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**One Year Advanced Diploma in International
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**1.4 Implementation of International Humanitarian
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The equal application of the laws of war: a principle under pressure

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Abstract

The ‘equal application’ principle is that in international armed conflicts, the laws of war apply equally to all who are entitled to participate directly in hostilities, irrespective of the justice of their causes. The principle, which depends on maintaining separation between jus ad bellum and jus in bello, faces serious challenges in contemporary armed conflicts and discourses. Some variations of the principle may be inevitable. However, it has a firm basis in treaties and in historical experience. It is the strongest practical basis that exists, or is likely to exist, for maintaining certain elements of moderation in war. The rival proposition – that the rights and obligations of combatants under the laws of war should apply in a fundamentally unequal manner, depending on which side is deemed to be the more justified – is unsound in conception, impossible to implement effectively and dangerous in its effects.

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The equal application of the laws of war: a principle under pressure

The ‘equal application principle’ is that the laws of war apply equally to all belligerent parties in an international armed conflict, irrespective of the question of how the war began or the relative justice of the causes involved.¹ Under this principle, the laws of war (otherwise called *jus in bello*, law of armed conflict and international humanitarian law) apply equally to all those who are entitled to participate directly in hostilities – and, so far as the application of the law is concerned, it is not relevant whether a belligerent force represents an autocracy or a democracy, nor is it relevant whether it represents the government of a single country or the will of the international community.

The principle is closely related to, indeed based on, another principle, namely the separation between *jus in bello* and *jus ad bellum* – the law relating to the lawfulness of the use of force.² In practice that separation has never been absolute, and is not so today. Among the connections between the two bodies of law are the following. (i) In many modern conflicts, violations of norms of humanitarian law by one or more parties have been cited as a basis for military intervention or economic sanctions by outside powers and international organizations.³ (ii) One meaning of the principle of proportionality is about the proportionality of a military action in relation to a grievance and/or to the issues at stake in a war, thus forming a link between *jus ad bellum* and the manner of conduct of hostilities.⁴ (iii) The self-defence of a state is sometimes seen as a basis for justifying actions that might otherwise be problematic under *jus in bello*.⁵ (iv) The use of sanctions and force with international authorization, for example by the UN Security

1 The term ‘principle of equal application’ and variants thereto is used here because it is consistent with the intent of the ‘scope of application’ provisions of the Geneva Conventions and other treaties on the laws of war. In Rodin and Shue, above note *, some contributors use the phrase ‘symmetry thesis’ to refer to this principle. I have not followed this usage because what is at stake is an established legal principle, not a mere thesis or proposition; and the principle does not depend on an assumption that there is symmetry between belligerents.

2 For a useful discussion, including extensive references to sources, see Marco 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 Michael N. Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines – Essays in Honour of Yoram Dinstein*, Martinus Nijhoff, Leiden, 2007, pp. 241–64.

3 Adam Roberts, ‘Humanitarian issues and agencies as triggers for international military action’, *International Review of the Red Cross*, No. 839 (2000), pp. 673–98.

4 Christopher Greenwood, ‘The relationship between *ius ad bellum* and *ius in bello*’, *Review of International Studies*, Vol. 9 (4) (1983), pp. 221–34. See also ‘The applicability of international humanitarian law and the law of neutrality to the Kosovo campaign’, *Israel Yearbook on Human Rights*, Vol. 31 (2001), pp. 111–44, esp. at p. 143, where he emphasizes that a *jus ad bellum* requirement that the use of force should be proportionate ‘should never be used to undermine the principle of the equal application of the *jus in bello*’.

5 See, e.g., the International Court of Justice’s reference to ‘an extreme circumstance of self-defence’ in the advisory opinion on *The Legality of the Threat or Use of Nuclear Weapons*, 1996, para. 105(2) E. Self-defence is discussed further below in the section on certain arguments for varying the law in favour of particular parties, text at note 42.

Council, is sometimes associated with a variation of the normal rights and duties of a belligerent (and also of neutral states) under *jus in bello*.⁶

Granted that the separation of *jus in bello* and *jus ad bellum* is less than absolute in contemporary conflicts, it is not surprising that the equal application principle is under serious challenge. There are many arguments to the effect that the rights and obligations of combatants under the laws of war should apply unequally to opposing sides in a war, depending on which side is deemed to have the more justified or righteous cause. Such arguments, while far from new, have revived in the post-Cold War era, often in the form of mere implications, assumptions or piecemeal decisions, rather than as part of a fully developed critique of the scope of application of the laws of war. These arguments for varying the application of the law in favour of certain parties, which are explored further in a later section of this article, include claims that certain UN-authorized or US-led uses of force are of such a special character that the normal rules should not be applicable to them without significant variation. Often these arguments are based on an assumption that adversary forces are not lawful belligerents – for example, because they have defied the will of the international community on some issue, are engaged in criminality or are associated with ‘terrorists’.

The logical outcome of such arguments is what can be termed the ‘unequal application proposition’, which is that combatants justified under *jus ad bellum* should have wider *jus in bello* rights than unjustified combatants.⁷ There are, potentially, two implications of this ‘unequal application’ proposition: (i) that the laws of war should be revised to make explicit allowance for different rules applying to the different sides in a conflict; or (ii) that the laws should remain the same, but their mode of application should be varied in particular cases. Either way, the ‘unequal application’ proposition is superficially attractive but it is based on weak reasoning and is dangerous in its potential effects.

Another proposition, which critiques the equal application principle from a slightly different angle, is that many soldiers in a conflict, even perhaps some or all of those on the ‘aggressor’ side, may be individually so innocent of blame that they should not be legitimate targets. In this view the laws of war, by appearing to permit attacks on the soldiers of a belligerent state, can be morally questionable, at least as regards certain conflicts or certain parties in conflicts. The problem of the ‘innocent soldier’ is indeed serious. However, as is indicated below, it is not a problem to which existing law and practice are blind. Moreover, it is questionable whether the problem of the innocent soldier could ever be usefully addressed either by unequal application of the laws of war, or by viewing the laws of war as an obstacle rather than a solution because of their apparent tolerance of attacks on soldiers.

6 The effects of UN authorization on the principle of equal application are discussed further below in the section on certain arguments for varying the law in favour of particular parties, text at note 53.

7 For explorations by two philosophers of the proposition that *jus in bello* should be applied in an unequal manner, e.g., to help protect soldiers who are fighting in a cause which has been authoritatively accepted as just under *jus ad bellum*, see the chapters by Jeff McMahan and David Rodin in Rodin and Shue (eds.), above note *, pp. 19–43, 44–68.

In this survey there are only brief references to conflicts within states (i.e., civil wars) and to terrorism. These two phenomena have always raised difficult challenges in relation to application – let alone equal application – of the laws of war. In both civil wars and counter-terrorist campaigns there is, typically, a legitimate question about whether the law relating to international armed conflict is formally applicable. Governments are generally reluctant to recognize that their adversaries have a formal status as a party to the conflict; and in particular that they can be entitled to full prisoner-of-war status. Yet in many instances of largely internal conflict the case for application of the laws of war may be strong. The 2001 agreement extending the application of the 1980 UN Convention on Certain Conventional Weapons (CCW) to non-international armed conflicts is one significant formal recognition of this.⁸ In addition, the application of the laws of war in largely or wholly internal conflicts may be urged by international bodies including the UN Security Council.⁹ Similarly, the Council has recognized that in the struggle against terrorism, states must ‘comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law’.¹⁰ Even in instances where full application of the laws of war is rejected by states – as in US policy in certain aspects of the ‘war on terror’ – there may be strong arguments for applying particular provisions of the law such as Common Article 3 of the 1949 Geneva Conventions. This was the conclusion of the US Supreme Court in June 2006 in the case of *Hamdan v. Rumsfeld*.¹¹

The main focus here is on international armed conflicts of various types, and on two central questions. Should one particular form of distinction, based on the justice or legal status of the cause of one side in a conflict, affect the legal protections and duties of belligerents? And do the laws of war have a response to the problem of the ‘innocent soldier’? I will approach these questions by breaking them up into nine topics:

1. Three misleading assumptions about the laws of war.
2. Treaty basis of the principle that the laws of war apply equally to all belligerents.
3. Four historical reasons for this principle.

8 Amendment Article 1 of the 1980 Convention on Certain Conventional Weapons, 21 December 2001. There are 63 states parties to this amendment. Information from www.icrc.org/ihl (last visited 1 October 2008).

9 See, e.g., the following UN Security Council resolutions reaffirming (in armed conflicts that were to a significant degree non-international in character) that all parties are bound to comply with their ‘obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949’: SC Res. 764 of 13 July 1992 on Bosnia and Herzegovina, and SC Res. 1193 of 28 August 1998 on Afghanistan.

10 SC Res. 1624 of 14 September 2005, passed at a ‘summit’ meeting of the UN Security Council attended by heads of state and government.

11 In its judgment on 29 June 2006 in the case of *Hamdan v. Rumsfeld*, which concerned the status and treatment of detainees suspected of involvement in terrorism, the US Supreme Court placed emphasis on both Common Article 3 of the 1949 Geneva Conventions, and Article 75 of 1977 Additional Protocol I. This confirmed a more general tendency to view the provisions of Common Article 3 as applicable in a wider range of circumstances than simply civil war within a state (which is what a strict reading of that article’s ‘scope of application’ wording might suggest).

4. Reciprocity and reprisals: their bearing on equal application.
5. Distinctions between different categories of people in the laws of war.
6. Certain arguments for varying the application of the law in favour of particular parties.
7. The difficulty of agreeing which side is more justified in its resort to force.
8. The 'innocent soldier' in the law and conduct of war.
9. Conclusion: why the equal application principle should be respected.

Three misleading assumptions about the laws of war

Sometimes, but by no means always, supporters of the 'unequal application' proposition and its variants base their viewpoint on one or more misleading assumptions about the laws of war – assumptions which have in common that they tend to exaggerate the role and influence of the laws of war. Three of these assumptions need to be addressed briefly here in order to clear the way for exploration of more substantive issues.

The first misleading assumption is that this body of law grants belligerents certain 'rights', including the right to shoot at the soldiers of an opposing army – with the implication, therefore, that the law can expand or withdraw that right in particular cases. It would be more accurate, both historically and legally, to say that the law recognizes certain rights of belligerents, or even that it suffers them to take certain actions: it is not the source of such rights. Essentially, the laws of war are not a general regime that governs the whole of war in all its aspects: rather, they are a modest and limited set of rules that establish certain limitations in war. Indeed, a large part of the rules relates, not to the conduct of armed conflict itself, but rather to the treatment of those persons (prisoners, sick and wounded, and inhabitants of occupied territory) who are in the hands of the adversary as a consequence of armed conflict. In other words, the role of law in war is not to constitute 'the rules of the game', but rather to provide a modest body of rules applicable to certain aspects and consequences of war. Seen in this light, it is hard to see how the laws of war could be a basis for a set of ad hoc variations expanding or withdrawing something so intrinsic to war as the right to attack the armed forces of an adversary.

The second misleading assumption is that the laws of war amount for the most part to a systematic constraint on the effective conduct of operations – and one that may make a successful outcome more difficult for a belligerent applying them. In this view, relaxing the application of certain rules by the side deemed to be more justified, or granting that side more *jus in bello* privileges, might help that side to achieve a successful outcome. This is an oversimplification of a much more complex reality. The laws of war can properly be seen as providing a set of rules that, while seeking to minimize various side effects of war, are compatible with and may positively assist the effective and professional conduct of operations. By contrast, systematic violations of the law often contribute to failure, especially if they have the effect of assisting coalition-building against the offending state.

The third misleading assumption sometimes encountered is that the equal application of the laws of war to all belligerents is based on the premise that there is 'moral equality on the battlefield'. The implication of this is that, since in many cases it is inappropriate to view the belligerents as having any kind of moral equality under *jus ad bellum*, the equal application of the laws of war is problematic or even plain wrong. However, the laws of war are not dependent on a notion of moral equality between belligerents. On the contrary, the laws of war are compatible with the idea that in any given war there may be very strong reasons for viewing one party as preferable to the other, including in moral terms. It is natural that such reasons should inform not just the preferences of individuals but also the policies of certain states and also some international bodies. There may be international war crimes investigations into the conduct of belligerent parties (whether conducted by the International Criminal Court, by an ad hoc tribunal established by the UN Security Council or by a state or alliance) that conclude by being more critical of one side than the other. There may be Security Council condemnation of the acts of one party. For example, in respect of the war in Bosnia and Herzegovina in 1992–5 the UN Security Council took certain actions which plainly inclined towards favouring one side in the war, yet at the same time it upheld the principle of equal application of the laws of war.¹² While this basic approach to the war in Bosnia was problematic, it showed that equal application of the laws of war is not the same thing as moral equality on the battlefield.

Treaty basis of the principle that the laws of war apply equally to all belligerents

It is a cardinal principle of *jus in bello* that it applies in cases of armed conflict whether or not the inception of the conflict is lawful under *jus ad bellum*, and applies equally to all belligerents. This principle has been recognized for at least 150 years as a basis of the laws of war, and it finds reflection in numerous treaty provisions.¹³ In the four 1949 Geneva Conventions there is no hint that the nature of the cause of a war, or the justness of any party, could affect the application of the law. Common Article 1 states, in full, 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.'¹⁴ Common Article 2 specifies that the law applies irrespective of whether there is

12 The application of the laws of war in the war in Bosnia and Herzegovina in 1992–5 is discussed further below under the headings 'UN-authorized forces in enforcement actions' and 'UN peacekeeping forces'.

13 All laws-of-war treaties mentioned in this survey may be found at www.icrc.org/ihl (last visited 3 September 2008). Agreements concluded up to 1999 are in Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War*, 3rd edn, Oxford University Press, Oxford, 2000.

14 For an authoritative account of the origins and meanings of Common Article 1 of the 1949 Geneva Conventions, see Frits Kalshoven, 'The undertaking to respect and ensure respect in all circumstances: from tiny seed to ripening fruit', *Yearbook of International Humanitarian Law*, Vol. 2 (1999), T. M. C. Asser Press, The Hague, 2000, pp. 3–61.

a declaration of war, and even if the state of war is not recognized by one of the parties to a conflict.¹⁵ The Geneva Conventions were negotiated and agreed just a few years after the Allies had fought what was widely held to have been a justified war against a particularly violent and dangerous political system – yet there was no provision for those who fight in the nobler cause to have privileged application of the rules.

The principle of equal application of the laws of war to all parties to a particular conflict is stated even more explicitly in 1977 Protocol I additional to the Geneva Conventions of 1949. Its preamble reaffirms ‘that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict’.¹⁶ Article 1 repeats the 1949 undertaking ‘to respect and to ensure respect for the present Convention in all circumstances’, and goes on to specify that the situations to which the Protocol applies ‘include 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’.¹⁷ Many were worried about this formula, which seems to favour one side in certain types of war, but the view that one side might have the more just cause was not translated into any argument that the law should apply unequally. On the contrary, the Protocol spelled out in detail how an entity such as a national liberation movement should take the appropriate steps to apply the Conventions and the Protocol, with the same rights and obligations as any other party.¹⁸

Four historical reasons for equal application of the laws of war

Why has the equal application principle come to be so widely accepted? It is the product of hard-won experience, over at least half a millennium, of four main kinds: (i) between the sixteenth and the eighteenth centuries the equal application principle emerged as part of the underlying philosophy of the laws of war for the good reason that other ideas were more problematic; (ii) in the nineteenth century it became part of a strong and sound tradition of seeking a uniform set of rules in the form of treaties; (iii) in the twentieth and twenty-first centuries the principle has become deeply entrenched in court decisions, state practice and the opinions of lawyers; and (iv) the principle has been reinforced by the practical experience of the International Committee of the Red Cross.

15 1949 Geneva Conventions, Common Article 2.

16 1977 Protocol I, preamble.

17 *Ibid.*, Article 1(1) and (4).

18 *Ibid.*, Article 96(3).

Underlying philosophy of the laws of war

The first historical reason for emphasis on equal application arises from the fact that this principle was a key foundation of the body of political philosophy that contributed to the development of the laws of war between the sixteenth and the eighteenth centuries. There is a long and distinguished tradition of thought which views the laws of war as applicable to both sides in a war. Alberico Gentili (1552–1608) and Hugo Grotius (1583–1645) were among those who played key parts in the emergence of this view, even though both of them believed in the distinction between lawful and unlawful resort to war, and in the deep importance of just war for the maintenance of international society. In particular, Grotius' emphasis on *temperamenta belli* – essentially a moral and prudential plea for moderation in war – put the focus on humane limitations regarding the means by which wars were waged.¹⁹

The separation of *jus in bello* from *jus ad bellum* was rendered explicit in the writings of Emmerich de Vattel (1714–67), with his insistence that 'regular war, as to its effects, is to be accounted just on both sides', and that 'whatever is permitted to the one in virtue of the state of war, is also permitted to the other'.²⁰ The position he thus expounded was by no means free of flaws. While he recognized the risk that states might transgress the bounds of 'the common laws of war', he did not specify the effect of such conduct on the equal application of the law. His whole theory was based on the idea of 'natural principles of the law of nations' which he deduced 'from nature itself'.²¹ His ideas were open to challenge and his influence was limited. Yet the explicit emphasis on the equal application of the laws of war was important.

At about the same time Jean-Jacques Rousseau developed the idea, based more on political philosophy than on strict law, that all combatants in war are deserving of such protection as can be provided. In his view combatants in war are essentially innocent. Rousseau was a consistent advocate of limitations in war – in particular through doctrines that would prohibit the killing of prisoners and the enslavement of conquered peoples. His view of war was influenced by the fact that – at least by comparison with events in the twentieth and twenty-first centuries – the eighteenth century was a time of limited wars, fought with limited means for limited objectives. It was against this background that he developed a

19 On the ambiguities of the Grotian tradition of thought about limitations in war and their relation to *jus ad bellum* issues, see Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.), *Hugo Grotius and International Relations*, Clarendon Press, Oxford, 1990, pp. 15–26 (Kingsbury and Roberts), and pp. 194–207 (Draper).

20 Emmerich de Vattel, *Le droit des gens* (posthumous edition, 1773 [1758]). The edition cited here is *The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns*, ed. Joseph Chitty, Sweet, Stevens and Maxwell, London, 1834, pp. 382–3. The citation is from book III, ch. 12, §§ 190–1.

21 *Ibid.* §§ 191–2.

view of war that had profound and enduring implications for the application of the laws of war:

War is then not a relationship between one man and another, but a relationship between one State and another, in which individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers; not as members of the fatherland, but as its defenders. Finally, any State can only have other States, and not men, as enemies, inasmuch as it is impossible to fix a true relation between things of different natures.

...

Since the aim of war is the destruction of the enemy State, one has the right to kill its defenders as long as they bear arms; but as soon as they lay down their arms and surrender they cease to be enemies or the enemy's instruments, and become simply men once more, and one no longer has a right over their life. It is sometimes possible to kill the State without killing a single one of its members; and war confers no right that is not necessary to its end. These principles are not those of Grotius; they are not founded on the authority of poets, but follow from the nature of things, and are founded on reason.²²

Rousseau did not succeed completely in reconciling his view of soldiers as simply 'enemies by accident' with his advocacy elsewhere of the militia system in which each citizen is pledged to defend the fatherland. Also, his attacks on Grotius, implying that he was too tolerant of whoever wielded power, were not always fair. Indeed, Rousseau's emphasis on restraint in war was in more of a Grotian tradition than he liked to admit. Yet his emphasis on the equal application of the rules to all belligerents was one of his most important legacies. It is not by accident that the International Committee of the Red Cross was to be founded (in 1863) in his beloved Geneva, nor that it has frequently drawn on Rousseau's classic statement quoted above as a key foundational basis for the law that the Red Cross supports and the activities it undertakes.²³

The pursuit of a uniform set of rules

The second historical reason for equal application of the laws of war is that the modern laws of war, as they have emerged in treaty form since the mid-nineteenth century, have been based on recognition of the need for a uniform and universally accepted set of rules. Having different rules applying to, or applied by, different belligerent parties has long been seen as a recipe for chaos. In the Crimean War (1853–6) different European states followed different rules about the capture of

22 Jean-Jacques Rousseau, *Du Contrat Social, ou Principes du Droit Politique* (1762), paragraph I.iv, in *Rousseau: The Social Contract and other Later Political Writings*, ed. and trans. Victor Gourevitch, Cambridge University Press, Cambridge, 1997, pp. 46–7.

23 See, e.g., François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, Macmillan Education, Oxford, 2003, pp. 125, 717.

property at sea. There were inconsistent practices between allies, causing much confusion and inefficiency, especially in their relations with states that were neutral in this conflict. After the war, as part of the peace agreement concluded in Paris, the parties to the peace negotiations agreed the terms of the 1856 Paris Declaration on Maritime Law, which begins memorably:

Considering:

That maritime law, in time of war, has long been the subject of deplorable disputes;

That the uncertainty of the law and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts;

That it is consequently advantageous to establish a uniform doctrine on so important a point; ...²⁴

The 1856 Paris Declaration has special significance. It appears to be the first multilateral convention that was open to accession by all states. In other words, it is the first example of what is now seen as the standard form in which international law finds expression. It may seem paradoxical that the type of instrument which is the very basis of modern international law emerged in the field of the laws of war. However, it was no accident. War is pre-eminently a field in which certain rules of conduct are needed – and they have to be available before the outbreak of hostilities, as it is so difficult to create new rules once war has broken out.

This pressure to develop rules that are uniform for all belligerents is a continuous thread running through the subsequent development of the laws of war. The four 1949 Geneva Conventions provide striking evidence – both in the manner of their original negotiation, and in the subsequent adherence by states. The negotiations at Geneva in April–August 1949, convened by the Swiss government, were attended by the representatives of sixty-four states: this was five more states than the membership of the United Nations at the time.²⁵ Today, in 2008, there are 194 states party to the 1949 Geneva Conventions: two more than the current membership of the United Nations. These figures are testimony to the success of the effort to secure at least formal adherence to the laws of war on the basis of their uniform application.²⁶

Court decisions, state practice and the opinions of lawyers

The third historical reason for equal application is the degree of support that the principle has received in court decisions, in practice, and in writings – to all of

24 1856 Paris Declaration on Maritime Law, preamble.

25 Official lists show that as at May 1949 there were 59 member states of the UN. Information from www.un.org/members (last visited 1 October 2008).

26 Information on states party to the 1949 Geneva Conventions from www.icrc.org/ihl (last visited 1 October 2008).

which only the briefest reference can be offered here. Although in the course of the twentieth century the idea of the illegality of the aggressive use of force gained strength, this did not lead to a weakening of the principle of equal application of *jus in bello* irrespective of which side had responsibility, or even legal culpability, for the outbreak of the war. In 1946 the International Military Tribunal at Nuremberg, in rejecting certain excuses for non-application of the law, implicitly accepted the equal application principle.²⁷ Subsequently, the US military tribunals, also at Nuremberg, explicitly accepted the principle. This was clearest in the *Hostages* case (*USA v. Wilhelm List et al.*), in which US Military Tribunal V, citing the international lawyer L. Oppenheim as its authority, ruled on 19 February 1948:

Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral states. This is so, even if the declaration of war is *ipso facto* a violation of international law ...²⁸

A significant body of subsequent state practice and legal writing attests to the continued salience of the principle of equal application of the laws of war.²⁹

The ICRC's experience

The fourth historical reason for the equal application principle is that its importance has been confirmed by the experience of the International Red Cross and Red Crescent Movement and, above all, the Movement's main body concerned with taking action in wars – the International Committee of the Red Cross, founded in 1863 as 'the Geneva Committee' that was soon to become the International Committee for Relief to Wounded Soldiers. Throughout the ICRC's existence, its role as an impartial humanitarian organization has been spelled out in laws-of-war treaties, especially in the 1949 Geneva Conventions and in 1977 Additional Protocol I.

The International Conference of the Red Cross and Red Crescent, the main deliberative body of the Movement, has repeatedly passed resolutions favouring equal application of international humanitarian law. For example, the 25th International Conference, held in Geneva in 1986, strongly reiterated the traditional Red Cross principles of neutrality towards belligerents, thus never to

27 On the IMT at Nuremberg, see section on reciprocity below, text at note 36.

28 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946–April 1949*, 15 vols., Government Printing Office, Washington DC, 1949–53, XI, p. 1247.

29 See, e.g., the clear enunciation of 'universal application of the law of armed conflict' in *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford University Press, Oxford, 2004, p. 34; and the excellent discussion of 'equal application of the *jus in bello*' by Yoram Dinstein in his *War, Aggression and Self-Defence*, 4th edn, Cambridge University Press, Cambridge, 2005, pp. 156–63.

take sides or engage in controversy, and of impartiality in the relief of suffering, without discrimination based on nationality, race, religious beliefs, class or political opinions. It also passed a resolution stating, *inter alia*, that the International Conference

- (1) *regrets* that disputes about the legal classification of conflicts too often hinder the implementation of international humanitarian law and the ICRC's work,
- (2) *appeals* to all Parties involved in armed conflicts to fully respect their obligations under international humanitarian law and to enable the ICRC to carry out its humanitarian activities.³⁰

In its customary law study, published in 2005, the ICRC appears to take it for granted that the rules must be applied equally. It indicates that this is an absolute obligation, not one dependent on reciprocity between the parties. Its distillation of customary international law regarding compliance is, 'Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control'.³¹ In addition, as the ICRC study notes, UN Security Council and General Assembly resolutions on a wide range of conflicts have called on all the parties to implement international humanitarian law.³²

For the ICRC, the principle of impartiality, which is the essential basis of its capacity to work in the field, is intimately linked to the equal application principle.³³ Likewise, the principle of humanity means that it would make no sense to make the application of the rules dependent on political criteria. Since the ICRC not only works at the rough end, dealing with the practicalities of humanitarian relief in war, but also has a significant role in the development and implementation of *jus in bello*, its strongly held view favouring equal application of the laws of war merits respect. However, the ICRC's emphasis on equal application is so absolute that it sometimes appears to neglect the principle of reciprocity, which merits brief consideration here.

Reciprocity and reprisals: their bearing on equal application

In the long history of the laws of war, two concepts – reciprocity and reprisals – have had a significant bearing on the principle of equal application. Reciprocity is the idea that compliance by one party is in some respects dependent on compliance

30 Resolution I, 'Respect for international humanitarian law in armed conflicts and action by the ICRC for persons protected by the Geneva Conventions', *Handbook of the International Red Cross and Red Crescent Movement*, 13th edn, ICRC and IFRC, Geneva, 1994, p. 752.

31 Rule 139, in Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, 2 vols., ICRC and Cambridge University Press, Cambridge, 2005, I (*Rules*), p. 495.

32 For a useful listing of such UN resolutions see *ibid.*, II (*Practice*), pp. 3168–72.

33 Jelena Pejic, 'Non-discrimination and armed conflict', *International Review of the Red Cross*, No. 841 (2001), pp. 183–94.

by the other party. Reprisals is the idea that certain otherwise illegal acts of retaliation may be carried out by one party to a conflict in response to illegal acts of warfare and intended to cause the enemy to comply with the law. Both ideas, in their own distinct ways, reflect the proposition that if one side does not comply with *jus in bello*, then its adversary may be entitled to depart from some of the rules. While both of these ideas are thus based on possible variations in the application of *jus in bello*, neither of them link this to *jus ad bellum*. Despite this, both ideas are relevant to the present enquiry because of the light they shed on the proposition that significant variations in the application of the laws of war as between belligerents may be practicable and useful.

