a person on suspicion of having committed a criminal offence related to the conflict meet the internationally agreed standards of due process. The latter serve to safeguard the fundamental rights of criminal suspects which, it should be recognized, may be particularly under (p. 295) pressure in situations of armed conflict when emotions run high and an urge for revenge against the adversary can arise.

GCIII and GCIV both include detailed provisions on criminal proceedings against POWs⁹⁵ or civilians⁹⁶ who may be subject to trial in an IAC, and include specific judicial guarantees. The catalogue is updated and expanded in API which, as already mentioned, constitutes a safety net in terms of fundamental guarantees.⁹⁷ Denial of the right to a fair trial to POWs or civilians is a grave breach of GCIII⁹⁸ and GCIV⁹⁹ respectively, and is also listed as a grave breach in API.¹⁰⁰ As regards NIACs, the passing of sentences without a trial that affords 'all the judicial guarantees which are recognized as indispensable' is one of the specific prohibitions of Common Article 3.¹⁰¹ APII likewise provides a list of fair trial rights.¹⁰² In this context it should be noted that the relevant articles of the two Additional Protocols were fashioned largely according to the fair trial guarantees of the ICCPR.¹⁰³ However, the right to a fair trial may not be derogated from in situations of armed conflict

under IHL, even though the ICCPR appears to allow it.¹⁰⁴ The right to a fair trial is also a norm of customary IHL, applicable in both IACs and NIACs.¹⁰⁵

Given the undisputed nature of judicial guarantees under IHL, and the relative similarity of its catalogue of rights with that in human rights law (which has been extensively interpreted in the jurisprudence), this chapter does not list or summarize the individual guarantees. It is perhaps more useful to very briefly highlight two broader issues related to criminal proceedings linked to an armed conflict under IHL.

The first is the difference, in IAC, between the criminal offences for which POWs and civilians may be tried. As noted in section 3 'Procedural Safeguards in Internment' above, POWs are essentially combatants captured by the adverse party in an IAC. Combatants are members of the armed forces of a party to an IAC who have the explicit right under IHL and domestic law to participate directly in hostilities. As a result, POWs may not be prosecuted by the detaining state for lawful acts of violence committed in the course of hostilities (known as 'combatant privilege'). Their immunity from criminal prosecution under the domestic law of the captor does not, however, extend to violations of IHL, in particular grave breaches of the Geneva Conventions or API and other war crimes,¹⁰⁶ or for criminal acts committed after capture.¹⁰⁷ GCIII obliges the detaining state to procedurally treat POWs suspected of having committed a criminal offence as it would members of its own forces. The general rule is that a POW can be validly sentenced only if the sentence has been pronounced 'by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power'.¹⁰⁸

(p. 296) Civilians do not enjoy the 'combatant privilege'. Whether in IAC or NIAC, civilians who take a direct part in hostilities can be prosecuted by the detaining state for the very fact of having taken up arms, and all acts of violence committed during such participation, as well as for other offences related to the armed conflict that may be penalized under the domestic law of the captor. This includes grave breaches of the Geneva Conventions or API and other war crimes.¹⁰⁹ It should be noted, however, that civilian direct participation in hostilities is not a violation of IHL and is not a war crime per se under either treaty or customary IHL.¹¹⁰

The second issue that merits highlighting is the death penalty. It is sometimes said that IHL provides for the death penalty, which is not the case. This body of norms establishes a certain number of substantive offences under international law and obliges states to adopt domestic legislation that would enable their prosecution and punishment. It does not, however, incorporate specific penalties, and it thus does not allow or disallow capital punishment, which is the purview of regulation at the national level. The aim of IHL provisions on the death penalty, where it is foreseen in domestic law, is to ensure that certain persons are protected against it and that safeguards exist with respect to its possible implementation.

Pursuant to API, parties to an IAC shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. It stipulates that the death penalty shall not be executed on such women.¹¹¹ In addition, capital punishment for a conflict-related offence shall not be executed on persons below the age of eighteen years at the time of commission of the offence.¹¹² APII contains similar provisions in situations of NIAC: '[t]he death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children'.¹¹³

GCIII and GCIV incorporate additional specific safeguards with respect to the death penalty that is imposed on POWs or civilians, respectively, related to: information about offences that carry the death penalty and a prohibition to impose such a penalty on other acts

thereafter;¹¹⁴ notification of its pronouncement to the Protecting Power;¹¹⁵ and an obligatory minimum six-month moratorium on its execution where it is pronounced.¹¹⁶

(p. 297) 6. Conclusion

An obvious conclusion that may be drawn from any review of IHL rules on detention is that deprivation of liberty is far more comprehensively regulated in situations of IAC than NIAC. Common Article 3 of the four Geneva Conventions and APII provide key protections for detainees, but these are limited in both scope and specificity compared to those provided in IAC by the Geneva Conventions and API. In addition, debate and disagreement continue over the applicability and adequacy of human rights law, the precise contours of customary IHL, and how international law can reach the behaviour of non-state parties to an armed conflict. Given that NIAC is significantly more prevalent than IAC, and that new scenarios of NIAC have emerged over the past decade-and-a-half, an effort to fill the IHL gaps would appear necessary.

While steps to this effect have been taken by some states at the domestic level in the form of legal and policy guidance,¹¹⁷ and on one occasion by a group of interested states,¹¹⁸ they remain fragmented and insufficient. In this context, it should be noted that the ICRC was mandated by the International Conference of the Red Cross and Red Crescent in 2011 to pursue research and consultation with states and other relevant actors to identify and propose a range of options—and recommendations—in order to ensure that IHL remains practical and relevant in providing legal protection to persons deprived of liberty.¹¹⁹ The results of the ensuing four-year consultation process, the focus of which was detention in NIAC, were submitted to the 2015 International Conference of the Red Cross and Red Crescent in the form of a comprehensive concluding report.¹²⁰ A corresponding resolution was likewise adopted by Conference members,¹²¹ paving the way for a new phase of deliberations among states on this issue but, unfortunately, these proved unsuccessful. No further substantive exchanges were held within the process as states were unable to agree on the procedure that should govern discussions going forward. A very brief progress report was thus submitted to the 2019 International Conference of the Red Cross and Red Crescent.¹²² This outcome can only be called disappointing. It must be hoped that if and when the international political climate improves a way will be found for states to again focus on the vitally important issue of strengthening IHL protection for persons deprived of their liberty.(p. 298)

Footnotes:

* The views expressed are the author's alone and do not necessarily reflect those of the International Committee of the Red Cross (ICRC).

1 The 'IHL treaties' collectively referred to here and elsewhere in the chapter are the four Geneva Conventions for the protection of victims of war of 1949 and their two Additional Protocols of 1977.

2 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol 1: Rules* (CUP 2005) (CIHL) rule 99.

3 In this context, see White House, *Memorandum on the Humane Treatment of al Qaeda and Taliban Detainees* (7 February 2002) para 5 www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf, which incorrectly provided for such a modification.

4 Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GCIII) article 13.

5 *ibid* article 14. The Convention also includes a ‘no adverse distinction’ clause, in article 16. The concept of no adverse distinction, which is the IHL equivalent of the human rights prohibition on discrimination, is applicable to both IACs and NIACs. Apart from the prohibition of discrimination on the non-exhaustive grounds listed, it also implies that in certain circumstances, and depending on the special needs of certain groups of persons, preferential treatment may, and indeed must, be granted. For example, priority in medical care given to wounded or sick persons may depend on the seriousness of their condition.

6 *ibid* article 12.

7 *ibid* articles 129 and 130. See also the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 8(2) (a) and (b) www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

8 Geneva Convention (IV) Relative to the Protection of Civilian Persons in the Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV) article 27. Obviously, the formulation of the last sentence reflects the era in which it was drafted and would not be thus worded today. The Convention also includes a ‘no adverse distinction’ clause, in article 27.

9 *ibid* article 32.

10 *ibid* article 33.

11 *ibid* article 29.

12 *ibid* articles 147 and 146. See also Rome Statute articles 8(2)(a) and (b).

13 GCIII article 17.

14 *ibid*.

15 GCIV article 31.

16 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API) article 75.

17 *ibid* article 75(1). The full wording of the ‘no adverse distinction’ clause has been omitted here.

18 *ibid* article 75(2). The prohibited acts are:

a) violence to the life, health, or physical or mental well-being of persons, in particular: i) murder; ii) torture of all kinds, whether physical or mental; iii) corporal punishment; and iv) mutilation; b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; c) the taking of hostages; d) collective punishments; and e) threats to commit any of the foregoing acts.

19 Geneva Conventions Common Article 3(1). The last sentence would obviously be differently worded nowadays and was, in fact, rephrased in the corresponding text of the Rome Statute: ‘... all judicial guarantees which are generally recognized as indispensable’. See Rome Statute, article 8(2)(c)(iv).

20 CIHL ‘Fundamental Guarantees’, section V(1).

21 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII) article 4(1) and (2).

22 *ibid* article 4(2) prohibits the following acts against, *inter alia*, detainees:

‘at any time and in any place whatsoever’: ‘a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; b) collective punishments; c) taking of hostages; d) acts of terrorism; e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; f) slavery and the slave trade in all their forms; g) pillage; h) threats to commit any of the foregoing acts’.

23 API has very few provisions which may be deemed to specifically regulate conditions of detention in IAC.

24 See eg in the case of disciplinary or penal sanctions.

25 See eg GCIII articles 21, 22, 25 and GCIV, articles 82, 83, 85.

26 See eg GCIII, articles 70, 71, and 72; GCIV articles 106, 107, and 108. Civilian internees are also allowed family visits (article 116).

27 APII article 5(1).

28 *ibid* article 5(1)(b).

29 *ibid* article 5(1)(c) and (d).

30 *ibid* article 5(2).

31 See *ibid* article 5(2)(a)–(d).

32 See *ibid* article 5(e).

33 CIHL rules 118–127.

34 The list, with slight modifications to the one above, was first published in Jelena Pejic, ‘The Protective Scope of Common Article 3: More than Meets the Eye’ (2011) 93(881) *IRRC* 28 www.icrc.org/fre/assets/files/review/2011/irrc-881-pejic.pdf.

35 See eg The UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UNGA Resolution 70/175 (8 January 2016) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA Resolution 43/173 (9 December 1988).

36 See Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (ICRC/Martinus Nijhoff 1987) 875 (para 3063) (with regards to article 75(3)) (‘AP Commentary’).

37 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

38 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) article 5(4); American Convention on Human Rights (Pact of San José, Costa Rica) (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 article 7(6); African Charter on Human and People’s Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) article 6.

39 ICCPR article 9(4).

40 See *ibid* article 4(2), which does not include article 9 in the list of non-derogable rights. Article 5(4) ECHR is also not among the non-derogable rights under article 15 of that treaty. Under the jurisprudence of the Inter-American Court of Human Rights, the right to habeas corpus is itself non-derogable in order to protect non-derogable rights (see *Habeas Corpus in Emergency Situations* (Advisory Opinion) OC-8/87, Inter-American Court of Human Rights Series A No 8 (30 January 1987); *Judicial Guarantees in States of Emergency* (Advisory Opinion) OC-9/87, Inter-American Court of Human Rights Series A No 9 (6 October 1987)). The African Charter is silent on the issue of derogation.

41 United Nations Human Rights Committee, ‘General Comment No. 35, Article 9 (Liberty and security of person)’ UN Doc CCPR/C/GC/35 (16 December 2014) (HRC GC 35) paras 15, 45, and 66. The paras suggest that there can be no derogation from the right to judicial review in NIAC. The General Comment does not, unfortunately, make any mention of NIAC with an extraterritorial element (see further below), where the issue has proven to pose an actual legal and practical challenge.

42 See HRC GC 35, paras 64 and 66, and *Case of Hassan v The United Kingdom* App No 29750/09 (ECtHR, 16 September 2014), paras 103–107. In the view of this contributor, IHL rules on procedural safeguards in internment in IAC are the *lex specialis* to human rights law, an approach not adopted in HRC GC 35 or by the European Court of Human Rights (ECtHR).

43 At the time of writing, the ECtHR has not heard a case related to procedural safeguards in NIAC. As already noted, HRC GC 35 essentially rejects any specificity of detention in NIAC.

44 GCIII article 4.

45 API article 43(2). This excludes medical and religious personnel.

46 GCIII article 21.

47 *ibid* article 5(2).

48 See AP Commentary to article 45(1) of API, on the nature of a ‘competent tribunal’ under GCIII article 5, para 1745.

49 Judicial review under the domestic law of the detaining state could be sought to obtain the release of a POW who is detained despite the end of active hostilities.

50 GCIII article 118(1).

51 *ibid* article 119(5).

52 *ibid* articles 109(1) and 110.

53 *ibid* article 21(2).

54 API article 85(4)(b).

55 GCIV articles 27, 41, and 78.

56 Examples of activities that are not direct participation in hostilities but would constitute a serious security threat are general financing or general intelligence gathering, recruitment for military operations, etc.

57 GCIV article 42(1).

58 *ibid* article 78(1).

59 Jean Pictet (ed), *Commentary: Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) 367.

- 60** GCIV article 43.
- 61** *ibid* article 78(2).
- 62** *ibid* articles 43(1) and 78(2).
- 63** *ibid* articles 43(1) and 78(2). See also Pictet (above n 59) 261, 368–9.
- 64** GCIV article 132(1) and API article 75(3).
- 65** GCIV articles 46(1) and 133(1). Judicial review under the domestic law of the detaining state could be sought to obtain the release of a civilian who is detained despite the close of hostilities.
- 66** API article 85(4)(b).
- 67** But regulations elaborating on the internment review process would in practice be necessary.
- 68** APII articles 5 and 6.
- 69** A good overview of this and other positions is provided for in *Abd Ali Hameed Al-Waheed (Appellant) v Ministry of Defence (Respondent)* and *Serdar Mohammed (Respondent) v Ministry of Defence (Appellant)* [2017] UKSC 1 and [2017] UKSC 2. <https://www.supremecourt.uk/cases/docs/uksc-2014-0219-judgment.pdf>, accessed 18 March 2020.
- 70** For a review see Kubo Macak, 'A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict' (2015) 45 *Isr YB HR* (forthcoming) <http://ssrn.com/abstract=2559220>, and Ezequiel Heffes, 'Detentions by Armed Opposition Groups in Non-International Armed Conflicts: Towards a New Characterization of International Humanitarian Law' (2015) 20(2) *JC & SL* 229.
- 71** See eg Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 236–42.
- 72** Eg the uncertain extraterritorial reach of domestic law, and questions related to the application of human rights law in NIACs with an extraterritorial element. The extent of the extraterritorial reach of human rights obligations is evolving (and remains disputed by some states), and the issue of whether assisting states must derogate from their human rights obligations in order to intern persons abroad is unresolved in practice (as already mentioned, no state has done so to date).
- 73** This approach is believed to be feasible given the current unwillingness of states to further develop IHL governing NIACs by means of binding norms, including those regulating various aspects of detention such as grounds and process for internment.
- 74** This is the proposal made by the ICRC, 'Internment in Armed Conflict: Basic Rules and Challenges', Opinion Paper, November 2014, 8 (ICRC Paper on Internment).
- 75** *ibid*.
- 76** Pejic (above n 34) 28–31.
- 77** GCIV Commentary 257.
- 78** *ibid* 368.
- 79** The question here is what constitutes direct participation in hostilities, an issue outside the scope of this chapter. See eg Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL' (ICRC 2009) www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf.

80 The terms ‘internment’ and ‘administrative detention’ are used interchangeably in the guidance. It encompasses, in addition to armed conflict, other situations of violence, as the ICRC has observed in practice that non-criminal detention for security reasons is a common occurrence in peacetime practice as well.

81 The institutional position is entitled: ‘Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence’. It was published as Annex 1 to an ICRC Report, ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ (30th International Conference of the Red Cross and Red Crescent) (2007) www.icrc.org/eng/assets/files/other/icrc_002_0892.pdf.

82 The purpose of the commentary is only to provide an overview of the various legal sources, primarily IHL, but also human rights law, on the basis of which the ‘rules’ were formulated.

83 The guidance does not cover POW detention, outlined above.

84 See ICRC, ‘Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ (32nd International Conference of the Red Cross and the Red Crescent) (ICRC October 2015) 7–8 and 10–11 <http://reliefweb.int/sites/reliefweb.int/files/resources/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf>.

85 See International Commission of Jurists, ‘The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism’ (adopted 28 August 2004) (Belin Declaration) www.unhcr.org/refworld/docid/41dec1f94.html. Pursuant to Principle 10 on *non-refoulement*:

States may not expel, return, transfer or extradite, a person suspected or convicted of acts of terrorism to a state where there is a real risk that the person would be subjected to a serious violation of human rights, including torture or cruel, inhuman or degrading treatment or punishment, enforced disappearance, extrajudicial execution, or a manifestly unfair trial; or be subject to the death penalty.

86 In human rights law, *non-refoulement* is expressly provided for in the Convention against Torture pursuant to which: ‘No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’ The Convention also states that: ‘For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.’ See UN Office of the United Nations High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 article 3(1) and (2).

87 Persecution as a ground for *non-refoulement* is provided for in international refugee law. See 1951 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 article 33.

88 The operation of the principle of *non-refoulement* under human rights law and refugee law or under extradition treaties is beyond the scope of this chapter and will not be further discussed.

89 GCIII article 12(2); GCIV article 45(2).

90 GCIII article 12(3); GCIV article 45(3).

91 GCIV article 45(4).

92 This is the position of human rights bodies. See eg Committee against Torture, 'Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland—Dependent Territories' UN Doc CAT/C/CR/33/3 (10 December 2004) para 5(e); Human Rights Committee, 'Concluding Observations: United States of America' UN Doc CCPR/C/USA/CO/3/Rev.1 (18 December 2006) para 16.

93 Another such issue is the reliance by a sending state on 'diplomatic assurances'. In order to comply with their obligations under the principle of *non-refoulement*, sending states have increasingly resorted to transfer agreements under which the receiving state provides assurances that a transferred person will be treated in accordance with international standards. While it is uncontroversial that such assurances do not, per se, relieve a sending state of its *non-refoulement* obligations, there are different views as to whether assurances may ever be resorted to. Some believe they cannot, while others focus on the conditions that must accompany them.

94 In human rights law, this is articulated in ICCPR article 2(3). In the context of IACs, due also to the ICRC's efforts, a practice has developed allowing POWs to express fear of repatriation to their state of origin and to not be repatriated if the circumstances point to a danger of a violation of their fundamental rights upon return.

95 See GCIII articles 82–88 and 99–108.

96 See GCIV articles 64–76 and 126.

97 API article 75(4).

98 GCIII article 130.

99 GCIV article 147.

100 API article 85(4)(e).

101 CA3(1)(d).

102 APII article 6.

103 See ICCPR article 14.

104 See *ibid* article 4(2).

105 See CIHL rule 100.

106 See Rome Statute article 8(1) and (2).

107 See GCIII article 93. POWs may be tried for other crimes under international law which they may have committed, such as genocide or crimes against humanity.

108 *ibid* article 102. The Convention also specifically stipulates that a POW 'shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war' (*ibid* article 84(1)). It also provides that POWs "may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts' (*ibid* article 87(1)).

109 In addition to war crimes, civilians may likewise be tried for other crimes under international law which they may have committed, such as genocide or crimes against humanity.

110 See eg the list of War Crimes under article 8 of the Rome Statute.

111 API article 76(3).

112 *ibid* article 77(5).

113 APII article 6(4).

114 GCIII article 100(1) and (2); GCIV article 68(2).

115 GCIII article 107(2); GCIV article 71(2).

116 GCIII article 101; GCIV article 75(2). Under the latter treaty, the six-month suspension may be reduced in 'individual cases in circumstances of grave emergency involving an organized threat to the security of' the detaining State or its forces, provided that the Protecting Power is notified and given an opportunity to make representations to the competent authorities (GCIV article 75(3)).

117 See eg UK Ministry of Defence (MoD), 'Joint Doctrine Publication 1-10: Captured Persons (CPERS)' (3rd edn, January 2015) www.gov.uk/government/uploads/system/uploads/attachment_data/file/455589/20150920-JDP_1_10_Ed_3_Ch_1_Secured.pdf.

118 See eg 'The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines' (19 October 2012) <http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf>.

119 See ICRC, 'Resolution 1 "Strengthening Legal Protection for Victims of Armed Conflicts"' (31st International Conference of the Red Cross and Red Crescent (December 2011) www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm).

120 See ICRC, 'Concluding Report on Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty' (32nd International Conference of the Red Cross and Red Crescent (October 2015) http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf).

121 See ICRC, 'Resolution on Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty' (32nd International Conference of the Red Cross and Red Crescent (December 2015) http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-AR-Persons-deprived-of-liberty_EN.pdf).

122 Please see the link for the cover page of the report in order to complete the reference https://rcrcconference.org/app/uploads/2019/10/33IC-Deprived-of-liberty_EN.pdf

The legal situation of “unlawful/unprivileged combatants”

KNUT DÖRMANN*

While the discussion on the legal situation of unlawful combatants is not new, it has nevertheless become the subject of intensive debate in recent publications, statements and reports following the US-led military campaign in Afghanistan. Without dealing with the specifics of that armed conflict, this article is intended to shed some light on the legal protections of “unlawful/unprivileged combatants” under international humanitarian law.¹ In view of the increasingly frequent assertion that such persons do not have any protection whatsoever under international humanitarian law, it will consider in particular whether they are a category of persons outside the scope of either the Third Geneva Convention (GC III)² or the Fourth Geneva Convention (GC IV) of 1949.³ On the basis of this assessment the applicable protections will be analysed. Before answering these questions, a few remarks on the terminology would seem appropriate.

Terminology

In international armed conflicts, the term “combatants” denotes the right to participate directly in hostilities.⁴ As the Inter-American Commission has stated, “the combatant’s privilege (...) is in essence a licence to kill or wound enemy combatants and destroy other enemy military objectives.”⁵ Consequently (lawful) combatants cannot be prosecuted for lawful acts of war in the course of military operations even if their behaviour would constitute a serious crime in peacetime. They can be prosecuted only for violations of international humanitarian law, in particular for war crimes. Once captured, combatants are entitled to prisoner-of-war status and to benefit from the protection of the Third Geneva Convention. Combatants are lawful military targets. Generally speaking, members of the armed forces (other

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than medical personnel and chaplains) are combatants. The conditions for combatant/prisoner-of-war status can be derived from Article 4 of GC III and from Articles 43 and 44 of PI, which developed the said Article 4.⁶

Generally speaking, a civilian is any person who does not belong to one of the categories of persons referred to in Article 4A (1), (2), (3) and (6) of GC III and Article 43 of PI (see PI, Article 50). Under the law governing the conduct of hostilities, as contained especially in Articles 48 *et seq.* of PI, and under customary international law, civilians are entitled to general protection against the dangers arising from military operations; in particular they may not be made the object of an attack. Except for the relatively rare case of a *levée en masse*, civilians do not have the right to participate directly in hostilities. If they nevertheless take direct part, they remain civilians but become lawful targets of attacks for as long as they do so. Their legal situation once they find themselves in enemy hands will be the crux of the following analysis.

Whereas the terms "combatant", "prisoner of war" and "civilian" are generally used and defined in the treaties of international humanitarian law, the terms "unlawful combatant", "unprivileged combatant/belligerent" do not appear in them. They have, however, been frequently used at least since the beginning of the last century in legal literature, military manuals and case law. The connotations given to these terms and their consequences for the applicable protection regime are not always very clear.

For the purposes of this article the term "unlawful/unprivileged combatant/belligerent" is understood as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy. This seems to be the most commonly shared understanding.⁷ It would include for

1 This article does not address protection deriving from other bodies of law, in particular human rights law.

2 Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

3 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

4 See Article 43(2) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (PI).

5 Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 68.

6 Article 44 of PI sets the standard for parties to the Protocol. Its status under customary international law is more doubtful.

7 See for example G. Aldrich, "The Taliban, Al Qaeda, and the determination of illegal combatants". *American Journal of International Law*, Vol. 96, 2002, p. 892; Report on Terrorism and Human Rights, *op. cit* (note 5), para. 69.

example civilians taking a direct part in hostilities, as well as members of militias and of other volunteer corps — including those of organized resistance movements — not being integrated in the regular armed forces but belonging to a party to conflict, provided that they do not comply with the conditions of Article 4A (2) of GC III. In the following text, for reasons of convenience, only the term “unlawful combatant” will be used.

If a person who has participated directly in hostilities is captured on the battlefield, it may not be obvious to which category that person belongs. For such types of situations Article 5 of GC III (PI, Article 45) provides for a special procedure (competent tribunal) to determine the captive’s status.

The notion “unlawful combatant” has a place only within the context of the law applicable to international armed conflicts as defined in the 1949 Geneva Conventions and Additional Protocol I. The law applicable in non-international armed conflicts does not foresee a combatant’s privilege (i.e. the right to participate in hostilities and impunity for lawful acts of hostility).⁸ Once captured or detained, all persons taking no active/direct part in hostilities or who have ceased to take such a part come under the relevant provisions of international humanitarian law (i.e. Article 3 common to the four Geneva Conventions, and Additional Protocol II, in particular Articles 4-6), as well as the relevant customary international law.⁹

⁸ See also Report on Terrorism and Human Rights, *op. cit* (note 5), para. 70.

⁹ This may clearly be seen from the following excerpts (emphasis added):

GC I-IV, common Art. 3: “(1) *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, shall *in all circumstances* be treated humanely, *without any adverse distinction* founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. (...)”

PII, Art. 2: “1. *This Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (hereinafter referred to as ‘adverse distinction’) to all persons affected by an armed conflict* as defined in Article 1.

2. *At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict*, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.”

PII, Art. 4 (1): “*All persons who do not take a direct part or who have ceased to take part in hostilities (...)*”

PII, Art. 5 (1): “*shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict*, whether they are interned or detained”

PII, Art. 6 (1): “*This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.*”

The protective rules apply regardless of the way in which such persons have participated in hostilities (e.g. in accordance with IHL or not; in accordance with national law or not; etc.). Nor does it matter whether the person was a member of an armed rebel group, a member of the armed forces of a State or a civilian who (temporarily) took a direct/active part in hostilities.

The legal protection of unlawful combatants under GC IV

Given that unlawful combatants as defined in the previous section do not meet the conditions to qualify as prisoners of war and thus are not protected by GC III, this analysis will first examine whether unlawful combatants fall within the personal scope of application of GC IV. It will then consider to what particular protections they are entitled once they are in enemy hands. Lastly, the implications of the law on the conduct of hostilities will be briefly discussed.

In accordance with the rules of interpretation of international treaties, the main focus will be on the "ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".¹⁰ Subsidiarily, the *travaux préparatoires* and legal writings will also be analysed.

Personal field of application of GC IV as defined in Article 4 thereof

The personal field of application of GC IV is defined in the following terms. Article 4 (1) specifies:

"Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

This definition seems all-embracing. According to this paragraph *any person* would be protected once he/she finds himself/herself in the hands of a Party to a conflict or occupying Power. Only nationals of that Party/Power are excluded.¹¹ The very broad wording of the paragraph, read in isolation, would not only include civilians but even members of the armed forces.¹²

The scope of application is, however, reduced by specific exceptions. The following persons are excluded by the subsequent paragraphs of Article 4:

¹⁰ Art. 31 of the Vienna Convention on the Law of Treaties.

¹¹ The provisions of Part II are, however, wider in application, as defined in Article 13.

¹² J. Pictet (ed.), *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, (hereinafter *Commentary IV*), p. 46.

According to its paragraph 2:

- “Nationals of a State which is not bound by the Convention” are not protected (this is a highly theoretical restriction, since the 1949 Conventions have virtually universal participation);
- “Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State,” are not protected “while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are”.

For the latter exception the wording is not absolutely clear. According to the ICRC Commentary to Article 4 of GC IV — which is confirmed by the *travaux préparatoires* — the following distinction is required:

On the territory of belligerent States nationals of a neutral or co-belligerent State, so long as the State in question has normal diplomatic representation in the State in whose territory they are, are excluded. In occupied territories nationals of a co-belligerent State, so long as the State in question has normal diplomatic representation in the occupying State, are excluded. However, in this situation, nationals of neutral States are protected persons and the Convention is applicable to them. Its application in this case does not depend on the existence or non-existence of normal diplomatic representation.¹³

According to Article 4 (4), GC IV does not protect persons protected by GC I-III.

A textual interpretation of the Conventions can only lead to the conclusion that all persons who are not protected by GC I-III, thus also persons who do not respect the conditions which would entitle them to POW status/treatment, are covered by GC IV provided that they are not:

- nationals of a State which is not party to the Convention;
- nationals of the Party/Power in which hands they are; or
- nationals of a neutral State (only if they are in the territory of a belligerent State) or co-belligerent State with normal diplomatic representation (for details see the foregoing quotation from the ICRC Commentary).

¹³ *Commentary IV, op. cit* (note 12), p. 46. Commentaries concerning the draft Convention, Final Record of the Diplomatic Conference of 1949 (hereinafter Final Record), Vol. II A, p. 814. See also the explanation by the Swiss Rapporteur at the Diplomatic Conference, who confirmed that interpretation, Final Record, Vol. II A, p. 793. See also the statement by the US, *ibid.*, p. 794.

The fact that a person has unlawfully participated in hostilities is not a criterion for excluding the application of GC IV. On the contrary, Article 5 of GC IV, which allows for some derogations — under strict conditions — from the protections of GC IV, uses the term “protected persons” with regard to persons detained as spies or saboteurs as well as persons definitely suspected of or engaged in activities hostile to the security of the State/Occupying Power. Both the concepts of “activity hostile to the security of the State/Occupying Power” and of “sabotage”¹⁴ certainly encompass direct participation (without entitlement) in hostilities. Thus, this article would apply in particular to persons who do not fulfil the criteria of GC I-III and take a direct part in hostilities, i.e. persons labelled “unlawful combatants”.¹⁵

A further argument for the application of GC IV to “unlawful combatants” can be drawn from Article 45 (3) of PI. The provision reads as follows:

“Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.”

This provision of Additional Protocol I, which was adopted by consensus,¹⁶ contains an implicit confirmation of our interpretation of GC IV that “unlawful combatants” are protected persons under GC IV if they fulfil the above-mentioned nationality criteria. By stating in Article 45 (3) of PI that “any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in

¹⁴ See E. Rosenblad, “Guerrilla warfare and international law”. *Revue de droit pénal militaire et de droit de la guerre*, 1973, pp. 110 *et seq.* Rosenblad further states: “A saboteur, who is [sic] unlawful combatant, is on the one hand punished in accordance with the Civilians Convention. Granted that he is a “protected person” (Article 4) and that in this capacity he shall be unconditionally “treated with humanity” (third paragraph of Article 5). A protected person can, however, if ‘imperative reasons of security’ make this necessary, be subjected to assigned residence or to internment (Article 78). Furthermore, the Occupying Power can under certain circumstances retain a saboteur without judgement (second paragraph of Article 5) and, in the case of prosecution, sentence him to death (second paragraph of Article 68).”

¹⁵ See F. Kalshoven, “The position of guerrilla fighters under the law of war”. *Revue de droit pénal militaire et de droit de la guerre*, 1972, p. 72, for guerrilla fighters whom he defines as persons (taking a direct part in hostilities) not regarded as prisoners of war, *ibid.*, pp. 65, 69.

¹⁶ CDDH/SR.41, O.R. Vol. VI, p. 155.

accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol”, it recognizes that GC IV is in fact applicable to some categories of unlawful combatants — otherwise the formulation “who does not benefit from more favourable treatment in accordance with the Fourth Convention” would be meaningless. The second sentence of that paragraph (“In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention”) implicitly recognizes that especially unlawful combatants in occupied territory (i.e. protected persons participating directly in hostilities in occupied territory without being entitled to POW status) are protected by GC IV. If unlawful combatants in occupied territories were not covered by GC IV, there would be no reason to restrict the scope of its Article 5.¹⁷

Further support for our interpretation may also be found in Military Manuals. For example in the US Military Manual FM 27-10, *The Law of Land Warfare*, 1956, pp. 31, 98 *et seq.*, the law is developed as follows (emphasis added):

“72. Certain Persons in Occupied Areas

Persons in occupied areas not falling within the categories set forth in Article 4 [GC III], who commit acts hostile to the occupant or prejudicial to his security are subject to a special regime [reference is made to the provisions of GC IV, Part III, Section III] ...

73. Persons Committing Hostile Acts Not Entitled To Be Treated as Prisoners of War

If a person is determined by a competent tribunal, acting in conformity with Article 5 [GC III] not to fall within any of the categories listed in Article 4 [GC III], he is not entitled to be treated as a prisoner of war. He is, however, a “protected person” within the meaning of Article 4 [GC IV]. ...

247. Definition of Protected Persons

[quotation of GC IV, Art. 4]

Interpretation. Subject to qualifications set forth in paragraph 248, those protected by [GC IV] also include all persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war.

¹⁷ See in this regard M. Bothe, K. Partsch and W. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 1982, pp. 261 *et seq.*

248. Derogations

a. Domestic and Occupied Territory

[reference is made to GC IV, Art. 5]

b. Other Areas. Where, in territories other than those mentioned in a. above, a Party to the conflict is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person is similarly not entitled to claim such rights and privileges under [GC IV] as would, if exercised in favour of such individual person, be prejudicial to the security of such a State."

See also the British Manual Part III—The Law of War on Land, 1957, n° 96:

«Should regular combatants fail to comply with these four conditions [of GC III, Art. 4], they may in certain cases become unprivileged belligerents. This would mean that they would not be entitled to the status of prisoners of war upon their capture. Thus regular members of the armed forces who are caught as spies are not entitled to be treated as prisoners of war. But they would appear to be entitled, as a minimum, to the limited privileges conferred upon civilian spies or saboteurs by the Civilian Convention, Art. 5. (...) Members of the armed forces caught in civilian clothing while acting as saboteurs in enemy territory are in a position analogous to that of spies."

Travaux préparatoires

The issue of persons qualifying as unlawful combatants, as defined for the purposes of this article, was touched upon in two committees dealing with GC III and GC IV. On the basis of the Final Records it is difficult to reach a definite conclusion, although there might be good reason to believe that "unlawful combatants" meeting the nationality criteria of Article 4 of GC IV are protected by GC IV (and that this protection is subject to derogations). The difficulty of reaching a positive conclusion lies in the fact that first of all, the recorded statements can hardly be considered representative, since they reflect only the views of some delegations. Secondly, they were made in different committees and at different stages of the negotiations; in particular, some statements relating to GC III were made at a time when Article 5 of GC IV had not yet been proposed. Thirdly, the terms "unlawful combatants"/"unprivileged belligerents" were generally not used; instead, references are found to persons violating the laws of war, saboteurs and spies. In Committee II, discussing GC III, the underlying view seems primarily to have been that "unlawful combatants" should not be entitled to the same protection as prisoners of war, nor to all the protections accorded to

“peaceful” civilians,¹⁸ but that they should be entitled to a humane treatment and not be summarily executed.¹⁹

The draft Convention III, as approved by the International Red Cross Conference in Stockholm and submitted to the Diplomatic Conference of 1949, contained the following paragraph in Article 3 defining POWs:

“The present Convention shall also provide a minimum standard of protection for any other category of persons who are captured or detained as the result of an armed conflict and whose protection is not specifically provided for in any other Convention.”

The ICRC delegate Mr Wilhelm explained this paragraph as follows:

“The ICRC was uncertain which category of persons it was desired to cover. The present Conference was engaged in framing a Convention to protect members of armed forces and similar categories of persons, such as members of organized resistance movements, and another convention to protect civilians. Although the two Conventions might appear to cover all the categories concerned, irregular belligerents were not actually protected. It was an open question whether it was desirable to give protection to persons who did not conform to the laws and customs of war; but in view of the fact that isolated cases might arise which deserved to be taken into account, it would appear necessary to provide for a general clause of protection, similar to the one contained in the Hague Convention of 1907, to which the Soviet Delegate had referred. It did not however seem expedient to introduce this conception into an Article, the main object of which was to define clearly all the categories of persons who should be protected by the present Convention [III].”²⁰

¹⁸ See for example Colonel Hodgson (Australia): “In his opinion, the rights of the State in relation to certain persons such as spies, saboteurs, fifth columnists and traitors, had been insufficiently defined. (...) It was desirable to provide for the necessary exceptions to the rules for protection contained in the Convention.” (Committee III (Civilians), 2nd meeting, 26.4.1949), Final Record, Vol. II A, p. 622.

¹⁹ Wilhelm (ICRC), Cohn (Denmark), Final Record, Vol. II A, p. 433; Brigadier Page (UK): “The whole conception of the Civilians Convention was the protection of civilian victims of war and not the protection of illegitimate bearers of arms, who could not expect full protection under rules of war to which they did not conform. Such persons should no doubt be accorded certain standards of treatment, but should not be entitled to all the benefits of the Convention. (...) To sum up, the United Kingdom Delegation considered that (...) civilians who violated those rules should cease to be entitled to the treatment provided for law-abiding citizens. The United Kingdom Delegation would not however oppose any reasonable proposal to ensure that such civilians were humanely treated.” (Committee III (Civilians), 2nd meeting, 26.4.1949), Final Record, Vol. II A, p. 621; General Dillon (USA): “Clearly, the persons not enumerated in Article 3 [Art. 4 C III] were not to be deprived of all rights”. Final Record, Vol. II A, p. 409.

²⁰ Final Record, Vol. II A, p. 433.

From this statement, three essential points can be singled out:

First, Mr Wilhelm interpreted the Stockholm drafts of GC III and IV as not protecting irregular belligerents or "persons who did not conform to the laws and customs of war". This is rather surprising, given that the personal scope of application of GC IV was very broadly defined,²¹ unless he meant that such persons might be covered by the personal field of application but that the substantive provisions did not really accord protection (if he limited his statement to unlawful combatants on the battlefield as defended nowadays in the legal literature by, for example, Baxter, Draper and Kalshoven).

Second, he recognized the need for minimum protection of such persons, which can be derived from the Martens Clause.

Third, this protection should not be spelled out in a convention dealing with POWs.

The Danish delegate responded by saying that "it was not a question of granting the persons referred to in the paragraph the same rights and privileges as those of prisoners of war, but simply of affording "a minimum of protection", "of preventing such persons from being subjected to inhuman treatment or summarily shot".²²

Other delegates were not opposed to providing a minimum of protection, but could not agree that such a protection clause be introduced in GC III. Thus the proposed paragraph 3 of draft Article 3 [GC III, Art. 4] was not retained.²³ Instead the Conference essentially agreed upon what became the substance of Article 5 of GC III (i.e. protection as POWs for "persons resisting the enemy" until a competent tribunal determines their status). The second part of the latter proposal, which read: "Even in cases where the decision of the above-mentioned authorities would not allow these persons to benefit under the present Convention, they shall nevertheless remain under the safeguard and rule of the principles of International Law as derived

²¹ "Persons protected under the present Convention are those who, at a given moment and in whatever manner, find themselves, in the case of a conflict or occupation, in the hands of a Power of which they are not nationals; (...) Persons such as prisoners of war, the sick and wounded, the members of medical personnel, who are subject to other international conventions, remain protected by the said conventions." Art. 3, *Revised and New Draft Conventions for the Protection of War Victims*, texts approved and amended by the XVIIth International Red Cross Conference, Geneva, 1948, pp. 114-115.

²² Final Record, Vol. II A, p. 433.

²³ Final Record, Vol. II A, p. 480.

from the usages prevailing among civilized nations, of human rights and the demands of the public conscience”, was likewise not retained.²⁴ In the end, the Danish delegate only asked as cited in the quotation below, for the Summary Record to mention that his view regarding interpretation of Article 3 had met with no objections.²⁵ The Committee’s discussions were summarized as follows in the Report to the Plenary Assembly:

“Certain Delegations wished to extend the application of the Convention to cover still other categories of persons. They had particularly in mind civilians who had taken up arms to defend their life, their health, their near ones, their livelihood, under an attack which violated the laws and conditions of war and desired to ensure that such civilians falling into enemy hands should not be shot after summary judgment but should be treated according to the provisions or at least the humanitarian principles of the Convention. Numerous possible solutions of this problem were carefully considered but in the end a majority of the Committee came to the conclusion that it would be difficult to take the course proposed without the risk of indirectly weakening the protection afforded to persons coming under the various categories of Article 3 [GC III, Art. 4]. One Delegation pointed out, in particular, that the acceptance of the proposed extension would be tantamount to rejecting the principles generally accepted at The Hague, and recognized in the Prisoner of War Convention. It was, according to the views of this Delegation, essential that war, even illegal war, should be governed by those principles. Nevertheless, another Delegation asked that the Summary Record should mention that no objections had been raised, during the discussion in the Special Committee, against his view that Article 3 should not be interpreted in such a way as to deprive persons, not covered by the provisions of Article 3, of their human rights or of their right of self-defence against illegal acts.”²⁶

In the plenary debates on Article 5 of GC III (decision by a competent tribunal in case of doubt) the issue of persons not fulfilling the conditions to qualify as POWs, but participating nevertheless in hostilities (i.e. unlawful combatants), arose again. Captain Mouton (Netherlands), arguing in favour of

²⁴ Final Record, Vol. III, p. 63.

²⁵ Final Record, Vol. II A, p. 481.

²⁶ Final Record, Vol. II A, p. 562. The last two sentences of the Report to the Plenary Assembly, which touch upon separate issues but were nevertheless intermingled, gave rise to controversy in the Plenary. See Final Record, Vol. II B, p. 268.

a court decision instead of a decision by a "competent authority", claimed that the latter approach would mean "in practice that (...) the military commander on the spot ... decides whether a person who has fallen into his hands comes under Article 3 [GC III] or does not belong to Article 3. (...) It means that if he decides that he does not belong to Article 3 he will be considered to be a *franc tireur* and be put against the wall and shot on the spot." Mr. Morosov (USSR) responded: "Where is it laid down that any person not protected by Article 3 should be shot? I do not know of any law to this effect, and I do not know of anybody who would wish to devise a clause of that kind. ... If a person is not recognized as a prisoner of war under the terms of Article 3, such a person would then be a civilian and would enjoy the full protection afforded by the Civilians Convention." The Dutch delegate did not accept that view and said: "That persons who do not fall under Article 3 are automatically protected by other Conventions is certainly untrue. The Civilian Convention, for instance, deals only with civilians under certain circumstances; such as civilians in an occupied country or civilians who are living in a belligerent country, but it certainly does not protect civilians who are in the battlefield, taking up arms against the adverse party. These people, if they do not belong to Article 3, and if they fall into the hands of the adverse party, might be shot (...)." ²⁷

To sum up, in the debates on GC III one statement (Russia) is recorded that GC IV automatically applies when the conditions of Article 4 of GC III are not met. The efforts by the Danish delegation focused on ensuring a minimum of protection for civilians resisting an aggressor in the exercise of self-defence without fulfilling the conditions of a *levée en masse*. The Dutch delegation rejected the Russian view as regards civilians on the battlefield taking up arms against the adverse party. Their statement can, however, be interpreted as implying that civilians taking up arms against the enemy in occupied territory or in enemy territory protected by GC IV.

The discussions in connection with GC IV must be assessed against this background. The drafting history of GC IV seems to support the view that "unlawful combatants" fulfilling the nationality criteria of its Article 4 are protected, but that the protection is subject to derogations. While certain delegations took the view that GC IV should not protect persons violating the laws of war, saboteurs and spies (who would be unlawful combatants²⁸ — although the

²⁷ Final Record, Vol. II B, pp. 271 *et seq.*

²⁸ The term "sabotage" in a military context has been said to denote acts committed in order to damage or destroy the infrastructure material of the enemy, "lines of communication" and "military installations" (GC IV, Articles 64 and 68). See Rosenblad, *op. cit.* (note 14), p. 109.

term was never used in the Final Record),²⁹ other delegations disagreed.³⁰ As stated by the Australian delegate, “two schools of thought had become evident during the discussion — that of those delegations which wished for a broad and ‘elastic’ Convention, and that of those which wanted a restricted Convention.”³¹ In order to overcome the divergent views the Committee adopted, as a compromise, draft Article 3A (which became Article 5 of GC IV). This provision treated persons violating the laws of war, saboteurs and spies as “protected persons”, but allowed States in certain circumstances to deprive such persons of some of the protections of GC IV.³² This compromise solution was finally adopted overwhelmingly by the Diplomatic Conference.³³

²⁹ *Commentary IV, op. cit* (note 12), p. 52 (“Some people considered that the Convention should apply without exception to all the persons to whom it referred, while to others it seemed obvious that persons guilty of violating the laws of war were not entitled to claim its benefits. These divergent views had not been expressed [during preliminary discussions], however, and the problem did not arise until after the Stockholm Conference. It arose then because the Conference had adopted a definition of protected persons which covered those who committed hostile acts without being members of the regular combatant forces.”).