Reciprocity

Elements of the principle and practice of reciprocity could be found in the following:

- The provisions, found in numerous treaties of the laws of war, that the rules apply to all cases of armed conflict between the parties to the treaty concerned; and that the rules will also govern relations with a state that is not a party, provided that the state concerned 'accepts and applies' the treaty's provisions.³⁴
- The reservation made by many states party to the 1925 Geneva Protocol on Gas and Bacteriological Warfare to the effect that the Protocol was binding only in relation to other states bound by it, and would cease to be binding if an enemy or its allies failed to respect the prohibitions embodied in the Protocol.³⁵

The idea that the laws of war are applicable only in circumstances where there is reciprocity has evolved, and has been duly modified. Many developments have contributed to a recognition that there is an obligation to respect the law that does not depend completely on reciprocity. Three such developments derive directly from the experience of warfare in the twentieth century. (i) The 1946 Judgment of the International Military Tribunal at Nuremberg stated that the laws of war, provided that the rules in question were generally accepted as 'being declaratory of the laws and customs of war', had to be implemented even if some of the belligerents in a war were not parties to a particular treaty.³⁶ (ii) In certain wars in which one side conspicuously violated basic provisions of the laws of war there has been no suggestion that this would have entitled the other side to abandon its policy of adherence to the law. For example, in the 1991 Gulf War a number of violations by Iraq, in a range of matters including treatment of prisoners and

34 1949 Geneva Conventions, Common Article 2, the terms of which are reflected in 'scope of application' provisions of a number of subsequent treaties on the laws of war.

35 Some of the states that had made such reservations to the 1925 Geneva Protocol subsequently withdrew them, because preserving any right of like-for-like retaliation against biological or chemical weapons was considered inconsistent with their obligations under the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention prohibiting possession of such weapons.

36 *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany*, HMSO, London, 23 vols., 1946–51, Part 22, p. 467.

wanton destruction resulting in pollution of the air above Kuwait and of the waters of the Gulf, did not lead to demands that the US-led coalition should abandon adherence to the law. (iii) In certain conflicts in which the forces of states have been used against non-state entities using terrorist methods, there has been a recognition on the part of the state that certain rules based on the laws of war should be applied – even if the circumstances were different from those of normal inter-state war, adversaries did not meet the requirements for prisoner-of-war status and the formal applicability of the treaty regime to the conflict was not accepted. The UK role in Northern Ireland after the disasters of 1971–2 is a possible case in point.

All three of these developments suggest a retreat from certain strict notions of reciprocity. Indeed, they suggest that, at times, observance of the law may be regarded as a duty irrespective of the adversary's actions: not 'equal application', but rather 'invariable application'. They indicate that the laws of war are capable of being applied in, or adapted to, a wider range of circumstances than was originally envisaged in the treaties.

This conclusion is reinforced by the 1969 Vienna Convention on the Law of Treaties. Although this provides that a party's material breach of a multilateral treaty may enable other parties to suspend the treaty in whole or in part, it specifies that this cannot be done with respect to 'provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.³⁷ This clearly prohibits belligerents from suspending (whether as reprisals or in the name of reciprocity) key humanitarian provisions of laws-of-war treaties.

In its customary law study, the ICRC concluded (citing much practice in support) that 'the obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity'.³⁸ While there has certainly been a legal trend in this direction, it is not self-evident that reciprocity in the application of the laws of war is completely dead in legal theory or in the practice of states. As to legal agreements, the ICRC study did not discuss the provisions of Common Article 2 of the 1949 Geneva Conventions, which suggest an element of reciprocity in the implementation of the conventions in wartime, and which have been reflected in later treaties.³⁹ As regards the practice of states in armed conflict, while simple notions of a right of reprisal have come under heavy pressure, it is hard to believe that the principle of reciprocity has entirely ceased to have residual value as one means of inducing compliance with the law.

Although reciprocity may still constitute one basis, however imperfect, for applying the laws of war, there is no serious suggestion in any legal writings that it could be accompanied by unequal application depending on an evaluation of the cause of each side under *jus ad bellum*. Indeed, reciprocity and unequal application

37 1960 Vienna Convention on the Law of Treaties, Article 60(5).

38 Rule 140 in Henckaerts and Doswald-Beck, above note 31, I, pp. 498–9. In the account of this and the preceding rule there is no exploration of reciprocity in observance of the conventions.

39 Including the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, Article 3(2).

do not fit well together: to have two separate bases for varying the application of the law would be a recipe for confusion. If, alternatively, the principle of reciprocity is as dead as the ICRC suggests, it is clear that what replaces it is a strong obligation on states to observe the same body of rules in all armed conflicts or occupations in which they are engaged, irrespective of the statements or actions of adversaries.

Belligerent reprisals

In theory, belligerent reprisals are a precise and well-defined means of responding to a serious problem. They are based on the proposition that certain specific acts that would otherwise be contrary to the law may be carried out by a belligerent with the stated purpose of compelling an opponent to desist from violations of the laws of war. The history of reprisals in modern war does not inspire confidence in this particular approach. On the contrary, it suggests that such departures from strict application of the law, even in response to a pattern of violations, are often open to misunderstanding and can lead to an escalation of hostilities and a general pattern of violations of the law.⁴⁰ This chequered history of reprisals has led to progressive restrictions on the right of belligerents to engage in them. In particular, 1977 Additional Protocol I contains important prohibitions on various types of reprisal. However, certain declarations and reservations made at ratification of Protocol I or accession thereto indicate that some states are concerned to keep open the possibility of reprisals, especially if an adversary makes serious and deliberate attacks against civilians and civilian objects.⁴¹ This concern may well be justified. However, the fact that the ancient institution of reprisals is not completely dead does not mean that there would be merit in introducing, through the idea of 'unequal application' of the laws of war, further possibilities of varying the application of the law on the ground of a claimed legal or moral distinction between adversaries.

Distinctions between different categories of people in the laws of war

Although the laws of war, as they have evolved over centuries, do not draw a distinction between belligerents based on the presumed morality of their respective causes, they do encompass numerous distinctions between different classes of people based on the nature of their relationship to the armed conflict and their right (or otherwise) to participate in hostilities. For example, particular legal

40 For a critical view of reprisals see Frits Kalshoven, *Belligerent Reprisals*, Sijthoff, Leyden, 1971.

41 The limitations on reprisals in 1977 Additional Protocol I are mainly in Articles 51–56. Certain states, when indicating adherence to the treaty, made reservations and declarations to these articles. That of the United Kingdom – statement 'm' in Roberts and Guelff, above note 13, p. 511 – is notably explicit on this point.

protections, duties and prohibitions apply to each of the following distinct categories of people:

- combatants entitled to prisoner-of-war status if captured
- civilians in occupied territory
- civilians in or near areas of combat
- medical personnel
- representatives of the ICRC
- mercenaries
- unlawful (or unprivileged) combatants
- persons suspected of war crimes (i.e. crimes under *jus in bello*)
- nationals of a state which is not at war with either of the belligerents
- personnel in UN operations other than enforcement operations
- UN forces when they are involved in armed hostilities

This tendency to identify different categories of individuals is fundamentally different from the approach of human rights law, which seeks to identify rights that pertain to all human beings, generally without distinctions being drawn. The laws-of-war emphasis on distinct categories is essential for the application of legal rules in warfare, for reasons that are obvious. For example, soldiers on active duty simply cannot have the same immunities as, say, Red Cross workers or civilians.

This capacity of the law to distinguish between different categories of people might be thought to suggest a capacity to distinguish between people on the basis of their status under *jus ad bellum*. There are many reasons, as indicated in the next section, why such variations in application of the law might be thought desirable.

Certain arguments for varying the application of the law in favour of particular parties

Naturally there are often pressures to apply the laws of war selectively, or even to accord particular privileges to one party or another, on account of the justice of the cause. There is even some practice that amounts to a claim for special rights under the law. Possible arguments for applying the law unequally as between the parties to an international armed conflict include:

- A state or alliance which is acting in self-defence following an initial act of aggression by the adversary should be entitled to take measures against that adversary that would not be lawful in other circumstances.
- Unequal combats, in which a weaker party faces a larger and more powerful adversary, often involve pressures to violate the rules, and sometimes give rise to claims that one side should be entitled to certain exemptions, or is not bound at all by *jus in bello*.
- Major powers, especially those with a worldwide series of military commitments, sometimes claim that equal application of certain rules, and submission

to supranational judicial procedures, would be detrimental to their status and to the efficient execution of their international roles.

- A UN-authorized military force, conducting an enforcement action, might be proclaimed to be immune from all hostile action, so that any attacks on it would constitute a war crime.
- UN peacekeeping operations have legal protection from attack, and might thus appear to be a case where the laws of war do already apply unequally.

All these arguments are serious, and illustrate only too clearly the range of pressures for unequal application of the law. They are considered in turn. The purpose of the very brief survey that follows is simply to outline each of these arguments and to give a rough indication of whether they have influenced the conduct of belligerents, and not to engage in appraisal or rebuttal.

State or alliance fighting a war in self-defence

The argument that an initial act of aggression is a crime of a nature to put one side in a war in a special legal category as regards application of *jus in bello* is just one example of the type of claim that can be made in support of the 'unequal application' approach. In the conduct of warfare it is often possible to detect an implicit claim that the adversary's violations (including in the original decision to resort to force) provide an excuse for extreme acts by one's own side that might otherwise be doubtful under *jus in bello*. The long history of such claims attests to the attraction of the idea of unequal application of the laws of war, but it also suggests that there are many dangers in such an approach, which is contrary to the existing law.

A possible example of a claim to special rights in war on account of (among other things) the opponent's initiation of war is in this statement made by President Truman in a broadcast to the American people three days after the bombing of Hiroshima on 6 August 1945:

Having found the bomb we have used it. We have used it against those who attacked us without warning at Pearl Harbor, against those who have starved and beaten and executed American prisoners of war, against those who have abandoned all pretense of obeying international laws of warfare. We have used it in order to shorten the agony of war, in order to save the lives of thousands and thousands of young Americans.

And we shall continue to use it until we completely destroy Japan's power to make war. Only a Japanese surrender will stop us.⁴²

Japan in fact surrendered five days later, on 14 August 1945. Whatever one thinks of the US atomic bombing of Hiroshima and Nagasaki, or of

42 'Radio report to the American people on the Potsdam Conference', 9 August 1945, *Public Papers of the Presidents of the United States: Harry S. Truman, 1945*, GPO, Washington DC, 1961, p. 212. This broadcast was on the day of the Nagasaki bombing.

President Truman's statements in justification, the case does suggest that there is already more than enough of a tendency to use the circumstances of how a conflict broke out as a justification for extreme acts in response. The question as to whether it is desirable to give formal legitimacy to that tendency must be asked.

Another version of the argument that the defensive side should be privileged is the idea that a party fighting a defensive war against invaders on its own territory should be allowed to engage in actions that might otherwise be prohibited. To some extent there is already provision for this in the laws of war – for example, the reference to the *levée en masse* in Article 2 of the 1899 and 1907 Hague Regulations was particularly sought by small states that feared attack by more powerful ones. Other outcomes of such thinking have included the proposition, which finds reflection in 1977 Additional Protocol I, that a party fighting defensively to oppose ongoing foreign control is entitled to hide among the population, being only required to put on uniforms or insignia immediately before engaging in acts of military resistance.

Unequal combat

Most military contests are unequal, with the inequalities assuming many forms. In some cases the inequalities are of such a character that there is a genuine question whether the laws of war are fully applicable anyway, while in other cases the applicability of the law is basically accepted, but there may be claims for unequal application of the law as regards particular issues. Here, the first form of unequal combat to be considered is that which includes an element of established government versus unlawful insurgency.

Many wars (including some international ones) encompass situations in which organized armed forces under government control are in combat against lightly armed irregular forces, often termed 'guerrillas' or 'terrorists'. In such situations forces representing governments frequently deny the right of their adversaries to participate in hostilities at all: rather, the insurgent forces are seen as criminals and outlaws. In asymmetric combat of this kind there are pressures on both sides to violate basic rules, or to regard them as not strictly applicable to the situation at hand.⁴³ Often the irregular forces have little interest in observing the law, partly because they appear to have no chance of being treated upon capture as prisoners of war, and partly because their organization and targeting both depend on some blurring of the crucial distinction between soldiers and civilians. For their part, and especially if they are poorly trained and led, the government forces involved in countering irregulars may be under pressures (such as the

43 Toni Pfanner, 'Asymmetrical warfare from the perspective of humanitarian law and humanitarian action', *International Review of the Red Cross*, No. 857 (2005), pp. 149–74. In the conclusion he states, 'International humanitarian law should not be overstretched. It cannot be extended to situations other than those it was intended to cover without giving wrong directives' (p. 173).

difficulty of distinguishing combatant from civilian) that lead to violations of basic rules.⁴⁴

If the conflict is a pure case of civil war, the application of the full range of the laws of war governing international armed conflict is likely to be called into question: governments of all political colours have historically opposed granting to rebels within their territories the same status and rights as the soldiers of a foreign state. The issue becomes more complex in situations such as the following types, all three of which are familiar features of our times: (i) the ‘internationalized civil war’ in which outside countries intervene on one or both sides in a civil war; (ii) a belligerent in an international war faces guerrilla opposition within territory it has occupied; or (iii) an international war is part of an overall international campaign against terrorism. In all three cases international armed conflict overlaps with a conflict against parties who are seen by their adversaries as not entitled to participate in hostilities. It is not surprising that in these circumstances there are pressures to apply the laws of war unequally.

Asymmetric warfare can also arise in the context of wars of a purely international character. The principle of equal application applies to such asymmetric wars, and has often been explicitly accepted by belligerents as applicable. For example, in asymmetric bombing campaigns from Iraq 1991 onwards, the United States has accepted that a laws-of-war framework applies. This is not necessarily a triumph for the principle of equal application. A key problem regarding the conformity of these US-led bombing campaigns to the laws of war concerns the notably broad US definition of ‘military objectives’, which has come to encompass the adversary regime’s sources of power.⁴⁵

In armed conflicts between sovereign states of conspicuously unequal capacities there is sometimes a particular kind of unequal application, or rather abuse, of the law. Some relatively less powerful states (as well as non-state bodies) have engaged in consistently unlawful operations against the more powerful adversary such as hostage-taking, co-location of their military objects with civilian objects, use of human shields, use of suicide bombers disguised as civilians, indiscriminate attacks, use of proxy forces to engage in unlawful operations while denying all responsibility for their actions and deliberate attacks on civilians. Such unlawful operations have been prevalent during the period of US military dominance since the end of the Cold War, and can be seen as a response to the US ability to fight war from the air with impunity and with a high degree of accuracy. In many cases, they are intended to lure the United States and its coalition partners into causing civilian damage and incurring international criticism: as such, they are part of what Charlie Dunlap of the US Air Force has called ‘lawfare’, or ‘the

44 See especially A. P. V. Rogers, ‘Unequal combat and the law of war’, *Yearbook of International Humanitarian Law*, Vol. 7 (2004), pp. 3–34. See especially the list of reasons why things go wrong, at pp. 33–4.

45 This issue is explored further in Adam Roberts, ‘Air power, accuracy, and the law of targeting: why no brave new world?’, in Richard B. Jaques (ed.), *Issues in International Law and Military Operations*, International Law Studies, Vol. 80, US Naval War College, Newport, Rhode Island, 2006, pp. 133–50.

strategy of using – or misusing – law as a substitute for traditional means to achieve an operational objective’.⁴⁶

In pursuing an approach to operations which violates basic rules of the laws of war, many parties do not attempt to make specific arguments showing why they should be exempted from an otherwise valid body of law. Often they simply assert their absolute right to take such action as they see fit, or even claim authority from a supreme deity. However, insofar as legal arguments can be inferred from the public statements of such parties, they appear to be based on a mixture of *jus ad bellum* and *jus in bello* considerations. The particular claim that a virtuous cause under *jus ad bellum* entitles belligerents to ignore aspects of *jus in bello* is as disturbing here as it is in other instances.

In some unequal combats, more modest and limited claims are made, or implied, that militarily weaker parties, because they cannot act in the same manner as their adversaries and cannot observe the law in the same way, are in some way exempted from certain obligations under the laws of war. Sometimes such claims are limited and specific to a tactical situation, and may be based on an underlying respect for the law. One example might be that a party lacking a safe rear area adjacent to its ongoing military operations, or even any permanent control over territory at all, might claim to be relieved of the obligation to keep POWs in camps that are not exposed to the fire of the combat zone.

Major powers question particular rules and procedures

Major powers have often had doubts about the equal application of the laws of war. Sometimes, of course, they have sought to influence the development of the law in their favour – as evidenced, for example, by the natural interest of major powers in the inter-war years in prohibiting certain forms of submarine warfare that threatened their control of the sea.⁴⁷ However, if major powers do not succeed in shaping the law in ways compatible with their interests, they sometimes seek a degree of ‘unequal application’ either by choosing not to become parties to certain treaties that are perceived as problematic, or by rejecting international procedures for implementing the laws of war. It is sobering to note that China, India, Russia and the United States are not parties to the 1997 Ottawa Convention on Anti-Personnel Mines, nor to the 1998 Rome Statute of the International Criminal Court. India and the United States are not parties to either of the 1977 Protocols additional to the Geneva Conventions.⁴⁸

46 Brig. Gen. Charles Dunlap, ‘Air and information operations: a perspective on the rise of “lawfare” in modern conflicts’, presentation prepared for the US Naval War College Conference on Current Issues in International Law and Military Operations, Newport RI, 25–27 June 2003. For a brief summary of his views on ‘lawfare’, see his chapter, ‘Legal issues in coalition warfare: a US perspective’, in Anthony M. Helm (ed.), *The Law of War in the 21st Century: Weaponry and the Use of Force*, International Law Studies, Vol. 82, US Naval War College, Newport, RI, 2006, at pp. 227–8.

47 See, e.g., the terms of the 1936 London *Procès-Verbal* on Submarine Warfare against Merchant Ships.

48 Information on states parties to these treaties from www.icrc.org/ihl (last visited 1 October 2008).

The United States is the best-known and most criticized of these cases of partial abstention from the current laws-of-war regime. Although it has taken action in 2008 to ratify five agreements on the laws of war,⁴⁹ it remains a non-party to certain key agreements. The United States refused to ratify 1977 Additional Protocol I, perceiving it (rightly or wrongly) as a ‘terrorist’s charter’, or (slightly more plausibly) as privileging participants in national liberation struggles. Despite refusing ratification of Protocol I, the United States indicated that it would observe those parts of this agreement that it regarded as reflecting customary international law, or as acceptable as a matter of policy; but since 2004 it has ceased to make this commitment.⁵⁰ As for the Ottawa landmine convention, the United States refused to become a party mainly because it continued to see a certain military utility in landmines, including those on the border between North and South Korea. It rejected the ICC Statute for a wide variety of reasons, including concern that members of the US forces, deployed in a wide range of situations globally, might be subjected to politically motivated investigations or prosecutions.⁵¹ At the same time, the United States has developed an approach to the conduct of war which concentrates on weakening the enemy’s government rather than its armed forces. This approach, which can be problematic vis-à-vis the laws of war, is discussed further below.⁵²

In addition, there is the familiar problem that the United States views the laws of war, including treaties to which the United States is a party, as of limited application in the ‘war on terror’, principally on the grounds that the terrorist movements which it is combating do not meet the criteria laid down in the laws of war for prisoner-of-war status. In this special version of the ‘unequal application’ proposition, the cause represented by al Qaeda is so deeply wrong that those deemed to be adherents of the movement should not benefit from the standard treatment for detainees and prisoners of war as outlined in the conventions on the laws of war – or even (in some interpretations) from the plain meaning of basic rules of universal application set out in the 1984 Convention on Torture.

The positions taken by the United States and other powers that seek in various ways to limit the full application of the law, or even to apply it unequally

49 In September 2008 the US Senate gave favourable advice and consent to US ratification of the following five agreements: 1954 Hague Cultural Property Convention, 2001 CCW amended Article 1 (expanded scope of application), 1980 CCW Protocol III (incendiary weapons), 1995 CCW Protocol IV (blinding laser weapons), and 2003 CCW Protocol V (explosive remnants of war). Information from www.senate.gov/pagelayout/legislative/one_item_and_teasers/trty_rtf.htm (last visited 1 October 2008). Acts of ratification with depositaries were expected to follow promptly.

50 Several US official publications indicated that the US viewed certain provisions of 1977 Protocol I as either legally binding as customary international law or acceptable practice although not legally binding. See, e.g., *Operational Law Handbook 2003*, US Army, International and Operational Law Department, Judge Advocate General’s School, Charlottesville, VA, ch. 2, p. 11. Subsequent editions of this handbook have not contained this statement.

51 US attempts to secure immunity for its forces from investigation and prosecution by the ICC have included UN Security Council resolutions mentioned below in note 54; and the pursuit of bilateral immunity agreements (often called ‘Article 98 agreements’) with individual states.

52 See below discussion of the problem of the ‘innocent soldier’, pp. 28–31.

in a particular conflict, contain many distinct strands, some stronger and more durable than others. As regards the specific question of what light US practice sheds on the ‘unequal application’ proposition, the answer has to be that it adds to the doubts about it. The two issues on which the United States has come closest to advocating ‘unequal application’ are evident in its attitude to detainees in the ‘war on terror’, and in its attitude to the International Criminal Court. In both of these matters, the US position is widely perceived internationally as hypocritical, with the United States advocating standards and procedures for others that it does not follow consistently or rigorously itself. On both these matters ‘unequal application’ contributed to a degree of US isolation even from some of its close allies.

UN-authorized forces in enforcement actions

The capacity of the United Nations to implement sanctions, to establish peace-keeping forces, and to authorize uses of force, raises complex questions about whether the laws of war (including the law of neutrality) apply in exactly the same manner to such actions as they do to states acting individually or in alliances. Some writers have sought to advance the radical proposition that forces acting under the authority of the United Nations, whether in enforcement or peacekeeping mode, should have a general immunity from attack.⁵³ On a more limited issue, the UN Security Council, citing among its reasons ‘that it is in the interests of international peace and security to facilitate Member States’ ability to contribute to operations established or authorized by the United Nations Security Council’, sought in 2002 and 2003 a general exemption of limited duration from investigation and prosecution by the International Criminal Court for personnel from a contributing state that is not a party to the Rome Statute who are taking part in any UN-established or authorized operation. This resolution, passed at US instigation, linked a *jus ad bellum* issue to a partial exemption from *jus in bello*, but the resolution did not imply that personnel in a UN operation (whether in peacekeeping or enforcement mode) were exempt from the substantive rules of the laws of war, only that the enforcement should be within national jurisdictions.⁵⁴

Although they sometimes merge in practice, the two basic modes of UN action by forces in the field – enforcement and peacekeeping – are conceptually distinct, especially as regards the application of the laws of war. Forces engaged in enforcement actions will be considered first, before the separate matter of UN peacekeepers.

53 See, e.g., Walter Gary Sharp, ‘Protecting the avatars of international peace and security’, *Duke Journal of International and Comparative Law*, Vol. 7 (1996), pp. 93–183. This article contained as an appendix (pp. 175–83) a draft additional protocol to the 1949 Geneva Conventions which would have provided that personnel in any operation authorized or mandated by the competent organ of the UN may in no circumstances be attacked.

54 SC Res. 1422 of 12 July 2002. Renewed by SC Res. 1487 of 12 June 2003. Not renewed in 2004 owing to the controversy over the Abu Ghraib scandal. Not renewed subsequently.

The application of the laws of war to forces fighting with UN authorization has many dimensions.⁵⁵ As indicated, one question that has attracted attention is whether forces fighting with UN authority for UN-proclaimed objectives should be granted immunity from attack. If the UN Security Council wished to support this position – or indeed to grant peacekeepers immunity – it could make the claim that under the UN Charter it has the powers to do so. Article 103 provides that states' obligations under the Charter shall prevail over their obligations under any other international agreement. The Council is well aware of this, and certain of its resolutions have explicitly given precedence to the provisions of the resolution concerned over any international agreement or contract that member states had entered into.⁵⁶ This might seem to be a legal basis, and an authoritative procedure, for varying the application of the laws of war.

Yet in practice neither the Security Council, nor major states leading coalitions under its authorization, have sought as a matter of general principle to apply the laws of war unequally in ongoing operations. This could have been because of respect for the *jus cogens* status of such basic rules as those in the Geneva Conventions, or because of the more practical consideration that troop-contributing states saw no advantage in casting any doubt on the application of the laws of war. Thus the general assumption has been that UN-authorized national or coalition armed forces should be bound by the laws of war in the same manner as their adversaries. Examples of explicit recognition of the equal application principle include:

- *The US-led coalition in the Korean War, 1950–53.* In 1951 the US-led UN Command in Korea instructed all forces under it to observe the provisions of all four 1949 Geneva Conventions, even if participants had not yet ratified them.
- *The US-led forces in the 1991 Gulf War.* Statements from the US leadership of the coalition reflected the explicit assumption that the laws of war applied to coalition operations.
- *The US-led 'multinational force' in Iraq following the 2003 invasion.* Security Council Resolution 1546 of 8 June 2004 explicitly called on all forces in Iraq 'to act in accordance with international law, including obligations under international humanitarian law'.

While the equal application principle is clear from such cases, there have been some variations. Thus in respect of the occupation of Iraq under the Coalition Provisional Authority, a Security Council resolution of May 2003 appeared to relieve certain states of the responsibilities, and stigma, of occupying powers when it indicated that 'other States that are not occupying powers are working now or in the future may work under the Authority'; and the same resolution

55 For a useful exploration see Christopher Greenwood, 'International humanitarian law and united nations military operations', *Yearbook of International Humanitarian Law*, Vol. 1 (1998), pp. 3–34.

56 See, e.g., SC Res. 757 of 30 May 1992, imposing economic sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro), para. 11.

went on to proclaim certain goals for the occupation that went beyond the confines of the 1907 Hague Regulations and the Fourth Geneva Convention (protection of civilians) of 1949.⁵⁷ These variations, while reflecting the exigencies of a particular situation and the imperious nature of the US transformative vision for Iraq, are open to interpretation as favouring one party against another. However, it is significant that this rare case of ‘unequal application’ occurred during an occupation rather than an armed conflict as such, and at a time when opposition to the occupation of Iraq had not yet coalesced into a new phase of hostilities.

Some Security Council resolutions authorizing particular uses of force have undoubtedly involved a degree of discrimination against one side in an ongoing armed conflict in matters relating to its use of force on the battlefield. In respect of the war in Bosnia in 1992–5, for example, several UN measures relating to the authorizations of military actions by NATO and the United Nations Protection Force (UNPROFOR) also prohibited certain military acts by the Bosnian Serbs and by their co-belligerents in the Yugoslav armed forces. One such case was the ban on military flights that was established in October 1992.⁵⁸ A subsequent resolution in March 1993 extending the ban and providing for enforcement measures (which were to be carried out through NATO) contained at least the implicit message that the Serb forces should not attack NATO aircraft carrying out their mandate to ensure compliance with the ban, but at the same time it required any measures taken by NATO to be ‘proportionate to the specific circumstances and the nature of the flights’.⁵⁹ Similarly, the resolutions in 1993 establishing the six ‘safe areas’ in Bosnia prohibited armed attacks or any other hostile acts against those areas.⁶⁰ While all this might seem to be applying rules in a partial way, with a main aim being to restrain Serb military activities, it was not asserted that Serb military actions in violation of these resolutions would necessarily constitute war crimes. When, in May 1993, the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) was adopted by the UN Security Council, its specific purpose was to address ‘serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991’, not to charge people with ignoring or undermining UN Security Council resolutions, nor indeed for violations of *jus ad bellum*. The ICTY Statute’s list of crimes was soundly based in long-established law under *jus in bello*, and it did not at any point assert that violations of the terms of UN Security Council

57 SC Res. 1483 of 22 May 2003, preamble and para. 8. For a discussion see Marten Zwanenberg, ‘Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation’, *International Review of the Red Cross*, No. 854 (2004), pp. 745–68.