³⁰ Mr. Castberg (Norway): “Saboteurs could not of course claim protection under the Prisoners of War Convention; they should nevertheless be protected against criminal treatment and torture.” Mr. Söderholm (Sweden) and Mr. Dahl (Denmark) supported this view. Colonel Du Pasquier (Switzerland) remained somewhat ambiguous in saying “In regard to the legal status of those who violated the laws of war, the Convention could not of course cover criminals or saboteurs. Moreover, Article 55 [Art. 64 of GC IV] and those following established the principle that an occupying Power was entitled to lay down penal regulations to protect its troops. On the other hand, Article 29 [Arts 31/32 of GC IV] and those following fixed the limits of such penal legislation and in particular prohibited torture and the taking of hostages.” He was in favour of the revised form of Article 3 as drawn up by the International Committee of the Red Cross [which would have covered unlawful combatants]. Therefore, the Italian delegate Mr. Maresca, while expressing support for the ICRC proposal, suggested that a clause be added providing that protected persons were under an obligation not to act in such a way as to violate the rules of war. General Schepers (Netherlands) agreed with the Scandinavian delegates. (Committee III (Civilians), 2nd meeting, 26.4.1949), Final Record, Vol. II A, pp. 621 *et seq.*

³¹ Final Record, Vol. II A, p. 622.

³² See Final Record, Vol. II A, p. 796; Commentaries concerning the draft Convention, *ibid.*, p. 814: “Modern warfare does not take place on the battlefield alone; it also filters into the domestic life of the belligerent; enemy secret agents penetrate into the inner workings of the war machine, either to spy or to damage its mechanism. [...] Many Delegations have therefore felt the fear that, under cover of the protection offered by our convention, spies, saboteurs or other persons dangerous to the State may be able to abuse the rights which it provides for them. The Delegations have considered it their duty to prevent the guarantees of the Convention acting to the advantage of surreptitious activities. The idea has thus arisen that, with respect to persons who are a secret threat to the security of the State, the benefit of the Convention should be restricted to a certain extent. Owing to the very great difficulty in tracking down these underground activities, it is intended to allow the State a free hand in its defence measures without imposing any obligations under the Convention other than the duty to ensure humane and legal treatment. It was these considerations which resulted in Article 3A [Art. 5 of GC IV] (...)”

³³ Final Record, Vol. II B, pp. 377, 384: 31 votes in favour, 9 abstentions (GC IV, Art. 4); 25 votes in favour, 9 against, 6 abstentions (GC IV, Art. 5).

If the interpretation expressed by the UK delegate³⁴ of the initial draft of GC IV's Article 4³⁵ is correct ("[i]n its present form, Article 3 would mean that persons who were not entitled to protection under the Prisoners of War Convention would receive exactly the same protection by virtue of the Civilians Convention, so that all persons participating in hostilities would be protected, whether they conformed to the laws of war or not"), and since no fundamental changes were made to that draft text, there are strong reasons to believe that in the end delegations accepted that GC IV is applicable to unlawful combatants if they fulfil the conditions set forth in Article 4 thereof. The aim of a somewhat reduced protection for such persons is achieved by means of its Article 5, which was inserted at a later stage and allows for derogations for the types of persons often referred to as unlawful combatants. In short, the drafting history of GC IV — in particular the UK statement cited above — justifies the conclusion that it covers unlawful combatants and that the extent of this coverage is subject to the limitations outlined in its Article 5. The drafting history as a whole — namely the discussions on GC III and IV — shows that the issue of persons not fulfilling the conditions to qualify as POWs but participating nevertheless in hostilities was controversial at the time. There are no indications that — contrary to the adopted wording of its Article 4 — there was general agreement that GC IV should not cover "unlawful combatants". Its broad personal scope of application was finally accepted, despite obvious hesitations, by the Diplomatic Conference. The price for this was the insertion of Article 5.

Legal literature

In legal writings divergent opinions are expressed about the applicability of GC IV to unlawful combatants. A number of authors clearly share our view that GC IV does cover unlawful combatants if they fulfil the nationality

³⁴ Brigadier Page (UK), Committee III (Civilians), 2nd meeting, 26.4.1949, Final Record, Vol. II A, p. 621.

³⁵ "Persons protected under the present Convention are those who, at a given moment and in whatever manner, find themselves, in the case of a conflict or occupation, in the hands of a Power of which they are not nationals; (...) The provisions of Part II are, however, wider in application, as defined in Article II. Persons such as prisoners of war, the sick and wounded, the members of medical personnel, who are subject to other international conventions, remain protected by the said conventions." Art. 3, *Revised and New Draft Conventions for the Protection of War Victims*, texts approved and amended by the XVIIth International Red Cross Conference, Geneva, 1948, pp. 114-115.

criteria.³⁶ Baxter apparently limits the scope of application of GC IV to unlawful combatants who operate in occupied territory.³⁷ The fact that he does not extend the protection to unlawful combatants operating in the territories of the parties to a conflict (Part III, Section 1) and in enemy territory (Part III, Section 2) is not consistent, given that the definition of protected persons is the same. Despite the clear indications in the wording of GC IV, some legal commentators seemingly do not recognize the applicability of GC IV to unlawful combatants at all.³⁸ However, they do not give any legal reasoning for their position. It is merely asserted that GC IV does not cover unlawful combatants; an analysis of its Article 4 is not provided. When these authorities refer to case law (in particular *ex parte Quirin*³⁹), it is case law that predates GC IV. Considering that the issue was simply not specifically regulated in any instrument of international humanitarian law before the adoption of GC IV, this approach is somewhat doubtful. More recent case law correctly adopts a rather different view. In the *Delalic* case, the ICTY found that:

36 K. Ipsen, in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995, p. 301; H. McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, Dartmouth, Aldershot, 2nd ed., 1998, p. 137; E. David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2nd ed., 1999, pp. 397 *et seq.*; Bothe, Partsch and Solf, *op. cit.* (note 17), pp. 261 *et seq.*; Aldrich, *op. cit.* (note 7), p. 893, footnote 12; G.I.A.D. Draper, "The status of combatants and the question of guerrilla warfare". *British Yearbook of International Law*, 1971, p. 197 (recognizes the applicability of GC IV to persons who do not fulfil the conditions of GC III, Art. 4, but participate in hostilities in enemy territory or in occupied territory, within the limits of GC IV, Art. 5); Rosenblad, *op. cit.* (note 14), p. 98 (recognizes the applicability of GC IV to members of organized resistance movements who do not fulfil the conditions of GC III, Art. 4, within the limits of GC IV, Art. 5); Kalshoven, *op. cit.* (note 15), p. 71 (recognizes the applicability of GC IV to persons who do not fulfil the conditions of GC III, Art. 4, but participate in hostilities in enemy territory or in occupied territory. In situations other than fighting in enemy territory or occupied territory, "the guerrilla fighter who falls into enemy hands will not enjoy the full protection extended to protected persons in occupied territory. It is submitted, however, that he will not be entirely without protection. The principle expounded in Article 3 for non-international armed conflict provide at the same time a minimum below which belligerents may not go in other situations either (...) To my mind, the strongest argument in favour of this thesis lies precisely in the element of their foreign nationality and, hence, allegiance to the opposite Party from the one which holds them in its power."

37 R.R. Baxter, "So-called 'unprivileged belligerency': Spies, guerrillas, and saboteurs". *British Yearbook of International Law*, 1951, pp. 328 *et seq.*, 343 *et seq.*; R.R. Baxter, "The duties of combatants and the conduct of hostilities (Law of The Hague)", in Henry Dunant Institute and UNESCO (ed.), *International Dimensions of Humanitarian Law*, Martinus Nijhoff, The Hague, 1988, pp. 105 *et seq.*

38 For example I. Detter, *The Law of War*, Cambridge University Press, 2000, p. 136; R.K. Goldmann/B.D. Ittemore, "Unprivileged combatants and the hostilities in Afghanistan: Their status and rights under international humanitarian and human rights law". <http://asil.org/taskforce/goldman.pdf>, p. 38; C. Greenwood, "International law and the 'war against terrorism'", *International Affairs* 2002, p. 316; Report on Terrorism and Human Rights, *op. cit.* (note 5), para. 74.

39 317 U.S. 1, 63 S.Ct. 2 (1942).

"271. [...] If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, *provided that its article 4 requirements are satisfied.*"⁴⁰

In 1949, GC IV was adopted in the knowledge of the problems associated with unlawful combatants (see the discussions during the Diplomatic Conference). It is therefore in our view hardly defensible to maintain that unlawful combatants were generally excluded from the scope of application of GC IV, contrary to the rather comprehensive wording of its Article 4. The same would be true of claims that there is coexisting customary international law which comprehensively covers unlawful combatants and would constitute a sort of *lex specialis* (the US Manual quoted above would be contrary to such a rule of customary international law!). In this connection it should also be recalled that the drafters of PI apparently had an understanding of the scope of application of GC IV which would include at least certain types of unlawful combatants.

Substantive protections for unlawful combatants under GC IV

With regard to the treatment of protected persons, GC IV provides for various standards of protection depending on the situation in which they find themselves in the hands of another Party/Power. Part III thereof defines the material scope of protection for protected persons within the meaning of GC IV's Article 4. Its first section contains provisions common to the territories of the parties to conflict and to occupied territories. These include:

rules on humane treatment; special protection for women; non-discrimination; prohibition of the use of protected persons as human; prohibition of coercion and of corporal punishment, torture, etc.; individual responsibility; and prohibition of collective punishment, pillage, reprisals and hostage taking.

This section is followed by specific provisions on the treatment of aliens in the territory of a party to conflict (Section II), which deal *inter alia* with:

the right to leave the territory; the treatment of persons in confinement; the right to individual/collective relief, to medical attention and to

⁴⁰ ICTY, Judgment, *The Prosecutor v. Delalic et al.*, IT-96-21-T, 16 November 1998, para. 271 (emphasis added).

practise their religion; employment; measures of control, i.e. assigned residence and internment, and the procedure to be followed; and transfer to another Power.

Section III, on protected persons in occupied territory, includes rules on: deportation and transfers; children; labour; food and medical supplies for the population; hygiene and public health; relief operations; penal legislation; penal procedure; treatment of detainees; and security measures.

Section IV contains regulations for the treatment of internees, *inter alia* on: places of internment; food and clothing; hygiene and medical attention; religious, intellectual and physical activities; personal property and financial resources; administration and discipline; relations with the outside; penal and disciplinary sanctions; transfers of internees; deaths; and release, repatriation and accommodation in neutral countries.

Article 79 of that section stipulates that protected persons may not be interned, except in accordance with the provisions of Articles 41-43 (aliens in the territory of a party to conflict) and Articles 68 and 78 (protected persons in occupied territory).

Since unlawful combatants are protected by GC IV if they fulfil the nationality criteria set out in Article 4 thereof, the above forms of protection also apply to them. In addition to the general protections of Part III, Section 1, applicable to the territories of Parties to the conflict and to occupied territories, specific protections are foreseen for unlawful combatants operating in occupied territory and for unlawful combatants in enemy territory. These protections may, however, be subject to derogations under Article 5 of GC IV (see below).

The fact that GC IV only provides for different *specific* protections to aliens in the territory of an enemy party to the conflict and persons in occupied territory, who are in the hands of the adverse party, may have led some experts to conclude that the situation of unlawful combatants in the zone of military operations (at the front/on the battlefield in their own country, which is not occupied) was not taken into account in the drafting of GC IV, and in particular of Articles 4 and 5.⁴¹

If, however, the interpretation of GC IV's Article 6 proposed in the Commentary edited by J.S. Pictet is accepted, this approach would be difficult to defend:

⁴¹ See A. Rosas, *The Legal Status of Prisoners of War*, Helsinki, Suomalainen Tiedeakatemia, 1976, p. 411; Baxter, "Unprivileged belligerency", *op. cit* (note 37), pp. 329 *et seq.*

"It follows from this that the word "occupation", as used in the Article, has a wider meaning than it has in Article 42 of the Regulations annexed to the Fourth Hague Convention of 1907. So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 referred to above. The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets. (...) The Convention is quite definite on this point: all persons who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals are protected persons. No loophole is left."

Under the foregoing interpretation, every person who fulfils the nationality criteria as set out above and is captured while enemy armed forces are present (from the moment of invasion until the withdrawal) would be protected by the provisions of GC IV (Part III, Sections I, III and IV).

This interpretation of the concept of occupation, however, is not universally shared. The German Military Manual for example states: "Occupied territory does not include battle areas, i.e. areas which are still embattled and not subject to permanent occupational authority (area of invasion, withdrawal area)." In the commentary to that provision of the manual it is further explained: "The law of occupation is not applicable until the armed forces invading a foreign country have established actual control over a certain territory (after invasion), and ceases to apply when they no longer have such control (after withdrawal). The rules are intended to apply in stable situations."⁴² Similarly, the distinction proposed by Draper, Baxter and Kalshoven⁴³ can be of significance only if they have a different understanding of occupation, which for them would probably require a minimum control of territory for some time by the adverse party.

As a consequence of that interpretation, persons who fulfil the nationality criteria as set out above, and who find themselves in enemy hands in battle areas where no actual control has been established, would not be covered by the provisions of Part III, Sections III and IV, of GC IV. They would

⁴² H.P. Gasser, in Fleck (ed.), *op. cit* (note 36), p. 528.

⁴³ See footnotes 30 and 31.

be protected by the rather general provisions of GC IV, Part II,⁴⁴ and should also come within the protections of its Part III, Section I.⁴⁵

But what will their protection be once they are taken from the battle area to enemy territory or occupied territory, or if the battle area itself becomes occupied territory (i.e. foreign troops have established actual control)? Does it matter that these persons were not in enemy territory or occupied territory at the time they were captured? The normal reflex would possibly be that the law applicable to the place where they are held should apply, i.e. :

- Part III, Sections I, III and IV, of GC IV for persons who end up in occupied territory;
- Part III, Sections I, II and IV, of GC IV for persons who end up in enemy territory.

The very broad wording of Article 4 of GC IV points in that direction by specifying that the Convention protects “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power”.⁴⁶ Support for our position

44 Provisions on :

- the establishment of hospital and safety zones and neutralized zones;
- the conclusion of agreements for the evacuation of especially vulnerable categories of persons;
- the protection of civilian hospitals;
- the protection of medical personnel;
- the protection of transports of sick and wounded civilians and other especially vulnerable categories of persons on land, by sea or by air;
- the free passage of aid consignments;
- the special protection of children;
- permission to exchange family news; and
- facilitating enquiries relating to missing family members.

For the purpose of this article they are not relevant because they do not regulate the treatment/detention/prosecution of protected persons.

⁴⁵ In addition Art. 3 common to GC I-V, the application of which is recognized in any type of armed conflict as a matter of customary international law (see the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14 at p. 114, para. 218), would also apply, as well as other minimum guarantees which will be discussed below.

⁴⁶ In the *Rajic* case (Review of the Indictment, *Prosecutor v. Ivica Rajic*, IT-95-12-R61, paras. 35-37), the ICTY held that: “The International Committee of the Red Cross’s Commentary on Geneva Convention IV suggests that the protected person requirement should be interpreted to provide broad coverage. The Commentary states that the words ‘at a given moment and in any manner whatsoever’ were ‘intended to ensure that all situations and all cases were covered’. International Committee of the Red Cross, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 47 (Geneva 1958) (...). At page 47 it further notes that the expression ‘in the hands of’ is used in an extremely general sense.

It is not merely a question of being in enemy hands directly, as a prisoner is ... In other words, the expression ‘in the hands of’ need not necessarily be understood in the physical sense; it simply means that the person is in territory under the control of the Power in question.”

may be found in the Commentary edited by Pictet, which states: "The Article refers both to people who were in the territory before the outbreak of war (or the beginning of the occupation) and to those who go or are taken there as a result of circumstances: travellers, tourists, people who have been shipwrecked and even, it may be, spies or saboteurs."⁴⁷

However, those authors who agree that GC IV is applicable to unlawful combatants in occupied territory or in enemy territory do not further pursue that line of thought. They seem to limit the specific protections of GC IV to unlawful combatants operating in occupied territory or in enemy territory at the time of their capture.⁴⁸ In the words of Draper: "If they were *operating in neither type of territory*, their position is far from clear and their protection is speculative."⁴⁹

If that approach is agreed with, there should be no doubt that at least Article 75 of PI and Article 3 common to GC I-IV do as customary international law provide for a minimum of protection.

Derogations

The rights and privileges defined in particular in Part III of GC IV are not absolute. Article 5 of GC IV provides for derogations in specific circumstances:

"Where in the territory of a Party to the conflict, the latter is satisfied that an individual *protected person is definitely suspected of or engaged in activities hostile to the security of the State*, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, *be prejudicial to the security of such State*.

Where in occupied territory an individual *protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power*, such person shall, in those cases where

⁴⁷ Commentary IV, *op. cit* (note 12), p. 47.

⁴⁸ Draper, *op. cit* (note 36), p. 197; Baxter, "Unprivileged belligerency", *op. cit* (note 37), pp. 328 and 343 *et seq.*; Baxter, "Duties of combatants", *op. cit* (note 37), pp. 105 *et seq.*; Kalshoven, *op. cit* (note 15), pp. 70 *et seq.*, 73; Rosas, *op. cit* (note 41), pp. 411 *et seq.* In one of its publications the ICRC has also chosen such a formulation, which could point to such an interpretation: "thus guerrillas who do not meet these conditions [of GC III, Art. 4] and who operate in occupied territory are protected by Geneva Convention IV". *Rules Applicable in Guerrilla Warfare*, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May – 12 June 1971, Paper submitted by the International Committee of the Red Cross, Geneva, January 1971, p. 19.

⁴⁹ Draper, *op. cit* (note 36), p. 197.

absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.” (Emphasis added.)

On reading this article it could be taken to apply in particular to persons who take a direct part in hostilities without fulfilling the criteria of GC I-III, i.e. such persons as are labelled “unlawful combatants”.⁵⁰ As pointed out above, both the concepts of “activity hostile to the security of the State/Occupying Power” and of “sabotage”⁵¹ certainly do encompass direct participation in hostilities (without being entitled thereto).

Article 5 contains the following distinction:

- in the territory of a Party to conflict, such persons are not entitled to claim such rights and privileges under GC IV as would, if exercised in the favour of such individual person, be prejudicial to the security of such State;⁵²
- in occupied territory, such persons are, in those cases where absolute military security so requires, regarded as having forfeited rights of communication under GC IV.

⁵⁰ See Kalshoven, *op. cit* (note 15), p. 72, for guerrilla fighters whom he defines as persons (taking a direct part in hostilities) not regarded as prisoners of war, *ibid.*, pp. 65, 69.

⁵¹ See references in note 10.

⁵² As for possible derogations under para. 1, *Commentary IV*, *op. cit* (note 12), p. 55, indicates the following: “The rights referred to are not very extensive in the case of protected persons under detention; they consist essentially of the right to correspond, the right to receive individual or collective relief, the right to spiritual assistance from ministers of their faith and the right to receive visits from representatives of the Protecting Power and the International Committee of the Red Cross. The security of the State could not conceivably be put forward as a reason for depriving such persons of the benefit of other provisions — for example, the provision in Article 37 that they are to be humanely treated when they are confined pending proceedings or subject to a sentence involving loss of liberty, or the stipulation in Article 38 that they shall receive medical attention, if their state of health so requires. Furthermore, it would be really inhuman to refuse to let a chaplain visit a detained person who was seriously ill. Torture and recourse to reprisals are of course prohibited. It should, moreover, be noted that this provision cannot release the Detaining Power from its obligations towards the adverse Party. It remains fully bound by the obligation, imposed on it by Article 136, to transmit to the official Information Bureau particulars of any protected person who is kept in custody for more than two weeks. This is not, in fact, a right or privilege of the protected person, but an obligation of the Detaining Power.”

Apart from problems of interpretation of concepts such as "definitely suspected"⁵³, "hostile to the security of the State". "such rights and privileges ... as would be prejudicial to the security of such State". "absolute military security so requires", the meaning of Article 5 (2), which gives a right to derogate only from the provisions relating to communication, is rendered somewhat unclear by paragraph 3, according to which "in each case" (i.e. both in the situations referred to in paragraph 1 and in those referred to in paragraph 2) the protected persons "shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention".⁵⁴ If only provisions relating to communication can be derogated from, why is there a need to indicate as minimum protections humane treatment and fair trial?⁵⁵

The two categories of non-derogable protections include: the right to "humane treatment" as defined in Articles 27 and 37, and thus the prohibition of torture and ill-treatment;⁵⁶ as well as the fair trial rights contained in Articles 71-76,⁵⁷ which are made applicable to internees in non-occupied territory by Article 126 in the event of criminal proceedings.⁵⁸

Minimum guarantees under customary international law

As we have seen, the protection of unlawful combatants under GC IV depends on whether they fulfil the nationality criteria set out in Article 4.

⁵³ As far as suspicion is concerned, it is important to emphasize that "[t]he suspicion must not rest on a whole class of people; collective measures cannot be taken under this Article; there must be grounds justifying action in each individual case". *Commentary IV, op. cit* (note 12), p. 55. See also Final Record, Vol. II A, p. 815 (Committee III report to the Plenary).

⁵⁴ Rosas, *op. cit* (note 41), p. 412.

⁵⁵ See debate at the Diplomatic Conference between the representatives of the USSR and the UK, Final Record, Vol. II B, pp. 379 *et seq.*

⁵⁶ GC IV, Art. 32. See also Final Record, Vol. II A, p. 815 (Committee III report to the Plenary): "The third paragraph defines what was left somewhat vague by the first two paragraphs. It confirms the obligations of the State as regards humane treatment and correct penal procedure; it does nothing to weaken the force of the prohibition of torture or brutal treatment." See also the findings of the ICTY in the *Delalic* case, which were adopted "in order to determine the essence of the offence of inhuman treatment [under the Geneva Conventions], the terminology must be placed within the context of the relevant provisions of the Geneva Conventions and Additional Protocols". It considered the prohibition of inhuman treatment in the context of GC II, Art. 12; GC III, Arts 13, 20 and 46; GC IV, Arts 27 and 32; GC I-IV, common Art. 3; PI, Art. 75; and PII, Arts 4 and 7; according to which protected persons "shall be humanely treated". Any conduct contrary to the behaviour prescribed in these provisions shall constitute inhuman treatment.

⁵⁷ *Commentary IV, op. cit* (note 12), p. 58.

⁵⁸ *Ibid.*, Art. 126, p. 497; Kalshoven, *op. cit* (note 15), p. 72. Otherwise common Article 3 would be the basis, *Commentary IV, op. cit* (note 12), Article 5, p. 58.

The question remains as to how far the protections of GC IV are supplemented by other rules of international law and to what extent such rules apply to unlawful combatants who do not fulfil those criteria.

The minimum guarantees applicable to all persons in the power of a party to conflict are defined nowadays in Article 75 of PI. The scope of application is defined as follows:

“1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.”

This article clearly ensures that no person in the power of a Party to an international armed conflict is outside the protection of international humanitarian law.⁵⁹ It defines the minimum standards that apply to any such person and thus increases existing protection, for example in the situations referred to in Article 5 of GC IV. As pointed out above, Article 45 (3) of PI explicitly recognizes the application of Article 75 to unlawful combatants.

The said Article 45⁶⁰ not only contains an implicit confirmation of our interpretation of the personal field of application of GC IV but, in connection with Article 75 of PI, it supplements the protection of unlawful combatants. This is done in two ways:

First, Article 45 (3) in conjunction with Article 75 provides for a minimum of protection for those unlawful combatants not covered by GC IV because they do not fulfil the nationality criteria of GC IV's Article 4 and — if the interpretation defended by Baxter, Draper and Kalshoven is followed

⁵⁹ See statement by the ICRC at the Diplomatic Conference of 1974-1977, CDDH/III/SR.43, OR Vol. XV, pp. 25 *et seq.*; Finland, *ibid.*, p. 27, Belgium, *ibid.*, p. 31, Holy See, *ibid.*, p. 34.

⁶⁰ This paragraph does not cover combatants who are denied prisoner-of-war status by application of paragraph 4 of Article 44 (i.e. members of the armed forces who do not comply with the minimum standards of distinction). The latter in fact continue to come within the scope of the procedural guarantees of the Third Convention, whereas the provision under consideration here concerns persons who are refused these guarantees.

— for those who fall into enemy hands in the battle area.⁶¹ Previously, these types of unlawful combatants were protected solely on the basis of common Article 3 as customary international law or of the Martens Clause.

Second, for those unlawful combatants who are protected by GC IV it complements that protection by defining minimum guarantees which must be respected in all circumstances. More specifically:

(1) For unlawful combatants in enemy hands on enemy territory, Article 75 of PI specifically ensures that various judicial guarantees are respected (para. 4). Before the adoption of PI this was possible only on the basis of common Article 3 as customary international law⁶² or of GC IV's Article 126.⁶³ In addition, Article 75 of PI lays down other protections in relation to treatment (paras 1 and 2) and to arrest, detention and internment (para. 3), which in certain cases increase the protections contained in Part III, Sections I, II and IV, of GC IV.

(2) For unlawful combatants in enemy hands in occupied territory, Article 75 PI adds a few more judicial guarantees, such as the presumption of innocence. The protections in relation to treatment, arrest, detention and internment are supplemented. In addition, Article 45 (3) of PI restricts the possibility for derogations under GC IV's Article 5.

This interpretation is largely shared by Bothe, Partsch and Solf in their commentary on PI:

"Paragraph 3 applies the safeguards and protections of Art. 75 to any person who has taken part in hostilities, but who is not entitled to prisoner-of-war status or treatment, and who does not qualify for more favourable treatment under the Fourth Convention. This class of persons includes: members of the armed forces who forfeit both entitlement to prisoner-of-

⁶¹ See also the ICRC's commentary on the Draft Additional Protocols to the Geneva Conventions of August 12, 1949 (October 1973), on draft Article 65 [Art. 75 of PI]: "The purpose of this draft is to rectify an omission in the existing treaty law; on the one hand, persons who are not protected by the First, Second and Third Conventions are not necessarily always protected by the Fourth Convention, as is shown by its Article 4; on the other hand, Article 5 of the Fourth Convention relating to derogations is fairly difficult to interpret and appears to restrict unduly the rights of the persons protected.", pp. 81 *et seq.*

⁶² "[T]he following acts are and shall remain prohibited at any time and in any place whatsoever (...) (d) 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 (...)"

⁶³ "The provisions of Articles 71 to 76 inclusive shall apply, by analogy, to proceedings against internees who are in the national territory of the Detaining Power."

war status and treatment [e.g. spying under PI, Art. 46, or failure to distinguish themselves from the civilian population, as required by PI, Art. 44 (3)], nationals of States not bound by the Fourth Convention, nationals of the Detaining Power, and nationals of a neutral or co-belligerent State with which the Detaining Power maintains normal diplomatic relations [see the exclusions based on nationality in GC IV, Art. 4], spies, and mercenaries. Notwithstanding the derogations permitted by Art. 5 of the Fourth Convention, this paragraph also makes the protections of Art. 75 the minimum humanitarian standard applicable to civilians protected under the Fourth Conventions who participate directly in hostilities in the territory of a Party to the conflict or in any other area other than occupied territory. In occupied territory it virtually neutralizes the derogations permitted under Art. 5 of the Fourth Convention except for persons held as spies.”⁶⁴

See also the ICRC Commentary on Article 45 of PI:

“In armed conflict with an international character, a person of enemy nationality who is not entitled to prisoner-of-war status is, in principle, a civilian protected by the Fourth Convention, so that there are no gaps in protection. However, things are not always so straightforward in the context of the armed conflicts of Article 1 (General principles and scope of application), paragraph 4, as the adversaries can have the same nationality. Moreover, the concept of alien occupation often becomes rather fluid in guerrilla operations as no fixed legal border delineates the areas held by either Party, and this may result in insurmountable technical difficulties with regard to the application of some of the provisions of the fourth Convention. This is one of the reasons why the paragraph under consideration here provides that in the absence of more favourable treatment in accordance with the fourth Convention, the accused is entitled at all times to the protection of Article 75 of the Protocol (Fundamental guarantees). This rule is confirmed in paragraph 7 (b) of the said Article 75. However, it is also possible that, without being denied the protection of the fourth Convention, the accused may fall under the scope of Article 5 of the same Convention, which lays down some important derogations. In this case the guarantees of Article 75 (Fundamental guarantees) continue to apply in their entirety. Finally, the latter also apply to the person concerned when the

⁶⁴ Bothe, Partsch and Solf, *op. cit* (note 17), pp. 261 *et seq.*

fourth Convention as a whole applies to him, whenever the treatment resulting from this would be more favourable to him, whether or not the crimes of which he is accused are grave breaches of the Conventions or the Protocol (Article 75 — Fundamental guarantees, paragraph 7 (b)). This also applies, for example, to aliens in the territory of a Party to the conflict who may have taken part in hostilities against this Party, as the fourth Convention does not indicate what judicial guarantees they are entitled to.”⁶⁵ (Emphasis added.)

The protections of PI, Article 75, now constitute customary international law.⁶⁶ Most of the authors who do not seem to recognize the applicability of GC IV to unlawful combatants share the view that Article 75 of PI is applicable to unlawful combatants.⁶⁷ The authors who limit the applicability of GC IV to some types of unlawful combatants equally recognize the applicability of the said Article 75 to all unlawful combatants.⁶⁸ Those authors who wrote before the adoption of PI recognized that some minimum humanitarian guarantees apply to all unlawful combatants. They derived those guarantees either from Article 3 common to GC I-IV, Article 5 (3) of GC IV or the Martens Clause, depending on whether they accepted the applicability of GC IV to unlawful combatants or not.⁶⁹

Penal prosecution of unlawful combatants

It is generally accepted that unlawful combatants may be prosecuted for their mere participation in hostilities, even if they respect all the rules of international humanitarian law.⁷⁰ National legislation must, however, first

⁶⁵ Commentary on Art. 45, in Y. Sandoz, Ch. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff, Geneva, 1987, no. 1761. See also Commentary on Art. 51, in *ibid.*, no. 1942.

⁶⁶ See Greenwood, *op. cit.* (note 38), p. 316; Report on Terrorism and Human Rights, *op. cit.* (note 5), para. 76; Aldrich, *op. cit.* (note 7), p. 893.

⁶⁷ Report on Terrorism and Human Rights, *op. cit.* (note 5), para. 74; Y. Dinstein, “The distinction between unlawful combatants and war criminals”, in Y. Dinstein (ed.), *International Law at a Time of Perplexity*, 1989, p. 112.

⁶⁸ Ipsen, in Fleck (ed.), *op. cit.* (note 36), p. 301; McCoubrey, *op. cit.* (note 36), p. 137; David, *op. cit.* (note 36), pp. 397 *et seq.*; Bothe, Partsch and Solf, *op. cit.* (note 17), pp. 261 *et seq.*; Aldrich, *op. cit.* (note 7), p. 893, footnote 12.

⁶⁹ G. Schwarzenberger, *International Law as applied by International Courts and Tribunals*, Vol. II, Stevens, London, 1968, pp. 115 *et seq.*; Draper, *op. cit.* (note 36), p. 197; Rosenblad, *op. cit.* (note 14), p. 98; Kalshoven, *op. cit.* (note 15), p. 71.

⁷⁰ C. Rousseau, *Le droit des conflits armés*, A. Pedone, Paris, 1983, p. 68; Dinstein, *op. cit.* (note 67), p. 105; *Commentary IV*, *op. cit.* (note 12), p. 50; Kalshoven, *op. cit.* (note 15), pp. 73 *et seq.*

provide for such a possibility.⁷¹ If unlawful combatants furthermore commit serious violations of international humanitarian law, they may be prosecuted for war crimes.⁷² In any such proceedings they are entitled to fair trial guarantees as contained in GC IV if applicable (i.e. if they comply with the nationality requirements of its Article 4), or at least to those contained in Article 75 of PI, which reflects customary international law. There seems to be general agreement that once in the hands of the enemy they may not be executed/punished without proper trial.⁷³ It is interesting to note that Dinstein considerably limits the competence of a capturing State to punish unlawful combatants for mere participation in hostilities when he claims “[a]n unlawful combatant may be put on trial only for an act committed in the course of the same mission that ended up in his capture by the adversary. (...) Hence, should the enemy capture [him] at a later stage, it may not prosecute him for the misdeeds of the past.”⁷⁴ Thus, Dinstein applies to unlawful combatants the rules of the Hague Regulations relating to spies. This restriction has also been included in Article 44 (5) of PI (which stipulates that “[a]ny combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities”) for members of the armed forces who have not distinguished themselves from the civilian population as required by that article’s paragraph 3.⁷⁵

⁷¹ Dinstein, *op. cit.* (note 67), p. 114; Kalshoven, *op. cit.* (note 15), p. 73.

⁷² Baxter, “Unprivileged Belligerency”, *op. cit.* (note 37), p. 344.

⁷³ Draper, *op. cit.* (note 36), pp. 197-198; Baxter, “Unprivileged Belligerency”, *op. cit.* (note 37), pp. 336, 337, 340; Baxter, “Duties of Combatants”. *op. cit.* (note 37), pp. 105 *et seq.*; Schwarzenberger, *op. cit.* (note 69), pp. 115 *et seq.*; M.H.F. Clarke, T. Glynn and A.P.V. Rogers, “Combatant and Prisoner of War Status”, in M.A. Meyer (ed.), *Armed Conflict and the New Law: aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, British Institute of International and Comparative Law, London, 1989, p. 125; Rousseau, *op. cit.* (note 70), p. 68; Dinstein, *op. cit.* (note 67), p. 112; Kalshoven, *op. cit.* (note 15), pp. 73 *et seq.*

⁷⁴ Dinstein, *op. cit.* (note 67), p. 112.

⁷⁵ See Commentary on Art. 44, in Sandoz, Swinarski and Zimmermann (eds), *op. cit.* (note 65), nos. 1721 *et seq.* (footnotes omitted):

“The Rapporteur explains this provision as follows:

‘Paragraph 5 is an important innovation developed within the Working Group. It would ensure that any combatant who is captured while not engaged in an attack or a military operation preparatory to an attack retains his rights as a combatant and a prisoner of war whether or not he may have violated in the past the rule of the second sentence of paragraph 3. This rule should, in many cases, cover the great majority of prisoners and will protect them from any efforts to find or to fabricate past histories to deprive them of their protection.’

Thus only a member of the armed forces captured in the act can be deprived of his status as a combatant and of his right to be a prisoner of war. For paragraph 4 to be applicable, it is necessary that the violation was

"Protections" of unlawful combatants in the conduct of hostilities

Only the civilian population and individual civilians enjoy general protection against dangers arising from military operations. They are protected against direct attacks, unless and during the time that they take a direct part in hostilities. A civilian is any person who does not belong to "one of the categories of persons referred to in Article 4 (A) (1),⁷⁶ (2),⁷⁷ (3)⁷⁸ and (6)⁷⁹ of the Third Convention and in Article 43 of this Protocol" (i.e. members of the armed forces). Thus for the purposes of the law on the conduct of hostilities, there is no gap.⁸⁰ Either a person is a combatant or a civilian. Given that unlawful combatants by definition do not fulfil the criteria of either Article 4 (A) (1), (2), (3) and (6) of GC III or Article 43 of PI, this means that they are civilians. For such time as they directly participate in hostilities they are lawful targets of an attack. When they do not directly par-

committed at the time of capture or directly before the capture. The link in time between violation and capture must be so close as to permit those making the capture to take note of it themselves. Thus this is a case of 'flagrante delicto'. There is no doubt that this is, 'mutatis mutandis,' analogous to the situation of the spy, and consequently there is some relationship with the concept of an unprivileged belligerent. Like a spy, the combatant who does not carry his arms openly must be caught in the act for the sanction to be applicable to him. Similarly, like him, the combatant who is captured while he is not committing this breach, does not incur any responsibility for acts which he committed previously. However, it should be noted that in contrast to espionage, which is not prohibited by the law of armed conflict, but is merely made punishable, it is prohibited in the Protocol for a combatant not to carry his arms openly, and in principle the Protocol makes him responsible for this. However, in practical terms the adversary cannot do anything against him as a matter of criminal law unless he has surprised him 'flagrante delicto' at the moment of capture. The prohibition exists, but the sanction can only be applied under this condition. A combatant who commits this breach preserves, at least temporarily, his status as a combatant, and his right to prisoner-of-war status. If he is captured while he is not committing this breach, he is a prisoner of war and punishment can only be meted out in accordance with paragraph 2."

76 Members of regular armed forces.

77 *Members of militias and volunteer corps, including organized resistance movements, not included in the regular armed forces.*

78 Members of regular armed forces of a non recognized government/authority.

79 *Levée en masse.*

80 For the different approaches in GC IV and PI see Commentary on Art. 50, in Sandoz, Swinarski and Zimmermann (eds), *op. cit* (note 65), no. 1908: "Article 4 of the fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War contains a definition of the persons protected by that Convention against arbitrary and wanton enemy action when they are in the power of the enemy; this is the main object of the Convention. However, Part II, entitled "General protection of populations against certain consequences of war" has a wider field of application; according to Article 13, that Part covers "the whole of the populations of the countries in conflict". That definition is close to the definition of the civilian population given in Article 50 of the Protocol under consideration here."

ticipate in hostilities they are protected as civilians and may not be directly targeted. It must be stressed that the fact that civilians have at some time taken direct part in the hostilities does not make them lose their immunity from direct attacks once and for all.⁸¹

If unlawful combatants who have laid down their arms or no longer have means of defence surrender at discretion, they must not be killed or wounded.⁸² It is likewise prohibited to declare that no quarter will be given.⁸³

Conclusion

As this article has shown, it can hardly be maintained that unlawful combatants are not entitled to any protection whatsoever under international humanitarian law. If they fulfil the nationality criteria of GC IV's Article 4, they are clearly protected by that convention. The fact that a person has unlawfully participated in hostilities is not a criterion for excluding the application of GC IV, though it may be a reason for derogating from certain rights in accordance with Article 5 thereof. The specific protections of GC IV depend on the situation in which such persons find themselves in enemy hands. They are most extensive if unlawful combatants are in enemy hands in occupied territory. For those in enemy hands in enemy territory the protections of international humanitarian law are also quite well developed, whereas on the battlefield, where no actual control is established — depending on the interpretation of occupation — they may be the least developed. The guarantees contained in Article 75 of PI constitute the minimum protections that apply to all persons, including unlawful combatants, in the hands of a Party to an international armed conflict, irrespective of whether they are covered by GC IV or not.

⁸¹ See Art. 51 (3) PI: "Civilians shall enjoy the protection afforded by this Section, unless and *for such time as* they take a direct part in hostilities" (emphasis added). Commentary on Art. 51, in Sandoz, Swinarski and Zimmermann (eds.), *op. cit* (note 65), no. 1944; Bothe, Partsch and Solf, *op. cit* (note 17), p. 301.

⁸² Art. 23 (c) 1907 Hague Regulations. See also ICRC, *Rules Applicable in Guerrilla Warfare*, *op. cit* (note 48), p. 19.

⁸³ Art. 23 (d) 1907 Hague Regulations. See also ICRC, *Rules Applicable in Guerrilla Warfare*, *op. cit* (note 48), p. 19; Kalshoven, *op. cit* (note 15), pp. 67 *et seq.*

Résumé

La situation juridique des « combattants illégaux »

Knut Dörmann

Dans cet article, l'auteur examine les protections juridiques que le droit international humanitaire accorde aux « combattants illégaux » – question dont l'intérêt a été vivement relancé à la suite des opérations militaires menées par les États-Unis en Afghanistan au lendemain des événements du 11 septembre. Comme le terme « combattants illégaux » ne figure pas dans les traités de droit international humanitaire, des questions ayant trait à la situation juridique de cette catégorie de personnes et aux protections auxquelles elles ont droit ne cessent de se poser. Le terme s'applique généralement à toutes les personnes qui participent directement aux hostilités sans y être autorisées et qui, lorsqu'elles tombent au pouvoir de l'ennemi, n'ont pas droit au statut de prisonnier de guerre. Ces « combattants illégaux » n'étant par conséquent pas protégés par la III^e Convention de Genève de 1949, l'auteur s'efforce avant tout de répondre à la question controversée de savoir si cette catégorie de combattants relève du champ d'application particulier de la IV^e Convention de Genève de 1949. Partant de là, il expose les différents types de protection particulière applicables aux « combattants illégaux ».

2 Lawful combatancy

I. Lawful and unlawful combatants

A. *Combatants and civilians*

112. The cardinal principle of distinction in LOIAC (*supra* 33–4) calls for a demographic bifurcation into two disparate categories of combatants and civilians. This bifurcation serves as a key to the normative architecture relating to the conduct of hostilities and susceptibility to attack. The goal is to ensure in every feasible manner that IACs are waged among combatants and that they will spare civilians.

113. Combatants are basically members of the armed forces of a Belligerent Party – whether these forces are regular or irregular, and irrespective of belonging to the standing army or to reservist units – including para-military militias incorporated *de facto* in the armed forces. The specific task assigned to an individual within the military apparatus is irrelevant. The main characteristic of members of the armed forces is that they are trained to engage in combat and fire weapons, even if in practice they serve in auxiliary or administrative position (ranging from legal advisers to drivers or cooks).²¹³ Still, not all members of the armed forces are combatants. The exceptions are medical and religious personnel (see *infra* 135, 163).

114. The expression ‘members of the armed forces’ covers only those persons who are actually serving in the armed forces. Legal liability for conscription by itself does not turn a person into a combatant until he has been called up.²¹⁴ Retirement from the armed forces moves a person back from the category of a combatant to that of a civilian.

115. The trouble is that, as a matter of increasing frequency in contemporary IACs, civilians, instead of keeping out of the circle of fire, take a direct part

²¹³ See J. de Preux, ‘Article 43’, *Commentary on the Additional Protocols* 505, 515.

²¹⁴ See A. Rogers, ‘Combatant Status’, *Perspectives on the ICRC Study on Customary International Humanitarian Law* 101, 111 (E. Wilmschurst and S. Breau eds., 2007).

in the hostilities. When they do so, civilians are assimilated to combatants for such time as they engage in the hostilities (see *infra* 469 *et seq.*). Empirically, what counts therefore is not formal status alone (namely, membership in armed forces) but also conduct (namely, engagement in hostilities). Civilians directly participating in hostilities differ from combatants in that they are not entitled to act the way they do. But they do not differ from combatants in that they become lawful targets for attack.

B. *The consequences of being a combatant*

116. One of the telling earmarks of LOIAC – lending it a distinct *lex specialis* character compared to human rights law (see *supra* 89) – relates to lethal attacks against enemy combatants, which may be pursued without warning or any other preliminaries. The LOIAC rule is that the use of deadly force against enemy combatants need not come as a last resort (when all alternative means of subduing them have been exhausted unsuccessfully): a lethal attack may be carried out as a first resort.²¹⁵ In this crucial respect, what counts is not conduct but legal status.²¹⁶ Enemy combatants who desire to avoid the risk of being subjected to an attack must surrender (see *infra* 514).

117. The bleak consequences that stem from combatant status must be underlined. All enemy combatants can be targeted (i) at any time (24/7); (ii) anywhere (other than in neutral territories); (iii) whether or not they are in uniform; (iv) whether or not they are carrying arms; and (v) whether they are advancing, staying in place, straggling or retreating. They ‘may be targeted wherever found, armed or unarmed, awake or asleep, on a front line or a mile or a hundred miles behind the lines’.²¹⁷ The ICRC would like to introduce some restraints on the entitlement to kill combatants (or those assimilated to combatants).²¹⁸ But this would be utterly incompatible with the general practice of States, and the ICRC was strenuously advised by many experts in the field against taking such a position.²¹⁹ The only restraints relevant to killing combatants (or those assimilated to combatants) relate to the need to observe LOIAC prescripts prohibiting the use of certain weapons (see Chapter 3) or recourse to illicit methods of warfare (such as shooting *hors de combat* or perfidious killing; see *infra* 505 *et seq.*, 719 *et seq.*).

²¹⁵ See G.S. Corn, L.R. Blank, C. Jenks and E.T. Jensen, ‘Belligerent Targeting and the Invalidity of a Least Harmful Means Rule’, 89 *ILS* 536, 556 (2013).

²¹⁶ See C.H.B. Garraway, ‘“Combatants” – Substance or Semantics?’, *International Law and Armed Conflict*, *supra* note 15, at 317, 325.

²¹⁷ G. Solis, ‘Targeted Killing and the Law of Armed Conflict’, 60 *NWCR* 127, 130 (2007).

²¹⁸ See *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* 17, 78 (ICRC, N. Melzer ed., 2009).

²¹⁹ See H. Parks, ‘Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise and Legally Incorrect’, 42 *NYUJILP* 769, 828 (2009–10).

C. *Entitlement to engage in hostilities*

118. Entitlement to engage in hostilities is limited to lawful combatants. That is to say, only lawful combatants are entitled to attack lawful targets – causing death, injury and destruction – possessed, so to speak, of a ‘licence to kill’ and to harm in combat. The concept of unlawful combatancy first emerged in the law of sea warfare. Article 1 of the 1856 Declaration of Paris announces:

Privateering is, and remains, abolished.²²⁰

Privateers (or corsairs) – not to be confused with pirates – were privately owned vessels that were officially authorized by a Belligerent Government (through the issuance of what was known as ‘letters of marque’) to maraud enemy shipping in time of war; as such, privateering amounted to a ‘lawful form of pillage’ (see *infra* 774 *et seq.*).²²¹ The language of the Declaration of Paris indicates that it merely confirms a pre-existing abolition of privateering (under customary international law). The law of land and air warfare has subsequently been adjusted to exclude parallel modes of behaviour.