58 SC Res. 781 of 9 October 1992, establishing the ban on military flights over Bosnia. The ban did not apply to UNPROFOR flights or to other flights in support of UN operations.

59 SC Res. 816 of 31 March 1993, extending the ban to encompass helicopters and authorizing members states to use ‘all necessary measures’ to enforce the ban.

60 SC Res. 819 of 16 April 1993, establishing Srebrenica as a ‘safe area’; SC Res. 824 of 6 May 1993, extending the concept of ‘safe areas’ to Sarajevo, Tuzla, Zepa, Gorazde and Bihac; and SC Res. 836 of 4 June 1993, providing for enforcement by UNPROFOR and by member states (i.e. NATO).

resolutions constituted a crime *per se*.⁶¹ The Statute applied to all parties taking military action in the former Yugoslavia, and could potentially apply to actions of outside forces, including NATO. In general, these actions in relation to the war in Bosnia suggest a strong concern to maintain the principle of equal application of the laws of war, even at the same time as leaning towards one side in the war.

UN peacekeeping forces

Unlike armed forces authorized to take military action to achieve UN purposes, UN peacekeeping forces have generally been considered to have immunity from attack. They are not participants in hostilities: indeed, they are typically deployed in a post-conflict situation. However, in the early 1990s UN peacekeeping forces were often deployed, or their mission was continued, in the midst of ongoing armed conflict. There were repeated severe challenges to the special status of UN peacekeeping forces. The principle of their immunity from attack was openly flouted in certain conflicts, UN peacekeepers being attacked and abducted in Angola, Rwanda, Somalia and Bosnia. This led to new lawmaking, resulting in the 1994 UN Convention on the Safety of United Nations and Associated Personnel. Not a document of the laws of war as such, it confirms the principle that personnel on certain UN operations shall have immunity from attack; and it criminalizes attacks on them. In all the treaties with a bearing on the conduct of war, this is the one which might seem to come closest to privileging one particular group of soldiers over others. However, it does so only to a limited extent, because it specifically provides:

This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.⁶²

This statement reflects the long-standing principle that UN forces engaged in armed conflict are subject to the laws of war in the normal way. Further confirmation of this came in 1999 with the UN Secretary-General's 'Bulletin on observance by United Nations forces of international humanitarian law'.⁶³

Thus the application of the Convention on the Safety of UN Personnel is primarily to UN peacekeeping forces. Even in that regard, in the light of events since its text was concluded in 1994 and entered into force in 1999, its value

61 Statute of the International Criminal Tribunal for the former Yugoslavia, adopted by SC Res. 827 of 25 May 1993. In the drafting process there was no suggestion that violations of Security Council resolutions *per se* might form part of the subject matter of the Tribunal.

62 1994 UN Convention on the Safety of United Nations and Associated Personnel, Article 2(2). The provisions of this convention are reflected in the 1998 Rome Statute of the International Criminal Court, Article 8(2)(b)(iii) and (e)(iii).

63 Promulgated in UN Doc. ST/SGB/1999/13 of 6 August 1999. Reprinted in Roberts and Guelff, above note 13, pp. 725–30.

appears uncertain. There may have been an effect in helping to reduce the number of fatalities among UN peacekeepers, but it is hard to prove. The high casualty figures during 1993–5 were largely due to the untypical situation of maintaining UN peacekeeping personnel in the midst of ongoing conflicts in Somalia and Bosnia. Fatalities decreased in 1996–9 as the UN involvements in certain other ongoing conflicts were wound down. However, in the period 2004–7, following an increase in UN peacekeeping commitments, there was an increase in fatalities, although not to quite the level of 1993–5.⁶⁴ While all these figures must be viewed with caution, they do raise a question about the effectiveness of the 1994 Convention; they also raise a question about the value of legal rules seeking to privilege a particular group of soldiers.⁶⁵

The difficulty of agreeing which side is more justified in its resort to force

When war is raging, it has always been difficult to secure agreement among the belligerent parties as to which side is the more legitimate under *jus ad bellum*. Even getting agreement among third parties and international bodies has been remarkably difficult. Situations in which a clear and widely accepted distinction can be drawn between the just and the unjust users of force are rare. This problem remains difficult today, despite the existence of the UN Security Council as a major body charged with making determinations about threats to the peace and breaches of the peace. The following two considerations illustrate some of the hazards in reaching determinations about the lawfulness of uses of force.

The first is essentially factual, and concerns the nature of wars. Their causes can seldom be identified in simple terms of right versus wrong. A war which begins with a plainly wrong act, such as aggression out of the blue against a recognized independent state, or a wilful act of violence which is self-evidently contrary to an international treaty regime, is a rarity – as are military responses that are free of taint in one form or another. Wars much more commonly begin with deep fears and grievances on both sides, understandable but clashing interests, conflicting understandings of key events and the responsibility for them, and rival complaints about violations of international law by the adversary. They may begin as civil wars and then become internationalized. On both sides there may be amalgams of high moral purposes and more mundane motives.

The second consideration is legal. There is a notable lack of reliable objective standards as to what constitutes the crime of aggression. The record of attempts to establish such standards is not encouraging. In the League of Nations

64 See detailed statistics in 'UN peacekeeping fatalities by year and incident type', available at www.un.org/Depts/dpko/fatalities (last visited 3 September 2008).

65 For a critical general survey of the UN Security Council's involvement in a range of matters relating to the laws of war see Andréa Viotti, 'In search of symbiosis: the Security Council in the humanitarian domain', *International Review of the Red Cross*, No. 865 (2007), pp. 131–53.

in the inter-war years, the efforts to define aggression encountered numerous difficulties. At the International Military Tribunal at Nuremberg in 1945–6, in determinations of guilt and sentencing there were more difficulties regarding the charges of aggression or ‘crimes against peace’ (i.e., crimes concerning *jus ad bellum*) than there were regarding the charges of ‘war crimes’ and ‘crimes against humanity’ (i.e., crimes concerning *jus in bello*).⁶⁶ The adoption in 1945 of the United Nations Charter, with its recognition of self-defence as the main justification for the use of force by states, strengthened the international legal basis for determining when the use of force is lawful, but the application of its rules to certain types of situation (such as preventive uses of force, assistance to liberation movements, and humanitarian intervention) has been problematic. Indeed, since 1945 the United Nations has likewise run into numerous difficulties in its many attempts to define aggression. In 1974 it concluded such a definition only in the modest form of a General Assembly resolution rather than a treaty.⁶⁷ This pattern has continued. As noted, the 1993 ICTY Statute did not include aggression within the Yugoslav Tribunal’s subject matter. In contrast, the 1998 Rome Statute of the International Criminal Court leaves open the possibility of a definition of aggression to be encompassed within the Statute seven years after its entry into force (which was on 1 July 2002).⁶⁸ However, there is no chance at all of this being achieved. The best instrument that exists for determining whether a particular use of force is illegal remains the UN Security Council. Yet this body only rarely interprets the actions of parties to conflicts as being generally ‘illegal’ on one side and ‘legal’ on the other in a *jus ad bellum* sense; and even when it has done so, as it essentially did over Korea in 1950 and Kuwait in 1990, it has not called for unequal application of the laws of war.

These two types of consideration, factual and legal, point to the inherent ambiguity or arguability of most decisions to use force. They help to explain why international trials of political and military leaders regarding responsibility for the initiation of war have been extremely rare. Such trials of subordinates have been even rarer: the international legal liability of the ordinary soldier for crimes under *jus ad bellum* is not clear. In these circumstances, the idea that there could be a distinctive *jus in bello* regime which varied according to the supposedly agreed *jus ad bellum* nature of a conflict resembles the proverbial house built on shifting sands.

The ‘innocent soldier’ in the law and conduct of war

Does the argument for the equal application of the law mean that nothing can be done about the innocent soldier? After all, soldiers may be innocent not only

66 For findings of guilt, sentences and dissenting opinion at Nuremberg on 1 October 1946, see *The Trial of German Major War Criminals: Proceedings of the IMT at Nuremberg*, Part 22, pp. 485–547.

67 GA Res. 3314 (XXIX) of 14 December 1974, which includes ‘Annex: Definition of Aggression’.

68 1998 Rome Statute of the International Criminal Court, Articles 5(2), 121 and 123.

because they are on the side considered to be acting more in conformity with *jus ad bellum*, but also because they are fighting (even if on the ‘wrong’ side) in a war they did not create, and into which they were dragged more or less reluctantly by their rulers. This view, recognized and respected at least since the time of Jean-Jacques Rousseau, has informed the development of the laws of war. Yet there is no room for complacency, as achievements in alleviating the lot of the soldier have been limited.

It might be argued that the problem of the ‘innocent soldier’ is a matter of a fundamental human right of each human being, namely the right to life. It could thus be seen as a problem to be addressed by international human rights law. The human rights stream of law merges with the laws of war at many points, and is often relevant to situations of armed conflict and military occupation.⁶⁹ However, in relations between belligerents in an armed conflict, which is the crucial issue at stake here, it is not self-evident that human rights law – designed first and foremost to govern relations between citizens and their own government – supplants the laws of war, which remain the main point of reference.

The laws of war can easily seem to be rigid on the principle that the soldier is a legitimate target in war. The massive killings of soldiers on both sides in the First World War were not self-evidently violations of the then-existing laws of war – an uncomfortable fact which may help to explain why, in the inter-war years, the laws of war were viewed as of limited significance. The conscripts on both sides in the hideous carnage of the First World War, or the Iraqi troops in occupied Kuwait in 1990–1, can indeed be deemed innocent in this sense, and worthy of protection.

The laws of war have never been blind to the claims of soldiers. The 1864 Geneva Convention, a pioneering treaty in this field, stated, ‘Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for.’⁷⁰ Or, as the 1868 St Petersburg Declaration renouncing the use of certain explosive projectiles put it in its preambular clauses,

Considering:

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

69 For a recent survey see Adam Roberts, ‘Human rights obligations of external military forces’, in *The Rule of Law in Peace Operations: ‘Recueils’ of the International Society for Military Law and the Law of War, 17th International Congress, Scheveningen, 16–21 May 2006*, ISMLLW, Brussels, 2006 (i.e. February 2007), pp. 429–49.

70 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Article 6.

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; ...⁷¹

The prohibitions of superfluous injury and unnecessary suffering are reflected in several subsequent agreements, including the 1980 UN Convention on Conventional Weapons,⁷² and the 1998 Rome Statute of the International Criminal Court.⁷³ In addition, of course, the laws of war make extensive provision for the protection of soldiers who are injured, who surrender, or who are taken prisoner. The St Petersburg acceptance of the purpose of disabling ‘the greatest possible number of men’ remains problematic, and is discussed further below.

Some of the most important means of reducing the costs of war borne by essentially innocent soldiers may derive, not so much from observance of formal legal provisions, but rather from other approaches to, or changes in, the conduct of war. In particular, three approaches – all of them involving moral ambiguity – have been evident in the conduct of certain operations in the post-Cold War period, as follows.

Force protection

Belligerents can seek to protect their own forces from the effects of war by taking a wide range of measures. Among the means to this end are: provision of body armour, avoidance of close contact with the enemy, and use of remote vehicles and remotely delivered weapons. Extraordinary results may be achieved by such measures, as was indicated by the almost casualty-free (for the United States) waging of war by the US Air Force over Kosovo in 1999 and Afghanistan in 2001. Such measures are in principle consistent with the laws of war. However, in practice there can be tensions. Acts of force protection, especially as one part of campaigns against adversaries who locate themselves among the people, often involve a risk of killing civilians – for example, in a school close to an anti-aircraft position, or in a crowd from which one shot may have been fired. An armed force perceived as ultra-protective of its own personnel, but willing to risk the lives of civilians as well as the adversary’s soldiers, is liable to be viewed with suspicion and even hatred. Force protection is no cure-all, and in some circumstances the safety of forces may be achieved as much by their mixing with the population (even at some risk) as by the use of firepower. However, force protection remains one important means of reducing risks to soldiers.

71 1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, preamble.

72 1980 UN 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, and its Protocols.

73 1998 Rome Statute of the International Criminal Court, Article 8(2)(b)(xx).

Avoiding direct attacks on enemy personnel

Is it really inevitable that belligerents should have as a purpose ‘to disable the greatest possible number of men’? Belligerents can take numerous actions which, while allowing for effective prosecution of a war, may save members of the adversary’s armed forces from its effects. Three possible means of achieving this can be identified. The first is that aspect of the strategy of indirect approach which emphasizes that the aim of war is not the defeat of the enemy in battle, but rather the use of manoeuvre and threat in such a way as to compel the adversary to surrender.⁷⁴ The second approach to the problem of saving enemy personnel is the credible announcement that all those who surrender will have humane treatment in accordance with the Geneva Conventions, thus possibly increasing the numbers willing to give themselves up before being attacked. The third approach involves limiting attacks, wherever possible, to enemy equipment as distinct from enemy personnel. For example, in the 1991 Gulf War the US-led coalition went to exceptional lengths, mainly through leaflets, to inform Iraqi soldiers that they would not be targets if they got out of their military vehicles and stayed away from them – a campaign that appears to have had considerable effect.⁷⁵ Actions such as those of the types indicated here are completely consistent with the laws of war, and may significantly reduce the numbers of enemy soldiers who die in a campaign.

Concentrating on weakening the enemy’s government rather than armed forces

Sometimes in war the attempt is made to target the enemy regime and its apparatus of government power as distinct from its armed forces. The operations of the US armed forces in the 1999 war over Kosovo and in the 2001 war in Afghanistan showed evidence of thinking along these lines. This approach can have the effect of reducing the adversary’s military casualties. However, it is often problematic vis-à-vis the laws of war, mainly because it may involve attacks on targets widely perceived to be civilian rather than military.⁷⁶

In short, a great deal has been done in the attempt to alleviate the fate of the innocent soldier, and no doubt more could be done. Most of the efforts in this direction (with the possible exception of certain attacks on government power) are either contained in, or are at least consistent with, the laws of war. It must be

74 For the classic exposition see B. H. Liddell Hart, *Strategy: The Indirect Approach*, rev. edn, Faber, London, 1967.

75 For details see Adam Roberts, ‘The laws of war in the 1990–91 Gulf conflict’, *International Security*, Vol. 18 (Winter 1993/94), pp. 170–2. For a wide range of propaganda leaflets, including those used in the 1991 Gulf War to encourage Iraqis to walk away from their military vehicles, see the Aerial Propaganda Leaflet Database of the website of the PsyWar Society, available at www.psywar.org/leaflets.php (last visited 3 September 2008).

76 For a critical evaluation of the US strategy of bringing the effects of war home to enemy civilians, see Ward Thomas, ‘Victory by duress: civilian infrastructure as a target in air campaigns’, *Security Studies*, Vol. 15 (January–March 2006), pp. 1–33.

doubtful whether unequal application of the law would do more to protect soldiers.

Conclusion: why the equal application principle should be respected

The principle of equal application of the laws of war, irrespective of the *jus ad bellum* aspects of a particular conflict, was not always accepted, but emerged and gained strength over time because other approaches proved more problematic. It is closely associated with the idea that the soldiers involved in an international armed conflict have a right to participate in hostilities. The essential foundation of the principle of equal application, namely the separation of *jus in bello* from *jus ad bellum*, faces serious challenges from several directions, and there have been some modifications of it in practice, especially as regards UN operations. Yet a principle may be important precisely because there are significant challenges to it, some of which may need to be accommodated, others rejected.

Equal application is not the same as universal application. The continued effectiveness of the principle of equal application depends in part on maintaining the distinction between international armed conflict (in which the principle is most clearly relevant) and other kinds of conflict (in some of which the principle is difficult to apply). Yet in certain situations that differ in some respects from the pure case of international armed conflict between sovereign states there can be persuasive reasons for maintaining the principle of equal application – as the UN Security Council indicated regarding the wars in Bosnia in 1992 and Afghanistan in 1998.

The most fundamental weakness of the ‘unequal application’ proposition derives from the fact that, in the midst of war, it is always difficult to secure agreement on which side exemplifies justice. In addition, proposals for ‘unequal application’ often stem from a misunderstanding of the nature of the existing laws of war. Such proposals have not been accompanied by any detailed outline of what any revision of the existing law would look like, nor have they shown recognition of the fact that when the laws of war have been developed or interpreted in a way that can be perceived as privileging one side in a conflict because of the nature of its cause, the other side has often shown a tendency to ignore or downgrade the law. At a time when *jus in bello* is under considerable pressure, not least from both sides (in different ways) in the ‘war on terror’, a philosophical-cum-legal approach that provides some basis for relativizing the application of the law on account of the alleged justice of the cause could only too easily be misused, for example to minimize still further the already attenuated body of rules applied to detainees.

Nor is the ‘unequal application’ proposition likely to address effectively the undoubtedly serious issue of what to do about the problem of the ‘innocent soldier’. Attempts to privilege one belligerent over another may merely add an additional layer of confusion to an already difficult situation. A better approach, soundly based in existing law and practice, is to focus on general immunities for

certain types of person; on provisions aimed at preventing superfluous injury and unnecessary suffering; and on other strategies and policy measures, including in matters relating to force protection and targeting, aimed at limiting the impact of war on soldiers.

The final problem of the ‘unequal application’ proposition is practical. So far as the laws of war are concerned, those who have the right to participate in hostilities need to be trained to observe a single set of rules. If their training is on the basis that the application of the rules, by their adversaries and by themselves, may vary in every mission, the law will risk losing not only its moral standing but also its practical value as a single, widely respected grab-bag of rules that are inherent in the idea of military professionalism.

Chapter 9

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?

Marco Sassòli*

One of the qualities that make Yoram Dinstein such a unique scholar is that he is one of the very few who are genuine experts in both *ius ad bellum* (the rules on the legality of the use of force) and *ius in bello* (the rules on how force may be used, which comprise International Humanitarian Law (IHL)). He has never tried to mix the two branches or even to nuance the absolute separation between them. On the contrary, he has insisted on strict separation in many of his writings.¹ As far as I know, none of his numerous publications is even dedicated to both branches: they always either deal with *ius ad bellum* or *ius in bello*. It may therefore be appropriate in this contribution in his honour to explore this separation – in my view crucial for the survival of IHL and for the effective protection of war victims – its reasons and consequences, the threats it is subject to, and the possible tendencies which would make it pointless.²

* I would like to thank my research assistants, Ms Lindsey Cameron, Ms Marie-Hélène Proulx and Mr Éric Corthay, for their help in finding references for and revising this text.

1 Yoram Dinstein, *War, Aggression and Self-Defence*, 3rd ed., (Cambridge: Cambridge Univ. Press, 2001) at 140–147; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge Univ. Press, 2004) at 4–5; Yoram Dinstein, “Symposium: The Rule of Law in Conflict and Post-Conflict Situations: Comments on War” (2004) 27 *Harv. J.L. & Pub. Pol’y* 877 at 881–882; Yoram Dinstein, “Jus in Bello Issues Arising in the Hostilities in Iraq in 2003” 34 *Israel Yearbook on Human Rights* (2004) at 2.

2 See generally on this distinction, François Bugnion, “Guerre juste, guerre d’agression et droit international humanitaire” (2002) 847 *Int’l Rev. Red Cross* 523–546 (also available online in English: <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/review?OpenDocument>); Terry Gill, “The Nuclear Weapons Advisory Opinion of the International Court of Justice and the Fundamental Distinction between the *Ius ad Bellum* and the *Ius in Bello*” (1999) 12 *Leiden J. Int’l Law* 613–624; Christopher Greenwood, “Self-Defence and the Conduct of International Armed Conflict” in Yoram Dinstein, ed., *International Law at a Time of Perplexity* (Dordrecht: Martinus Nijhoff Publishers, 1988) at 273–288; Christopher Greenwood, “The Relationship Between *Ius ad Bellum* and *Ius in Bello*” (1983) 9 *Review of International Studies* at 221–234. Peter Kooijmans, “Is there a Change in the *Ius ad Bellum* and, if so, What Does

I Definitions

The *ius ad bellum* defines when it is lawful to use force in international relations, *i.e.*, to resort to armed conflict. At least since the prohibition of the use of force was enshrined in Article 2 (4) of the UN Charter, it could be more appropriately referred to as *ius contra bellum*. As Yoram Dinstein has so brilliantly explained in every detail, the use of force between States is prohibited by a peremptory rule of international law. There are exceptions, in particular individual and collective self-defence, enforcement measures decided or approved by the UN Security Council, probably national liberation wars and arguably other cases. However, those exceptions in which a *ius ad bellum* (*i.e.*, a right to wage war) exists may only justify the use of force by one party. The enemy has necessarily violated the *ius contra bellum*. States are never equal before the *ius ad bellum* and if the *ius contra bellum* were respected, international armed conflicts would no longer exist.

In this article, I will use a broad concept of *ius ad bellum*, one which includes not only the rules of the UN Charter on the use of force, but also all rules of international law which directly or indirectly justify the use of force in international relations.

The *ius in bello* defines what is legal in an armed conflict. International Humanitarian Law is its most important branch, equally commented upon in all its aspects by Yoram Dinstein. It limits the use of violence in armed conflicts by protecting those who do not or no longer directly participate in hostilities and limiting the violence to the amount necessary to achieve the aim of the conflict, which under *ius in bello* can, whether that aim is lawful or unlawful under *ius ad bellum*, only be to weaken the military potential of the enemy. Today, this branch of international law is largely codified in the 1949 Geneva Conventions and the

it Mean for the *Ius in Bello*?" in Liesbeth Lijnzaad, Johanna van Sambeek and Bahia Tahzib-Lie, eds., *Making the Voice of Humanity Heard* (Leiden/Boston: Martinus Nijhoff Publishers, 2004) at 225-237; Hersch Lauterpacht, "Rules of Warfare in An Unlawful War" in George A. Lipsky, ed., *Law and Politics in the World Community* (Berkeley: Univ. Calif. Press, 1953) at 89-113; Melanie Macdonagh, "Can there be such a Thing as a Just War?" (2000) 4 *International Journal of Human Rights* at 289-294; Henri Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre* (Paris: Pedone, 1970); Rein Müllerson, "On the Relationship Between *Ius ad Bellum* and *Ius in Bello* in the General Assembly Advisory Opinion" in Laurence Boisson de Chazournes, ed., *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: CUP, 1999) at 267-274; Georges Scelle, "Quelques réflexions sur l'abolition de la compétence de la guerre" (1954) *RGDIP* at 5-22. Michael Walzer, *Just and Unjust Wars, A Moral Argument with Historical Illustrations*, 3rd ed., (New York: Basic Books, 2000); Quincy Wright, "The Outlawry of War and the Law of War" (1953) 47 *AJIL* at 365-376.

1977 Additional Protocols.³ In a recent study, the ICRC further identified a large body of customary rules of IHL applicable to both international and non-international armed conflicts.⁴

II Terminology and History

While the Latin terms feign ancient origins, and while war is one of the earliest subjects dealt with by international law, the two terms discussed in this article were born in the early twentieth century and used regularly only since the Second World War⁵ – interestingly enough precisely when *ius* (in the sense of a right) *ad bellum* no longer existed. The literal German equivalent of the two terms “Recht zum Kriege” and “Recht im Kriege” had however already been employed by Immanuel Kant, who also stressed the necessity of distinguishing the two branches.⁶

Earlier, at the time of Grotius and the classical just war theory, a *bellum iustum* (but only such a war) was subject to *temperamenta belli* (restraints on the waging of war, which were considered by Grotius not to be legal obligations). To be just, a war had to comply with both, in today’s terminology, *ius ad bellum* and *ius in bello*.⁷ The enemy, waging war for an unjust cause, was not subject to such *temperamenta belli*. Yet, as Vattel noted, both sides, even in a civil war, often claimed in good faith to be right; therefore, international law had to apply pending determination of who is actually right.⁸

3 Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31; Geneva Convention [II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85; Geneva Convention [III] relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135; Geneva Convention [IV] relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, 1125 U.N.T.S. 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, 1125 U.N.T.S. 609.

4 Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law* (Cambridge: Cambridge Univ. Press, 2005).

5 Robert Kolb, “Origin of the Twin Terms *Ius ad Bellum* – *Ius in Bello*” (1997) 320 *Int’l Rev. Red Cross* at 553–562.

6 Immanuel Kant, *The Philosophy of Law, An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, trans. W. Hastie (Edinburgh, 1887) at paras. 53 and 57.

7 See Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris: PUF, 1983) at 597–604.

8 See Bugnion, “Guerre juste”, *supra* note 2 at 525–526.

When natural law concepts were largely abandoned, war became a simple fact in international relations. It was only logical that international law, the *ius durante bello*, governed this aspect of international relations. Interestingly enough, only when the prohibition of the use of force appeared did the terms *ius ad bellum* and *ius in bello* appear.⁹ The latter had to necessarily be distinguished from the former, for it applied to a situation which should not exist under the former body of law. As will be discussed, one day, when the international community is regularly able and willing to live up to (or with) the rule of international law and to regularly and impartially enforce *ius ad bellum*, we may return to concepts of *temperamenta belli*.

III Reasons for the Separation

Although international armed conflicts are prohibited, they still occur. It is today recognized that international law must not only counter this reality, but also regulate it through IHL, which has to apply equally to both sides: the one resorting lawfully to the use of force and the one violating the *ius contra bellum*. In its Preamble, Protocol I clarifies both aspects. First, while IHL applies to violations of the *ius ad bellum*, it does not justify them: “The High Contracting Parties [...] [e]xpressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations”. Second, IHL must be respected by all sides, independent of who is right or wrong under *ius ad bellum*: “[r]eaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.” Post World-War II trials recognized that Germans accused of war crimes could rely on all the rights IHL provides to a lawful belligerent and could expect that the inhabitants of territories they occupied in violation of the *ius ad bellum* would comply with their own obligations under *ius in bello*.¹⁰

Several reasons underlie this separation, each of which illustrates the controversies surrounding it. First, one may consider it a mere question of logic. Once the primary rules prohibiting the use of force (*i.e.* the *ius ad bellum*) have been violated, the subsidiary rules of *ius in bello* must apply, as they are foreseen

9 See Kolb, *supra* note 5 at 561–562.

10 See the US Military Tribunal at Nuremberg in the cases of *Wilhelm List et al.* (section 3 (v)) 8 July 1947 – 19 February 1948, *Law Reports of Trials of War Criminals*, vol. VIII (The United Nations War Crimes Commission) at 34–76, and *In re Altstötter and Others* (The Justice Trial), *AD* 1947 at 278. See for the contrary view B. D. Meltzer, “A Note on Some Aspects of the Nuremberg Debate” (1946–7) 14 *U.C.L.R.* 455 at 461 and F. De Menthon, “Opening Address”, 5 *I.M.T.* 98 at 387.

precisely for situations in which the primary rules have been violated. They must perforce apply independently. This premise was not always uncontroversial. Some have objected to it, on the level of legal logic, based on the general principle *ex iniuria ius non oritur*, whereby he who acts contrary to the law cannot acquire rights as a result of his transgression.¹¹ In the main, however, IHL cannot be seen as providing rights to States, but rather as setting forth objective rules of behaviour binding them for the benefit of individuals affected by war. In addition, it is impossible to separate rights from obligations in IHL.¹²

From a more teleological point of view, in 1949 the International Law Commission refused to engage in codification of the laws of war because “public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.”¹³ Indeed, a national legislator adopting rules on how drivers should behave when driving in the prohibited direction on a one-way road would be criticized for undermining the main rule. One may reply that if the direction to be travelled on a one-way road was often controversial, subsidiary rules might help the avoidance of many accidents. This is precisely the approach of IHL. In many parts of the public, certain scepticism persists towards IHL on the ground that it arguably diverts attention from the main aim: to avoid wars. Even such an eminent IHL expert as Theodor Meron writes, after explaining the separation between *ius ad bellum* and *ius in bello*, that “it also offers an easy way out to those satisfied with the present situation. Ironically, making the war more humane enhances its acceptability and might even prolong it.”¹⁴ If this were true, one should seriously rethink the justification for IHL. I would simply respond that the premise is false. I am convinced that no politician, military leader or soldier has ever waged war because he or she trusted that IHL will be respected, thereby limiting the risks of battle. First, even a war in which IHL is perfectly respected causes unpredictable human suffering. Second, reality unfortunately shows that no belligerent can confidently count on the respect of IHL.