119. We shall address *infra* 132 *et seq.* the conditions of being a lawful combatant. What is of crucial importance is that lawful combatancy carries with it an entitlement to the privileges of POW once lawful combatants fall into the hands of the enemy. In other words, the privileged status of POW is vouchsafed to all captured military personnel, provided that they are lawful combatants.

120. Being POW admittedly carries the price-tag of denial of liberty, i.e. detention for the duration of the hostilities (which may drag on for many years).²²² However, such detention has solely one purpose: to stave off the possibility of further participation by the POW in the on-going hostilities. Detention is not due to any misgivings about previous reprehensible conduct on the part of the POW, and they cannot be prosecuted and punished ‘simply for having taken part in hostilities’.²²³ Denial of liberty is the downside for POW. The upside is that the prisoners’ life, health and dignity are guaranteed (itemized provisions to that effect are the highlights of Geneva Convention (III)).²²⁴ This is the decisive point: in a sense, POW exchange absence of personal liberty for safety of life and limb. To appreciate the salutary effects of the trade-off, it is advisable to consult the annals of history and keep in mind that until the modern era POW were slaughtered, maltreated, enslaved or held for ransom.²²⁵

²²⁰ Paris Declaration Respecting Maritime Law, *supra* note 99, at 788.

²²¹ D.J. Bederman, ‘Privateering’, VIII *MPEIL* 475, *id.*

²²² On the timing of their release, see Y. Dinstein, ‘The Release of Prisoners of War’, *Studies and Essays*, *supra* note 128, at 37–45.

²²³ A. Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts* 82 (1976).

²²⁴ Geneva Convention (III), *supra* note 3, at 507.

²²⁵ See H.S. Levie, *Prisoners of War in International Armed Conflict*, 59 *ILS* 2–5 (1978).

II. The rationale of the construct of unlawful combatancy

121. The distinction between lawful and unlawful combatants is a corollary of the cardinal distinction between combatants and civilians (see *supra* 112): the paramount purpose of the former distinction is to buttress the latter.²²⁶ LOIAC can effectively insulate civilians from the prospect of attack in hostilities only if and when the enemy can tell them apart from combatants. Blurring the lines of division between combatants and civilians is bound to generate confusion and endanger innocent victims of war. Hence, under customary international law, a sanction – deprivation of POW privileges – is imposed on those combatants who do not fulfil prescribed strictures (primarily, identifying themselves as required).

122. A civilian coming under the power of the enemy, if he did not directly participate in the hostilities (see *infra* 469 *et seq.*), is guaranteed by LOIAC not only his life, health and dignity – as is done with respect to combatant POW – but even his personal liberty, which cannot be withheld (through detention) without cause. However, a person is not allowed to wear simultaneously two caps: the hat of a civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant. He is assimilated to a combatant in that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy.

123. Article 5 of Geneva Convention (IV)²²⁷ specifically permits, in its first paragraph, derogation from the rights of protected persons engaged in activities hostile to the security of a Belligerent Party within its home territory. The derogation is less extensive in occupied territories, pursuant to the second paragraph. Neither Article 5 nor the Convention as a whole deals with unlawful combatants captured on the battlefield in enemy territory (prior to the onset of belligerent occupation).²²⁸ This failure of Article 5 to refer to areas where fighting is in progress has led R.R. Baxter to conclude:

A category of persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949 thus continues to exist and to be subject to the maximum penalty which the detaining belligerent desires to impose.²²⁹

²²⁶ See T. Meron, 'Some Legal Aspects of Arab Terrorists' Claims to Privileged Combatancy', 40 *NTIR* 47, 62 (1970).

²²⁷ Geneva Convention (IV), *supra* note 3, at 581.

²²⁸ See J. Callen, 'Unlawful Combatants and the Geneva Conventions', 44 *Vir. JIL* 1025, 1030–65 (2003–4).

²²⁹ R.R. Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs', 28 *BYBIL* 323, 328 (1951).

The present writer shares this opinion, although the ICRC Commentary,²³⁰ as well as the 1998 Judgment of an ICTY Trial Chamber in the *Delalić et al.* case,²³¹ maintain that there is no gap between Geneva Conventions (III) and (IV), so that any enemy national who is not covered by the one must be covered by the other.

III. Prosecution, punishment and detention of unlawful combatants

A. *Prosecution and punishment*

124. At bottom, warfare by its very nature consists of a patchwork of acts of violence (like homicide, assault, battery and arson) that are penalized by the criminal codes of all countries. When a combatant, John Doe, holds a rifle, aims it at Richard Roe (a soldier belonging to the enemy armed forces) with an intent to kill, pulls the trigger and causes Richard Roe's death, what we have is a premeditated homicide fitting the definition of murder in virtually all domestic penal codes. If, upon being captured by the enemy, John Doe is not prosecuted for murder, this is due to one reason only. LOIAC provides John Doe with a legal shield, protecting him from trial and punishment, by conferring upon him immunity from prosecution and its corollary: an entitlement to POW status. That is not to say that the privileged benefit of immunity from prosecution is available to a combatant unconditionally. If John Doe acts beyond the pale of lawful combatancy, LOIAC shunts aside the protective shield. Thereby, it subjects John Doe to the full rigour of the enemy's domestic legal system, and the ordinary penal sanctions provided by that law will become applicable to him.

125. The legal position concerning unlawful combatancy was summed up by the US Supreme Court, in the *Quirin* case of 1942 (per Chief Justice Stone):

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.²³²

With the exception of the last few words, this is an accurate reflection of LOIAC. The gist of the *Quirin* decision is that, upon being captured by the enemy, an unlawful combatant – like a lawful combatant (and unlike a civilian) – is subject to automatic detention. Yet, in contradistinction to a lawful combatant, an unlawful combatant fails to reap the benefits of POW status.

²³⁰ See *Commentary, IV Geneva Convention*, *supra* note 35, at 50–1.

²³¹ *Prosecutor v. Delalić et al.* (ICTY, Trial Chamber, 1998), para. 271.

²³² *Ex parte Quirin et al.* (1942), 317 US [Supreme Court Reports] 1, 30–1.

Hence, although he cannot be executed without trial, he is not exempt from being prosecuted and punished by military tribunals

126. What can unlawful combatants be prosecuted and punished for? The *Quirin* Judgment referred to trial and punishment 'for acts which render their belligerency unlawful'. It is true that sometimes the act which turns a person into an unlawful combatant constitutes by itself an offence and can be prosecuted and punished as such. But the fulcrum of unlawful combatancy is that the judicial proceedings may be conducted before regular domestic (civil or military) courts and, significantly, they may relate to acts other than those that divested the person of the status of lawful combatant. Even when the act negating the status of a lawful combatant does not constitute a crime *per se*, it can expose the perpetrator to ordinary penal sanctions (pursuant to the enemy's domestic legal system) for other acts committed by him that are branded as criminal. Unlawful combatants 'may be punished under the internal criminal legislation of the adversary for having committed hostile acts in violation of its provisions (e.g., for murder), even if these acts do not constitute war crimes under international law'.²³³

127. All captured enemy personnel may be prosecuted and punished for war crimes. There are several differences between the prosecution of war criminals and that of unlawful combatants (see *infra* 836). The premier distinction is derived from the active or passive role of LOIAC. War criminals are brought to trial for serious violations of LOIAC itself. With unlawful combatants, LOIAC refrains from stigmatizing the acts as criminal. It merely strips the mantle of immunity off the defendant who is therefore exposed to penal charges for any offence committed in breach of the enemy's domestic legal system.

B. Detention

128. Unlawful combatants may be subjected to administrative detention without trial (and without the attendant privileges of POW). Detention of unlawful combatants without trial was specifically mentioned as an option in the *Quirin* case (as quoted *supra* 125). Such detention is also the subject of special legislation of Israel, passed by the Knesset in 2002.²³⁴

C. The problem of 'suicide bombers'

129. By its very nature, the sanction of detention or prosecution (under the enemy's domestic legal system) is irrelevant to an odious category of

²³³ Rosas, *supra* note 223, at 305.

²³⁴ Detention of Unlawful Combatants Law, 2002, translated into English in 32 *Is. YHR* 389 (2002). For an important 2008 Judgment of the Israel Supreme Court relating to this Law, see *A and B v. State of Israel*, translated into English in 47 *ILM* 768 (2008).

unlawful combatants, i.e. successful ‘suicide bombers’ acting disguised in civilian clothes.²³⁵ A civilian (or a combatant out of uniform) who merely girds himself to become a ‘suicide bomber’, yet is thwarted in the attempt, can still be subject to detention or prosecution. But once the act is executed, the perpetrator is beyond the reach of the law. It is by no means resolved which effective lawful measures can be taken, by way of deterrence, against potential ‘suicide bombers’, especially in view of the generally accepted principle that nobody can be punished for an offence he has not personally committed.²³⁶ Accomplices and accessories to the act can evidently be prosecuted or detained, but members of the perpetrator’s family (or others associated with him) cannot be held responsible for his conduct solely because of that connection.

IV. Fundamental guarantees

130. Whether detained or prosecuted, unlawful combatants must not be deemed beyond the ambit of the law. Even the derogation clause of Geneva Convention (IV) – Article 5 (cited *supra* 123) – mandates, in its third paragraph, that ‘such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention’. Since Geneva Convention (IV) and Article 5 do not apply to unlawful combatants captured on the battlefield in enemy territory (see *supra ibid.*), it is important to note the words of Article 45(3) of AP/I:

Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol.²³⁷

Article 75 enumerates detailed fundamental guarantees to persons ‘who are in the power of a Party to the conflict and who do not benefit from more favourable treatment’.²³⁸ These guarantees are particularly germane to unlawful combatants (who are not entitled to the more favourable treatment of POW), and they are widely viewed as an expression of customary international law.²³⁹

131. The majority of the ICJ, in the *Nicaragua* case of 1986, also held that ‘minimum rules applicable to international and to non-international conflicts’ are expressed in Common Article 3 of the Geneva Conventions.²⁴⁰ At the time,

²³⁵ Feigning civilian status lies at the core of the problem (see *infra* 140 *et seq.*). Some suicide attacks (epitomized by Japanese *kamikaze* pilots in World War II, flying properly marked military aircraft) are brave manifestations of lawful combatancy.

²³⁶ See Article 33 (first paragraph) of Geneva Convention (IV), *supra* note 3, at 590.

²³⁷ AP/I, *supra* note 9, at 734. ²³⁸ *Ibid.*, 748–50.

²³⁹ See K. Dörmann, ‘The Legal Situation of “Unlawful/Unprivileged Combatants”’, 85 *IRRC* 45, 70 (2003).

²⁴⁰ *Nicaragua* case, *supra* note 182, at 114.

the fusion of IACs and NIACs in *Nicaragua* was greeted with surprise. The text of Common Article 3 adverts to an ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’,²⁴¹ and does not purport to be relevant to IACs. In his Dissenting Opinion, Sir Robert Jennings commented that the majority’s view of Common Article 3 as a minimum yardstick ‘is not a matter free from difficulty’.²⁴² This is particularly true considering that the majority of the ICJ did not see fit to produce any evidence for its conclusion that Common Article 3 is applicable to both IACs and NIACs.²⁴³ All the same, it can hardly be disputed today that when Common Article 3 prohibits ‘outrages upon personal dignity, in particular humiliating and degrading treatment’, or establishes the need to afford in trial ‘all the judicial guarantees which are recognized as indispensable by civilized people’, the text reflects an irreducible minimum that no Belligerent Party is allowed to ratchet down even one notch in any armed conflict (whether IAC or NIAC).

V. Entitlement to POW status under customary international law

A. *The Hague and Geneva provisions and their scope of application*

132. Hague Regulation 1 of 1907 proclaims:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.²⁴⁴

Hague Regulation 2 adds a provision entitled *Levée en masse*, which reads in the revised 1907 version:

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.²⁴⁵

Hague Regulation 3 decrees:

²⁴¹ Geneva Convention (I), *supra* note 3, at 461–2; Geneva Convention (II), *ibid.*, 487–8; Geneva Convention (III), *ibid.*, 512–13; Geneva Convention (IV), *ibid.*, 580–1.

²⁴² Dissenting Opinion of Judge R. Jennings, *Nicaragua* case, *supra* note 182, at 528, 537.

²⁴³ See T. Meron, *Human Rights and Humanitarian Norms as Customary International Law* 36–7 (1989).

²⁴⁴ Hague Regulations, *supra* note 11, at 66. ²⁴⁵ *Ibid.*

The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.²⁴⁶

As regards civilians who are not employed by the armed forces, yet accompany them, Hague Regulation 13 stipulates:

Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.²⁴⁷

133. The Geneva Conventions retain the Hague formula, making it even more stringent. Article 4(A) of Geneva Convention (III) promulgates:

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
- (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.²⁴⁸

²⁴⁶ *Ibid.*, 67.

²⁴⁷ *Ibid.*, 69–70.

²⁴⁸ Geneva Convention (III), *supra* note 3, at 513–14.

This text is replicated in Article 13 of both Geneva Convention (I) and Geneva Convention (II).²⁴⁹ Article 4(B) of Geneva Convention (III)²⁵⁰ goes on to create two further categories of persons who should be treated as POW: one relating to occupied territories (members of armed forces who have been released from detention in an occupied territory and are then reinterned),²⁵¹ and the other pertaining to neutral countries (members of armed forces of Belligerent Parties who reach neutral territory and have to be interned there under international law).

134. The first and foremost category of persons entitled to POW status covers members of the regular armed forces of Belligerent Parties. It does not matter what the semantic appellation of regular armed forces is (they may function, e.g., under the technical designation of militias); how they are structured; whether military service is compulsory or voluntary; and whether the units form part of standing armed forces or consist of reservists and draftees called up for active duty. The sole determinant factor is that units (however designated and structured) are integrated in the regular armed forces of the State.

135. An important exception is created in Article 4(C) of Geneva Convention (III):

This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.²⁵²

For its part, Article 33 states in its first paragraph:

Members of the medical personnel and chaplains while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of the present Convention, and shall also be granted all facilities necessary to provide for the medical care of, and religious administration to prisoners of war.²⁵³

Medical and religious personnel can thus be retained – ‘as an exceptional measure with one purpose in view’ – but, even then, they are not ‘on the same footing’ as detained POW.²⁵⁴ Still, if a physician or a chaplain ‘refuses to employ his professional abilities, even for the benefit of his own countrymen’, he will be removed from the category of retained personnel and be detained as an ordinary POW.²⁵⁵

²⁴⁹ Geneva Convention (I), *supra* note 3, at 465–6; Geneva Convention (II), *ibid.*, 491–2.

²⁵⁰ Geneva Convention (III), *supra* note 3, at 514.

²⁵¹ This special category makes it ‘impossible for an occupying Power to deprive prisoners of war of the benefit of the convention through the subterfuge of release and subsequent arrest’. R.T. Yingling and R.W. Ginnane, ‘The Geneva Conventions of 1949’, 46 *AJIL* 393, 405–6 (1952).

²⁵² Geneva Convention (III), *supra* note 3, at 514. ²⁵³ *Ibid.*, 524.

²⁵⁴ *Commentary, III Geneva Convention* 218 (ICRC, J. de Preux ed., 1960).

²⁵⁵ *Levie, supra* note 225, at 74.

136. The Hague and Geneva texts set out conditions for eligibility as POW, and these will be explored *infra* 138 *et seq.* The conditions apply explicitly only to a separate category of persons who belong to irregular armed forces: guerrillas, partisans, resistance movements and the like, however they call themselves. The question is whether members of regular armed forces (with the exception of medical and religious personnel) – whose entitlement to POW status seems to be taken for granted – are absolved from meeting the same conditions.

137. The issue came to the fore in the *Mohamed Ali* case of 1968, where the Privy Council held (per Viscount Dilhorne) that it is not enough to ascertain that a person belongs to the regular armed forces, in order to guarantee to him POW status.²⁵⁶ The Privy Council pronounced that even members of the armed forces must observe the conditions imposed on irregular armed forces, notwithstanding the fact that this is not stated *expressis verbis* in the Geneva Conventions or in the Hague Regulations.²⁵⁷ The facts of the case related to Indonesian soldiers who – at a time of a ‘confrontation’ between Indonesia and Malaysia – planted explosives in a building in Singapore (then a part of Malaysia) while wearing civilian clothes. The Privy Council confirmed the Appellants’ death sentence for murder on the ground that a regular soldier committing an act of sabotage when not in uniform loses his entitlement to POW status.²⁵⁸ The earlier *Quirin* Judgment (see *supra* 125) – which concerned German members of the armed forces who took off their uniforms on a sabotage mission in the US (where they had landed by submarine) – was to the same effect.²⁵⁹ It follows from the case law that there is a presumption that, by their very nature, members of regular armed forces would meet the conditions of eligibility to POW status. But the presumption can definitely be rebutted.

B. *The seven Hague and Geneva conditions*

138. Hague Regulation 1 (quoted *supra* 132) establishes four general conditions for lawful combatancy: (i) subordination to responsible command; (ii) a fixed distinctive emblem; (iii) carrying arms openly; and (iv) conduct in accordance with LOIAC. Solely in the special setting of a *levée en masse* (to be examined *infra* 154) are conditions (i) and (ii) dispensed with. The provisions of the Hague Regulations on the four conditions of lawful combatancy (as in other matters) ‘are considered to embody the customary law of war on land’.²⁶⁰ Article 4(A)(2) of Geneva Convention (III) (quoted *supra* 133) not only repeats the four Hague conditions verbatim, but includes a *chapeau* from which two

²⁵⁶ *Mohamed Ali et al. v. Public Prosecutor* (1968) [1969] AC 430, 449.

²⁵⁷ *Ibid.*, 449–50. ²⁵⁸ *Ibid.*, 451–4. ²⁵⁹ *Ex parte Quirin et al.*, *supra* note 232, at 35–6.

²⁶⁰ See G.I.A.D. Draper, ‘The Status of Combatants and the Question of Guerilla [*sic*] Warfare’, 45 *BYBIL* 173, 186 (1971).

additional conditions can be inferred: (v) organization; and (vi) belonging to a Belligerent Party. One more condition is distilled in the case law from the text of the Geneva Conventions: (vii) lack of duty of allegiance to the Detaining Power (see *infra* 150). There is every reason to believe that all three additional conditions have also acquired a customary law standing. Each of the seven conditions deserves an explanation.

(a) *Subordination*

139. Condition (i) – subordination to a responsible commander – is designed to exclude individuals (known in French as *francs-tireurs*) acting on their own in wartime. The operation of small units of irregular armed forces is permissible, provided that the other conditions are fulfilled, but there is no room for hostilities in an IAC being conducted by individuals on their own initiative. John Doe or Richard Roe cannot lawfully conduct a private war against the enemy.

(b) *Fixed distinctive emblem*

140. Conditions (ii) and (iii) are linked to the cardinal principle of distinction between combatants and civilians (see *supra* 33–4). Condition (ii) – having a fixed distinctive emblem recognizable at a distance – is predicated on the two-pronged requirement of distinctiveness (*viz.* the emblem must identify and characterize the armed force using it) and fixity (to wit, the armed force is not allowed to confuse the enemy by ceaselessly changing its emblem). The most obvious fixed distinctive emblem of regular armed forces is that of a particular uniform. But wearing in battle a standard uniform, with all the proper insignia, is not strictly necessary. Indeed, Special Forces often wear non-standard uniforms, a phenomenon which is unobjectionable provided that the combatants retain some distinctive feature telling them apart from civilians.²⁶¹ *A fortiori*, irregular armed forces need not wear any elaborate uniform. Suffice it for them to be marked by a less complex fixed distinctive emblem: part of the clothing (such as a special shirt or a particular headgear) or a certain badge.²⁶²

141. The fixed distinctive emblem must be worn by combatants throughout any military mission in which they are likely to engage the enemy (throughout meaning from start to finish, namely, from pre-engagement to the end of disengagement), and the emblem is not supposed to be deliberately removed at any time in the course of that operation.²⁶³ Still, even regular armies do not require that uniforms be worn at all times. Combatants do not have to wear

²⁶¹ See W.H. Parks, 'Special Forces' Wear of Non-Standard Uniforms', *Issues in International Law and Military Operations*, 80 *ILS* 69, 90 (R.B. Jaques ed., 2006).

²⁶² See *Commentary, III Geneva Convention*, *supra* note 254, at 60.

²⁶³ See Levie, *supra* note 225, at 47.

uniforms either when they are off-duty or when they are working in a back-office.²⁶⁴ In particular, they do not have to be in uniform if they are operating in a rear-guard location, remote from the contact zone (defined as the front-line area on land where the forward elements of the opposing forces are in contact with each other). The main point is that uniforms are expected to be worn during combat. Even in this respect, there may be exceptional situations. If uniformed soldiers, sent on a combat mission, bivouac overnight, they may remove their uniforms in their tents. Should the encampment be subjected to a surprise raid by the enemy, the aroused defenders may instantaneously use their weapons to repel the attack without being concerned about their semi-clad state.

142. The condition of having a fixed distinctive emblem raises a number of questions. It is not easy to fathom the obligation that the distinctive emblem must be recognizable at a distance. The phraseology needs to be reasonably construed. Combatants seeking to stay alive do not attempt to draw attention to themselves, and even soldiers in uniform are allowed to use camouflage. This is a lawful ruse of war (see *infra* 754 *et seq.*), as long as the combatants merely exploit the topographical conditions: the physical as distinct from the demographic landscape of civilians.²⁶⁵ Another issue relates to night warfare. Needless to say, combatants are not required to carry an illuminated distinctive emblem that is recognizable at a distance in the dark. It is important that the terse (and perhaps imperfect) formulation of condition (ii) would not overshadow its crystal-clear thrust. The point is not whether combatants can be seen, but whether (if observed) they are likely to be mixed up with civilians.

143. When combatants proceed to (or from) a military engagement in a vehicle or in a tank – and, similarly, if they sail in a warship or fly in a military aircraft – it is not enough for each individual soldier (as well as sailor or aviator) to wear the distinctive emblem: the vehicle or other platform must itself be properly identified.²⁶⁶ By the same token, the external marking of the vehicle or other platform does not absolve the combatants on board from wearing their personal distinctive emblems once they are separated from it. As for the aircrews of military aircraft, the HPCR Manual of Air and Missile Warfare elucidates that, when they are conducting military combat operations on land or on water outside their aircraft, they have to distinguish themselves from the civilian population.²⁶⁷

²⁶⁴ See T. Pfanner, 'Military Uniforms and the Law of War', 86 *IRRC* 93, 101 (2004).

²⁶⁵ See D. Bindschedler-Robert, 'A Reconsideration of the Law of Armed Conflicts', *The Law of Armed Conflicts: Report of the Conference on Contemporary Problems of the Law of Armed Conflict*, 1969 I, 43 (Carnegie Endowment, 1971).

²⁶⁶ See *Commentary, III Geneva Convention*, *supra* note 254, at 60.

²⁶⁷ *HPCR Manual*, *supra* note 7, at 317 (Rule 117).

(c) *Carrying arms openly*

144. Condition (iii) – carrying arms openly – has the same rationale and brings up similar issues as condition (ii). Does condition (iii) imply that a combatant is barred from carrying a sidearm in a holster or hand grenades in a pouch? The question is plainly rhetorical. What counts is not the ambiguous language but the kernel of the condition. A lawful combatant must abstain from creating the false impression that he is a civilian. He must carry his arms openly in a reasonable way, depending on the nature of the weapon and the prevailing circumstances.

(d) *Conduct in accordance with LOIAC*

145. Condition (iv) – conduct in accordance with LOIAC – is the key to understanding the philosophy underlying the distinction between lawful and unlawful combatants. This is largely a group requirement (see *infra* 159). Unless combatants are themselves willing to respect LOIAC, they are estopped from relying on that body of law when desirous of reaping its benefits.²⁶⁸ The condition is linked to any manifestation of conduct incompatible with LOIAC, and not necessarily to the specific commission of war crimes (for the definition of which see *infra* 824 *et seq.*).

(e) *Organization*

146. Condition (v) – organization – is implicit in the Geneva text, but it merely sheds light (from a somewhat different angle) on Hague condition (i). Lawful combatants must act within a hierarchical framework, embedded in discipline, and subject to supervision by upper echelons to which the subordinate units in the field report.

(f) *Belonging to a Belligerent Party*

147. Condition (vi) – belonging to a Belligerent Party – got a practical expression in the 1969 Judgment of an Israeli Military Court in the *Kassem* case.²⁶⁹ Here a number of persons, belonging to an organization called Popular Front for the Liberation of Palestine, crossed the Jordan River from the East Bank (the Kingdom of Jordan) to the West Bank (Israeli occupied territory) for sabotage purposes. When captured and charged with security offences, they claimed entitlement to POW status. The Israeli Military Court held that irregular armed forces must belong to a Belligerent Party.²⁷⁰ Since no Arab Government at war with Israel at the time had assumed responsibility for the activities of the Popular Front – which was indeed illegal in the Kingdom of Jordan – the

²⁶⁸ See Levie, *supra* note 225, at 50–1.

²⁶⁹ *Military Prosecutor v. Kassem et al.* (Israel, Military Court, 1969), 42 *ILR* 470.

²⁷⁰ *Ibid.*, 476.

condition was not fulfilled.²⁷¹ The Judgment was criticized by G. Schwarzenberger, arguing that the Geneva Conventions were not meant to limit the scope of lawful combatancy under pre-existing rules of LOIAC.²⁷² However, even prior to the Geneva Conventions, the premise was that lawful combatants had to be acting on behalf of a Belligerent Party.²⁷³

148. In 1999, the *Kassem* holding was explicitly endorsed by the *Tadić* Judgment of the Appeal Chamber of the ICTY.²⁷⁴ The law was set here unequivocally:

States have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces. In order for irregulars to qualify as lawful combatants, it appears that international rules and state practice therefore require control over them by a Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance of these irregulars *vis-à-vis* that Party to the conflict. These then may be regarded as the ingredients of the term ‘belonging to a Party to the conflict’.²⁷⁵

Some commentators contend that the test is presented here too strictly, and that the threshold should be lowered to any form of express or tacit acceptance by the State, but even they do not deny that the requirement of belonging to a Belligerent Party is pivotal to an entitlement to POW status.²⁷⁶

149. The condition of belonging to a Belligerent Party is especially important in the context of cyber warfare. Not every person who, by operating a computer keyboard, launches a destructive attack against the enemy can benefit from a lawful combatant’s status: to do so, he must have an affiliation with the State on whose behalf he purports to act.²⁷⁷

(g) *Non-allegiance to the Detaining Power*

150. Condition (vii) – non-allegiance to the Detaining Power – is not spelt out as such in the Geneva Conventions, and was inferentially deduced from the Conventions in the case law. The principal authority is the 1967 Judgment of the Privy Council in the *Koi* case,²⁷⁸ in which captured Indonesian paratroopers, landing in Malaysia, included a number of Malay nationals who were convicted and sentenced to death for having unlawfully possessed arms in a

²⁷¹ *Ibid.*, 477–8.

²⁷² See G. Schwarzenberger, ‘Human Rights and Guerrilla Warfare’, 1 *Is. YHR* 246, 252 (1971).

²⁷³ See L. Nurick and R. W. Barrett, ‘Legality of Guerrilla Forces under the Laws of War’, 40 *AJIL* 563, 567–9 (1946).

²⁷⁴ *Prosecutor v. Tadić*, *supra* note 185, at 1536–7. ²⁷⁵ *Ibid.*, 1537.

²⁷⁶ K. Del Mar, ‘The Requirement of “Belonging” under International Humanitarian Law’, 21 *EJIL* 105–24 (2010).

²⁷⁷ See S. Watts, ‘Combatant Status and Computer Network Attack’, 50 *Vir. JIL* 391–447 (2009–10).

²⁷⁸ *Public Prosecutor v. Koi et al.* (1967) [1968] AC 829.

security zone. The question on appeal before the Privy Council was whether they were entitled to POW status. The Privy Council held (per Lord Hodson) that nationals of the Detaining Power, as well as other persons owing it a duty of allegiance, are not entitled to such status.²⁷⁹ This was pronounced by the Privy Council to be a rule of customary international law, relying on specific provisions of Geneva Convention (III) signalling that POW cannot be nationals of the Detaining Power nor can they owe it any duty of allegiance.²⁸⁰ These are Articles 87 and 100 of the Convention.²⁸¹

151. The link of nationality (or allegiance) has to be scrutinized carefully. The fact that a combatant belonging to State A – captured by State B – is a national of State C, does not make any difference to his status (subject to treaty rules with respect to mercenaries; see *infra* 177 *et seq.*). A German soldier serving in the French Foreign Legion was entitled to enjoy POW privileges in the Indo-China War. But such a soldier would not have been entitled to the same privileges had he been fighting for France in a war against Germany.

152. The *Koi* case also brings up a question of the law of evidence. Under the second paragraph of Article 5 of Geneva Convention (III) (quoted *infra* 161) should any doubt arise as to whether certain persons belong to any of the categories enumerated in Article 4, they enjoy the Convention's protection until their status is determined by a competent tribunal. Opinions in the Privy Council were divided as to whether the mere allegation by a defendant that he is a foreign national generates doubt in accordance with Article 5: the majority held that this was the legal position, but a minority dissented.²⁸² The more vexing issue relates to the burden of proof. The minority opined that the burden of proof lies on the defendant, who must show that he is entitled to POW status (and consequently that he is not a national of the Detaining Power).²⁸³ The majority did not address the point. But the correct interpretation of the law apparently is that, once a defendant persuades the court that he is a member of the enemy armed forces, the burden of proof that he owes allegiance to the Detaining Power (and can therefore be denied POW status) falls on the prosecution.²⁸⁴ Incontestably, the defendant first has to show that he is a member of the enemy armed forces.

C. *The impact and extent of the conditions*

(a) *Guerrilla warfare*

153. The Hague and Geneva conditions are conjunctive, meaning that they must be complied with cumulatively.²⁸⁵ Given the exigencies of guerrilla

²⁷⁹ *Ibid.*, 856–8. ²⁸⁰ *Ibid.*, 856–7. ²⁸¹ Geneva Convention (III), *supra* note 3, at 541, 545.

²⁸² *Public Prosecutor v. Koi et al.*, *supra* note 278, at 855, 865. ²⁸³ *Ibid.*, 864.

²⁸⁴ See R.R. Baxter, 'The Privy Council on the Qualifications of Belligerents', 63 *AJIL* 290, 293 (1969).

²⁸⁵ See E.T. Jensen, 'Combatant Status: Is It Time for Intermediate Levels of Recognition for Partial Compliance', 46 *Vir. JIL* 209, 222 (2005–6).

warfare, it is not easy for irregular armed forces to comply with all seven Geneva conditions or even with the core four Hague conditions. These conditions are actually patterned after the operations of regular armed forces (which they do not mention). Regular armed forces are organized, are subject to hierarchical discipline and normally belong to a Belligerent Party; they have a proud tradition of wearing uniforms and carrying their arms openly; they are trained to respect LOIAC; and the issue of allegiance scarcely arises. However, with irregular armed forces (to whom the conditions overtly refer), the situation is more complicated. Even if other problems are ignored, the impediment to meeting both conditions of distinction – conditions (ii) and (iii) of a fixed distinctive emblem and carrying arms openly – is patent, ‘since secrecy and surprise are the essence’ of guerrilla warfare.²⁸⁶ Most of the resistance movements of World War II did not fulfil all the cumulative conditions.²⁸⁷ From a pragmatic standpoint, many critics believe that ‘obedience to these rules would be tantamount to committing suicide, as far as most guerrillas would be concerned’.²⁸⁸ Still, it is noteworthy that the framers of the Geneva Conventions – acting in 1949, with the experience of World War II fresh in their minds – were not disposed to alleviate the conditions of lawful combatancy even in the case of resistance movements.

(b) *Levée en masse*

154. Under Hague Regulation 2 and Article 4(A)(6) of Geneva Convention (III) (quoted *supra* 132–3), the only time that the cumulative conditions are eased is that of *levée en masse*. This category applies only to the inhabitants of unoccupied territories. The idea (originating in the French Revolution)²⁸⁹ is that at the point of invasion – and in order to forestall occupation – the civilian population can take up arms spontaneously. This is an extraordinary phase²⁹⁰ in the course of which, as a stop-gap measure and for an interim stage in the fighting, there is no need to meet all cumulative conditions for attaining the status of lawful combatancy. Only two Hague conditions remain in place: carrying arms openly and acting in accordance with LOIAC (conditions (iii) and (iv)). It follows that there is no need to meet the two other Hague conditions of subordination to a responsible commander and using a fixed distinctive emblem (conditions (i) and (ii)). Bearing in mind that a *levée en masse* takes place on

²⁸⁶ See Baxter, *supra* note 229, at 328.

²⁸⁷ See J.S. Pictet, ‘The New Geneva Conventions for the Protection of War Victims’, 45 *AJIL* 462, 472 (1951).

²⁸⁸ G. von Glahn, ‘The Protection of Human Rights in Time of Armed Conflicts’, 1 *Is. YHR* 208, 223 (1971).

²⁸⁹ On the origins of the institution, see W.G. Rabus, ‘A New Definition of the “Levée en Masse”’, 24 *NILR* 232, *id.* (1977).

²⁹⁰ In the opinion of the present writer, the circumstances of *levée en masse* are so exceptional that they do not apply to cyber warfare. However, opinions on the subject are divided. See *Talinn Manual*, *supra* note 10, at 102–3.

the spur of the moment, condition (v) – organization – is irrelevant. Condition (vi) – belonging to a Belligerent Party – is equally inapplicable, since a *levée en masse* is self-propelled. On the other hand, it is arguable that condition (vii) of nationality (or allegiance) remains in play.

155. The transitional phase of *levée en masse* lapses *ex hypothesi* after a relatively short duration. One of three scenarios is bound to unfold: (i) the territory will be occupied (despite the *levée en masse*); (ii) the invading force will be repulsed (thanks to the *levée en masse* or to the timely arrival of reinforcements); or (iii) the battle of defence will stabilize, and then there will be ample opportunity for organization.

(c) *Certain civilians*

156. *Au fond*, entitlement to POW status is confined to lawful combatants. But that is not the end of the matter. Pursuant to both Hague Regulation 13 and Article 4(A)(4)–(5) of Geneva Convention (III) (quoted *supra* 132–3), the standing of certain civilians – employed by or accompanying the armed forces – resembles that of lawful combatants as far as POW status is concerned. Although civilians who are employed by or accompany the armed forces do not qualify as combatants, they are entitled to POW status. Antithetically, should civilians directly participate in hostilities, they will be assimilated – for such time as they do so – to combatants, but will not gain POW privileges (see *infra* 471–2).

157. Some civilians are Government employees who may be tasked with functions better left to the armed forces. A graphic example is that of the operation of drones, or unmanned aerial vehicles (UAVs), equipped with missiles, remotely piloted by members of staff of the US Central Intelligence Agency (CIA). The issue is not that these persons are not wearing uniforms while programming or guiding a drone by remote control at a great distance from the strike zone,²⁹¹ (as observed *supra* 141, there is no real need to wear uniforms far from the contact zone). The core of the problem is that the CIA is a civilian agency and not a branch of the US armed forces.²⁹² Furthermore, for the drone itself to be considered a military aircraft, it has to be operated by a State's armed forces: otherwise, it is not allowed to exercise the belligerent right of attack against enemy lawful targets (see *infra* 357).²⁹³

²⁹¹ See M.W. Lewis and E. Crawford, 'Drones and Distinction: How IHL Encouraged the Rise of Drones', 44 *Gtn. JIL* 1127, 1161 (2012–13).

²⁹² See R.J. Vogel, 'Drone Warfare and the Law of Armed Conflict', 39 *Den. JILP* 101, 134–5 (2010–11).

²⁹³ See I. Henderson, 'Civilian Intelligence Agencies and the Use of Armed Drones', 13 *YIHL* 133, 168 (2010).

(d) *Armed groups and individuals*

158. Who should respect the seven Hague and Geneva conditions: the individual or the armed group of which he is a member? The question does not arise with respect to regular troops. The assumption is that they collectively meet all the conditions, and, to the extent that there is a lapse in the concrete case, it affects John Doe but not an entire army. In the *Mohamed Ali* and *Koi* cases, there was every reason to believe that members of the armed forces of Indonesia generally wear uniforms and do not owe allegiance to Malaysia, although the defendants in the dock failed to fulfil these conditions (and were therefore denied POW status). Contrastingly, in the operations of irregular armed forces, the point at issue is whether the conditions of lawful combatancy are discharged not only by individuals but also by the guerrilla movement itself.

159. By their nature, conditions (i), (v) and (vi) are addressed to guerrilla groups collectively, and not to any of the members personally. It is necessary to verify that each armed group as a whole is organized, has a responsible commander and belongs to a Belligerent Party. Should that be the case, all members of the armed group will benefit from this state of affairs.²⁹⁴ The reverse applies to condition (iii) and (vii), directed at each member of the armed group rather than the group in its entirety: the issue of carrying arms openly and the link of nationality must be determined individually. In between is condition (ii) on a fixed distinctive emblem. This requires some preliminary action on the part of the armed group, which must adopt its identifying emblem. If it neglects to do that, no member of the group is capable of meeting the condition. But, even if the armed group adopts a fixed distinctive emblem, that does not mean that John Doe will use it when it really counts (just as the defendants in the *Mohamed Ali* or *Quirin* case did not wear their uniforms at the critical time). If John Doe fails to wear the distinctive emblem, his act of omission does not contaminate other members of his group, but the personal consequences are liable to be dire.

160. The situation is more complex as regards condition (iv), conduct in accordance with LOIAC. Four different scenarios have to be scanned:

- (i) If most of the members of an armed group observe LOIAC most of the time, condition (iv) has to be viewed as fulfilled for all of them. Hence, an individual member of the armed group – Richard Roe – will not be deemed an unlawful combatant even if he has committed a war crime²⁹⁵ (on the distinction between war criminals and unlawful combatants, see *infra* 836). Admittedly, should Richard Roe then be prosecuted by the enemy for the war crime perpetrated, the fact that he cannot additionally be categorized as an unlawful combatant will not save him.

²⁹⁴ See Draper, *supra* note 260, at 196.

²⁹⁵ US Department of the Army, *Field Manual: The Law of Land Warfare* 28 (FM 27–10, 1956).

- (ii) If there is no conclusive evidence as to the conduct of the armed group as a whole (either because this conduct is uneven or because the group has no sharply defined record), Richard Roe will be adjudged on the basis of his own behaviour. If he has not breached LOIAC personally, he has to be given the benefit of the doubt and not be treated as an unlawful combatant.
- (iii) If the armed group as a whole has an incorrigible record of flouting LOIAC, and the personal behaviour of Richard Roe does not come to a real test (for instance, because he is captured at an early stage of deployment), Richard Roe will have to answer for the misdeeds of the group at large. The armed group's general pattern of misconduct will be extrapolated to him.
- (iv) However, if it is established that Richard Roe himself has actually behaved in full compliance with LOIAC, it is submitted that the fact that most of the other members of his armed group do not have a similar exemplary record should not be weighed against him. The present writer cannot accept the view that, even if Richard Roe actually observes LOIAC, he should be tagged as an unlawful combatant only because the group to which he belongs commonly acts in breach of that body of law.²⁹⁶

(e) *Doubt*

161. The second paragraph of Article 5 of Geneva Convention (III) declares:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.²⁹⁷

The ICRC Commentary observes that the provision 'would apply to deserters, and to persons who accompany the armed forces and have lost their identity card'.²⁹⁸ Of course, these are only examples. The fly in the ointment is that the question of when doubt arises is itself not free of doubt.²⁹⁹ Article 45(1) of AP/I creates a presumption in favour of any person who claims POW status or appears to be entitled to it.³⁰⁰ Once more, '[d]espite the precautions taken by the drafters of this article', cases of doubt may come up: 'the doubt may concern the presumption itself', e.g., when an individual's pretences are refuted

²⁹⁶ See Draper, *supra* note 260, at 197. See also Meron, *supra* note 226, at 65.

²⁹⁷ Geneva Convention (III), *supra* note 3, at 514–15.

²⁹⁸ *Commentary, III Geneva Convention*, *supra* note 254, at 77.

²⁹⁹ See Baxter, *supra* note 126, at 108–9. ³⁰⁰ AP/I, *supra* note 9, at 733–4.

by his comrades.³⁰¹ The ‘competent tribunal’ referred to may be – but is not necessarily – a military tribunal.³⁰²

VI. The legal position under AP/I

162. The legal position regarding lawful and unlawful combatancy is radically altered in conformity with AP/I. The instrument does not eliminate altogether the dichotomy of lawful and unlawful combatants. It expressly pronounces that spies and mercenaries are not entitled to POW status (see Articles 46(1) and 47(1) quoted *infra* 177, 772). However, the general distinction between lawful and unlawful combatants – put in place by the Hague Regulations and strengthened by the Geneva Conventions – is completely subverted.

163. Article 43 of AP/I lays down:

1. The armed forces of a Party to a conflict consist of organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to the conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.³⁰³

164. By itself, Article 43 appears to follow in the footsteps of the Hague and Geneva norms (see *supra* 132–3), as well as customary international law. Indeed, it reaffirms four of the seven conditions for (lawful) combatancy: condition (i) concerning the existence of a command responsible for the conduct of its subordinates; condition (iv) about compliance with the rules of LOIAC; condition (v) stressing the need for organization and discipline; and condition (vi) pertaining to the need to belong to a Belligerent Party.³⁰⁴

165. Unfortunately, Article 44 goes much further:

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his

³⁰¹ See J. de Preux, ‘Article 45’, *Commentary on the Additional Protocols* 543, 550–1.

³⁰² See *Commentary, III Geneva Convention*, *supra* note 254, at 77.

³⁰³ AP/I, *supra* note 9, at 732. ³⁰⁴ See de Preux, *supra* note 213, at 517.

right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
 - (a) during each military engagement, and
 - (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.
 Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).
4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.
5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.
6. This article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.
7. This article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.
8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.³⁰⁵

166. The verbose language of Article 44 is quite convoluted, not to say arcane. But when a serious attempt is made to reconcile its disparate paragraphs with one another, a dismaying composite picture emerges. Notwithstanding the provision of Article 43, Article 44(2) does away – for all intents and purposes – with condition (iv): whether or not in compliance with LOIAC, all combatants are entitled to the status (or, at least, to the protection) of POW.

167. The most problematic clause in Article 44 is paragraph 3. Although paying lip-service to the principle of distinction, it retains only a truncated

³⁰⁵ AP/I, *supra* note 9, at 732–3.

version of condition (iii): the duty to carry arms openly is restricted to the duration of the battle itself and to the preliminary phase of deployment in preparation for the launching of an attack, while being visible to the enemy. Visibility to the enemy seems to imply that if the combatant neither knows nor should know that he is visible, the obligation does not apply.³⁰⁶ It is not clear whether visibility is determined solely by the naked eye or it also includes observation by means of binoculars and even infra-red equipment³⁰⁷ (upon ratification, Australia and New Zealand made declarations to the latter effect³⁰⁸). More significantly, there is no agreement as to when deployment begins: at the original assembly point (from which the combatants proceed to their destination) or only moments before the attack is launched.³⁰⁹ Upon ratification of AP/I, many countries registered their formal understanding that the situation alluded to in the second sentence of Article 44(3) can only exist in occupied territories and that the term 'deployment' includes any movement towards a place from which an attack is to be launched.³¹⁰

168. In practical terms, the fine points of paragraph 3 of Article 44 are moot, since – in a most enigmatic fashion³¹¹ – paragraph 4 adds that, albeit technically deprived of POW status, transgressors must be afforded with every protection conferred on POW. Thus, in all but name, condition (iii) – however circumscribed – is vitiated by Article 44. 'Offering combatants de jure or de facto POW status upon capture gives them even less incentive to separate themselves from civilians and necessarily increases the dangers to civilians'.³¹² When it comes to condition (ii), the sole reference to it is made in paragraph 7, articulating an intention not to affect the practice of wearing uniforms by regular armies. Thereby, Article 44 only underscores the abolition of condition (ii) where it really counts, namely, when irregular forces take part in hostilities. In fact, the consequence is 'to tip the balance of protection in favor of irregular combatants to the detriment of the regular soldier and the civilian'.³¹³ In

³⁰⁶ See J. de Preux, 'Article 44', *Commentary on the Additional Protocols* 519, 535.

³⁰⁷ See W.A. Solf, 'Article 44', *New Rules* 275, 289.

³⁰⁸ Reservations and Declarations Made at the Time of Ratification of Protocol I, *Laws of Armed Conflicts* 792, 793 (Australia), 810 (New Zealand).

³⁰⁹ See de Preux, *supra* note 306, at 534–5.

³¹⁰ Reservations and Declarations Made at the Time of Ratification of Protocol I, *supra* note 308, at 793 (Australia), 796 (Belgium), 797 (Canada), 801 (France), 802 (Germany), 805 (Ireland), 807 (Italy), 808 (Korea), 813 (Spain), 816 (UK). The deployment issue alone is also covered *ibid.*, 810 (Netherlands), *id.* (New Zealand).

³¹¹ See R. Lapidoth, 'Qui a Droit au Statut de Prisonnier de Guerre?', 82 *RGDIP* 170, 204 (1978).

³¹² R.D. Rosen, 'Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity', 42 *Van. JTL* 683, 735 (2009).