Humanitarian reasons for the separation are even more compelling. War victims need as much protection against the belligerent fighting in conformity with the *ius ad bellum* as against a belligerent who violated *ius contra bellum*. They are not responsible for “their” State’s violation of international law (*i.e.*, *ius ad bellum*) and they require the same protection regardless of whether they are on

11 See Hersch Lauterpacht, “The Limits of the Operation of the Law of War” (1953) 30 *B.Y.B.I.L.* 206 at 212 (who rebuts himself this thesis). For a detailed rebuttal, see Bugnion, “Guerre juste”, *supra* note 2 at 529–533.

12 Bugnion, *ibid.* at 536–537.

13 See (1949) *Yearbook of the International Law Commission* at 281 (A/CN.4/SER. A/1949).

14 Theodor Meron, “The Humanization of Humanitarian Law” (2000) 94 *AJIL* 239 at 241.

the “right” or on the “wrong” side”. Conceptually, this assertion may be justified by the fact that *ius in bello* confers rights (and imposes duties) not only on the belligerent States but also on human beings.¹⁵ A right afforded by international law to an individual, such as the right of a combatant to be treated in a humane way when captured by the enemy, is not rescinded just because his State has acted in contravention of international law.¹⁶

The humanitarian consideration is coupled with a very practical one. Most belligerents and those who fight for them are convinced their cause is just. Seldom does any binding third-party decision on which side violated *ius ad bellum* exist during the conflict. Even if it does, the belligerent designated as the aggressor will disagree. During a conflict, belligerents never agree on which party violated *ius ad bellum*, e.g. on which side is the aggressor, but IHL nevertheless has to apply during the conflict. It therefore only has a chance of being respected if it applies independently of the violation of *ius ad bellum* and if both sides apply the same rules.¹⁷ Otherwise, “[e]ach of the belligerents would consider its adversary to be the aggressor and take advantage of this determination to disregard the rules imposed by the law of war. Here too, the floodgates would be left open for a surge of unchecked violence.”¹⁸

IV Consequences of the Distinction

A The Equality of Belligerents before International Humanitarian Law

Under *ius ad bellum*, the parties to an international armed conflict are never equal because one side has necessarily violated that law, although it is often controversial which side has done so. Conversely, under *ius in bello*, both sides have to always comply with exactly the same rules. Many scholars rightly see this as “absolute dogma”.¹⁹ It means that while aggression is unlawful, the first shot fired by a member of the aggressor’s armed forces upon a soldier of the attacked State is as lawful under *ius in bello* – and governed by the identical restraints – as the latter’s shooting back in order to defend his country. In other words, “[t]he individual military action undertaken within the framework of the conflict can only

15 See Yoram Dinstein, “The International Law of Inter-State Wars and Human Rights” (1977) 7 *Israel Yearbook on Human Rights* 139 at 147–52.

16 See Wright, “The Outlawry of War” *supra* note 2 at 373; Yoram Dinstein, *War, Aggression and Self-Defence*, *supra* note 1 at 142.

17 Yoram Dinstein, *War, Aggression and Self-Defence*, *supra* note 1 at 141.

18 Bugnion, “Guerre juste”, *supra* note 2 at 536.

19 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) 37 *Int’l Rev. Red Cross* 35 at 53; Yoram Dinstein, *War, Aggression and Self-Defence*, *supra* note 1 at 144; and most importantly the fundamental book by Meyrowitz, *supra* note 2.

be judged in the light of the *ius in bello*, but not by the yardstick of the *ius ad bellum* independently from the question which party violated the *ius ad bellum* by starting the conflict.”²⁰ Any requirement treating the parties to an armed conflict differently can therefore only be based upon *ius ad bellum*. Thus, when, in 1993, the UN Security Council required the Bosnian Serbs to refrain from attacking protected areas, while Bosnian government forces were allowed to remain in those areas²¹ and not prohibited to fire upon Bosnian Serb forces (e.g., to defend the areas), such requirement did not derive from the IHL regime on protected areas, but was perforce a *ius ad bellum* regime.²²

It is not surprising that this equality comes under attack by those who consider themselves as serving a particularly noble cause. That IHL did not bind the victim of aggression was apparently official doctrine in the Soviet Union (and under Marxist-Leninist doctrine aggression was by definition an attribute of capitalist States).²³ At the diplomatic conference which adopted the 1977 Additional Protocols, the Democratic Republic of Vietnam explained in detail why an aggressor should be subject to IHL, while the victim of an aggression should be relieved of any of its obligations.²⁴ The Vietnamese proposal was fortunately not accepted; the above-mentioned preambular paragraph 5 of Protocol I was instead adopted by consensus.²⁵ In actual practice, Vietnam also abandoned its position.²⁶ Similar theories reappear, however, in the “war on terror”. One author writes: “[T]he fundamental principle of the equality of belligerents in the eyes of *ius in bello* means that the combatants’ privilege would be granted not only to arguably worthy forces such as armed pro-democracy militants, but also to those on the other side as well, such as armed anti-democracy forces. These potential extensions of the category of international armed conflicts are precisely the sorts of slippery slopes that advocates of a strict separation of *ius ad bellum*

20 Michael Bothe, “Terrorism and the Legality of Pre-emptive Force” (2003) 14 *EJIL* 227 at 234.

21 See UN Security Council Resolutions 819 (1993), 824 (1993), and in particular para. 5 of SC Res. 836 (1993) referring to the “withdrawal of military and paramilitary units other than those of the government of the Republic of Bosnia and Herzegovina”.

22 See Jean-Philippe Lavoyer, “International Humanitarian Law, Protected Zones and the Use of Force” in Wolfgang Biermann and Martin Vadset, eds., *UN Peacekeeping in Trouble: Lessons Learned from the Former Yugoslavia* (Aldershot: Ashgate, 1998) at 262–279.

23 See references in Jiri Toman, *L’Union soviétique et le droit des conflits armés* (Geneva: Graduate Institute of International Studies, 1997) at 19.

24 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Geneva, 1974–1977)* (Bern: Federal Political Department, 1978) [hereinafter: Official Records], vol. IV at 177–188.

25 *Ibid.*, vol. VII at 167–172.

26 On the actual practice of Vietnam, see Bugnion, “Guerre juste”, *supra* note 2 at 542–543.

and *ius in bello* have long feared, but that their arguments have always been normatively and logically insufficient to prevent.”²⁷ This criticism misses the point. In that the worthiness of one’s cause is often in the eyes of the beholder, is certainly not shared by the enemy, and may change over time, the preservation of the distinction between *ius ad bellum* and *ius in bello* remains very relevant and appropriate even in today’s conflicts. In my view, criticism should instead be directed against “extensions [...] of the category of [...] armed conflicts.”²⁸

*B International Humanitarian Law Applies Independently of the
Qualification of the Conflict under Ius ad Bellum*

The applicability of IHL or of certain of its sub-regimes (such as the law of military occupation) depends on the actual situation on the ground, *i.e.*, upon whether there is armed violence between armed forces of two States or a degree of violence by armed groups within a State sufficient for a non-international armed conflict. The justification for the violence or the presence of the parties is irrelevant. This may be illustrated by the Israeli-Palestinian conflict.

Israel denies the *de iure* applicability of parts of the Fourth Geneva Convention on occupied territories to the territories it has occupied since 1967, arguing that those territories did not lawfully belong to another High Contracting Party (in the case of the West Bank: Jordan) before 1967.²⁹ However, whatever the Bible or the Balfour Declaration may have promised to the Jewish people, even if the 1967 war was fought in self-defence, and even if Israel had a stronger right to the West Bank than Jordan and the annexation of the West Bank by Jordan in 1950 was resultantly illegal, in 1967 there was an armed conflict between Israel and Jordan and during that conflict Israel gained control of territories over which it previously had no control. These facts are decisive for the applicability of IHL of military occupation.³⁰ Other arguments pertain to *ius ad bellum* and may, if correct, have an impact upon the final status of those territories, but they do not bar the applicability of IHL pending such a final peace agreement. Palestinian groups also regularly invoke *ius ad bellum* to justify non-respect of *ius in bello* in their fighting. When they fight Israeli forces without distinguishing themselves from the civilian population, or when they deliberately attack civilians (for exam-

27 Nathaniel Berman, “Privileging Combat? Contemporary Conflict and the Legal Construction of War” (2004) 43 *Colum. J. Transnat’l L.* at 28.

28 *Id.* See for my criticism Marco Sassòli, “Use and Abuse of the Laws of War in the ‘War on Terrorism’” (2004) 22 *Law and Inequality: A Journal of Theory and Practice* 195 at 198–203.

29 See for the Israeli position Meir Shamgar, “The Observance of International Law in the Administered Territories” (1971) 1 *Israel Yearbook on Human Rights* at 262–277.

30 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (9 July 2004) [2004] I.C.J. Rep. 136, online: <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> at paras. 92–95.

ple by suicide attacks), they assert their right to resist foreign occupation. Such a right could justify their acts only under *ius ad bellum*; they would nevertheless have to comply with IHL when resisting.

The question whether a legitimate presence bars the applicability of IHL during a military occupation arose in the Eritrea-Ethiopia Claims Commission. During the conflict between Ethiopia and Eritrea from 1998 – 2000, Eritrean armed forces moved into and administered territory that had previously been administered by Ethiopia. Eritrea argued before the Claims Commission that the Geneva Conventions, and especially the IHL of occupation, did not apply to its activities there because it claimed it was the rightful sovereign of the territory such that the alleged offences were in fact “interactions between Eritrean forces and Eritrean nationals”.³¹ The Eritrean argument was reinforced by the fact that the Boundary Commission had determined the territory in question to be part of Eritrea. Eritrea therefore argued that “it could not be subject to occupation by Eritrea’s own forces”.³² The Commission rejected this position, stating

The Commission does not agree that persons should be denied the protections of international humanitarian law because of disputes between the Parties to an international conflict regarding sovereignty over the territory concerned.³³

In other words, the Commission correctly held that any *ius ad bellum* issues could not affect the applicability of IHL to the conflict.

C Arguments under Ius ad Bellum May Not Be Used to Interpret International Humanitarian Law

Ius ad bellum not only has no impact upon the applicability of IHL, but it also may not be used to interpret a provision of IHL. Thus when balancing the anticipated military advantage of an attack upon a military objective with the expected incidental civilian losses – in order to evaluate whether the latter are excessive, thereby making the attack unlawful³⁴ – the military commander may only take *ius in bello* advantages into account and not, *e.g.*, the liberation of civilians under enemy occupation. The proportionality analysis by the military commander trying to occupy a town on the territory of the adverse party and the analysis by the commander trying to liberate a town on his own territory that is occupied by the enemy is exactly the same. I could therefore accept the suggestion that in

³¹ *Partial Award, Central Front, Ethiopia’s Claim 2*, Eritrea Ethiopia Claims Commission, (Federal Democratic Republic of Ethiopia v. State of Eritrea) The Hague, 28 April 2004 at para. 77.

³² *Ibid.*

³³ *Ibid.* at para. 78. See also paras. 27 – 31.

³⁴ See Art. 51 (5) (b) of Protocol I.

an armed conflict labelled a “humanitarian intervention”, a stricter proportionality analysis applies³⁵ only in the overall *ius ad bellum* proportionality analysis, not for the proportionality which must be respected under *ius in bello* for every single attack. For the very same reason, the concept of military objective cannot be more restricted during a humanitarian intervention than in any other armed conflict.³⁶

Similarly, while it may be possible to classify “the sole policeman or local defence guard [who defends a village against enemy forces engaged in ethnic cleansing], even if they joined hands to try to prevent the cataclysm,”³⁷ as members of the civilian population for the purposes of classifying them as possible victims of a crime against humanity, they are lawful targets under IHL.

Unfortunately, the highest judicial organ of the United Nations, the International Court of Justice, could not reach a definitive conclusion as to whether the most typical *ius ad bellum* argument, self-defence, could be used to interpret IHL. By seven votes to seven, with the President’s casting the necessary tie-breaking vote, the Court came to the correct conclusion (in my view) that the “use of nuclear weapons would generally be contrary to [...] the principles and rules of humanitarian law.”³⁸ The Court could obviously have come to another conclusion. Equally, it could have found that a general prohibition exists, but that there are also exceptions. Under the separation between *ius ad bellum* and *ius in*

35 See Christopher Greenwood, “Self-Defense”, *supra* note 2 at 273–88, asserting that the use of force for humanitarian purposes must be limited to what is necessary and proportionate to achieving the humanitarian purposes of the operation. This principle, Greenwood argues, necessarily restricts the range of what may be lawfully attacked. See Christopher Greenwood, “International Law and the NATO Intervention in Kosovo” (2000) 49 *Int’l & Comp. L. Q.* 926 at 933. Critical, Andreas Laursen, “Nato, the War over Kosovo, and the ICTY Investigation” (2002) 17 *Am. U. Int’l L. Rev.* 765 at 788.

36 Ove Bring, “International Humanitarian Law after Kosovo: Is *Lex Lata* Sufficient?” (2002) 71 *Nordic J. Int’l Law* 39 at 50–54; Michael Bothe, “The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on Report to the Prosecutor of the ICTY” (2001) 12 *E.J.I.L.* 531 at 535; *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, online: <http://www.un.org/icty/pressreal/natoo61300.htm> at para. 37 [ICTY Report]. Richard B. Bilder, “Kosovo and the ‘New Interventionism’: Promise or Peril?” (1999) 9 *J. Transnat’l L. & Pol’y* 153 at 171–172, thinks that NATO practice in the Kosovo campaign reveals rather the opposite, *i.e.* that in a humanitarian intervention it may be legitimate to attack additional targets to put pressure on the leadership.

37 *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)*, S/1994/674, para. 78; *Prosecutor v. Blaskic* (2000) Case No. IT-95-14 (ICTY, Trial Chamber) at para. 213 and *Prosecutor v. Tadic* (1997) Case No. IT-94-1 (ICTY, Trial Chamber, Merits) at para. 640.

38 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (July 8, 1996) [1996] ICJ Rep. 226 at para. 105 E.

bello, such exceptions could not be based upon *ius ad bellum* arguments. Yet this is precisely what the Court considered possible when it wrote: “However [...] the Court cannot conclude definitely 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 the State would be at stake.”³⁹ This conclusion has been widely criticized, including by Yoram Dinstein.⁴⁰ If it would be lawful for that reason, that would mean the end of IHL as we know it. In nearly all international armed conflicts, at least one side believes itself to be fighting in self-defence. In most armed conflicts, at least one side’s very survival is at stake. If such a situation could justify the (otherwise prohibited) use of nuclear weapons, it could perforce also justify the killing of wounded or sick or the torture of prisoners of war. I prefer the finding of a post-World War II tribunal (in relation with the admittedly slightly different plea of national emergency): “[T]he contention that the rules and customs of warfare can be violated if either party is hard pressed in any way must be rejected [...]. War is by definition a risky and hazardous business. [...] It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. [...] To claim that they can be [...] disregarded when [one belligerent] considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.”⁴¹

The ICJ unfortunately repeated the offence in its advisory opinion on the Wall in the Occupied Palestinian Territory. After mentioning several rules of IHL that it considered to be violated by the wall (without actually providing reasons for its conclusion), the ICJ enquired whether those violations could be justified by circumstances excluding their unlawfulness. Among them, it dealt with self-defence. In a very controversial paragraph, it found that the conditions for self-defence were not satisfied because the attacks were not attributable to another State and originated from territory under Israeli control.⁴² According to the separation between *ius ad bellum* and *ius in bello*, it should simply have

³⁹ *Id.*

⁴⁰ Yoram Dinstein, *War, Aggression and Self-Defence*, *supra* note 1 at 146. Yoram Dinstein, “The Law of Air, Missile and Nuclear Warfare” (1997) 27 *Israel Yearbook on Human Rights* at 12–13; Eric David, “The Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons” (1997) 37 *Int’l Rev. Red Cross* 21 at 31; Louise Doswald-Beck, “IHL and the Advisory Opinion”, *supra* note 19 at 53.

⁴¹ US Military Tribunal at Nuremberg, *US v. Alfred Krupp et al.*, The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. X, 1949, 100, at Section 4 (iii).

⁴² *Legal Consequences of the Construction of a Wall*, *supra* note 30 at para. 139. See criticism in *AJIL* 2005; Ruth Wedgwood, “The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense” (2005) 99 *AJIL* 52 – 61 and Sean D. Murphy, “Self-Defense and the Israeli Wall Advisory Opinion: An *Ipse Dixit* from the ICJ?” (2005) 99 *AJIL* 62 – 76.

explained that as far as violations of IHL are concerned, self-defence, belonging to *ius ad bellum*, could not justify violations of *ius in bello*.

*D International Humanitarian Law May Not Render the Application
of Ius ad Bellum, e.g. Self-defence, Impossible*

The most noble and legitimate cause under *ius ad bellum* does not permit one to disregard IHL or even to interpret it differently; conversely, the separation between *ius ad bellum* and *ius in bello* also implies that *ius ad bellum* is an absolute limit on possible developments (or interpretations) of IHL. As long as it is lawful under *ius ad bellum* to use force for certain reasons and purposes, IHL may not make it impossible to achieve those purposes. After all, parties and those who fight for them would hardly renounce their lawful purposes just to comply with IHL. This body of law inevitably seeks compromise between military necessity and the demands of humanity, precisely because military necessities are for certain belligerents based upon, and implement, *ius ad bellum*.

In contemporary wars directed against modern societies, which are evermore integrated and survive only by relying on sophisticated infrastructure networks, many attacks against genuinely military objectives will have increasingly distant and indirect reverberating effects throughout country and on the civilian population. It is suggested with growing frequency that such reverberating effects must be taken into account when evaluating whether incidental civilian losses or damages are excessive.⁴³ This may, however unfortunately, not go as far as to make it impossible to efficiently win a conflict waged, for example, in self-defence against such a country. Similarly, the tendency to outlaw weapons not because they are technically inherently indiscriminate, but because they are most often used in an indiscriminate way, may not go so far as to outlaw the weapons necessary to win a war complying with *ius ad bellum* (e.g., authorized by the UN Security Council to restore international peace and security). Indeed, contemporary reality in many conflicts shows that many weapons are used indiscriminately. However, this cannot lead to the outlawing of guns, artillery or machetes.

Similarly, if national liberation wars and armed resistance against a technologically overwhelming aggressor or foreign occupier are lawful under *ius ad bellum*, IHL cannot outlaw *every* efficient method to win such a war. Certainly, it

43 See for the US "International Law and Legal Considerations in Targeting" (Appendix A), in *Joint Doctrine for Targeting*, Joint Publication 3-60, (17 January 2002), at A-5, online http://www.dtic.mil/doctrine/jel/new_pubs/jp3_60.pdf, at I-6, and Michael N. Schmitt, "The Principle of Discrimination in 21st Century Warfare" (1999) 2 *Yale Human Rights & Dev Law Journal* 143 at 168; Michael N. Schmitt, "Future War and the Principle of Distinction" 28 *Israel Yearbook on Human Rights* (1999) 51 at 79-80. *Contra* Lt. Col. Kenneth A. Rizer, "Bombing Dual Use Targets: Legal, Ethical and Doctrinal Perspectives" (2001), online: <http://www.airpower.maxwell.af.mil/air-chronicles/cc/Rizer.html>.

would, for instance, be preferable for the protection of the civilian population if combatants always clearly distinguished themselves from the civilian population and if military objectives were kept far from concentrations of civilians. However, under such rules, certain belligerents would not have the slightest chance of overcoming the enemy, even though they might be fighting for a cause which is lawful under *ius ad bellum*. Inevitably, therefore, IHL had to be adapted to make such fighting, and victory, possible. Thus, Protocol I had to lower the distinction requirement to what is both possible to comply with in a guerrilla war and the minimum necessary to ensure respect for the civilian population.⁴⁴ Those who criticize this as “law in the service of terror” want to have *ius in bello* bar the realization of *ius ad bellum*.⁴⁵

Similar objections must be raised against the claim made by the United States and some writers that both sides, the defender and the attacker, have an equal responsibility to protect the civilian population from the effects of hostilities.⁴⁶ It is true that the civilian population is best protected if both sides take precautionary measures. In law, however, State practice and the text, legislative history, and context of Protocol I indicate that both under Protocol I and in customary international law the main responsibility is conferred upon the “attacker”. Beyond the absolute prohibition to use civilians as shields,⁴⁷ Protocol I, which lists several passive precautions to be taken by the defender, clearly indicates that these obligations are weaker than those of an attacker. They have to be taken only “to the maximum extent possible,” and the defender has only to “endeavour to remove” the civilian population and “avoid” locating military objectives nearby.⁴⁸

44 See Art. 44 (3) of Protocol I.

45 *A Message from the President of the United States Regarding Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts, Message from the President of the United States*, US Government Printing Office, 100th Congress, 1st session, Treaty Doc. 100-2, Washington D.C., 1987; Douglas J. Feith, “Law in the Service of Terror” (1985) *The National Interest* No. 1 at 47.

46 See the Vietnam war Letter by J. Fred Buzhardt, General Counsel of the Department of Defense to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, reproduced in (1973) 67 *AJIL* 122 at 123; *U.S. Air Force Pamphlet 110-34* at 3-1; *U.S. Naval Handbook NWP 9* at 11-1; forcefully, W. Hays Parks, “Air War and the Law of War” (1990) 32 *The Air Force Law Review* 1 at 149-168 with further references; A.P.V. Rogers, *Law on the Battlefield*, (Manchester: Manchester Univ. Press, 1996) at 77-79; lately, Kenneth Anderson, “Who Owns the Rules of War?”, *The New York Times Magazine*, 13 April 2003, online: <http://www.nytimes.com/2003/04/13/magazine/13RULES.html>. According to Danielle L. Infeld, “Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But Is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?” (1992-93) 26 *George Washington J. Int'l and Comp. Law* 109 at 141, the defender even has the primary obligation.

47 See Art. 51 (7) of Protocol I.

48 See Art. 58 of Protocol I.

Even with those qualifications, several delegations at the Diplomatic Conference stressed that the provision, in particular the obligation in respect to the location of military objectives, may not prevent a State from organizing its national defence as it considers necessary.⁴⁹ Other delegations enumerated the many factors to be taken into account when evaluating whether a given measure prescribed by Article 58 is at all “possible”.⁵⁰ Participants report that in the competent working group of the conference,

many representatives of both developing and developed countries strongly objected to the obligation to endeavour to avoid the presence of military objectives within densely populated areas. This was deemed by representatives of densely populated countries to restrict their right to self defence, and by others to impose too heavy an economic burden to disperse their industrial, communications and transportation facilities from existing locations in densely populated areas.⁵¹

When becoming a party to Protocol I, Belgium, Italy, the Netherlands, and Algeria declared that the term “feasible” must be understood to mean taking the available means or military considerations into account. Switzerland and Austria even made formal reservations subjecting Article 58 to the “exigencies dictated by the defence of the national territory.”⁵² Requiring extreme precautionary measures, *i.e.*, either the removal of possible military objectives from their population centres or the evacuation of that population from these centres, would make efficient self-defence of densely populated or poorer countries, that is to say, *ius ad bellum*, impossible.

V The Distinction in Non-international Armed Conflicts

A International Law Does Not Prohibit Non-international Armed Conflicts; Internal Law Does

Technically, no international *ius ad bellum* exists concerning non-international armed conflicts, since such conflicts are neither justified nor prohibited by international law. In fact, the only category of conflicts within an existing State that

49 *Official Records*, *supra* note 24, vol. VI, 213/214 (France, Switzerland, Austria), 232 (Italy), 234/235 (South Korea), 239 (Cameroon).

50 *Ibid.*, vol. VI, 214 (U.K., The Netherlands), 224 (Canada), 226 (Germany), 241 (U.S.).

51 Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts* (Boston: Martinus Nijhoff, 1982) at 372.

52 See for the text of declarations and reservations Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents*, 4th ed. (Leiden/Boston: Martinus Nijhoff, 2004) at 792, 794, 796, 807, 810, and 814. Switzerland withdrew its reservation on 17 June 2005.

has been considered as having a justification in international law – national liberation wars in which a people exercises its right to self-determination – has been moved into the category of international armed conflicts.⁵³ This shift in classification, based as it is on the justification for such conflicts, has been criticized by many as mixing up *ius ad bellum* and *ius in bello*.⁵⁴ Yet, although the shift may be contrary to the idea that *ius ad bellum* should not influence the applicability of IHL, the crucial equality of both belligerents before IHL has been preserved. The national liberation movement and the “colonial dominator”, “alien occupier” or “racist regime” against which it is fighting are equally bound by this body of law.⁵⁵

Nevertheless, *ius ad bellum* for non-international armed conflicts does exist, in national legislation. As the monopoly on the use of force for State organs is inherent in the very concept of the Westphalian State, we may assume that the national legislation of all States prohibits anyone under their jurisdiction to wage an armed conflict against governmental forces or, except State organs acting in said capacity, anyone else.

*B International Humanitarian Law Treats Parties to a Non-
international Armed Conflict Equally;
However, It Cannot Require Internal Laws to Do So*

IHL of non-international armed conflicts treats all parties to such conflicts equally.⁵⁶ Article 3 common to the four Geneva Conventions of 1949 explicitly prescribes that “each Party” to such a conflict has to apply its provisions. Here too, *ius in bello*, in the form of either the application of this Article or the conclusion of agreements between the parties which bring into force all or part of IHL of

⁵³ Art. 1 (4) of Protocol I.

⁵⁴ See Message from the President, *supra* note 45.

⁵⁵ Thus explicitly Art. 96 (3) (c) of Protocol I.

⁵⁶ States rejected at the 1974-1977 diplomatic conference which elaborated Protocol II an explicit provision prescribing such equality (cf. Art. 5 of draft Protocol II, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949* (Geneva: ICRC, June 1973), but the applicability of the principle is uncontroversial (see François Bugnion, “Jus ad Bellum, Jus in Bello and Non-International Armed Conflict” (2003) 6 *Yearbook of International Humanitarian Law* [forthcoming]; Yves Sandoz, Christophe Swinarski & Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Geneva/Dordrecht: ICRC/Martinus Nijhoff Publishers, 1987) at paras. 4442-4444 [ICRC Commentary]; Rosemary Abi-Saab, *Droit humanitaire et conflits internes* (Genève/Paris, 1986) at 157-159; Michael Bothe, “Conflits armés internes et droit international humanitaire” (1978) *RGDIP* 82 at 92 and 93).

international armed conflicts,⁵⁷ has no impact on the legitimacy or legality of the cause of the parties under *ius ad bellum*.⁵⁸

When drafting Protocol II, States made a desperate attempt to ignore the obvious, based upon the illusion that social phenomena disappear when they are not mentioned in legal rules, by deleting any reference to “parties” to non-international armed conflicts.⁵⁹ But it is clear that the higher threshold of Protocol II can only be satisfied when highly organized non-State parties exist. It is uncontroversial that such parties have to respect all the rules of Protocol II. Those rules are now formulated in the passive tense, as prohibitions of various acts against certain categories of persons.

Obviously, IHL cannot oblige States to adopt internal laws that treat members of rebel forces and members of governmental forces equally. While domestic law authorizes the latter to use force, the use of force by the former is generally criminalized, even if it complies with IHL; States may punish members of rebel forces for the mere fact of having directly participated in hostilities. This consequence results from the absence of any combatant status in non-international armed conflicts. *De lege ferenda*, a minimum status rewarding rebels who fought while respecting IHL should be determined.⁶⁰ *De lege lata*, the only provision offering a (very limited) reward to rebel forces who comply with IHL is Article 6 (5) of Protocol II, which encourages the authorities in power at the end of the conflict to grant such persons the broadest possible amnesty. Equally, one cannot imagine in non-international armed conflicts a status of protected persons, benefiting from a more complete set of protections, for civilians of “enemy nationality.”⁶¹ In a non-international armed conflict, civilians cannot be linked to one party by nationality; indeed, they generally all possess the same citizenship. Nor can “protected” civilians be identified by allegiance with the enemy⁶² because allegiance to rebel forces is precisely what national laws repress.

57 The conclusion of such agreements is encouraged by Article 3 (3) common to the Conventions.

58 Article 3 (4) common to the Conventions stipulates that its application “shall not affect the legal status of the Parties to the conflict.”

59 See Rosemary Abi-Saab, *supra* note 56, pp. 156–159; Georges Abi-Saab, “Non-International Armed Conflicts” in *International Dimensions of Humanitarian Law* (Geneva/Paris/Dordrecht: Henry Dunant Institute/UNESCO/Nijhoff, 1988) 217 at 231.

60 See in detail Bugnion, “Jus ad Bellum, Jus in Bello and Non-International Armed Conflict”, *supra* note 56.

61 As foreseen in Art. 4 of Convention IV for international armed conflicts.

62 The ICTY replaces, for international armed conflicts, the nationality standard laid down in Article 4 of Convention IV, by an allegiance standard (See *The Prosecutor v. Tadic* (1999) Case No. IT-94-I (ICTY, Appeals Chamber, Merits) at paras. 163–69, and our criticism, Marco Sassòli and Laura Olson, “Case Report, Judgment, The Prosecutor v. Dusko Tadic, Case n° IT-94-A, ICTY Appeals Chamber (15 July 1999)” (2000) 94 *AJIL* 571 at 576–77.

Apart from these differences, however, IHL implies that even beyond the letter of treaty law, both parties must have the equal opportunity to respect IHL. This means, for example, that rebel forces must be able to establish a regularly constituted court, although such court must be established by law,⁶³ and it is difficult to imagine non-State armed groups passing the requisite legislation. If they are unable to do so, the rebels are at serious disadvantage in applying IHL because it prescribes that only such a court may pass sentences.⁶⁴ Not only could they then not punish their enemies, while the government authorities could, but their ability to enforce the respect of IHL through criminal prosecution of their own members would be seriously hampered.

Thus, as with international armed conflicts, it is crucial to separate the illegality of a non-international armed conflict under domestic law from the applicability and application of IHL rules.⁶⁵ Similarly, rules of IHL must apply equally to both sides, however morally justified a conflict may be, as in rebellions against a dictatorial government, the battle between a democratic government and a terrorist group, or efforts to combat an armed group seeking to loot natural resources or engaged in drug trafficking. Here again, however, the separation encounters practical limits when the underlying aim of one party is incompatible with IHL, as in the case of the elimination or forcible transfer of a civilian population.⁶⁶

VI Contemporary Threats to the Distinction

A New Concepts of “Just” (or even “Humanitarian”) War

Neither existing nor suggested new justifications for the use of force in international relations (such as “humanitarian intervention”) necessarily lead to a blurring of the distinction between *ius ad bellum* and *ius in bello*. The separation precisely implies that whatever the justification for a conflict, the same rules of IHL apply. In reality, however, the more either a party to a conflict or an individual fighter is convinced that the cause is just, the more difficulties they will have in accepting the legal fact that they have the same obligations and (only) the same rights as their unjust enemies.⁶⁷ They will invoke many brilliant legal theories to obtain more rights or fewer obligations than their opponents. Carefully

63 See, e.g., Art. 14 (1) of the International Covenant on Civil and Political Rights.

64 See Art. 3 (1) (1) (d) common to the Geneva Conventions and Art. 6 (2) of Protocol II.

65 See Bugnion, “Jus ad Bellum, Jus in Bello and Non-International Armed Conflict”, *supra* note 56.

66 Kirsti Samuels, “Jus ad bellum and Civil Conflicts: A Case Study of the International Community’s Approach to Violence in the Conflict in Sierra Leone” (2003) 8 *Journal of Conflict & Security Law* 315 at 337.

67 Yoram Dinstein, “Symposium: The Rule of Law in Conflict and Post-Conflict Situations: Comments on War” (2004) 27 *Harv. J.L. & Pub. Pol’y* 877 at 881, and, for

considered, such theories invariably blur the distinction between *ius ad bellum* and *ius in bello*.

It is thus unsurprising that during its 1989 invasion of Panama, labelled “Operation Just Cause”, the US administration sought to deny prisoner-of-war status to the captured commander-in-chief of the armed forces of Panama, arguing that the legitimate (but ousted) president of Panama had requested US intervention. Correctly, US courts rejected this blurring between *ius ad bellum* and *ius in bello* by recognizing General Noriega’s status as a prisoner of war, even after he had been convicted for drug trafficking.⁶⁸

When the US briefly called its 2001 invasion of Afghanistan “Operation Infinite Justice,”⁶⁹ it might reasonably have been feared the US would deny the applicability of IHL based upon *ius ad bellum* arguments. Fortunately this was not to be, although innovative US interpretation of *ius in bello* led to a similar result.⁷⁰ While the Geneva Conventions were recognized as applicable, captured enemy forces were characterized as having neither combatant nor civilian status. Therefore, they were denied the protection of both the Third and the Fourth Geneva Conventions. Whether the denial was motivated by the purported justification of the operation on the basis of the 11 September 2001 attacks is a matter of pure speculation. That *ius ad bellum* and *ius in bello* are blurred in those parts of the “war on terror” which are armed conflicts is, however, confirmed by at least one expert, who writes, “[i]n short, contemporary IHL absolutists, by eliding distinctions between lawful and unlawful combatants and adopting an interpretive approach absolute with respect to observance of [...] the *ius in bello* [...] but agnostic with respect to the justice of the cause on behalf of which combatants take up arms (the *ius ad bellum*), privilege terrorists at the expense of their fettered targets.”⁷¹ It is not surprising that he comes to the following conclusion: “In effect, a rationalized IHL is an admixture of *ius in bello* and *ius ad bellum* that treats not merely the conduct of soldiers but also the cause for which they fight as practically significant in establishing differential legal standards, canons of interpretation and guidelines for adjudication.”⁷²

humanitarian interventions, Adam Roberts, “The So-Called ‘Right’ of Humanitarian Intervention” (2000) 3 *Yearbook on International Humanitarian Law* 3 at 3-4.

68 *U.S. v. Manuel Antonio Noriega*, United States District Court for the Southern District of Florida, 808 F. Supp. 791 (1992).

69 See “Bush to explain sustained nature of future war”, 20 September 2001, CNN.com, online: <http://archives.cnn.com/2001/US/09/19/gen.america.under.attack/>.

70 See Marco Sassòli, “Use and Abuse”, *supra* note 28 at 195-221.

71 William Bradford, “Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War” (2004) 73 *Mississippi Law J.* 639 at 860.

72 *Ibid.* at 897. See also, for a call to deny “Nazis”, whether organized in regular armed forces or otherwise, combatant status, Berman, “Privileging Combat?”, *supra* note 27 at 56.

In my view, the controversy over whether the United Nations is bound by IHL is partly related to the tendency of those who argue against full applicability to invoke *ius ad bellum* for the purpose of denying the full applicability of *ius in bello*.⁷³ Certainly, there are technical reasons for doubts. The UN is not a party to the Geneva Conventions. The UN has insisted that it is bound by the “principles and spirit” of humanitarian law, but denies that it is bound by the detailed rules of IHL. I also have some doubt whether customary IHL, which developed in conflicts between States, binds the organization. At the very least, soldiers involved in a UN operation are bound by virtue of their own States’ engagement to “respect and ensure respect for” international humanitarian law “in all circumstances”.⁷⁴ In addition, a UN Secretary-General’s Bulletin on Observance by United Nations Forces of IHL includes and summarizes many, but not all, rules of IHL and instructs UN forces to comply with them when engaged as combatants in armed conflicts.⁷⁵ Interestingly enough, in debates leading to its adoption, UN representatives argued that UN forces, even when involved in actual fighting with the armed forces of a State, could not possibly be labelled a party to a conflict, an occupying power or as “the enemy.” Rather, they represent both international legality and the entire international community, including even a State against whom they fight. Similarly, in debates about when IHL fully applies to UN forces, some argue that it depends on their mandate. But that is clearly a *ius ad bellum* argument, while IHL should and does apply according to the actual situation.

In my view, the notion that UN forces, which represent international legality and the international community, and which enforce international law, cannot be bound by the same rules as their enemies underlies the UN’s reluctance to be bound by the full corpus of IHL rules. Yet, as mentioned, the fact that the UN has authorized military intervention has no impact on the applicability of IHL to the conflict. The UN may authorize the use of force and lead an operation, or it may authorize a regional organization or a State to lead a military intervention.

73 See, on the whole debate whether IHL applies to UN operations, Christopher Greenwood, “International Humanitarian Law and United Nations Military Operations” (1998) 1 *Y.B Int’l Humanitarian L.* 3; Claude Emanuelli, *Les actions militaires de l’ONU et le droit international humanitaire* (Montréal: Wilson & Lafleur Ltée, 1997); Daphna Shrager, “The United Nations as an Actor Bound by International Humanitarian Law” in Luigi Condorelli, Anne-Marie La Rosa and Sylvie Scherrer (eds), *Les Nations Unies et le droit international humanitaire, Actes du Colloque international à l’occasion du cinquantième anniversaire des Nations Unies, Genève 19, 20, 21 octobre 1995* (Paris: Pedone, 1996) 317; Dietrich Schindler, “United Nations Forces and International Humanitarian Law” in Christophe Swinarski, ed., *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of J. Pictet* (1984) 521 at 523.

74 Article 1 common to the four Geneva Conventions.

75 UN Doc. ST/SGB/1999/13 of 6 August 1999.

Is there any reason to distinguish between a campaign that is UN-led as opposed to a campaign that is UN-authorized with regard to the applicability of IHL?

On a more technical level, States contributing to UN peace forces correctly perceive that if IHL applied to hostilities between their forces and those opposed to them, both would be combatants and therefore lawful targets of attacks. Contributing States obviously hope that their forces will not be attacked. However, do they really think that such attacks are less likely if the applicability of IHL is denied, which incidentally also strips their own forces of any protection by that law?

For an extreme example of an illusionary stand along these lines, consider the arguments of some European NATO member States during the UN authorized NATO air attacks against Bosnian Serb artillery positions threatening protected areas in Bosnia and Herzegovina during 1994–95. They seriously asserted that their pilots were not combatants, that the Bosnian Serbs had no right to fire upon them and that if captured the pilots had to be released immediately. The States claimed their pilots were UN “experts on mission,” protected by the 1946 Convention on the Privileges and Immunities of the United Nations. Some actually issued identity cards designating them as such. In *ius in bello*, the idea that someone may attack but not be attacked by those bombed, and must be released upon capture, only to bomb again, is absurd. It will never withstand the test of reality. It was not surprising that as soon as two French pilots were shot down, France changed its legal position and asked for prisoner of war status and treatment.⁷⁶ Indeed, if I were such a pilot, I would clearly prefer to invoke prisoner of war status, rather than claim that the legitimacy of my mission under the UN Charter meant my enemies should not have shot me down and they must now immediately release me to allow me to fulfil my mission, *i.e.*, to bomb them.

IHL of international armed conflicts, including the rules on military occupation, does not apply, however, when UN forces are present with the consent of the sovereign of the territory in question. Nonetheless, in such cases, it may be wise to apply IHL by analogy, since it provides a framework to address many of the situations with which peacekeepers will be confronted.⁷⁷

76 See “Peace Operations” in Jeanne Meyer and Brian Bill, eds., *Operational Law Handbook* (2002) (Virginia, 2002) for the expert on mission status of NATO pilots in the enforcement of the no-fly zone and during the bombardment of Bosnian Serb positions. See also Agence France Presse, “Paris admet que ses deux pilotes disparus en Bosnie sont prisonniers”, *Dépêche*, 20 September 1995; AFP, “M. Millon: les démarches pour libérer les pilotes français vont ‘s’intégrer dans le plan de paix’”, *Dépêche*, 20 September 1995 and AFP, “La Croix-Rouge ignore toujours ou sont les pilotes français abattus en Bosnie”, 21 September 1995, for France’s reaction to its pilots being held prisoner and recourse to the ICRC, which emphasized that it was not involved in negotiations for release of the pilots.

77 Marco Sassòli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers” (2005) 16 *EJIL* 661 at 689 and 691–693.

*B Law Enforcement Directed at Terrorists Classified as
International Armed Conflict*

Two of the many disadvantages of the US administration's current approach towards the "war on terror", *i.e.*, classifying that war as a single world-wide international armed conflict, are that the characterization creates a category of international armed conflicts in which IHL cannot be applied independently of the conflict's justification and in which IHL cannot apply equally to both sides. The author cited above, in criticizing the strict separation between *ius ad bellum* and *ius in bello* in the context of a "war on terror,"⁷⁸ may be correct in his premises, but is wrong in the conclusion he draws. It is not the "war on terror" that demonstrates that the separation between *ius ad bellum* and *ius in bello* is erroneous. It is rather the equality of the belligerents before IHL, resulting from that separation, which constitutes an additional argument that the entire "war on terror" should not be labeled as "war".

In the "war on terror," the US and its allies are by definition on the right side and the terrorists are on the wrong one, if only because the latter are defined by a methodology prohibited in IHL, terrorism.⁷⁹ To label that fight against terrorism as "war" may conform to a political analysis and have psychological advantages, but from an IHL perspective it inevitably implies conferring upon the terrorists an equal status, which criminals do not enjoy and should not have. This is precisely how the terrorists see what they do – not as crime, but as war against the West. In the US approach to the applicable IHL, the "terrorists" are labelled "unlawful combatants" who may be targeted at any time until they surrender. They may be detained without an individual status determination until the end of that "war." However, they are (correctly) denied the benefits of combatant status, *i.e.*, the right to commit acts of violence, combatant immunity against prosecution and prisoner of war treatment.⁸⁰

While such inequality is contrary to the basic notions of IHL, it conforms to the typical law enforcement situation, which is indeed the appropriate legal framework for all parts of the "war on terror" not taking place within an international armed conflict (such as the conflict between the US and Afghanistan in 2001/2002) or amounting to a non-international armed conflict. Where a genuine armed conflict exists, however, the same IHL must apply to both sides, even if the goal of one is to fight global terrorism. I therefore agree with Ruth Wedgwood when she writes that

⁷⁸ Berman, "Privileging Combat?", *supra* note 27 at 28.

⁷⁹ See Art. 33 (3) of Convention IV, Art. 51 (2) of Protocol I and Arts. 4 (2) (d) and 13 (2) of Protocol II.

⁸⁰ See Sassòli, "Use and Abuse", *supra* note 28 at 196, 206 and 211–213.

[o]ne potential problem with the war paradigm is that in an ordinary war between states, military objects are legitimate targets. Humanitarian lawyers, military lawyers, have chosen to separate *ius in bello* from *ius ad bellum*, i.e., how you fight a war from when you can fight a war. Once you're at war, in any ordinary interstate setting, it's conceded that either side can strike at military targets. But we would not concede that bin Laden has a privileged right to strike at the U.S.S. Cole or the Pentagon or Khobar Towers. So the traditional war paradigm of war between Westphalian states doesn't quite fit properly either.

I cannot, however, agree with her solution: "We're going to have to pick elements from each, and then craft the reconstructed model to fit the facts of the case."⁸¹ This approach forfeits IHL's normativity and predictability, both of which are essential for victims of future conflicts, including US victims, confronting opponents who believe the law does not to fit the facts of their case as they see it.

C Genuine Armed Conflicts Perceived as "International Police Action"

While the "war on terror" is one in which the law enforcement paradigm should prevail, in other situations genuine armed conflicts are sometimes perceived as international police actions. Such labels imply an unwillingness to apply IHL. Thus, for instance, the Russian Federation consistently denies the obvious – the existence of an armed conflict in Chechnya.

Even in international armed conflicts, those fighting for the enemy are sometimes claimed by the opposing side to be not combatants, but "criminals", generally based upon the cause for which they fight. This non-application of IHL is as problematic as its application to terrorist acts, but for different reasons. First, as a practical matter, combatants have much less choice than criminals to elect the cause for which they fight. Second, unlike combatants, all acts of violence criminals commit are crimes, whether directed against enemy armed forces or uninvolved civilians, or simply conducted indiscriminately. While combatants have an incentive to comply with IHL because they benefit from combatant immunity for acts which conform to IHL, criminals are liable for punishment for any violent act they commit, whether complying with IHL or not. An important incentive for respect of IHL is therefore lost. Third, if an armed conflict is labelled as law enforcement, while the "law enforcers" remain bound by human rights law and domestic law, their enemies are bound only by the *ius ad bellum* barring them from fighting, not any *ius in bello* on how to fight. Killing women and children indiscriminately and targeting members of enemy armed forces become legal equivalents.

⁸¹ Ruth Wedgwood, "Comment" in "Symposium: America Fights Back: The Legal Issues" (2004) 11 *Cardozo J. Int'l & Comp. L.* 831 at 847–848.

For the same reasons, the claim that “defensive armed reprisals” or other “measures short of war” do not constitute armed conflicts, if correct, may only have consequences under *ius ad bellum*, while *ius in bello* must fully apply.⁸²

*D International Armed Conflicts Change into Law Enforcement Actions
Directed by the International Community against “Outlaw States”*

From the perspective of the UN Charter, the contemporary world can be perceived as ruled by a collective security system. Others may see it as developing towards a hegemonic system in which the sole superpower will ensure international law and order with coalitions of the willing.⁸³ From both perspectives, international armed conflicts between States can no longer be perceived as conflicts between equals. Both from the point of view of the means at the disposal of the two sides and from a moral point of view, they are asymmetric. On the one side there is the international community and those who represent it, or at least who claim to represent it; on the other side there is generally one single “outlaw” State (in recent years, for instance, Yugoslavia or Iraq).

In such an environment, the separation between *ius ad bellum* and *ius in bello*, and the application of the same IHL rules to both sides, becomes less and less acceptable for those who perceive themselves as enforcing the common interest. At the same time, equal application corresponds less and less to reality because the militarily weaker “outlaw” does not respect IHL, but rather sees the resort to acts prohibited by IHL, such as terrorist attacks or perfidy, as his only chance of avoiding total defeat.

The major disadvantage of such a development is that it leads to a self-fulfilling prophecy and an *ex-post* justification for IHL violations. Similarly, to criminals in domestic law enforcement, there will be no rules on how the outlaws may fight against law enforcers. As a result, the “outlaws” will not even be bound by IHL (rather than simply acting in violation of IHL). As for the “law enforcers”, they can no longer be bound by the full set of IHL rules, including, *e.g.*, combatant status and combatant immunity for the members of the “outlaw” armed forces. Nor can the “law enforcers” tolerate the resistance that IHL puts up in situations of military occupation to changes of laws and institutions by an occupying power.⁸⁴ At most, they will accept being bound by a new set of *temperamenta belli*, human rights-like restraints addressed to those who are engaged

82 As recognized by Yoram Dinstein, *War, Aggression and Self-Defence*, *supra* note 1 at 194–196, and Yoram Dinstein, “Symposium: The Rule of Law in Conflict and Post-Conflict Situations: Comments on War” *supra* note 67 at 887.

83 Detlev Vagts, “Hegemonic International Law” 95 *AJIL* (2001) 843 ff. and José E. Alvarez, “Hegemonic International Law Revisited” (2003) 97 *AJIL* 873–888.

84 See Sassòli, “Legislation” *supra* note 77 at 668–682.

in international law enforcement – but not to their enemies.⁸⁵ Thus, the historical cycle, which started with *temperamenta belli* for those engaging in a *bellum iustum*, would be closed and we would return to the starting point.

It may be that this development is inevitable. I would hope it would take place in the form of strengthened international institutions able and willing to enforce the rule of international law. In such an environment, there could indeed be inequality before the law as between those who enforce international law and the subjects of that enforcement. Yet, I contend that contemporary reality remains very far from the utopia just described – and from a genuine hegemonic world order. First, the world is still made up of sovereign States. Even when they violate international law, States cannot yet be perceived as simple criminal gangs, comprised of criminal individuals. In particular, the freedom of combatants, and even more so of civilians, to “join” an “outlaw” State is incomparably less than the freedom an individual has to join a criminal gang in the domestic legal order. Second, despite all the progress made by international criminal law and international criminal justice in recent years, the possibility of holding responsible individuals who decide upon a course of action resulting in their State’s violation of international law is still underdeveloped. It depends to a great extent on the willingness of States to co-operate. This implies that behaviour contrary to the international community’s common interest (including law and order) cannot yet be dealt with exclusively as individual behaviour. It must still in addition be attributed to States to generate the necessarily collective reaction. Third, in the absence of an efficient international system of adjudication, there may, in a given armed conflict, still be *bona fide* divergences of view over which side is the outlaw and which is fighting for the common interest.

As long as these realities remain unchanged, armed conflicts will continue to have more in common with traditional wars than with domestic law enforcement. Law that attempts to protect those involved in, and affected by, a social phenomenon should not disappear before the phenomenon to which it applies. This truism applies to IHL, including the separation which must be drawn between it and the legitimacy of the cause of the parties involved.

85 See David Scheffer, “Beyond Occupation Law” (2003) 97 *AJIL* 842; Nehal Bhuta, “The Antinomies of Transformative Occupation” (2005) 16 *EJIL* 721; and Steven Ratner, “Foreign Occupation and International Territorial Administration” (2005) 16 *EJIL* 695.

Elective affinities? Human rights and humanitarian law

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Abstract

Complementarity and mutual influence inform the interaction between international humanitarian law and international human rights law in most cases. In some cases when there is contradiction between the two bodies of law, the more specific norm takes precedence (lex specialis). The author analyses the question of in which situations either body of law is more specific. She also considers the procedural dimension of this interplay, in particular concerning the rules governing investigations into alleged violations, court access for alleged victims and reparations for wrongdoing.

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Traditionally, international human rights law (IHRL)¹ and international humanitarian law (IHL)² are two distinct bodies of law with different subject matters and different roots, and for a long time they evolved without much mutual influence. This has changed. A brief overview of historical developments and of recent cases shows that – whatever the understanding of governments in 1864, 1907 or 1949 – there is today no question that human rights law comes to complement humanitarian law in situations of armed conflict. In international jurisprudence, case law since the report of the European Commission of Human Rights on northern Cyprus after the Turkish invasion³ and continuing through to later national and

* The views expressed in this article are those of the author and do not necessarily reflect those of the ICRC. Some parts of this article are reproduced from “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict”, *Israel Law Review*, Vol. 40 (2007), pp. 310–55.

international jurisprudence on the Palestinian territories, Iraq, the Democratic Republic of the Congo or Chechnya leaves no doubt as to the applicability of human rights to situations of armed conflict.

In short, these regimes overlap, but as they were not necessarily meant to do so originally, one must ask how they can be reconciled and harmonized. As M. Bothe writes,

[T]riggering events, opportunities and ideas are key factors in the development of international law. This fact accounts for the fragmentation of international law into a great number of issue-related treaty regimes established on particular occasions, addressing specific problems created by certain events. But as everything depends on everything, these regimes overlap. Then, it turns out that the rules are not necessarily consistent with each other, but that they can also reinforce each other. Thus, the question arises whether there is conflict and tension or synergy between various regimes.⁴

How human rights and humanitarian law can apply coherently in situations of armed conflict is still a matter of discussion. Jurisprudence over the last few years has changed the picture considerably and, to a certain extent, the law is constantly evolving. Jurisprudence on concrete cases will, hopefully, provide more clarity over time. So far, some areas are becoming clearer and in other areas patterns are emerging but are not consolidated.

This article seeks to provide some parameters which can inform the interplay between human rights and humanitarian law in a given situation. Indeed, two main concepts should govern their interaction: complementarity and mutual influence of the respective norms in most cases, and in some cases precedence of the more specific norm (*lex specialis*) when there is contradiction between the two bodies of law. The question is: in which situations is either body of law the more specific?

Lastly, the procedural dimension will be considered, for that is possibly where the interplay between human rights law and humanitarian law has its most practical effect: what are the rules governing investigations into alleged violations, court access for alleged victims and reparations for wrongdoing?

- 1 In the following, “international human rights law”, “human rights law” and “human rights” are used interchangeably.
- 2 In the following “international humanitarian law”, “humanitarian law” and “law of armed conflict” are used interchangeably.
- 3 See, e.g., Report of the European Commission of Human Rights, *Cyprus v. Turkey*, Appl. No. 6780/74 and 6950/75, Eur Comm HR Decisions and Reports (hereinafter DR) 125; European Court of Human Rights (hereinafter ECtHR), *Cyprus v. Turkey*, Judgment of 10 May 2001, Reports of Judgments and Decisions (hereinafter Reports) 2001-IV.
- 4 Michael Bothe, “The historical evolution of international humanitarian law, international human rights law, refugee law and international criminal law”, in Horst Fischer, Ulrike Froissart, Wolff Heintschel von Heinegg and Christian Raap (eds.), *Crisis Management And Humanitarian Protection*, Berliner Wissenschafts-Verlag, Berlin, 2004, p. 37.

The overlap of international human rights law and international humanitarian law in situations of armed conflict

The converging development of human rights law and humanitarian law

Beyond their common humanist ideal, international human rights law and international humanitarian law had little in common at their respective inception. The theoretical foundations and motivations of the two bodies of law differed.

The rationale for modern human rights is to find a just relationship between the state and its citizens, to curb the power of the state vis-à-vis the individual.⁵ To begin with, human rights were a matter of constitutional law, an internal affair between the government and its citizens. International regulation would have been perceived as interference in the exclusive domain of the state. Except for the protection of minorities after the First World War, human rights remained a subject of national law until after the Second World War. They then became part of international law, starting with the adoption of the Universal Declaration of Human Rights in 1948.