³¹³ G.B. Roberts, 'The New Rules for Waging War: The Case against Ratification of Additional Protocol I', 26 *Vir. JIL* 109, 129 (1985–6).

the final analysis, all this militates against the interests of civilians. 'Inevitably, regular forces would treat civilians more harshly and with less restraint if they believed that their opponents were free to pose as civilians while retaining their right to act as combatants and their POW status if captured'.³¹⁴

169. As pointed out (*supra* 153), the seven cumulative conditions of lawful combatancy are onerous for irregular forces. Hence, it would have made sense to alleviate the conditions to some extent. In particular, the two conditions of distinction – conditions (ii) and (iii) – could become alternative rather than cumulative, considering that when one is fulfilled the other may be deemed redundant.³¹⁵ This was the original proposal of the ICRC on the eve of the Diplomatic Conference that produced AP/I.³¹⁶ But the path taken by the framers of Article 44 leads in a different direction. The pendulum in the Article has swung from one extreme to the other, reducing *ad absurdum* the conditions of lawful combatancy.

170. The outcome is that, for Contracting Parties to AP/I (if they have not made any reservation), the general distinction between lawful and unlawful combatants becomes nominal in value. Contrarily, as far as non-Contracting Parties are concerned, it is the firm position, e.g., of the US that Article 44 does not reflect customary international law and that, by blurring the distinction between combatants and civilians, it undermines a core principle of LOIAC.³¹⁷ Indeed, refusal to accept Article 44(3) – perhaps more than any other provision of AP/I – has cemented American opposition to the instrument as a whole.³¹⁸ The net result has been aptly summarized by C. Greenwood:

Article 44(3) – or, at least, the rule laid down in the second sentence – is an innovative provision and is thus binding only between States which have become parties to AP/I. Other States continue to be bound by the stricter rule in the Hague Regulations and the Geneva POW Convention. The highly unsatisfactory result is that there are currently two different standards of what constitutes lawful combatancy.³¹⁹

VII. A case study: the Afghanistan War

171. This case study relates to the Afghanistan War, as waged by the American-led coalition against the Taliban and their Al-Qaeda allies from 2001 to 2014 (see *supra* 106). The presupposition is that this war constituted an IAC. The conventional view is that – at some early point following the installation

³¹⁴ A.D. Sofaer, 'The Rationale for the United States Decision', 82 *AJIL* 784, 786 (1988).

³¹⁵ See W.J. Ford, 'Members of Resistance Movements', 24 *NILR* 92, 104 (1977).

³¹⁶ See Y. Dinstein, 'Another Step in Codifying the Laws of War', 28 *YBWA* 278, 284 (1974).

³¹⁷ See *Operational Law Handbook* 17 (US Army Judge Advocate General, 2014).

³¹⁸ See J.C. Yoo and J.C. Ho, 'The Status of Terrorists', 44 *Vir. JIL* 207, 226–7 (2003–4).

³¹⁹ C. Greenwood, 'The Law of War (International Humanitarian Law)', *International Law* 783, 790 (2nd edn, M.D. Evans ed., 2006).

in Kabul of a new Government replacing the Taliban – the IAC was succeeded by a NIAC, with foreign forces continuing combat against the Taliban at the invitation of the new Government. But, in the opinion of the present writer, the IAC was not terminated until the conclusion of the coalition's mandate in 2014. Be that as it may, nobody can deny that there was an IAC in Afghanistan at the outset of the hostilities between the coalition and the Taliban.

172. The Afghanistan War raised multiple problems concerning the status of lawful/unlawful combatancy. A preliminary question relates to the status of the Taliban regime on the eve of the war. On the one hand, the Taliban were in *de facto* control of the bulk of the territory of Afghanistan. On the other hand, the regime was not recognized as the Afghan Government by the overwhelming majority of the international community.³²⁰ By itself, this lack of recognition cannot erode the privileges of combatants under customary international law. As indicated (see *supra* 105), the application of LOIAC is not dependent on recognition of a particular regime as the Government of the enemy State. According to Article 4(A)(3) of Geneva Convention (III) (quoted *supra* 133) members of regular armed forces professing allegiance to a Government unrecognized by the Detaining Power (the definitive case being that of the 'Free France' forces of General de Gaulle in World War II, unrecognized by Nazi Germany)³²¹ are entitled to POW status. Yet, inasmuch as the underlying idea is the equivalence of the armed forces of recognized and unrecognized governments, the latter – no less than the former – are bound by the seven cumulative conditions of lawful combatancy. The proper question, therefore, is not whether the Taliban regime was recognized, but whether the Taliban forces actually observe all these conditions.

173. Whereas Taliban forces carry their arms openly (condition (iii)), they do not wear uniforms in combat nor do they display any other fixed distinctive emblem (condition (ii)). Since the conditions are cumulative, members of the Taliban forces fail to qualify as POW under the customary international law criteria. These criteria admit of no exception, not even in the unusual circumstances of Afghanistan. To say that '[t]he Taliban do not wear uniform in the traditional western sense'³²² may be somewhat misleading, for the Taliban forces do not wear any uniform in any sense at all, Western or Eastern (nor even any special headgear or other fixed distinctive emblem that would single them out from civilians). All armed forces – including the Taliban – are required to wear uniforms in combat or use some other fixed distinctive emblem. If they do not, they cannot invoke POW status under customary international law.

³²⁰ See R. Wolfrum and C.E. Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law', 6 *MPYUNL* 559, 570–7 (2002).

³²¹ See *Commentary, III Geneva Convention*, *supra* note 254, at 62.

³²² R. Cryer, 'The Fine Art of Friendship: *Jus in Bello* in Afghanistan', 7 *JCSL* 37, 70 (2002).

174. The legal status of Al-Qaeda fighters must not be confused with that of Taliban forces. Al-Qaeda fighters constitute irregular forces. In Afghanistan, they easily satisfied the requirement of belonging to a Belligerent Party (condition (vi)). In reality, in the relations between Al-Qaeda and the Taliban regime, there were times when it appeared that ‘the tail was wagging the dog’: the Belligerent Party (Afghanistan) seemed to belong to Al-Qaeda, rather than the reverse. Incontrovertibly, Al-Qaeda is a well-organized armed group (condition (v)), with subordination to command structure (condition (i)), and in the hostilities in Afghanistan its members usually carried their arms openly (condition (iii)). However, apart from the fact that Al-Qaeda (like the Taliban) declines to use a uniform or possess a fixed distinctive emblem (condition (ii)), the group divulges consummate disdain towards LOIAC in brazen disregard of condition (iv).

175. Al-Qaeda’s contempt for this quintessential prerequisite qualification of lawful combatancy was flaunted in the execution of the armed attack of 9/11. Not only did Al-Qaeda terrorists, wearing civilian clothes, hijack US civilian passenger airliners. The most shocking aspects of the events of 9/11 were that (i) the primary objective targeted (the Twin Towers of the World Trade Center in New York City) was unmistakably a civilian object rather than a military objective (see *infra* 274 *et seq.*): close to 3,000 civilians lost their lives in the ensuing carnage; and (ii) the Twin Towers, as well as the other target of the attack (the Pentagon, plainly a military objective; see *infra* 296(n)), were struck by the hijacked passenger airliners, which (with their flammable fuel load) were used as flying bombs, in total disregard for the fate of hundreds of civilian passengers on board. No armed group conducting attacks in such an egregious fashion can arrogate POW status to its fighters. Whatever lingering doubt may exist with respect to the entitlement of Taliban forces to POW status, there is – and there can be – none as regards Al-Qaeda terrorists.

176. Strangely enough, the US Supreme Court, in the *Hamdan* case of 2006, seems to have subscribed to the fiction that a cross-border world-wide ‘war on terrorism’ constitutes a NIAC.³²³ This judicial decision must be seen as limited to the confines of American domestic law, inasmuch as – from the vantage point of international law (see *supra* 97 *et seq.*) – a NIAC cannot possibly assume global dimensions.³²⁴ To the extent that Al-Qaeda personnel were associated with an IAC in Afghanistan, they must be seen as unlawful combatants participating in that armed conflict.

³²³ *Hamdan v. Rumsfeld et al.* (2006), 45 *ILM* 1130, 1153–4 (2006) (per Justice Stevens).

³²⁴ See M.N. Schmitt, ‘The United States Supreme Court and Detainees in the War on Terror’, 37 *Is. YHR* 33, 67–9 (2007).

VIII. Mercenaries

177. Article 47 of AP/I introduces a new rubric of unlawful combatants, namely, that of mercenaries:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
 - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) does, in fact, take a direct part in the hostilities;
 - (c) 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;
 - (d) is neither a national of a Party to a conflict nor a resident of territory controlled by a Party to the conflict;
 - (e) is not a member of the armed forces of a Party to the conflict; and
 - (f) 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.³²⁵

178. Depriving mercenaries of the status of lawful combatants and entitlement to POW, pursuant to Article 47, constitutes a departure from customary international law.³²⁶ Moreover, since their conduct is not linked in any way to the principle of distinction between combatants and civilians (see *supra* 33–4), mercenaries do not resemble traditional classes of unlawful combatants.

179. The definition of mercenaries in Article 47 is crafted restrictively. Its six conditions are cumulative: there is ‘a six-part test’, and individuals who do not meet even one of its segments will ‘escape being considered mercenaries under this definition’.³²⁷ Some commentators go so far as to maintain that, taken together, these six conditions ‘render Article 47 unworkable’.³²⁸ The linchpin is condition (c): ‘the desire for private gain’. The difficulty lies in proving that it is this venal motivation that ‘essentially’ impels a person to join the hostilities. It is not easy to determine what remuneration would be considered ‘substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces’ in which the mercenaries are serving. Patently, persons who receive payment that is identical to that of ‘combatants of similar

³²⁵ AP/I, *supra* note 9, at 734–5.

³²⁶ See H.C. Burmester, ‘The Recruitment and Use of Mercenaries in Armed Conflicts’, 72 *AJIL* 37, 43 (1978).

³²⁷ D.P. Ridlon, ‘Contractors or Illegal Combatants? The Status of Armed Contractors in Iraq’, 62 *AFLR* 199, 229, 232 (2008).

³²⁸ F.J. Hampson, ‘Mercenaries: Diagnosis before Prescription’, 22 *NYIL* 3, 30 (1991).

ranks and functions in the armed forces' of the same Belligerent Party are not mercenaries in the sense of Article 47. But even if it is shown that an alleged mercenary is more generously compensated, he can always contend that this is not what motivated him, and that he was 'essentially' driven to enlist by a belief in the rightness of the cause, religious or ideological kinship with the Belligerent Party, etc.³²⁹

180. Mercenaries within the range of Article 47 have to be 'specially recruited' for a particular armed conflict (condition (a)). In contemporary warfare, there is a growing trend of outsourcing diverse military duties in an IAC by hiring security services from the private sector.³³⁰ The first issue is whether private contractors lending such services can be regarded as 'specially recruited', if they are long-term employees in the pay of well-organized private military companies providing security services for a fee (which may be substantial).³³¹ There is no agreement among commentators as to whether the corporate veil makes any difference here. Some think that long-term employees of a private military company cannot be considered 'specially recruited' for any particular armed conflict;³³² whereas others express the opposite view.³³³

181. The main question relating to private contractors, whether or not they are acting under a corporate guise, is the nature of their mission. Besides being 'specially recruited', mercenaries have to be recruited 'in order to fight' (another limb of condition (a)) and must in fact 'take a direct part in the hostilities' (condition (b)). We shall deal *infra* 374 *et seq.* with the difference between ordinary security services provided by private contractors and direct participation in the hostilities (on the general meaning of the phrase 'direct participation in the hostilities', see *infra* 469 *et seq.*). It ought to be added that the fighting requirement in Article 47 excludes from the ambit of mercenaries experts who are recruited in a purely advisory capacity.³³⁴

182. Even when recruitment is for the purpose of fighting, Article 47 specifically removes from consideration as mercenaries members of the ordinary armed forces of Belligerent Parties (condition (e)), thereby leaving out units 'like the Gurkhas in the British Army or the members of the French Foreign

³²⁹ See P.W. Singer, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law', 42 *Col. JTL* 521, 529 (2003–4).

³³⁰ On the emergence of the phenomenon, see E.L. Gaston, 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement', 49 *Har. ILJ* 221, 223–8 (2008).

³³¹ See A. Behnsen, 'The Status of Mercenaries and Other Illegal Combatants under International Humanitarian Law', 46 *Ger. YIL* 494, 498–9 (2003).

³³² See C. Walker and D. Whyte, 'Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom', 54 *ICLQ* 651, 679 (2005).

³³³ See Z. Salzman, 'Private Military Contractors and the Taint of a Mercenary Reputation', 40 *NYUJILP* 853, 880–2 (2007–8).

³³⁴ See E. Kwakwa, 'The Current Status of Mercenaries in the Law of Armed Conflict', 14 *Has. ICLR* 67, 70–1 (1990–1).

Legion'.³³⁵ What this means is that if foreigners enlist to serve in a standing Foreign Legion, even for the duration of a single conflict (and regardless of monetary inducements), they are not mercenaries in the eyes of the framers of Article 47.³³⁶ Thus, a Belligerent Party wishing to avoid the stigma of employing mercenaries can simply incorporate entire groups in its armed forces.³³⁷

183. Under condition (f) of Article 47, members of foreign armed forces officially sent by a third State are also not considered mercenaries. The exclusion covers military technicians who are sent on an official assignment by a foreign country, even if they are highly-rewarded volunteers (motivated by financial gain) and regardless of whether they take a direct part in hostilities.³³⁸

184. The nationality dimension plays an important role in the definition of mercenaries (condition (d)). A mercenary caught in the net of Article 47 cannot be a national of any Belligerent Party (again, irrespective of financial inducements).³³⁹ This helps a person who is a national of an allied State. But if he is a national of the Detaining Power, it must be recalled that – although avoiding characterization as a mercenary under AP/I – he will still be deprived of POW status owing to condition (vii) of lawful combatancy, as inferred in the case law from the Geneva Conventions (see *supra* 150).³⁴⁰

185. A Convention for the Elimination of Mercenarism in Africa was adopted by the Organization of African Unity in 1977.³⁴¹ While retaining (in Article 1) the definition of AP/I, this instrument establishes (in Article 2) a 'crime of mercenarism'.³⁴² In 1989, the UN General Assembly formulated an International Convention (not widely ratified) against the Recruitment, Use, Financing and Training of Mercenaries, which redefines mercenaries in Article 1.³⁴³ The definition of mercenaries here is broader compared to that of AP/I: *inter alia*, it is no longer necessary for the persons concerned to actually take part in hostilities.³⁴⁴ Pursuant to Article 3(1) of the Convention, a mercenary who directly participates in hostilities not only loses the status of lawful combatancy but also commits a punishable offence.³⁴⁵

³³⁵ See A.A. Yusuf, 'Mercenaries in the Law of Armed Conflicts', *The New Humanitarian Law of Armed Conflict* 113, 117 (A. Cassese ed., 1979).

³³⁶ See M.F. Major, 'Mercenaries and International Law', 22 *Ga. JICL* 103, 113 (1992).

³³⁷ See E.-C. Gillard, 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law', 88 *IRRC* 525, 561–2 (2006).

³³⁸ See J. de Preux, 'Article 47', *Commentary on the Additional Protocols* 571, 581.

³³⁹ See H.W. Van Deventer, 'Mercenaries at Geneva', 70 *AJIL* 811, 813–14 (1976).

³⁴⁰ See W.A. Solf, 'Article 47', *New Rules* 303, 307.

³⁴¹ Convention for the Elimination of Mercenarism in Africa, 1977, *Laws of Armed Conflicts* 1237.

³⁴² *Ibid.*, 1238.

³⁴³ International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989, *Laws of Armed Conflicts* 1243, 1244.

³⁴⁴ See L.C. Green, *The Contemporary Law of Armed Conflict* 116 (2nd edn, 2000).

³⁴⁵ Mercenaries Convention, *supra* note 343, at 1245.

IX. Converting merchant vessels into warships

A. *The conditions of conversion*

186. The issue of converting merchant vessels at sea into warships relates to the abolition of privateering³⁴⁶ (see *supra* 118) and to the status of lawful/unlawful combatancy. Under Hague Convention (VII) of 1907, a Belligerent Party may convert a merchant vessel into a warship, provided that six cumulative conditions are met:

- (a) The converted vessel must be put under the authority, control and responsibility of the State whose flag it flies (that is, the vessel cannot continue to be a private ship).
- (b) The converted vessel must bear the external distinguishing marks of warships of that State.
- (c) The vessel's commander must be a naval officer in the service of the State.
- (d) The crew must be subject to military discipline.
- (e) The converted vessel must observe LOIAC in its operations.
- (f) The State performing the conversion must announce this as soon as possible in the list of its warships.³⁴⁷

187. The practice of converting private ships to warships is quite common in wartime. Thus, during the Falkland Islands War (1982), the British Government requisitioned several private vessels, including the luxury liner *Queen Elizabeth 2*, for use as troop ships (or to perform other auxiliary functions).³⁴⁸ The aim of the six conditions laid down in Hague Convention (VII) is 'affording a more transparent public status to converted merchant ships', thereby drawing a clear-cut distinction between them and privateers.³⁴⁹ However, Hague Convention (VII) does not settle two questions crucial to compliance with the principle of distinction, namely, (i) whether conversion of a merchant vessel can be effected anywhere as well as at any time; and (ii) whether the same ship may be reconverted back into a merchant vessel before the termination of the war.³⁵⁰ If the answer to both questions is affirmative, the consequence is that a merchant vessel may be converted into a warship whenever it encounters an easy prey on the high seas, and immediately after the engagement it may place itself back in the protected niche of a non-combatant vessel. In that case, the difference

³⁴⁶ See H. Fujita, '1856 Paris Declaration Respecting Maritime Law', *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* 61, 71 (N. Ronzitti ed., 1988).

³⁴⁷ Hague Convention (VII) Relating to the Conversion of Merchant Ships into Warships, 1907, *Laws of Armed Conflicts* 1065, 1066–7 (Articles 1–6).

³⁴⁸ See E. Chadwick, 'Merchant Ship Conversion in Warfare, the Falklands (Malvinas) Conflict and the Requisition of the QE2', 12 *JHIL* 71, 72 (2010).

³⁴⁹ *Ibid.*, 79.

³⁵⁰ See G. Venturini, '1907 Hague Convention VII Relating to the Conversion of Merchant Ships into Warships', *The Law of Naval Warfare*, *supra* note 346, at 111, 122–4.

between privateers and converted merchant ships would become notional. This writer believes that any reconversion during the hostilities is forbidden.³⁵¹

B. Resistance by unconverted merchant vessels

188. An (unconverted) enemy merchant vessel summoned by a warship to stop – prior to capture – is not duty-bound to do so, and it may attempt to escape or resist capture.³⁵² Yet, by trying to do that, it exposes itself to attack, i.e. it turns itself into a lawful military objective (see *infra* 347).³⁵³ With a view to enabling merchant vessels to stoutly resist capture, a number of maritime Powers (primarily, the UK) have taken the step of arming them with light guns.³⁵⁴ Such an act has potentially grave repercussions for submarines, which – when surfaced – are vulnerable to damage even by light weapons.³⁵⁵ Consequently, the San Remo Manual provides that, if a merchant vessel is armed to an extent that it can inflict damage on a warship, it can be attacked and sunk as a military objective; although this excludes light individual weapons for the defence of personnel and purely defensive systems such as ‘chaff’ (thin metallic strips interfering with radar and navigation signals).³⁵⁶ The conclusion is confirmed by the Nuremberg Judgment, in which the IMT pronounced that it would not hold Dönitz guilty for having waged ‘submarine warfare against British armed merchant ships’.³⁵⁷

³⁵¹ Cf. *ibid.*, 123.

³⁵² See L. Oppenheim, II *International Law: A Treatise* 467 (H. Lauterpacht ed., 7th edn, 1952).

³⁵³ *San Remo Manual*, *supra* note 123, at 147 (Rule 60(e)).

³⁵⁴ See C.J. Colombos, *International Law of the Sea* 521 *et seq.* (6th edn, 1967).

³⁵⁵ See J. Gilliland, ‘Submarines and Targets: Suggestions for New Codified Rules of Submarine Warfare’, 73 *Gtn. LJ* 975, 984 (1984–5).

³⁵⁶ See *San Remo Manual*, *supra* note 123, at 147 (Rule 60(f)).

³⁵⁷ Nuremberg Judgment, *supra* note 102, at 304.



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The Status of Persons Held in Guantánamo under International Humanitarian Law

Marco Sassòli*

Abstract

Every component of the 'war on terrorism', every situation in which persons held in Guantánamo were involved and every individual detained there have to be qualified separately. Many persons held in Guantánamo are not at all covered by international humanitarian law (IHL). Others benefit from the fundamental guarantees of IHL of non-international armed conflicts, which do not offer a legal basis for their detention — an issue dealt with by domestic law. Those persons who were arrested in Afghanistan are protected by IHL of international armed conflicts. In such conflicts, there are two categories of 'protected persons': combatants, who become prisoners of war protected by the Third Geneva Convention if they fall into the power of the enemy; and civilians protected by the Fourth Geneva Convention when in enemy hands. The US administration claims that the persons it holds in Guantánamo are neither combatants nor civilians, but 'unlawful combatants'. However, no one can fall in between the two aforementioned Conventions and therefore be protected by neither of the two. There are good reasons to consider the captured Taliban as prisoners of war. As for the al Qaeda members captured in Afghanistan, it may be justified to deny them prisoner of war status, on a number of legal grounds. However, as protected civilians, they may not be deported to Guantánamo, but may be detained in Afghanistan for the prosecution and punishment of criminal offences (including for having directly participated in hostilities); or they may be interned for imperative security reasons, upon individual decision made in a regular procedure which must include a right of appeal.

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1. Introduction

The persons held by the US in Guantánamo Bay, Cuba, have become a symbol for critics of the US administration's approach towards human rights and international humanitarian law in its 'war on terrorism'. Many of the Guantánamo detainees fell into the hands of the US in Afghanistan, belonging either to the Taliban or, allegedly, to al Qaeda. Other prisoners held in Guantánamo were, however, arrested in Pakistan, Bosnia and Herzegovina, Gambia and other places far away from Afghanistan.

From a humanitarian point of view, other persons involved in or affected by the 'war on terrorism', and, even more so, the much greater number of victims of the many other armed conflicts around the world, certainly deserve more concern. From a legal point of view, however, the justifications given by the US — a democracy governed by the rule of law — for the detention of those persons 'give rise to great concern. They oblige us to discuss the very innovative interpretation of the 'laws of war', which I prefer to call 'international humanitarian law' (IHL), that the US administration adopts in the 'war on terrorism'. Some elements of this interpretation are arguable; others are unreasonable. Together, they lead to the surprising result that the detainees in Guantánamo are held outside the law.