Humanitarian law, for its part, was based first and foremost on the reciprocal expectations of two parties at war and on notions of chivalrous and civilized behaviour.⁶ It did not emanate from a struggle of rights claimants, but from a principle of charity – “*inter arma caritas*”.⁷ The primary motivation was a principle of humanity, not a principle of rights, and its legal development was made possible by the idea of reciprocity between states in the treatment of one another’s troops.⁸ Considerations of military strategy and reciprocity have historically been central to its development.⁹ Whereas human rights were an internal affair of states, international humanitarian law, by its very nature, took root in the relations between states, in international law (even if some of its precedents, such as the Lieber Code, were meant for civil war).

5 See, for a brief account, Louise Doswald-Beck and Sylvain Vité, “International Humanitarian Law and Human Rights Law”, *International Review of the Red Cross*, No. 293 (March–April 1993), pp. 94–119.

6 See, e.g., the Lieber Code: United States War Department, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, 24 April 1863, reprinted in Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflicts*, 3rd edn (1988).

7 First used as a motto on the title page of the “Mémorial des vingt-cinq premières années de la Croix-Rouge, 1863–1888,” published by the International Committee of the Red Cross on the occasion of the 25th anniversary of the foundation of the Committee; the wording was adopted by the Committee on 18 September 1888 following a suggestion by Gustave Moynier. This is now the motto of the International Committee of the Red Cross: see Statutes of the International Committee of the Red Cross 1973, Article 3(2).

8 See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (hereinafter First Geneva Convention); Theodor Meron, “On the inadequate reach of humanitarian and human rights law and the need for a new instrument”, *American Journal of International Law*, Vol. 77 (1983), p. 592.

9 Theodor Meron, “The humanization of humanitarian law”, *American Journal of International Law*, Vol. 94 (2000), p. 243.

After the Second World War the protection of civilians under the Fourth Geneva Convention, although largely destined only for those of the adversary or third parties, added a dimension to humanitarian law that brought it much closer to the idea of human rights law, especially with regard to civilians in detention. Here, humanitarian law started to apply to the traditional realm of human rights law, namely the relationship of the state to its citizens. The codification of Article 3 common to the four Geneva Conventions of 1949 likewise brought the two bodies of law closer, for it concerned the treatment of a state's own nationals. But although the Universal Declaration of Human Rights was adopted in 1948, just one year before the codification of the Geneva Conventions, the drafting histories show that the elaboration of the Declaration and that of the Geneva Conventions were not mutually inspired. While general political statements referred to the common ideal of both bodies of law, there was no understanding that they would have overlapping areas of application. It was probably not assumed, at the time, that human rights would apply to situations of armed conflict, at least not to situations of international armed conflict.¹⁰ Yet there are clear reminiscences of the newly ended war in the debates on the Universal Declaration. It is probably fair to say that “for each of the rights, [the delegates] went back to the experience of the war as the epistemic foundation of the particular right in question”.¹¹ Many of the worst abuses the delegates discussed took place in occupied territories. Even so, the Universal Declaration was meant for times of peace, since peace was what the United Nations sought to achieve.

As the four Geneva Conventions had been formulated at some speed in the late 1940s, there was still scope for development and improvement, especially for situations of non-international armed conflict. But the development of humanitarian law came to a standstill after the 19th International Conference of the Red Cross and Red Crescent in New Delhi in 1957. While the Conference adopted the “Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War”¹² drawn up by the International Committee of the Red Cross (ICRC), the initiative was not pursued.

At the United Nations, on the other hand, states slowly started to emphasize the relevance of human rights in armed conflict. As early as 1953, the General Assembly invoked human rights in connection with the Korean conflict.¹³ After the invasion of Hungary by Soviet troops in 1956, the UN Security Council called upon the Soviet Union and the authorities of Hungary “to respect ... the

10 Robert Kolb, “The relationship between international humanitarian law and human rights law: a brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Convention”, *International Review of the Red Cross*, No. 324 (1998).

11 Johannes Morsink, “World War Two and the Universal Declaration”, *Human Rights Quarterly*, Vol. 15 (1993), p. 358.

12 Reprinted in Dietrich Schindler and Jiri Toman (eds.), *Droit des Conflits Armés* (1996), p. 251.

13 Questions of atrocities committed by the North Korean and Chinese Communist forces against United Nations prisoners of war in Korea. GA Res. 804 (VIII), UN Doc. A/804/VIII, 3 December 1953 (on the treatment of captured soldiers and civilians in Korea by North Korean and Chinese forces).

Hungarian people's enjoyment of fundamental human rights and freedoms".¹⁴ The situation in the Middle East, especially, triggered the will to discuss human rights in situations of armed conflict.

In 1967 the Security Council, with regard to the territories occupied by Israel after the Six Day War, clearly made known its consideration that "essential and inalienable human rights should be respected even during the vicissitudes of war".¹⁵ A year later the Tehran International Conference on Human Rights marked a decisive step by which the United Nations accepted, in principle, the application of human rights in armed conflict. The first resolution of the International Conference, entitled "Respect and enforcement of human rights in the occupied territories", called on Israel to apply both the Universal Declaration of Human Rights and the Geneva Conventions in the occupied Palestinian territories.¹⁶ Then followed the resolution entitled "Respect for human rights in armed conflict", which stated that "even during the periods of armed conflicts, humanitarian principles must prevail". It was reaffirmed by General Assembly Resolution 2444 of 19 December 1968 with the same title, requesting the Secretary-General to draft a report on measures to be adopted for the protection of all individuals in times of armed conflict. His two reports concluded that human rights instruments, especially the International Covenant on Civil and Political Rights (ICCPR) – which had not even entered into force at that time – afforded a more comprehensive protection to persons in times of armed conflict than did the Geneva Conventions alone.¹⁷ The Secretary-General even mentioned the state-reporting system under the Covenant – not yet in force – which he thought "may prove of value in regard to periods of armed conflict",¹⁸ thus already anticipating the later practice of the Human Rights Committee.

Pursuant to the two reports of the Secretary-General, the UN General Assembly affirmed in its resolution on "Basic principles for the protection of civilian populations in armed conflict" that "[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict".¹⁹ It was around this period that one observer wrote, "the two bodies of law have met, are fusing together at some speed and ... in a number of practical instances the regime of human rights is setting the general direction and objectives for the revision of the law of war".²⁰

14 GA Res. 1312 (XIII), UN Doc. A/38/49, 12 December 1958.

15 SC Res. 237, preambular para. 1(b), UN Doc. A/237/1967, 14 June 1967; see also GA Res. 2252 (ES-V), UN Doc. A/2252/ESV, 4 July 1967, which refers to this resolution.

16 *Final Act of the International Conference on Human Rights*, UN Doc. A/Conf.32/41, 22 April–13 May 1968.

17 Report on Respect for Human Rights in Armed Conflict, UN Doc. A/7720, 20 November 1969, esp. ch. 3; Report on Respect for Human Rights in Armed Conflict, paras. 20–29, annex 1, UN Doc. A/8052, 18 September 1970.

18 *Ibid.*, para. 29.

19 GA Res. 2675 (XXV), Basic Principles for the Protection of Civilian Populations in Armed Conflict (9 December 1970).

20 G. I. A. D. Draper, "The relationship between the human rights regime and the laws of armed conflict", *Israel Yearbook on Human Rights*, Vol. 1 (1971), p. 191.

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, which met from 1974 to 1977, was in part a reaction to the UN process. The ICRC in particular could now relaunch the process of developing international humanitarian law to improve the protection of civilians not only in international but also in non-international armed conflict. The Diplomatic Conference and its outcome, the two Additional Protocols of 1977, owed an undeniable debt to human rights – some rights which are derogable under human rights law were notably made non-derogable as humanitarian law guarantees. Both Additional Protocols acknowledge the application of human rights in armed conflict.²¹ While the ICRC did not follow this course in the early stages of the discussion,²² it later accepted that “[h]uman rights continue to apply concurrently [with IHL] in time of armed conflict”.²³ Ever since then the application of human rights in armed conflict has been recognized in international humanitarian law, even if the details of their interaction remain under discussion. Indeed, there have constantly been resolutions by the Security Council,²⁴ the General Assembly²⁵ and the Commission on Human Rights²⁶ reaffirming or implying the application of human rights in situations of armed conflict. The United Nations has also conducted investigations into violations of human rights, for example in connection with the conflicts in Liberia²⁷ and Sierra Leone,²⁸ Israel’s military occupation of the

- 21 Article 72 of Protocol I Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, 1125 UNTS 3 (hereinafter Additional Protocol I); Preamble of Protocol II Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, 1125 UNTS 609 (hereinafter Protocol II).
- 22 ICRC, Draft Additional Protocols to The Geneva Conventions of August 12, 1949 – Commentary 131, 1973; see also Jean Pictet, *Humanitarian Law and the Protection of War Victims*, Sijthoff D. Henry Dunant Institute, Leyden/Geneva 1975, p. 15. One can assume that there was also an institutional motivation for the ICRC to keep its distance from human rights, which were associated with the “politicised” organs of the United Nations.
- 23 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva 1987, see esp. para. 4429.
- 24 SC Res. 1019, UN Doc. S/RES/1019 (9 November 1995) and SC Res. 1034, UN Doc. S/RES/1034 (21 December 1995) (in regard to Former Yugoslavia); SC Res. 1635, UN Doc. S/RES/1635 (28 October 2005) and SC Res. 1653, UN Doc. S/RES/1653 (27 January 2006) (Great Lakes region).
- 25 GA Res. 2546 (XXIV), UN Doc. A/RES/2546/XXIV (December 11, 1969)(territories occupied by Israel); GA Res. 3525 (XXX), UN Doc. A/RES/3525/XXX (December 15, 1975)(territories occupied by Israel); GA Res. 50/193, UN Doc. A/RES/50/193 (22 December 1995)(Former Yugoslavia); GA Res. 3525 (XXX), UN Doc. A/3525 (15 December 1975)(territories occupied by Israel); GA Res. 46/135, UN Doc. A/RES/46/135 (19 December 1991)(Kuwait under Iraqi occupation); GA Res. 52/145, UN Doc. A/RES/52/145 (12 December 1997)(Afghanistan).
- 26 Commission on Human Rights, Resolutions and Decisions see, e.g., UN Docs E/CN.4/1992/84 (3 March 1992)(Iraq); E/CN.4/2003/77 (25 April 2003)(Afghanistan), A/E/CN.4/RES/2003/16 (17 April 2003) (Burundi); E/CN.4/RES/2001/24 (20 April 2001)(Russian Federation); E/CN.4/RES/2003/15 (17 April 2003)(Congo); and reports to the Commission on Human Rights: OHCHR/STM/CHR/03/2 (2003) (Colombia); OHCHR/STM/CHR/03/3 (2003) (Timor-Leste); see also the Report of the Special Rapporteur of the UN Commission on Human Rights on the Situation of Human Rights in Kuwait under Iraqi Occupation, UN Doc. E/CN.4/1992/26 (16 January 1992).
- 27 The Secretary-General, Progress Report on UNOMIL, UN Doc. S/1996/47, 23 January 1996.
- 28 The Secretary-General, Progress Report on UNOMSIL, UN Doc. S/1998/750, 12 August 1998.

Palestinian territories²⁹ and Iraq's military occupation of Kuwait.³⁰ The Security Council has also addressed human rights violations by "militias and foreign armed groups" in the Democratic Republic of the Congo.³¹

The applicability of human rights treaties to situations of armed conflict is also confirmed by the existence of derogation clauses allowing for, but also restricting, derogation from human rights in times of emergency, which either explicitly or implicitly include wartime situations.³² Finally, some newer international treaties and instruments incorporate or draw from both human rights and international humanitarian law provisions. This is the case of the Convention on the Rights of the Child of 1989,³³ the Rome Statute of the International Criminal Court,³⁴ the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict,³⁵ the 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,³⁶ and, most recently, the draft Convention on the Rights of Persons with Disabilities.³⁷

Developments in international jurisprudence

A further important development leading to the recognition that human rights law applies to situations of armed conflict is the vast body of jurisprudence by universal and regional human rights bodies.

The UN Human Rights Committee has applied the ICCPR to both non-international and international armed conflict, including situations of occupation, in its concluding observations on country reports as well as its opinions on

29 Commission on Human Rights Resolution, UN Doc. E/CN.4/S5/1, 19 October 2000.

30 Commission on Human Rights Resolution, UN Doc. E/CN.4/1991/74, 6 March 1991.

31 SC Res. 1649, UN Doc. S/RES/1649, 21 December 2005 (The situation concerning the Democratic Republic of Congo), preambular paras. 4 and 5.

32 International Covenant on Civil and Political Rights, Article 4, 16 December 1966, 99 UNTS 171 (hereinafter ICCPR); European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 15, 213 UNTS 222, 3 September 1953 (hereinafter ECHR); and American Convention on Human Rights, Article 27, 1144 UNTS 123, 22 November 1969 (hereinafter ACHR). Article 27 of the ACHR has a virtually identical wording to Article 4 ICCPR; see also UN Doc. E/CN.4/SR.195, 1950, para. 23; UN Doc. E/CN.4/SR.196, 1950, para. 3; UN Doc. E/CN.4/SR.196, 1950, para. 5.

The omission of the term "war" in the ICCPR does not mean that derogations were not meant for situations of armed conflict, as the drafting history shows. Indeed, the drafters included a non-discrimination clause in Article 4, but deliberately left out discrimination on the ground of nationality in order to permit discrimination against enemy aliens, UN SCOR, 14th Sess, Supp No. 4, paras. 279–280; UN Doc. E/2256-E/CN.4/669, 1952. See also UN Doc. A/C.3/SR.1262, 1963, where the point was stressed that Article 4 could only apply within the territory of a state (Romania) para. 46, UN Doc. A/C.3/SR.1261, 1963.

33 Convention on the Rights of the Child of 1989, Article 38, 20 November 1989, 1577 UNTS 3 (hereinafter CROC).

34 Rome Statute of the International Criminal Court, 2187 UNTS 3, 1 July 2002.

35 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000, 1577 UNTS 3, 20 November 1989.

36 Adopted by GA Res. 60/147 of 16 December 2006, UN Doc. A/RES/60/147, 21 March 2006.

37 Adopted by GA Res. 61/106, UN Doc. A/RES/61/106, 13 December 2006, see esp. Article 11.

individual cases.³⁸ The same is true of the concluding observations of the UN Committee on Economic and Social Rights,³⁹ the Committee on the Elimination of Racial Discrimination,⁴⁰ the Committee on the Elimination of Discrimination against Women⁴¹ and the Committee on the Rights of the Child.⁴² The European Court of Human Rights has recognized the application of the European Convention both in non-international armed conflict⁴³ and in situations of occupation in international armed conflict.⁴⁴ The Inter-American Commission and Court have recognized the applicability of the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights to armed conflict situations.⁴⁵

The International Court of Justice has echoed the jurisprudence of human rights bodies. Its first statement on the application of human rights in situations of armed conflict can be found, with reference to the ICCPR, in the 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in

- 38 Concluding Observations: Democratic Republic of Congo, UN Doc. CCPR/C/COD/CO/3, 26 April 2006; Belgium, UN Doc. CCPR/CO/81/BEL, 12 August 2004; Colombia, UN Doc. CCPR/CO/80/COL, 26 May 2004; Sri Lanka, UN Doc. CCPR/CO/79/LKA, 1 December 2003; Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003; Guatemala, UN Doc. CCPR/CO/72/GTM, 27 August 2001; Netherlands, UN Doc. CCPR/CO/72/NET, 27 August 2001; Belgium, 14, UN Doc. CCPR/C/79/Add.99, 19 November 1998; Israel, UN Doc. CCPR/C/79/Add.93, 18 August 1998; United States of America, UN Doc. CCPR/C/USA/CO/3/Rev1, 18 December 2006; United Kingdom, UN Doc. CCPR/C/GBR/CO/6, 30 July 2008; *Sarma v. Sri Lanka*, UN Doc. CCPR/C/78/D/950/2000, 31 July 2003; *Bautista v. Colombia*, UN Doc. CCPR/C/55/D/563/1993, 13 November 1995; *Guerrero v. Colombia*, Communication No. R.11/45, UN Doc. Supp. No. 40(A/37/40), 31 March 1982.
- 39 Committee on Economic, Social and Cultural Rights, Concluding Observations: Colombia, UN Doc. E/C.12/1/Add.74, 30 November 2001; Guatemala, UN Doc. E/C.12/1/Add.93, 12 December 2003; Israel, UN Doc. E/C.12/1/Add.90, 23 May 2003.
- 40 Committee on the Elimination of Racial Discrimination: Concluding Observations: Israel, UN Doc. CERD/C/304/Add.45, 30 March 1998.
- 41 Committee on the Elimination of Discrimination against Women, Concluding Observations: Sri Lanka, paras. 256–302, UN Doc. A/57/38 (Part I), 7 May 2002; Democratic Republic of the Congo, paras. 194–238, UN Doc. A/55/381, February 2000; Colombia, paras. 337–401, UN Doc. A/54/38, 4 February 1999.
- 42 Committee on the Rights of the Child, Concluding Observations: Democratic Republic of Congo, UN Doc. CRC/C/15/Add.153, 9 July 2001; Sri Lanka, UN Doc. CRC/C/15/Add.207, 2 July 2003; Colombia, UN Doc. CRC/C/COL/CO/3, 8 June 2006.
- 43 See, e.g., ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment of 24 February 2005; *Isayeva v. Russia*, Judgment of 24 February 2005; *Ergi v. Turkey*, Judgment of 28 July 1998, Reports 1998-IV; *Ahmet Özkan and others v. Turkey*, Judgment of April 6, 2004.
- 44 *Cyprus v. Turkey*, above note 3; for an overview see Aisling Reidy, “The approach of the European Commission and Court of Human Rights to international humanitarian law”, *International Review of the Red Cross*, No. 324 (1998), pp. 513–29.
- 45 Inter-American Court of Human Rights (hereinafter I/A Ct HR), *Bámaca Velásquez v. Guatemala*, Judgment of 25 November 2000, Series C No. 70, para. 209; Inter-American Commission on Human Rights (hereinafter I/A Cm HR) *Coard v. the United States of America*, Case 10.951, OEA Doc. OEA/ser.L/V/II.106.doc.3rev, 1999, para. 37; *Alejandro v. Cuba*, Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev, 1999; *Victor Saldaña v. Argentina*, Report No. 38/99, OEA/Ser.L/V/II.95, Doc. 7 rev at 289, 1998, para. 18; *Rafael Ferrer-Matorra and others v. the United States*, Case No. 9903, Report No. 51/01, OEA/Ser.L/V/II.111, Doc. 20 rev 289, 1980, para. 179; *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba*, Decision of 12 March 2002, 41 ILM 532.

a time of national emergency. Respect for the right to life is not, however, such a provision. 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 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, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁴⁶

In the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Wall case) the Court expanded this argument to the general application of human rights in armed conflict:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.⁴⁷

It confirmed this statement in the case concerning the territory in eastern Congo occupied by Uganda (*DRC v. Uganda*). In this judgment, it repeated the holding of the advisory opinion in the Wall case that international human rights law applies in respect to acts done by a state in the exercise of its jurisdiction outside its own territory and particularly in occupied territories.⁴⁸ It thereby made it clear that its previous advisory opinion with regard to the occupied Palestinian territories cannot be explained by the long-term presence of Israel in those territories,⁴⁹ since Uganda did not have such a long-term and consolidated presence in the eastern Democratic Republic of the Congo. Rather there is a clear acceptance of the Court that human rights apply in time of belligerent occupation.

46 International Court of Justice (hereinafter ICJ) *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Reports, p. 226, para. 25 (hereinafter *Nuclear Weapons* case).

47 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Reports, p. 136, para. 106 (hereinafter *Wall* case).

48 ICJ, *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 19 December 2005, para. 216 (hereinafter *DRC v. Uganda*).

49 As argued by Michael J. Dennis, "Application of human rights treaties extraterritorially in times of armed conflict and military occupation", *American Journal of International Law*, Vol. 99 (2005), p. 122.

Extraterritorial application of human rights

Like the International Court of Justice, human rights bodies have not only applied human rights to armed conflict situations within the territory of a country, but also to armed conflict situations abroad. The extraterritorial reach of human rights has, more recently, and in particular in connection with the armed conflicts in Iraq and Afghanistan, sparked some controversy.

While the International Court of Justice, as explained above, affirms the application of human rights extraterritorially as a general principle, arguments about this question focus on the wording of the different treaties and must be dealt with separately.

International Covenant on Civil and Political Rights

The ICCPR contains the most restrictive application clause of international human rights treaties, since its Article 2(1) confines the Covenant's application to the obligation of the state to respect and ensure human rights "within its territory and subject to its jurisdiction". The ordinary meaning of this clause implies that both criteria apply cumulatively. However, the Human Rights Committee has interpreted the clause to mean persons *either* within the jurisdiction *or* within the territory of the state, and understands persons "within the jurisdiction" to mean anyone "within the power or effective control of the state".⁵⁰

The origins of this jurisprudence lie in cases that have no link to armed conflict. They concern the abduction, outside the state party, of dissidents by agents of the secret service. One of the first cases relating to violations of the ICCPR by state agents on foreign territory is *López Burgos v. Uruguay*.⁵¹ Kidnapped in Buenos Aires by Uruguayan forces, the applicant had been secretly detained in Argentina before being clandestinely transported to Uruguay. Had the Committee applied the Covenant according to the literal meaning of Article 2, it could not have held Uruguay responsible. Instead it used a teleological argument and took the view that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory".⁵²

The long-standing jurisprudence of the Human Rights Committee has confirmed this approach. In particular, the Committee has consistently applied the Covenant to situations of military occupation⁵³ and with regard to national troops

50 General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev1/Add.13, 26 May 2004, para. 10.

51 *López Burgos v. Uruguay*, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981; see also *Celiberti v. Uruguay*, UN Doc. CCPR/C/13/D/56/1979, 29 July 1981.

52 *López Burgos v. Uruguay*, above note 51, para. 12.3; *Celiberti v. Uruguay*, above note 51, para. 10.3.

53 Human Rights Committee, Concluding Observations on Cyprus, UN Doc. CCPR/C/79/Add.39, 21 September 1994, para. 3; Concluding Observations on Israel, UN Doc. CCPR/C/79/Add.93,

taking part in peacekeeping operations.⁵⁴ It has summed up this interpretation of Article 2 in its General Comment 31:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone *within the power or effective control* of that State Party, even if not situated within the territory of the State Party. ... This principle also applies to those within the *power or effective control of the forces of a State Party acting outside its territory*, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.⁵⁵

On the basis of the requirement of *power or effective control*, the Human Rights Committee thus accepts the extraterritorial applicability of the Covenant in two types of situations: in the case of control over a territory, such as in the case of occupation, or over an individual, such as in the abduction cases.

The International Court of Justice has followed the Human Rights Committee's approach and furthermore relied on the *travaux préparatoires* of the Covenant:

The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their state of origin, rights that do not fall within the competence of that state, but of that of the state of residence.⁵⁶

There is considerable controversy over the drafting history of the Covenant, especially between the Human Rights Committee and the United States, since the latter is of the opinion that the drafting history shows precisely that the Covenant was not meant to apply extraterritorially.⁵⁷ During the drafting, the United States proposed the addition of the requirement "within its territory" to

18 August 1998, para. 10; Concluding Observations on Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11.

54 Concluding Observations on Belgium, UN Doc. CCPR/C/79/Add.99, 19 November 1998, para. 14; Netherlands, UN Doc. CCPR/CO/72/NET, 27 August 2001, para. 8; Belgium, CCPR/CO/81/BEL, 12 August 2004, para. 6.

55 General Comment No. 31, above note 50, para. 10 (emphasis added).

56 *Wall* case, above note 47, paras. 108–111.

57 Annex I: Territorial Scope of the Application of the Covenant, 2nd and 3rd periodic reports of the United States of America, Consideration of reports submitted by States parties under Article 40 of the Covenant, UN Doc. CCPR/C/USA/3, 28 November 2005; Summary Record of the 2380th meeting, 18 July 2006, Second and third periodic reports of the United States of America, UN Doc. CCPR/C/SR.2380, 27 July 2006; Human Rights First, Submission to the Human Rights Committee, 18 January 2006, p. 7, available at <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/hrfirst.doc>.

Article 2, which only had the requirement “within its jurisdiction”.⁵⁸ Eleanor Roosevelt, the US representative and the then chair of the Commission, emphasized that the United States was “particularly anxious” not to assume “an obligation to ensure the rights recognized in it to citizens of countries under United States occupation”.⁵⁹ She explained that

The purpose of the proposed addition [is] to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states. The United States [is] afraid that without such an addition the draft Covenant might be construed as obliging the contracting states to enact legislation concerning persons, who although outside its territory were technically within its jurisdiction for certain purposes. An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying states in certain respects, but were outside the scope of legislation of those states. Another illustration would be leased territories; some countries leased certain territories from others for limited purposes, and there might be question of conflicting authority between the lessor nation and the lessee nation.⁶⁰

The United States took the view that the amendment was necessary “so as to make clear that a state was not bound to enact legislation in respect of its nationals outside its territory”.⁶¹ The United Kingdom followed the same line, and stated that “there were cases in which such nationals were for certain purposes under its jurisdiction, but the authorities of the foreign country concerned would intervene in the event of one of them committing an offence”.⁶²

However, with regard to *troops maintained by a state in foreign areas* Mrs Roosevelt stated that “such troops, although maintained abroad, remained under the jurisdiction of the State”.⁶³

Considering these exchanges, it becomes clear that reliance on the *travaux préparatoires* is of little help. Indeed, while it is clear that the amendment “within its territory” was added to the text in order to constitute a cumulative requirement together with the jurisdiction requirement, the reasons for the amendment relate to very precise situations. The fear was of a conflict between the jurisdictions of sovereign states; there was no reason for one state to intervene on the territory of

58 Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles, UN ESCOR Hum Rts Comm, 6th Sess, UN Doc. E/CN.4/365, 1950, p. 14 (United States proposal).

59 Summary Record of the Hundred and Thirty-Eighth Meeting, UN ESCOR Hum Rts Comm, 6th Sess, 138th mtg, UN Doc. E/CN.4/SR.138, 1950, p. 10.

60 Summary Record of the Hundred and Thirty-Eighth Meeting, UN ECOSOC, Commission on Human Rights, UN Doc. E/CN.4/SR.138, 6 April 1950, p.10; see also Summary Record of the Hundred and Ninety-Third Meeting, E/CN.4/SR.193, 26 May 1950, para. 53, and Summary Record of the Hundred and Ninety-Fourth Meeting, E/CN.4/SR.194, 25 May 1950, paras. 14, 16, 25.

61 UN Doc. E/CN.4/SR.329, p. 10; see also Summary Record of the Hundred and Ninety-Fourth Meeting, UN Doc. E/CN.4/SR.194, 25 May 1950, para. 16.

62 UN Doc. E/CN.4/SR.329, p. 12.

63 Summary Record of the Hundred and Ninety-Fourth Meeting, E/CN.4/SR.194, 25 May 1950, para. 32.

another if that other state had the means to uphold human rights. This is an altogether different scenario from the one envisaged in the *López Burgos* case or situations of occupation in which the authority of the occupied state has disappeared and been replaced by that of the occupying state.

The approach of the Human Rights Committee and the International Court of Justice can thus be justified in several ways. According to Article 31(1) of the Vienna Convention on the Law of Treaties, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The Human Rights Committee appears to have adopted this approach in its recent observations, as it held that in good faith the Covenant must apply extraterritorially.⁶⁴ Furthermore, the “preparatory work of the treaty and the circumstances of its conclusion” can be considered for purposes of interpretation not only if the meaning is ambiguous or obscure, but also if the interpretation according to the ordinary meaning “leads to a result which is manifestly absurd or unreasonable” (Article 32). In this sense, one member of the Human Rights Committee wrote in the *López Burgos* case,

To construe the words “within its territory” pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, *lead to utterly absurd results*. ... Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad.⁶⁵

Thus, even relying on the *travaux préparatoires*, which at first glance indicate otherwise, the interpretations of the Human Rights Committee and the International Court of Justice are convincing and the Covenant must be understood to apply to persons abroad when they are under the effective control of a state party, at least when that control is exercised to the exclusion of control by the territorial state.

European Convention on Human Rights

The European Convention on Human Rights rests on broader terms of application than the ICCPR in that, according to Article 1 ECHR, the states parties “shall secure to everyone within their jurisdiction” the rights set forth in the Convention.⁶⁶ The drafting history of Article 1 thereof does not give much

64 “The State party should review its approach and interpret the Covenant in good faith in accordance with the ordinary meaning to be given to its terms in their context including subsequent practice, and in the light of its object and purpose”. Concluding Observations on the United States of America, United States of America, UN Doc. CCPR/C/USA/CO/3/Rev1, 18 December 2006, para. 10.

65 *Lopez Burgos v. Uruguay*, above note 51. Individual opinion of Mr Tomuschat (emphasis added). Note that Tomuschat also excluded the situation of occupation from the scope of Article 2 – a conclusion that was not followed subsequently by the Human Rights Committee.

66 Article 1 ECHR.

indication as to the meaning of this article. The first draft made reference to “all persons residing within the territory” and was replaced by a reference to persons “within their jurisdiction”. The underlying consideration was that the word “residing” could be too restrictive and only encompass persons legally residing within the territory. It was consequently changed to “within their jurisdiction”, based on Article 2 of the then Draft Covenant on Civil and Political Rights discussed by the UN Commission.⁶⁷

The European Court of Human Rights has therefore more readily applied the Convention extraterritorially, as it merely had to interpret the meaning of the term “jurisdiction”. The Court found in the *Loizidou* case that where a state exercises *effective overall control over a territory* – a condition that is particularly fulfilled in the case of military occupation – it exercises jurisdiction for the purposes of Article 1 of the Convention.⁶⁸ It justified the effective control argument by saying that “any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention’s fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court”.⁶⁹

In the *Banković* case the European Court restricted its jurisprudence on extraterritorial application of the Convention. The case dealt with NATO’s aerial bombardment of the Serbian Radio-Television station. The Court took the view that such bombardments did not mean that the attacking states had jurisdiction within the meaning of Article 1 ECHR; it stated that “[h]ad the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949”.⁷⁰ The Court clearly saw a difference between warfare in an international armed conflict, where one state has no control over the other at the time of the battle, and the situation of occupation. It further argued that

In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on by the Court in favour of establishing

67 *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights* (Vol. III, p. 260), cited in ECtHR, *Banković and others v. Belgium and others*, application No. 52207/99, Admissibility Decision [GC], 12 December 2001, para. 19.

68 ECtHR, *Loizidou v. Turkey* (Preliminary Objections), Judgment of 23 March 1995, Series A No. 310, para. 62; *Loizidou v. Turkey*, Judgment of 18 December 1996, Reports 1996-VI, para. 56; *Cyprus v. Turkey*, application No. 25781/99 above note 3, para. 77.

69 *Cyprus v. Turkey*, above note 3, para. 78.

70 ECtHR, *Banković and others v. Belgium and others*, above note 67, para. 75.

jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.⁷¹

This argumentation leads to the understanding that the Court would not find that a state is exercising jurisdiction if it exercises overall control over a territory outside the Council of Europe.⁷²

However, subsequent judgments contradict this conclusion. In *Öcalan v. Turkey* the Court found Turkey responsible for the detention of the applicant by Turkish authorities in Kenya: it considered the applicant within the jurisdiction of Turkey by virtue of his being held by Turkish agents.⁷³ This broader extraterritorial application was confirmed in the case of *Issa and others v. Turkey*, in which the Court made it clear that control over an individual also engages the state's responsibility:

[A] State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.⁷⁴

In both the *Öcalan* and the *Issa* case, the Court recognized that states have “jurisdiction” over persons who are in the territory of another state but who are in the hands of their own state's agents. Interestingly, in its justification the Court relied on the case law of the Human Rights Committee in the *López Burgos* case and of the Inter-American Commission of Human Rights. It held that “[a]ccountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory”.⁷⁵ This argument was not confined to the “European legal space”.

It is difficult to reconcile the *Banković* decision with later jurisprudence of the Court. One way of understanding *Banković* is that the Court simply did not find that the state had effective control either over the territory or the persons, so that no “jurisdiction” was given under Article 2 of the European Convention on Human Rights. This does not, however, explain the argument about the European legal space. Another way of trying to find coherence in the jurisprudence is to

71 Ibid., para. 80.

72 See the severe criticism of the *Banković* judgment by Luigi Condorelli, “La protection des droits de l'Homme lors d'actions militaires menées à l'étranger”, *Collegium* 32 (2005), p. 100.

73 ECtHR, *Öcalan v. Turkey*, Judgment of 12 March 2003, para. 93.

74 ECtHR, *Issa and others v. Turkey*, Judgment of 16 November 2004, para. 71; see also *Isaak and others v. Turkey*, Appl. No. 44587/98, Admissibility decision of 28 September 2008, p. 19.

75 *Issa and others v. Turkey*, above note 74, para. 71.

follow the approach of the UK House of Lords in the *Al-Skeini* case. The House of Lords, after reviewing the case law of the European Court,⁷⁶ based its considerations on *Banković* as the authoritative case, excluding jurisdiction outside the area of the Council of Europe with the narrow exception of “activities of diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state”⁷⁷ and military prisons.⁷⁸ That approach, on the other hand, disregards the argument of the Court in the *Issa* case or in even in the *Öcalan* case, where it was uncontroversial that *Öcalan* came within the jurisdiction of Turkey from the moment he was handed over to Turkish agents, without fulfilling any of the conditions set out in the interpretation of the House of Lords. Future jurisprudence of the European Court of Human Rights will have to provide more clarity. An interesting case in this regard will be the decision in the interstate application from Georgia against Russia.⁷⁹

In sum, the case law of the European Court of Human Rights on the meaning of “jurisdiction” in Article 1 is not entirely coherent. While it remains unclear to what extent the regional nature of the Convention will limit jurisdiction to territory within the geographical area of the Council of Europe in future cases, it appears that at least it will not take this limitation into account if people are in detention abroad. Another question that remains unclear is whether, if state agents committed an unlawful targeted killing abroad without controlling that area, this would mean that they exercised jurisdiction. The *Issa* case seems to indicate this, and it would indeed seem contradictory to hold a state accountable under the European Convention for killing a person in detention but not for a targeted shooting. But, again, the matter is not entirely settled.

It is submitted that the term “jurisdiction” in itself cannot support the contention that it means exercise of control abroad only when it is exercised in some states and not in others. A state may in practice, with or without the agreement of the host state, lawfully or unlawfully, exercise jurisdiction abroad. Thus “persons will come within the jurisdiction of a State in circumstances in which they can be said to be under the effective control of that State or are affected by those acting on behalf of the State more generally, wherever this occurs”.⁸⁰ However, even if the Court in some cases cannot limit the application of the Convention because

76 Including cases such as Eur Comm HR, *Sánchez Ramírez v. France*, 86-A DR 155, 1996; *Freda v. Italy*, 21 DR 250, 1980; *Hess v. the United Kingdom*, 2 DR 72, 1975.

77 As described in *Banković and others v. Belgium and others*, above note 67, para. 73.

78 House of Lords, *Al-Skeini and others v. Secretary of State for Defence*, Judgment of 13 June 2007, [2007] UKHL 26, paras. 61–83, 91, 105–132; the Court of Appeals had interpreted the jurisprudence of the European Court of Human Rights to be broader and cover both overall control over a territory and control over a person: *R v. the Secretary of State for Defence, ex parte Al-Skeini and others*, Judgment of 21 December 2005, [2005] EWCA Civ 1609, paras. 62–112.

79 Press Release issued by the Registrar, “European Court of Human Rights grants requests for interim measures”, No. 581, 12 August 2008.

80 Sir Elihu Lauterpacht and Daniel Bethlehem, “The scope and content of the principle of *non-refoulement*: opinion”, in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations On International Protection* 87, 2003, para. 67.

of lack of “jurisdiction”, it may decide to do so on the basis of a more general argument that the Convention is a regional and not a universal treaty.

American Declaration on the Rights and Duties of Man

The Inter-American Commission on Human Rights has long asserted jurisdiction over acts committed outside the territory of a state.⁸¹ It has based this approach on the American Declaration on the Rights and Duties of Man, which contains no application clause. The Commission’s argument is teleological: since human rights are inherent to all human beings by virtue of their humanity, states have to guarantee those rights to any person under their jurisdiction, which the Commission understands to mean any person “subject to its authority and control”.⁸²

The Commission also took rather a broader view with respect to military operations than the European Court of Human Rights. While the European Court rejected jurisdiction in *Banković*, the Inter-American Commission, effectively using a “cause and effect” test, stated in the case of the invasion of Panama by the United States in 1989 that

Where it is asserted that a use of military force has resulted in non-combatant deaths, personal injury, and property loss, the human rights of the non-combatants are implicated. In the context of the present case, the guarantees set forth in the American Declaration are implicated. This case sets forth allegations cognizable within the framework of the Declaration. Thus, the Commission is authorized to consider the subject matter of this case.⁸³

However, this case has been pending since 1993 and no decision has been reached on its merits.

The Inter-American Commission has also had to decide on killings of persons by state agents acting abroad. Thus it condemned as a violation of the right to life the assassination of Orlando Letelier in Washington and Carlos Prats in Buenos Aires by Chilean agents.⁸⁴ Similarly, it condemned attacks on Surinamese citizens by Surinamese state agents in the Netherlands.⁸⁵

To sum up, the Inter-American Commission holds states accountable for any acts subject to their authority and control and has understood these criteria in the widest possible manner, including situations of armed attack on foreign territory.

81 For an overview of its jurisprudence see Cristina Cerna, “Extraterritorial application of the human rights instruments of the Inter-American system”, in Fons Coomans and Menno Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, 2004, pp. 141–74, and Douglas Cassel, *ibid.*, pp. 175–81.

82 *Coard v. the United States*, above note 45, para. 37.

83 *Salas v. the United States*, Report No. 31/93, Case No. 10.573, 14 October 1993, Annual Report 1993, OEA/Ser.L/V/85, Doc. 9 rev., 11 February 1994, para. 6.

84 Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, Doc.17, 9 September 1985, Chapter III, paras. 81–91, 181.

85 Second Report on the Human Rights Situation in Suriname, OEA/Ser.L/V/II.66, doc.21 rev 1, 2 October 1985, Chapter V, E.

Convention against Torture, Convention on the Rights of the Child, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination

Article 2 of the Convention against Torture requires each state party to take effective measures to prevent torture “in any territory under its jurisdiction”. The original proposal had only used the formulation “within its jurisdiction”. It was stated that this could be understood to cover citizens of one state who are resident within the territory of another state. It was proposed to change the phrase to “any territory under its jurisdiction”, which would “cover torture inflicted aboard ships or aircraft registered in the State concerned as well as occupied territories”.⁸⁶ In line with this purpose, the Committee against Torture has understood this to include territories under the effective control of a state party to the Convention, but has done so against the protests of some states such as the United Kingdom⁸⁷ and the United States.⁸⁸

The International Covenant on Economic, Social and Cultural Rights does not contain an application clause at all.⁸⁹ Both the UN Committee on Economic, Social and Cultural Rights and the International Court of Justice have nevertheless affirmed the applicability of this treaty to all persons within the control of a state, especially in occupied territory.⁹⁰

The Convention on the Rights of the Child (Article 2(1)) guarantees the rights set forth in the Convention to each child within the jurisdiction of states party thereto; the Committee on the Rights of the Child and the International Court of Justice have understood this to include occupied territories.⁹¹

The International Court of Justice has found in its Order of 15 October 2008 in the case between Georgia and the Russian Federation that the International Convention on the Elimination of All Forms of Racial Discrimination applies to actions beyond a State’s territory.⁹²

86 Report of the Working Group on A Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. E/CN.4/L.1470, 12 March 1979, para. 32; France proposed that “within its jurisdiction” should be replaced by “in its territory” throughout the draft, E/CN.4/1314, para. 54.

87 Committee against Torture, Conclusions and Recommendations on the United Kingdom, UN Doc. CAT/C/CR/33/3, 10 December 2004, para. 4(b).

88 Committee against Torture, Summary Record of the 703rd meeting, UN Doc. CAT/C/SR.703, 12 May 2006, para. 14.

89 The same is true for the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on all Forms of Discrimination against Women.

90 *Wall* case, above note 47, para. 112.

91 Committee on the Rights of the Child, Concluding observations on Israel, UN Doc. CRC/C/15/Add.195, 9 October 2002; *Wall* case, above note 47, para. 113.

92 ICJ, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Request for the Indication of Provisional Measures, Order of 15 October 2008, para No. 109.

State practice

Member states of the Council of Europe have unanimously adopted resolutions in the Committee of Ministers, the Council's decision-making body, for the execution of judgments of the European Court of Human Rights which had applied the Convention extraterritorially, for example in the case of *Cyprus v. Turkey* for the violations committed by Turkey during its occupation⁹³ or for the violations committed by the Russian Federation in Transdniestria in Moldova.⁹⁴

The positions and practice of states concerning the extraterritorial application of human rights, as expressed over a long period in General Assembly or Security Council resolutions, tend to confirm the application of human rights in international armed conflict. After the invasion of Hungary by Soviet troops in 1956, the Security Council called upon the Soviet Union and the authorities of Hungary "to respect ... the Hungarian people's enjoyment of fundamental human rights and freedoms".⁹⁵ In 1967 it considered, with regard to the territories occupied by Israel, that "essential and inalienable human rights should be respected even during the vicissitudes of war".⁹⁶ More recently, it has condemned human rights violations by "militias and foreign armed groups" in the Democratic Republic of the Congo.⁹⁷ As mentioned above, resolutions of the UN General Assembly and the UN Commission on Human Rights have also sometimes invoked human rights in such situations.⁹⁸

Few states have contested, vis-à-vis the human rights bodies, the application of the human rights treaties abroad.⁹⁹ Apart from Israel, it is doubtful whether any state has consistently objected to the extraterritorial application of human rights instruments. Also, it should be noted that some important

93 Interim Resolution ResDH(2005)44, concerning the judgment of the European Court of Human Rights of 10 May 2001 in the case of Cyprus against Turkey (adopted by the Committee of Ministers on 7 June 2005, at the 928th meeting of the Ministers' Deputies).

94 Interim Resolution ResDH(2006)26 concerning the judgment of the European Court of Human Rights of 8 July 2004 (Grand Chamber) in the case of *Ilașcu and others against Moldova and the Russian Federation* (Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies).

95 GA Resolution 1312 (XIII), 12 December 1958. See above note 14.

96 SC Resolution 237 (1967) of 14 June 1967, preambular paragraph 2. See above note 5.

97 UN Doc. S/RES/1649 of 21 December 2005.

98 See above notes 30 and 31.

99 See Replies of the Government of the Netherlands to the Concerns Expressed by the Human Rights Committee, UN Doc. CCPR/CO/72/NET/Add.1, 29 April 2003, para. 19; Second periodic report of Israel to the Human Rights Committee, UN Doc. CCPR/C/ISR/2001/2, 4 December 2001, para. 8; Second periodic report of Israel to the Committee on Economic, Social and Cultural Rights, UN Doc. E/1990/6/Add.32, 16 October 2001, para. 5; Committee against Torture, Conclusions and Recommendations on the United Kingdom, UN Doc. CAT/C/CR/33/3, 10 December 2004, para. 4 (b); Summary Record of the 703rd meeting, UN Doc. CAT/C/SR.703, 12 May 2006, para. 14; Annex I: Territorial Scope of the Application of the Covenant, 2nd and 3rd periodic reports of the United States of America, Consideration of reports submitted by States parties under Article 40 of the Covenant, UN Doc. CCPR/C/USA/3, 28 November 2005.

national courts, for instance in Israel¹⁰⁰ and the United Kingdom,¹⁰¹ have applied human rights extraterritorially. The objection of these governments therefore does not necessarily reflect internally coherent state practice, since such practice includes all branches of government (the executive, the legislature and the judiciary).¹⁰²

It would go beyond the scope of this article to analyse which human rights are customary. But it is uncontroversial that core human rights such as the prohibition of arbitrary deprivation of life, the prohibition of torture and cruel, inhuman or degrading treatment, the prohibition of arbitrary deprivation of liberty or the right to a fair trial form part of customary international law. As for their territorial scope, it can be seen from the above-mentioned UN resolutions that extraterritorial application has not been called into question outside treaty law.¹⁰³ Human rights in customary international law are of a universal nature and therefore belong to every human being, wherever he or she may be. It can hence be argued that customary human rights apply in all territories of the world and that any state agent, whether acting in his or her own territory or abroad, is bound to respect them. In other words, respect for customary human rights is not a matter of extraterritorial application, because outside of treaty application clauses, respect for human rights has never been territorially confined.

Complementarity and *lex specialis*

The concurrent application of human rights and humanitarian law has the potential to offer strong protection to the individual, but it can also raise many problems. With the increasing specialization of different branches of international law, different regimes overlap, complement or contradict each other. Human rights and humanitarian law are but one example of this phenomenon.¹⁰⁴ It is therefore necessary to review the pertinent international rules and general principles of interpretation in order to analyse the relationship between human rights and humanitarian law.

100 See, e.g., *Marab v. IDF Commander in the West Bank*, HCJ 3239/02, Judgment of 18 April 2002.

101 *Al-Skeini and others v. Secretary of State for Defence*, [2004] EWHC 2911 (Admin), No. CO/2242/2004, 14 December 2004; see also *Al-Skeini and others v. Secretary of State for Defence*, [2005] EWCA Civ 1609, 21 December 2005, paras. 3–11, 48–53, 189–190; *Al-Jedda, R v. Secretary of State for Defence*, [2005] EWHC 1809 (Admin), 12 August 2005.

102 The importance of court decisions in forming customary law when conflicting with positions of the executive is subject to debate: see International Law Association, Final Report of the Committee on Formation of Customary International Law, Statement of principles applicable to the formation of general customary international law, pp. 17, 18.

103 See, e.g., the United States Army *Operational Handbook* of 2006, ch. 3, p. 47. For the extraterritorial scope of the customary right to life, see Nils Melzer, *Targeted Killing*, 2007, pp. 287 f.; David Kretzmer, “Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence?”, *European Journal of International Law*, Vol. 16 (2005), pp. 171, 185; Orna Ben Naftali and Yuval Shany, “Living in denial: the application of human rights in the occupied territories”, *Israel Law Review*, Vol. 37 (2004), pp. 17, 87.

104 Bothe, above note 4, pp. 37.

Distinguishing features of human rights law and humanitarian law

Before the possibilities of concurrent application are discussed, some fundamental distinctions between the two bodies of law should be recalled. First, humanitarian law only applies in times of armed conflict, whereas human rights law applies at all times. Second, human rights law and humanitarian law are traditionally binding on different parties. While it is clear that humanitarian law is binding for “parties to the conflict”¹⁰⁵ – that is, both state authorities and non-state parties – this question is far more controversial in human rights law. Traditionally, international human rights law is understood to be binding only for states, and it will have to be seen how the law evolves in this regard.¹⁰⁶ Third, while most international human rights are with few exceptions derogable,¹⁰⁷ humanitarian law is non-derogable (with the sole limited exception of Article 5 of the Fourth Geneva Convention). Lastly, there are considerable differences in procedural and secondary rights, such as the right to an individual remedy, as will be further discussed below.¹⁰⁸

It is thus clear from the outset that a complete merging of the two bodies of law is impossible. It is natural, therefore, that the approach in jurisprudence and practice is rather that human rights and humanitarian law are not mutually exclusive, but complementary and mutually reinforcing. The concept of complementarity is, however, of a policy rather than a legal nature. To form a legal framework within which the interplay between human rights and humanitarian law can be applied, the principles of legal interpretation have to provide the tools. This leads to two main concepts: the concept of complementarity in its legal understanding in conformity with the Vienna Convention on the Law of Treaties, and the concept of *lex specialis*.

The meaning of “complementarity”

Complementarity means that human rights law and humanitarian law do not contradict each other but, being based on the same principles and values, can influence and reinforce each other mutually. In this sense, complementarity reflects a method of interpretation enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which stipulates that, in interpreting a norm, “any relevant rules of international law applicable in the relations between the parties” shall be taken into account. This principle, in a sense, enshrines the idea of international law understood as a coherent system.¹⁰⁹ It sees international law as a regime in

105 See Common Article 3 to the Fourth Geneva Convention.

106 Article 2 ICCPR; Article 1 ECHR; Article 1 ACHR; see Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006.

107 See Article 4 ICCPR; Article 15 ECHR; Article 27 ACHR.

108 See below. Investigation, remedies, reparation, pp. 540 *et seq.*

109 Campbell McLachlan, “The principle of systemic integration and Article 31(3)(c) of the Vienna Convention”, *International and Comparative Law Quarterly*, Vol. 54 (2005), pp. 279–320; International Law Commission, Report of the Study Group on Fragmentation of International Law: Difficulties arising from Diversification and Expansion of International Law, UN Doc. A/CN.4/L.676, 29 July 2005,

which different sets of rules cohabit in harmony. Thus human rights can be interpreted in the light of international humanitarian law and vice versa.

The meaning of the principle of *lex specialis*

Frequently, however, the relationship between human rights law and humanitarian law is described as a relationship between general and specialized law, in which humanitarian law is the *lex specialis*. This was the approach of the International Court of Justice in the *Nuclear Weapons* case cited above, in which the Court held that

the test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.¹¹⁰

The Court repeated the reference to the *lex specialis* principle in the *Wall* case.¹¹¹ It did not do so in the *DRC v. Uganda* case.¹¹² Since the Court gave no explanation for the omission, it is not clear whether the omission was deliberate and shows a change in the approach of the Court.

Among international human rights bodies the Inter-American Commission has followed the jurisprudence of the International Court of Justice, citing the *lex specialis* principle,¹¹³ but other human rights bodies have not. Neither the African Commission on Human and Peoples' Rights nor the European Court of Human Rights have yet made known their views on the subject. The Human Rights Committee has done so, but has avoided the use of the *lex specialis* formulation and instead found that "both spheres of law are complementary, not mutually exclusive".¹¹⁴

The principle of *lex specialis* is an accepted principle of interpretation in international law. It stems from a Roman principle of interpretation according to which, in situations especially regulated by a specific rule, this rule would displace the more general rule (*lex specialis derogat legi generali*). The *lex specialis* principle can be found in the writings of such early writers as Vattel¹¹⁵ or Grotius. Grotius writes,

What rules ought to be observed in such cases [i.e. where parts of a document are in conflict]? Among agreements which are equal ... preference should be

para. 27; see also Philippe Sands, "Treaty, Custom and the Cross-fertilization of International Law", *Yale Human Rights and Development Law Journal*, Vol. 1 (1999), p. 95.

110 *Nuclear Weapons* case, above note 46, para. 25.

111 *Wall* case, above note 47, para. 106.

112 *DRC v. Uganda*, above note 48, para. 216.

113 *Coard v. the United States*, above note 45, para. 42.

114 Human Rights Committee, General Comment No. 31, above note 50, para. 11.

115 Emerich de Vattel, *Le Droit Des Gens ou Principes de la Loi Naturelle*, Book II, ch xvii, para. 316 (reproduction of Books I and II edn 1758, in: *The Classics of International Law*, Geneva, Slatkine Reprints, Henry Dunant Institute, 1983).

given to that which is most specific and closest to the subject in hand, for special provisions are ordinarily more effective than those that are general.¹¹⁶

In legal literature a number of commentators criticize the lack of clarity of the principle of *lex specialis*. First, it has been said that international law, as opposed to national law, has no clear hierarchy of norms and no centralized legislator, but a “variety of fora, many of which are disconnected and independent from each other, creating a system different from the more coherent domestic legal order”.¹¹⁷ Second, it is stressed that the principle of *lex specialis* was originally conceived for domestic law and is not readily applicable to the highly fragmented system of international law.¹¹⁸ Third, critics point out that nothing indicates, particularly between human rights law and humanitarian law, which of two norms is the *lex specialis* or the *lex generalis*;¹¹⁹ some, for instance, argue that human rights law might well be the prevailing body of law for persons in the power of an authority.¹²⁰ It has even been criticized that “this broad principle allows manipulation of the law in a manner that supports diametrically opposed arguments from supporters that are both for and against the compartmentalization of IHL and IHRL”.¹²¹ Critics have therefore proposed alternative models to the *lex specialis* approach, calling them a “pragmatic theory of harmonization”,¹²² “cross-pollination”,¹²³ “cross-fertilization”¹²⁴ or a “mixed model”.¹²⁵ Without going into detail, these approaches have in common an emphasis on harmony between the two bodies of law rather than tension.

Lastly, there appears to be a lack of consensus in legal literature about the meaning of the *lex specialis* principle. The Report of the Study Group of the International Law Commission on Fragmentation of International Law has found that *lex specialis* is not necessarily a rule to solve conflicts of norms; that it has, in

116 Hugo Grotius, *De Jure Belli Ac Pacis*, Book II, section XXIX. Library Ires.

117 Anja Lindroos, “Addressing the norm conflicts in a fragmented system: the doctrine of *lex specialis*”, *Nordic Journal of International Law*, Vol. 74 (2005), p. 28.

118 See, e.g., International Law Commission, Report of the Study Group, above note 108; Lindroos, above note 117, pp. 27–8.

119 Nancie Prud’homme, “*Lex specialis*: oversimplifying a more complex and multifaceted relationship?”, *Israel Law Review*, Vol. 40 (2) (2007), pp. 356; Gloria Gaggioli and Robert Kolb, “A right to life in armed conflicts? The contribution of the European Court of Human Rights”, *Israel Yearbook on Human Rights*, Vol. 37 (2007), pp. 115–69.

120 Louise Doswald-Beck, “International humanitarian law and the International Court of Justice on the legality of the threat or use of nuclear weapons”, *International Review of the Red Cross*, No. 316 (January–February 1997), p. 35.

121 Prud’homme, above note 119, p. 14.

122 Ibid., p. 6.

123 Rene Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2005, p. 350.

124 Sands, above note 109, pp. 85–105.

125 Kretzmer, above note 103, p. 171.

fact, two roles – either as a more specific interpretation of or as an exception to the general law. As Martti Koskeniemi explains,

There are two ways in which law takes account of the relationship of a particular rule to a general rule (often termed a principle or a standard). A particular rule may be considered an application of the general rule in a given circumstance. That is to say, it may give instructions on what a general rule requires in the case at hand. Alternatively, a particular rule may be conceived as an exception to the general rule. In this case, the particular derogates from the general rule. The maxim *lex specialis derogat legi generali* is usually dealt with as a conflict rule. However, it need not be limited to conflict.¹²⁶

Understood not as a principle to solve conflicts of norms but as a principle of more specific interpretation, the principle of *lex specialis* in itself incorporates the complementarity approach mentioned above. It comes very close to the principle of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, according to which treaties must be interpreted in the light of each other.