The line of argument made by the US administration may be summed up as follows.¹ First, the US is engaged in an international armed conflict — the 'war on terrorism'. This is, secondly, one single, worldwide international armed conflict against a non-state actor (al Qaeda) or perhaps also against a social and criminal phenomenon (terrorism). That armed conflict started — without the US defining it so at that time — at some point in time in the 1990s and will continue until victory.

1 For a legal explanation of the US position, see A. Dworkin, *Crimes of War Project, Excerpts from an Interview with Charles Allen, Deputy General Counsel for International Affairs, U.S. Department of Defence* (16 December 2002), available at <http://www.crimesofwar.org/onnews/news-pentagon-trans.html> (last visited 31 October 2003) and, with a more moderate approach, W.H. Taft IV, 'The Law of Armed Conflict after 9/11: Some Salient Features', 28 *Yale Journal of International Law* (YJIL), (2003) 319. Such position was partly accepted by the courts in *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002), and *Hamdi v. Rumsfeld*, No. 02-7338 (4th Cir. 8 January 2003), (also available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&case=/data2/circs/4th/027338p.html> (last visited 5 August 2003)). See, for a critical assessment, J. Fitzpatrick, 'Speaking Law to Power: the War against Terrorism and Human Rights', 14 *European Journal of International Law* (2003), at 249; M.J.D. Sweeney, 'Detention at Guantánamo Bay — a Linguistic Challenge to Law', 30 *Human Rights* (2003) 15; J. Paust, 'War and Enemy Status after 9/11: Attacks on the Laws of War', 28 *YJIL* (2003), at 325; L. Vierucci, 'Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to which Guantanamo Bay Detainees are Entitled', 1 *Journal of International Criminal Justice* (2003), at 284; C. Moore, 'International Humanitarian Law and the Prisoners at Guantanamo Bay', 7 *International Journal of Human Rights* (2003), at 1; M. Mofidi and A.E. Eckert, '"Unlawful Combatants" or "Prisoners of War": the Law and Politics of Labels', 36 *Cornell International Law Journal* (2003), at 59; R.J. Wilson, 'United States Detainees at Guantánamo Bay: the Inter-American Commission on Human Rights Responds to a "Legal Black Hole"', 10 *Human Rights Brief* (2003) (also available at <http://www.wcl.american.edu/hrbrief/10/3detainees.cfm> (last visited 31 October 2003)); N. McDonald and S. Sullivan, 'Rational Interpretation in Irrational Times: the Third Geneva Convention and the "War on Terror"', 44 *Harvard International Law Journal* (2003), at 301; and G. Rona, 'Interesting Times for International Humanitarian Law: Challenges from the War on Terror', 27 *Fletcher Forum of World Affairs* (2003), at 55.

Thirdly, while the US claims, in this conflict, all the prerogatives that IHL of international armed conflicts confers upon a party to such a conflict, in particular to detain enemy combatants without any judicial decision in Guantánamo, it denies these detainees protection by most of that law, claiming that their detention is governed neither by the IHL rules applying to combatants nor by those applicable to civilians.

Fourthly, all those considered to be enemies in the ‘war on terrorism’ — even those who are denied the benefit of full protection by IHL of international armed conflicts — are not dealt with under domestic criminal legislation, nor under any other new or existing legislation; nor do they benefit from international human rights law. The US administration claims that their treatment is entirely and exclusively ruled by some mysterious rules of customary IHL.²

I will now discuss the approach of the US administration towards the persons held in Guantánamo from the point of view of IHL. As always, applying IHL implies, first, that the situation in which those persons are involved has to be legally classified in order to determine whether it is an armed conflict and whether the conflict is international or non-international in character. Secondly, for those persons who are covered by IHL, their status under this body of law has to be determined.

2. The Classification of the ‘War on Terrorism’ under International Humanitarian Law

IHL is, today, largely codified in treaties, in particular the four 1949 Geneva Conventions³ and the two 1977 Additional Protocols.⁴ The US is a party to the former, but not to the latter. It recognizes, however, Protocol II as desirable or even as existing law and most, but not all, provisions of Protocol I as reflecting customary international law.

The four Geneva Conventions and Protocol I apply to international armed conflicts. Article 2, common to the Geneva Conventions, provides that the latter ‘shall apply to all cases of declared war or of any other armed conflict which may arise between two

2 See, in particular, *United States: Response of the United States to Request for Precautionary Measures — Detainees in Guantánamo Bay, Cuba* (12 April 2002), reproduced in American Society of International Law, *International Law in Brief* (4 June 2002), available at <http://www.asil.org/ilib/ilib0508.htm#r2> (last visited 31 October 2003).

3 Convention [No. I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 6 UST 3114, 75 UNTS 31–83; Convention [No. II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949), 6 UST 3316, 75 UNTS 85–133; Convention [No. III] Relative to the Treatment of Prisoners of War (12 August 1949) 6 UST 3217, 75 UNTS 135–285; Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 6 UST 3516, 75 UNTS 287–417.

4 Protocol [No. I] Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3–434; Protocol [No. II] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) 1125 UNTS 609–699.

or more of the High Contracting Parties'. Only states can be party to the Geneva Conventions. Al Qaeda and terrorism are not states. Therefore, the law of international armed conflict does not apply to a conflict between the US (a state) and them. There is no indication that state practice and *opinio juris* go further and apply the law of international armed conflict also to conflicts between states and some non-state actors. On the contrary, and in conformity with the basics of the Westphalian system, states have always distinguished between conflicts against one another, to which the whole of IHL applied, and other armed conflicts, to which they were never prepared to apply the same rules, but only more limited humanitarian rules. Even a conflict spreading over borders may remain a non-international armed conflict. '[I]nternal conflicts are distinguished from international armed conflicts by the parties involved rather than by the territorial scope of the conflict.'⁵

If the aforementioned principles are applied to the 'war on terrorism', it may be held that the law of international armed conflicts covered the conflict in Afghanistan, because it was directed against the Taliban, representing *de facto* that state. As for al Qaeda, where it is acting *de facto* under the global or effective direction or control of the Taliban, the conflict against it may also be characterized as international.⁶ Such direction and control exist, however, only in Afghanistan and not elsewhere.

Each component of the 'war on terrorism' — and every situation in which persons held in Guantánamo were arrested — has to be classified separately. Until now, it was a matter of regret that once there was an international element in a conflict on a given territory, the whole conflict could not, under constant state practice, be defined as wholly international, but had to be split off into its components.⁷ Even less could a worldwide conflict be characterized as international simply because some of its components were international. No one claimed during the 'cold war' that IHL of international armed conflicts applied to internal conflicts, such as those in Greece, Angola, El Salvador, Nicaragua, or even to political tensions and arrests in Germany, Italy or Latin America, simply because those were part of the cold war — the 'war against communism' — or because there were international armed conflicts between proxies of the two superpowers in the Near East, Korea or Vietnam.

Components of the 'war on terrorism' that do not qualify as international armed conflicts may be non-international armed conflicts, covered by Article 3, common to the four Geneva Conventions, and by Protocol II. To fall under those provisions, they must, however, be armed conflicts. Criteria permitting such qualification are the

5 L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002), 136.

6 See ICTY, Judgment, *Tadić*, (IT-94-I-A), Appeals Chamber, 15 July 1999, *ILM* 1518 (1999), paras 116–144.

7 D. Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols', 163 *Hague Academy Collected Courses* (1979–II), at 119; H.P. Gasser, 'Internationalized Non-international Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon', 33 *American University Law Review* (1983), at 145; J.G. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: a Critique of Internationalized Armed Conflict', 850 *International Review of the Red Cross (IRRC)* (2003), at 313; É. David, *Principes de Droit des Conflits Armés* (3rd edn, Bruxelles: Bruylant, 2002), 153–160.

intensity, number of active participants, number of victims, duration and protracted character of the violence, organization and discipline of the parties, capability to respect IHL, collective, open and coordinated character of the hostilities, direct involvement of governmental armed forces (versus law enforcement agencies) and *de facto* authority by the non-state actor over potential victims.⁸

Other situations are not armed conflicts at all. Protocol II excludes ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts’.⁹ Terrorist actions by private groups have not customarily been viewed as creating armed conflicts.¹⁰ The UK stated, when it ratified Protocol I, ‘that the term “armed conflict” of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation’.¹¹ The British and Spanish campaigns against the IRA and ETA have not been treated as armed conflicts under IHL.¹²

If IHL applies, each conflict has its own beginning and its own end. At the end of active hostilities in a given international armed conflict, prisoners of war (not accused of or sentenced for a crime) must be repatriated. The detention, e.g. of Taliban fighters arrested in Afghanistan, cannot be prolonged simply because, in the Philippines or in Iraq, the ‘war on terrorism’ goes on.

3. The Status of Persons Held in the ‘War on Terrorism’ under International Humanitarian Law

A. Under the Law of International Armed Conflict

In international armed conflicts, there are two categories of ‘protected persons’, who are subject to two very different legal regimes: combatants, who become prisoners of war protected by the Third Geneva Convention if they fall into the power of the enemy; and civilians protected by the Fourth Geneva Convention when in enemy hands.

1. ‘Unlawful Combatants’?

The US administration claims that the persons it holds in Guantánamo are neither combatants nor civilians, but ‘unlawful combatants’. President Bush himself made

8 See L. Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002), 30–52.

9 Protocol II, *supra* note 4, Art. 1(2).

10 L.C. Green, *The Contemporary Law of Armed Conflict* (2nd edn, Manchester: Manchester University Press, 2000), ([A]cts of violence committed by private individuals or groups which are regarded as acts of terrorism [...] are outside the scope of “IHL”, at 56).

11 Reservation by the UK to Arts 1(4) and 96(3) of Protocol I, available at <http://www.icrc.org/ihl.nsf> (last visited 31 October 2003).

12 H. McCoubrey and N.D. White, *International Law and Armed Conflict* (Dartmouth: Aldershot, 1992), 318.

this argument concerning the status of Taliban fighters.¹³ Other administration officials extend it to members of al Qaeda and others qualified as 'terrorists'.¹⁴ However, according to the text, context and aim of the Third and Fourth Conventions, no one can fall between the two Conventions and thus be protected by neither of the two.¹⁵

The first paragraph of Article 4 of Fourth Geneva Convention reads as follows: 'Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.' According to paragraph 4 of that Article, persons protected by the Third Geneva Convention 'shall not be considered as protected persons within the meaning of the present Convention'. This clearly indicates that anyone (fulfilling the requirement for protected person status¹⁶) who is not protected by Convention III falls under Convention IV. The *Commentary* published by the International Committee of the Red Cross (ICRC) reads:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution — not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.¹⁷

The preparatory work of the article confirms this interpretation. The ICRC had first suggested referring to 'persons who take no active part in hostilities'. The XVIIth International Red Cross Conference objected that '[t]his phrasing did not, however, cover those who commit hostile acts whilst not being regular combatants, such as *saboteurs* and *franc-tireurs*.'¹⁸ This problem was reported to the Diplomatic Conference, which therefore adopted the present wording.

- 13 White House, Office of the Press Secretary, Statement by the Press Secretary on the Geneva Convention (7 May 2003) available at <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html> (last visited 31 October 2003).
- 14 Dworkin *supra* note 1; *Respondents' Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus*, 7, *Padilla v. Rumsfeld*, 02 Civ. 4445 (MBM), 2002 US Dist. (SDNY, 27 August 2002) (also available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702grsp.pdf> (last visited 21 August 2003)), at 22.
- 15 K. Doermann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' 849 *IRRC* (2003), at 45. That 'unlawful combatants' are protected by Convention IV is also recognized by R. Baxter, 'So-called "Unprivileged" Belligerency: Spies, Guerillas and Saboteurs', 28 *British Yearbook of International Law* (1951), at 323, 328 and 344. When the concept of 'unlawful combatants' was used by the US Supreme Court in *Ex Parte Quirin et al.*, 317 US 1 (1942), Convention IV did not yet exist.
- 16 The ICTY replaces the nationality standard laid down in Art. 4 by an allegiance standard (see *Tadić*, *supra* note 6, paras 163–169, and our criticism M. Sassòli and L. Olson, 'Case Report, Judgment, The Prosecutor v. Dusho Tadić, Case no IT-94-A, ICTY Appeals Chamber (15 July 1999)' 94 *American Journal of International Law (AJIL)* (2000) 571, at 576–577.
- 17 J. Pictet, International Committee of the Red Cross, *Commentary, IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), 51.
- 18 International Committee of the Red Cross, *Revised and New Draft Conventions for the Protection of War Victims, Remarks and Proposals Submitted by the ICRC* (1949), 68.

Moreover, Article 5 of the Fourth Geneva Convention allows for some derogations from the protective regime of that Convention for persons engaged in hostile activities. If such persons did not fall at all under that Convention, such a provision would not have been necessary.

From a humanitarian perspective, it is dangerous to revive such an easy escape category for the purpose of detaining persons as ‘unlawful combatants’. No one should fall outside the law and, in particular, not outside the carefully built protective system offered by the Geneva Conventions. This system constitutes the minimum safety net in that profoundly inhumane situation which is war, where most of the other legal safeguards tend to disappear.

The US administration has declared that it treats all captured ‘terrorists’ humanely. First, such a vague commitment is not sufficient. The law covers even those who commit the most horrible crimes; only this allows us to judge over them. Secondly, other, less scrupulous states may take advantage of such a new loophole by, for example, denying protection to US personnel. In conclusion, all persons held in Guantánamo who are covered by IHL of international armed conflicts, must, perforce, be either combatants or civilians.

2. Combatants

Combatants are defined as members of the armed forces of a party to the international armed conflict. The US argues that the Taliban held in Guantánamo, who are members of the armed forces of the *de facto* government of Afghanistan, are not prisoners of war, because they ‘have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war’.¹⁹ This allegation may astonish those who remember that, during ‘Operation Enduring Freedom’, the US stressed that it attacked Taliban command and control centres and did not complain about an impossibility to distinguish Taliban from civilians.²⁰ If the allegation were true, the legal consequence would be that the Taliban are indeed denied prisoner of war status, if they are considered as ‘other militias . . . volunteer corps, . . . including resistance movements’, but not if they are ‘members of the armed forces of a Party to the conflict’.²¹ It is at least arguable that the Taliban belong to the latter category. For regular armed forces, however, it would be dangerous to require respect for the laws of war as a precondition for prisoner of war status. In all armed conflicts, the enemy is accused of not complying with IHL, and such accusations are all too often accurate. If IHL violations by regular armed forces were permitted to deprive all their members, independently of their individual behaviour, of prisoner of war status, that status could frequently not perform its protective effect. Historically, the US never invoked

19 White House, *supra* note 13.

20 US Department of Defense News Briefing — Secretary Rumsfeld and Gen. Myers, Washington DC (8 February 2002), available at <http://www.defenselink.mil/news/Feb2002/t02082002-t0208sd.html> (last visited 22 November 2003).

21 Convention III, *supra* note 3, Art. 4(A), paras (2) and (1), respectively.

such an argument concerning the German *Wehrmacht*, which cannot be considered to have consistently complied with the laws of war.

As for the al Qaeda members captured in Afghanistan, it may be justified to deny them prisoner of war status, either because al Qaeda did not belong to Afghanistan, the enemy in the international armed conflict, or, if it is considered as an Afghan militia, it is highly doubtful whether it complied with the aforementioned conditions that it must fulfil.²²

In case of doubt whether persons having committed a belligerent act are combatants, the Third Geneva Convention prescribes that they must be treated as prisoners of war 'until such time as their status has been determined by a competent tribunal'.²³ The US established such tribunals in the Vietnam War and the 1991 Gulf War.²⁴ However, it argues now that, in the case of those detained in Guantánamo, there is no doubt.²⁵ If the applicability of the clause merely depended on whether the detaining power has doubts, the latter could, however, always evade its obligation, which would make the clause practically useless.²⁶

If a person fallen into the power of the enemy is determined to be a combatant, he or she is a prisoner of war. Prisoners of war may be interned, not as a punishment but to prevent them from rejoining the fight. Therefore, no individual decision has to be taken on the detention. The mere fact that they are enemy combatants is a sufficient justification for their detention until the end of active hostilities in that conflict.²⁷ This 'title' for detention prevails, as *lex specialis* for combatants, over human rights law and domestic law requiring an individual judicial determination. While in detention, prisoners of war benefit, however, from the protection of the Third Geneva Convention — a detailed regime making sure that they are treated not only humanely, but also not as prison inmates²⁸ — as they are not serving a sentence and have committed no unlawful act.

3. Civilians

Civilians are protected civilians if they fall, during an international armed conflict, into the hands of a belligerent and fulfil certain nationality requirements.²⁹ Enemies, i.e. Afghan nationals, are always protected. In an occupied territory, nationals of a

22 For a detailed discussion, see Vierucci, *supra* note 1, at 392–395.

23 Convention III, *supra* note 3, Art. 5(2).

24 United States Military Assistance Command, Vietnam. Directives No. 381–46, Military Intelligence: Combined Screening of Detainees, 27 December 1967, reproduced in M. Sassòli and A. Bouvier, *How Does Law Protect in War?* (Geneva: International Committee of the Red Cross, 1999), 780–783; and Department of Defense, 'Report to Congress on the Conduct of the Persian Gulf War', 31 ILM (1992), at 612 and 629.

25 Donald Rumsfeld, *Fiscal Year 2003 Department of Defense Budget Testimony*, available at <http://www.defenselink.mil/speeches/2002/s20020205-secdef2.html> (last visited 6 February 2002).

26 Cf. *United States v. Percheman*, 32 US 51, 69–70 (1833) ('It is one of the admitted rules of construction, that interpretations which lead to an absurdity, or render an act null, are to be avoided.').

27 Convention III, *supra* note 3, Arts 21 and 118.

28 Ibid., Art. 22(1).

29 *Supra* note 16.

third country other than an ally of the occupier are equally protected. On a party's own territory, only neutral nationals are protected, and only if they do not benefit from normal diplomatic protection.³⁰ Protected civilians may not be detained, except for two reasons. First, under domestic legislation (or security legislation introduced by an occupying power), they may be detained with a view to the prosecution and punishment of criminal offences (including for having directly participated in hostilities). Secondly, civilians may be interned for imperative security reasons, upon individual decision made in a regular procedure to be prescribed by the belligerent concerned and which must include a right of appeal.³¹ Such civilians are civil internees whose treatment is governed by extremely detailed provisions of the Fourth Geneva Convention and their case must be reviewed every six months.³²

Civilians who fell into US hands in Afghanistan may, in any case, not be held in Guantánamo, but only in Afghanistan. While combatants may be held as prisoners of war in every corner of the earth, civilians protected by the Fourth Geneva Convention may indeed never be deported out of an occupied territory.³³ Afghanistan was an occupied territory because it came under control of the US and its allies during an international armed conflict.

Surprisingly, and much to my relief, the Legal Adviser of the US State Department has recently admitted that 'unlawful combatants' are protected by the Fourth Geneva Convention.³⁴ However, the administration does not yet draw practical conclusions from this admission, as it still detains those persons in Guantánamo and denies them individual judicial or administrative determination of the justification for their detention.

It may appear strange to legally define as 'civilians' heavily armed 'terrorists' captured in an international armed conflict, but found not to benefit from combatant and prisoner of war status. In law, borderline cases never correspond to the ideal type of a category and fall nevertheless under its provisions. What counts is that such 'civilian status' does not lead to absurd results. As 'civilians', unprivileged combatants may be attacked while they unlawfully participate in hostilities. After arrest, the Fourth Convention does not bar their punishment for unlawful participation in hostilities; it even prescribes such punishment for war crimes. In addition, it permits administrative detention for imperative security reasons and for derogations from protected substantive rights of civilians within the territory of a state and from communication rights within occupied territory.³⁵ The Fourth Convention has not been drafted by professional do-gooders or professors, but by experienced diplomats and military leaders, fully taking into account the security needs of a state confronted with dangerous people.

30 Convention IV, *supra* note 3, Art. 4(2).

31 *Ibid.*, Arts 41–43 and 78.

32 *Ibid.*, Arts 79–135.

33 *Ibid.*, Arts 49 and 76.

34 Taft, *supra* note 1, at 324, refers to Art. 64 of Convention IV, which is located in the part of Convention IV covering protected civilians in occupied territories.

35 Convention IV, *supra* note 3, Art. 5(1) and (2), respectively.

Some may find it shocking that unprivileged combatants as civilians have thus an advantage over captured lawful combatants, i.e. prisoners of war, because the former may be interned only following a judicial or individual administrative decision. However, lawful combatants can be easily identified, based on objective criteria, which they will normally not deny (i.e. being a member in the armed forces of a party to an international armed conflict), while the membership and past behaviour of an unprivileged combatant and the future threat he or she represents can only be determined individually.

B. Under the Law of Non-international Armed Conflicts

IHL of non-international armed conflicts foresees no combatant or prisoner of war status, and contains no other rules on the status of persons detained in relation with the conflict, or on reasons justifying detention of civilians. The question as to whether 'unlawful combatants' are combatants or civilians does not arise. In non-international armed conflicts, IHL cannot possibly be seen as a sufficient legal basis for detaining anyone. It simply provides for guarantees of humane treatment and, in case of prosecution for criminal offences, for judicial guarantees. Possible reasons for arrest, detention or internment are entirely governed by domestic legislation, human rights law requiring that no one be deprived of his or her liberty except based on the law.³⁶ In state practice, too, governments confronted with non-international armed conflicts based any arrest, detention or internment of rebels, including rebel fighters, either on domestic criminal law or on special security legislation introduced during the conflict. They never invoked the 'law of war'.

C. Outside Armed Conflicts

IHL applies only to armed conflicts. It cannot, therefore, offer any protection to those held in connection with those components of the 'war on terrorism' that do not meet the lower threshold of a non-international armed conflict. It is evident that IHL can provide even less a legal basis for detaining such persons in Guantánamo or elsewhere.

4. Conclusion

Meant as the branch of international law that provides protection to all those affected by or involved in armed conflicts, IHL has become, for the US administration, a justification for denying such people and others any protection by human rights law and domestic legislation. In addition, while the US thus invokes IHL, it is not ready to provide them with the full benefit of this law.

To apply IHL, every component of the 'war on terrorism', every situation in which

36 Art. 9 of the UN Covenant on Civil and Political Rights.

persons held in Guantánamo were involved and every individual detained there have to be legally classified separately. Many persons held in Guantánamo are not covered by IHL at all. Others benefit from the fundamental guarantees of IHL of non-international armed conflicts, which do not offer a legal basis for their detention — an issue dealt with by domestic law. Those persons who were arrested in Afghanistan are protected by IHL of international armed conflicts. Under that law, only those who are prisoners of war may be held in Guantánamo; those who are not prisoners of war are civilians. As such, they may only be detained in Afghanistan and only after individual judicial or administrative determination. I am convinced that the 'war on terrorism' can be won — and victory may even be easier — if those carefully drafted standards of IHL were respected.