There are thus two aspects to the *lex specialis* principle. One is its meaning as a principle of interpretation whereby a more general rule is interpreted in the light of a more specific rule. The other is its function as a rule governing conflicting norms.

In light of this understanding, the following conclusion can be drawn. While complementarity – that is, *lex specialis* in the sense of a rule of interpretation – can often provide solutions for harmonizing different norms, it has its limits. When there is a genuine conflict of norms, one of the norms must prevail.¹²⁷ In such situations the *lex specialis* principle, in the sense of a conflict-solving rule, gives precedence to the rule that is most adapted and tailored to the specific situation. There may be controversy as to which norm is the more specialized in a concrete situation, and indeed “an abstract determination of an entire area of law as being more specific towards another area of law is not, in effect, realistic”.¹²⁸ But this should not call the application of the principle of *lex specialis* as such into question. While the respective rules of humanitarian law and human rights law can mostly be interpreted in the light of one another, some of them are contradictory, and it has to be decided which one prevails. In determining which rule is the more specialized one, the most important indicators are the precision and clarity of a rule and its adaptation to the particular circumstances of the case.

The application of *lex specialis* in its two different functions to the interplay between human rights and humanitarian law can be illustrated by the example of the use of force, especially in non-international armed conflict and in situations of occupation.

126 Martti Koskeniemi, Study on the Function and Scope of the Lex Specialis Rule and the Question of “Self Contained Regimes”, UN Doc. ILC(LVI)/SG/FIL/CRD.1 and Add.1 (2004), p. 4.

127 See International Law Commission, Report of the Study Group, above note 109, para. 42.

128 Lindroos, above note 117, p. 44.

The use of force

Different standards for the use of force in human rights law and humanitarian law

The rules governing the use of force in humanitarian law and in human rights law are based on different assumptions. Human rights law “seeks review of every use of lethal force by agents of the state, while [humanitarian law] is based on the premise that force will be used and humans intentionally killed”.¹²⁹

In human rights law, lethal force can be used only if there is an *imminent* danger of serious violence that cannot be averted save for such use of force. The danger cannot be merely hypothetical, it must be imminent.¹³⁰ This extremely narrow use of lethal force to protect the right to life is confirmed in the Principles on the Use of Force and Firearms by Law Enforcement Officials, which state that “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life” and requires clear warning before the use of firearms, with sufficient time for the warning to be observed.¹³¹ Under human rights law, the planning of an operation with the purpose of killing is unlikely ever to be lawful. Police officers are trained in de-escalation techniques or in the use of weapons in a manner completely different from that of soldiers. The European Court of Human Rights, for instance, has developed extensive case law on the requirements for planning and controlling the use of force in order to avoid the use of lethal force.¹³²

In international humanitarian law, the main principles reigning in the use of force are the principles of distinction, of precaution and of proportionality in order to avoid incidental loss of civilian life or damage to civilian objects.¹³³ The principle of proportionality in humanitarian law is different from proportionality in human rights law.¹³⁴ Whereas human rights law requires that the use of force be proportionate to the aim to protect life, humanitarian law requires that the incidental loss of civilian life, injury to civilians or damage to civilian objects caused by

129 Kenneth Watkin, “Controlling the use of force: a role for human rights norms in contemporary armed conflict”, *American Journal of International Law*, Vol. 98 (2004), p. 32.

130 See Principles 9 and 10 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; see also Nigel Rodley, *The Treatment of Prisoners Under International Law*, Oxford University Press, Oxford, 1999, pp. 182–8; Kretzmer, above note 103, p. 179.

131 Principles 9 and 10 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

132 ECtHR, *McCann and Others v. United Kingdom*, 18984/91, 1995, paras. 202–213; *Andronicou and Constantinou v. Cyprus*, Judgment of 9 October 1997, Reports 1997-VI, paras. 181–186, 191–193; *Hugh Jordan v. the United Kingdom*, Judgment of 4 May 2001, paras. 103–104; *Ergi v. Turkey*, above note 43, para. 79; *Isayeva, Yusupova and Bazayeva v. Russia*, above note 43, paras. 169–171; *Isayeva v. Russia*, above note 43, para. 189.

133 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, ICRC and Cambridge University Press, Cambridge, 2005, Rules 11–21.

134 See the discussion on the principle of proportionality in Noam Lubell, “Challenges in applying human rights law to armed conflict”, *International Review of the Red Cross*, Vol. 87 No. 860 (December 2005), pp. 737, 745–46.

an armed attack must not be excessive “in relation to the concrete and direct military advantage anticipated”.¹³⁵ The two principles can lead to different results. On the other hand, some authors argue that the “differences are fading progressively away and as HRL bodies develop an increasing branch of wartime human rights, sensitive to the peculiar characteristics of that type of situation”.¹³⁶

There is a growing position that even under humanitarian law the ability to use lethal force is limited not only by a principle of proportionality protecting incidental loss of civilian life or damage to civilian objects, but also by other limitations inherent to humanitarian law, in particular the principle of military necessity and the principle of humanity.¹³⁷ One of the oldest norms cited in this respect is the preambular paragraph of the St. Petersburg Declaration of 1868, which states that “the only legitimate object which States should endeavour to accomplish ... is to weaken the military forces of the enemy”.¹³⁸ Other rules could be cited to support this approach, in particular the prohibition on refusing quarter¹³⁹ or on the use of weapons causing unnecessary suffering or superfluous injury.¹⁴⁰ In this sense, military necessity is understood not only as an underlying principle of international humanitarian law or even as an enabling principle subjecting other rules of humanitarian law to the military objective, but as a principle which imposes constraints on the means and methods of warfare. In terms of the use of force, it limits that use to the degree and kind of force necessary to achieve the enemy's submission. Hence, “the fact that [humanitarian law] does not prohibit direct attacks against combatants does not give rise to a legal entitlement to kill combatants at any time and any place so long as they are not *hors de combat* within the meaning of Article 41 [2] AP I”.¹⁴¹ However, this approach is not without controversy among scholars and practitioners of international humanitarian law.

In view of these distinct rules, it is interesting to look at recent developments in jurisprudence. Have they called the rules into question? Have they led to a convergence, as is sometimes contended? It must be borne in mind, however, that most of the existing jurisprudence is of human rights bodies and courts and, to

135 See the codification in Additional Protocol I, Article 51(5).

136 Gaggioli and Kolb, above note 119, p. 138.

137 For an in-depth analysis of the concept of military necessity and its use in modern military manuals see Melzer, above note 103, pp. 336–56; Gaggioli and Kolb, above note 119, p. 136.

138 Preamble of the Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weights, 1868. Article 14 of the Lieber Code contains a similar clause: “Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.” See also Articles 15 and 16 of the Lieber Code, which define military necessity.

139 1907 Hague Regulations, Article 23(c); Geneva Convention II, Article 12; Additional Protocol I, Article 40.

140 Additional Protocol I, Article 35 (2).

141 Nils Melzer, above note 103, p. 347; in the words of Jean Pictet: “If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil”. *Development and Principles of International Humanitarian Law*, p. 75 f. (1985).

some extent, national courts. The judgments of these bodies and courts have no universally binding effect. Also, they adjudicate cases within the framework of specific treaties or laws. In particular, human rights bodies can often simply ignore humanitarian law because states have not acknowledged that they are involved in an armed conflict. An attempt must therefore be made to discover in which respect their statements can or cannot be generalized and whether or how they influence the broader, dogmatic discussion on human rights and humanitarian law.

Non-international armed conflict

While it would be fairly uncontroversial to assume that for the conduct of hostilities – that is, put simply, battlefield situations – humanitarian law is generally the *lex specialis* in relation to human rights law, two situations are more problematic: the use of force in non-international armed conflict; and the use of force in situations of occupation, where human rights have an important role to play. Is humanitarian law always the *lex specialis* in those situations?

Humanitarian law

The treaty-based humanitarian law of non-international armed conflict contains very few rules on the conduct of hostilities. The most important one is the protection of civilians against attack, unless and for such time as they take a direct part in hostilities, enshrined in Article 13(3) of Additional Protocol II. However, it is relatively uncontroversial that the rules regulating the conduct of hostilities – for example, distinction, proportionality, precaution – are part of customary international humanitarian law applicable to non-international armed conflicts.¹⁴²

The difficulty is that there is no combatant status in non-international armed conflict. This could lead to the conclusion that, apart from the government's armed forces, there are only civilians in such conflicts – meaning that members of armed groups could only be attacked when they are actually conducting hostilities, but not at any other time. From a military point of view, this is held to be unfeasible and not to reflect the reality of armed conflict. It moreover creates an imbalance between members of government armed forces, who could then be attacked at any time, and members of armed groups, who could not. During the drafting of Additional Protocol II there was no intention of precluding attacks at all times on members of armed groups who are fighting the government. On the contrary, the Commentary on 1977 Additional Protocol II states that “[t]hose belonging to armed forces or armed groups may be attacked at any time”.¹⁴³ Indeed, the principle of distinction only makes sense if not everyone is a civilian – that is, if the government is required to distinguish between the civilian population

142 See Henckaerts and Doswald-Beck, above note 133, Rules 1, 2, 5–24.

143 Sandoz, Swinarski and Zimmerman, above note 23, para. 4789.

and fighters of armed opposition groups. So who can be attacked and under what conditions?

There are, broadly speaking, three ways of approaching the targeting of members of armed groups in non-international armed conflict. The first is to hold that if a member of an armed group has a permanent fighting function, although he or she remains a civilian,¹⁴⁴ the mere fact of having the fighting function amounts to direct participation in hostilities and that person can therefore be attacked at all times (a sort of “continuous” direct participation in hostilities).¹⁴⁵ The second approach is to define those members of armed groups which have a permanent fighting function as “combatants for the purposes of the conduct of hostilities”, but without conferring on them a combatant *status* and combatant immunity as in international armed conflict (“membership approach”).¹⁴⁶ The third approach is to consider that anyone who is not formally a combatant – that is, not a member of the armed forces – is a civilian and can only be attacked during the actual times when he/she is directly participating in hostilities.

The consequence of the first two approaches is that members of armed groups who have a fighting function could be attacked at all times under international humanitarian law. The rules restricting the use of force against them would be the rules regulating the means and methods of war, for example rules on the use of weapons, the prohibition of perfidy, or denial of quarter.

Both in doctrine and in jurisprudence, however, many feel uncomfortable with at least one part of this solution, for while it is unproblematic to accept that “rebels who are organized, armed and assembled cannot be arrested”,¹⁴⁷ it is far more controversial to maintain that a member of an armed group, even a member with a permanent fighting function, can at all times be targeted without

144 The Supreme Court of Israel has taken the approach that members of “terrorist” groups continue to be civilians that can be targeted if and for such time as they directly participate in hostilities. *The Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment v. the Government of Israel, the Prime Minister of Israel, the Minister of Defence, the Israel Defense Forces, the Chief of General Staff of the Israel Defense Forces, and Surat HaDin – Israel Law Center and 24 Others*, the Supreme Court of Israel sitting as the High Court of Justice, Judgment of 14 December 2006, (hereinafter *Targeted Killings* case), para. 28. It has, however, avoided the question of what “for such time” means (para. 40).

145 See Third Expert Meeting on Direct Participation in Hostilities, Summary Report 2005, pp. 48–9, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct_participation_in_hostilities_2005_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf) (hereinafter DPH Report 2005). This seems to be the approach of the Supreme Court of Israel in the *Targeted Killings* case, above note 144, para. 39: “a civilian who has joined a terrorist organization which has become his ‘home’, and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack ‘for such time’ as he is committing the chain of acts.” But the Supreme Court also recognizes that between this situation and a civilian who only once or sporadically participates in hostilities and can only be attacked at those times, there is a grey area “about which customary international law has not yet crystallized”, para. 40.

146 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflicts*, Cambridge University Press, Cambridge, 2004, p. 29; Kretzmer, above note 103, pp. 197–8; Sandoz, Swinarski and Zimmermann, above note 23, para. 4789; I/A Commission HR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev 1 corr., 22 October 2002, para. 69.

147 Louise Doswald-Beck, “The right to life in armed conflict: does international humanitarian law provide all the answers?”, *International Review of the Red Cross*, Vol. 88 (864) (December 2006), p. 885.

the restrictions imposed by human rights law. Can a member of the Revolutionary Armed Forces of Colombia (FARC) be targeted when shopping in Bogotá, instead of the operation being so planned that he can be arrested? Can a suspected member of the Kurdistan Workers' Party (PKK) be targeted with lethal force in accordance with the principles of humanitarian law when taking part in a demonstration? Can lethal force be used without any warning against a Chechen rebel in Moscow while he is at home? The main practical question is whether such persons have to be arrested, if that is a possibility, rather than killed. Should the traditional rules of humanitarian law prevail in such a situation, should they be influenced by human rights law, or should human rights law as *lex specialis* displace humanitarian law?

Treaty-based international humanitarian law does not greatly clarify the question. As explained above, the principle of military necessity in its restrictive sense might stand in the way of shooting to kill a fighter in circumstances where there is no need to do so to achieve a concrete military aim, but this interpretation of military necessity remains, as yet, controversial.¹⁴⁸ On the other hand, such cases have increasingly been submitted to human rights bodies, which have addressed them from a human rights angle.

Human rights jurisprudence

One of the first cases was that of *Guerrero v. Colombia*,¹⁴⁹ which came before the UN Human Rights Committee. The authorities suspected that members of an armed opposition group had kidnapped a former ambassador and were holding him hostage in a house in Bogotá. While the hostage was not found, the police forces waited for the rebels to return and shot them. The UN Human Rights Committee held that

[T]he police action was apparently without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned ... the action of the police resulting in the death of Mrs. Maria Fanny Suarez de Guerrero was disproportionate to the requirements of law enforcement.¹⁵⁰

The Human Rights Committee has also criticized Israel's policy of targeted killings insofar as they are used, in part, as a deterrent or punishment, and has required that "before resorting to the use of deadly force, all measures to arrest a

148 See DPH Report 2005, above note 145, pp. 45–6.

149 Human Rights Committee, Communication No. R.11/45, UN Doc. Supp. No. 40(A/37/40), 31 March 1992.

150 Ibid., paras. 13.2, 13.3.

person suspected of being in the process of committing acts of terror must be exhausted”.¹⁵¹

The Inter-American Commission has generally held that members of armed groups who assume combatant functions cannot “revert back to civilian status or otherwise alternate between combatant and civilian status”.

The most extensive case law is that of the European Court of Human Rights. Before relating it here, it should be noted that in none of the cases that have come before the Court have the respondent governments put forward the argument that an armed conflict prevailed in their country.

The European Court of Human Rights’ seminal case on the use of force was *McCann and others v. the United Kingdom*, which concerned the killing of members of the Irish Republican Army (IRA) by UK special forces in Gibraltar. In this case, the Court held that the use of force must not only be proportionate in the moment that it is exercised, but that operations, even against suspected terrorists, must be planned so as to minimize to the greatest extent possible recourse to lethal force.¹⁵² This fundamental tenet lies at the heart of all subsequent cases on the use of force, be they law-enforcement or military operations.¹⁵³

In *Güleç v. Turkey*, in which police fired guns into a crowd to disperse demonstrators, the government argued that it had needed to use lethal force in a demonstration because of the suspected presence of PKK members.¹⁵⁴ The Court did not accept the argument and instead held that the authorities should have planned their operation so as to avoid lethal force, such as by using the necessary equipment such as truncheons, riot shields, water cannons, rubber bullets or tear gas, especially since the demonstration took place in a region in which a state of emergency had been declared and where at the time in question disorder could have been expected.¹⁵⁵ In *Gül v. Turkey*, the police fired at the door which Mehmet Gül was unlocking after they had knocked. The Court found the allegation by the police that Mehmet Gül had fired one pistol shot at them unsubstantiated. It held that opening fire with automatic weapons on an unseen target in a residential block inhabited by innocent civilians, including women and children, was grossly disproportionate.¹⁵⁶ In *Oğur v. Turkey*, the government asserted that the objective of the members of the security forces had been to apprehend the victim, who was thought to be a terrorist. On that occasion they had had to face a “major armed response”, to which they had replied with warning shots, one of which had hit Musa Oğur, who had allegedly been running away. The Court did not accept that the security forces had come under attack and held that the use of force was

151 Concluding Observations: Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 15.

152 *McCann and others v. the United Kingdom*, above note 132, para. 194; *Gül v. Turkey*, Appl. No. 22676/93, Judgment of 14 December 2000, para. 84.

153 See the latest case of *Akhmadov and others v. Russia*, Judgement of 14 November 2008, para. 100.

154 *Güleç v. Turkey*, Judgment of 27 July 1998, Reports 1998-IV, para. 67.

155 *Ibid.*, paras. 71–73.

156 *Gül v. Turkey*, above note 152, para. 82.

disproportionate, since no warning had been given and the warning shot had been badly executed.¹⁵⁷

In the case of *Hamiyet Kaplan v. Turkey*, the Court accepted that there was serious fighting between the government forces and the PKK. Four persons, including two children, died during a police raid on suspected members of the PKK, in the course of which a senior police officer was also killed by gunfire from the suspects' home. The Court accepted that there had been an armed confrontation between the police and the persons in the house and thus discarded the hypothesis that there had been an extrajudicial killing on the part of the police officers.¹⁵⁸ It nonetheless noted that during the organization of the operation, no distinction had been made between lethal and non-lethal force: the police officers had used only firearms, not tear gas or stun grenades. The uncontrolled violence of the assault on the house had inevitably put the suspects' lives in great danger. It criticized that there had been no sufficient legal framework and instruction to avoid the use of lethal force by the police officers and that therefore there had been a violation of the right to life.¹⁵⁹ Here again, although the Court did not contest the armed response of the suspect PKK members, it applied the strict requirements of law enforcement to the situation.

The common feature of these cases is that, even though the persons were alleged terrorists or suspected terrorists, the Court applies the full panoply of human rights safeguards for the right to life, including the necessity to avoid force, to use weapons which will avoid lethal injuries and to give warning.

In a number of recent cases, concerning security operations against Kurdish rebels in Turkey and Chechen rebels in Russia, the European Court of Human Rights has used language that is much closer to humanitarian law than to human rights law. In several cases since *Ergi v. Turkey* the Court, in assessing the proportionality of the use of force under Article 2 of the ECHR, has found that the state was responsible for "tak[ing] all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding, and, in any event, minimising incidental loss to civilian life"¹⁶⁰ – a standard found textually not in human rights law but in the obligation in Article 57(2)(a)(ii) of Additional Protocol I to take such precautions in attacks. The Court has accepted that injury to civilians might be a result of the use of force against members of organized armed groups, without qualifying that use of force as disproportionate.¹⁶¹ As said above, this test differs somewhat from that in human rights law in that it neither requires that force may only be used as a last resort or

157 *Oğur v. Turkey*, Judgment of 20 May 1999, Reports 1999-III, paras. 82–84.

158 *Hamiyet Kaplan v. Turkey*, Judgment of 13 September 2005, para. 50.

159 *Ibid.*, paras. 51–55. See also *Akhmadov and others v. Russia*, Judgement of 14 November 2008, para. 99.

160 *Ergi v. Turkey*, above note 43, para. 79; *Ahmed Özkan and others v. Turkey*, above note 43, para. 297. In *Ergi* the Court went very far in its requirement of precautionary measures, which included protection against firepower against civilians by PKK member caught in the ambush: *Ergi*, paras. 79, 80.

161 *Ahmed Özkan and others v. Turkey*, above note 43, para. 305; however, the Court found that the security forces should have verified after the combat operations whether any civilians were injured, para. 307.

that force must be avoided, to the extent possible, to spare not only innocent civilians but also the targeted person.

In the *Isayeva, Yusupova and Bazayeva* case, civilians were killed in a missile attack on a civilian convoy. While the Court made a general statement as to the need to avoid lethal force,¹⁶² its test was, in effect, whether harm to civilians could be avoided “in the vicinity of what the military could have perceived as military targets”.¹⁶³ On the other hand, in *Isayeva v. Russia*, in which the applicant and her relatives were attacked by missiles when trying to leave a village through what they had perceived as safe exits from heavy fighting, the Court took a slightly different approach. While accepting the need for exceptional measures in the context of the Chechen conflict,¹⁶⁴ the Court nonetheless recalled that Russia had not declared a state of emergency or made a derogation within the terms of Article 15 of the ECHR, so that the situation had to be “judged against a normal legal background”.¹⁶⁵ It then held that

[e]ven when faced with a situation where, as the Government submit, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters ... the massive use of indiscriminate weapons ... cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by state agents.¹⁶⁶

It further held that the villagers should have been warned earlier of the attacks and should have been able to leave the village earlier.¹⁶⁷ Thus the Court used the human rights model based on a law enforcement situation, but then also took into account the insurgency and focused more on the indiscriminate nature of the weapons and the lack of warning and safe passage for the civilians. It did not question that the rebels could be attacked, even if they posed no immediate threat.¹⁶⁸

From its case law it can be concluded that the European Court of Human Rights – albeit never explicitly and not always entirely consistently – appears broadly to distinguish between two kinds of situations: on the one hand, situations like *McCann*, *Gül*, *Oğur* or *Kaplan*, in which individual members of armed groups or alleged members of such groups are killed and insufficient precautions are taken to avoid the use of lethal force altogether, including against those persons; on the other hand, situations like *Ergi*, *Özkan* or *Isayeva, Yusupova and Bazayeva* and *Isayeva*, in which the government forces are engaged in military counter-insurgency operations or fully fledged combat against an armed group. In the latter

162 *Isayeva, Yusupova and Bazayeva v. Russia*, above note 43, para. 171; in *Isayeva v. Russia*, above note 43, paras. 175–176, the Court cites both standards.

163 *Isayeva, Yusupova and Bazayeva v. Russia*, above note 43, para. 175.

164 *Isayeva v. Russia*, above note 43, para. 180.

165 *Ibid.*, para. 191.

166 *Ibid.*, para. 191.

167 *Ibid.*, paras. 193–200.

168 It appears, however, to require that illegal fighters posed a danger to the military in *Akhmadov and others v. Russia*, Judgement of 14 November 2008, para. 101.

cases the Court appears to use standards that are, if not explicitly then implicitly, inspired by humanitarian law, especially the criterion of whether incidental civilian loss was avoided to the greatest extent possible. It does not question the right of government forces to attack opposition forces, or require that lethal force be avoided even in the absence of an immediate threat. The Court does, however, appear to go a little further than traditional humanitarian law, in particular when it requires that the local population be warned of the probable arrival of rebels in their village,¹⁶⁹ or that the fire from the opposition group which could endanger the villagers' lives be taken into account.¹⁷⁰

Lastly, mention should be made of a recent case decided by the Supreme Court of Israel. The Supreme Court had to decide on the targeted killing of members of armed groups – not in the context of a non-international armed conflict, but of occupation. Its findings are nonetheless instructive for our analysis, because the Supreme Court in effect combined the standards of humanitarian law and human rights law. While considering that “terrorists” were “civilians who are unlawful combatants”¹⁷¹ and that at least those civilians who have joined a “terrorist organisation” and commit a chain of hostilities lose their immunity from attack for such time as they commit the chain of acts – that is, also between the single acts constituting the chain – it ruled as follows:¹⁷²

[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 ... A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force ... Arrest, investigation and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers that it is not required ... However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation and trial are at times realisable possibilities ... Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs it should not be used ... [A]fter an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack

169 Ibid., para. 187.

170 *Ergi v. Turkey*, above note 43, para. 79.

171 *Targeted Killings* case, above note 144, para. 28.

172 Ibid., para. 39.

upon him is to be performed (retroactively). That investigation must be independent ...¹⁷³

While the basis for its findings was national law, the Supreme Court quoted extensively from doctrine and from the case law of the European Court of Human Rights. In other words, the Supreme Court did take human rights into account, as its formulation (“the means whose harm to the human rights of the harmed person is smallest”) shows. The Supreme Court required arrest wherever possible, and an investigation after the use of force. While it did not require an arrest in every situation, it required an investigation after every killing.

The possible interplay between humanitarian law and human rights law

What emerges from all the decisions discussed above (with the caveat that most of the decision are those of the European Court of Human Rights) is that presumed members of armed groups, “insurgents” or “terrorists” cannot be shot with intention to kill when there is a possibility of arresting them. This is typically the case when they are found in or around their homes¹⁷⁴ or far from any combat situation.¹⁷⁵ The case law of the European Court of Human Rights indicates that this is not the case when government forces are engaged in combat with armed groups.

As many emphasize, humanitarian and human rights law frequently lead to the same result. The outcome of most cases brought before human rights bodies would probably have been the same if decided by virtue of humanitarian law, for if the restrictive principles of military necessity and humanity are accepted, fighting members of armed groups not taking a direct part in hostilities must, if feasible in the actual circumstances, be arrested rather than killed.

However, unless an extremely expansive view is taken of the interpretation of humanitarian law in the light of human rights law,¹⁷⁶ the restrictions on the use of force do still appear to go further in human rights law than in humanitarian law. The first is that any operation including military operations in non-international armed conflict¹⁷⁷ involving the use of force must be planned in advance so as to avoid, to the greatest extent possible, the use of lethal force. Second, weapons must be chosen to avoid lethal force as far as possible. Third, any suspected violation of the right to life must entail an independent and impartial investigation; the relatives of the person killed have a right to a remedy if they can reasonably claim that

173 Ibid., para. 40, citations omitted.

174 Such as in *Guerrero v. Colombia*, above note 38; *Gül v. Turkey*, above note 152, *Oğur v. Turkey*, above note 157.

175 Such as in *Gülec v. Turkey*, above note 154.

176 Such as Gaggioli and Kolb, above note 119, pp. 148–9; Francisco Forrest Martin, “The united use of force rule: amplifications in light of the comments of Professors Green and Paust”, *Saskatchewan Law Review*, Vol. 65 (2002), p. 405; Francisco Forrest Martin, “The united use of force rule revisited: the penetration of the law of armed conflict by international human rights law”, *Saskatchewan Law Review*, Vol. 65 (2002), p. 451.

177 See *Akhmadov and others v. Russia*, above note 153, para. 100.

the right to life has been violated, and to individual reparation if such violation has occurred. In view of these differences, the question of which law applies to a particular use of force remains of practical importance. There are several ways of approaching the question of interplay.

With regard to the use of force in non-international armed conflict, the first would be to confine the application of humanitarian law to the geographical area where the fighting is taking place. Some arguments for this approach could possibly be found in the *Tadić* case:

Although the Geneva Conventions are silent as to the geographical scope of international “armed conflicts”, the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual 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 protection of prisoners of war and civilians, are not so limited.¹⁷⁸

This passage of *Tadić* could be understood to restrict certain rules of humanitarian law to combat situations, thereby giving way to human rights law in all other situations. However, subsequent jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) has not confirmed this approach, in which some parts of humanitarian law would be applied to the entire conflict and not others. In the *Kunarac* case, the Appeals Chamber made it clear that the decisive criterion for the application of humanitarian law is whether there is an armed conflict and whether the act in question occurs in relation to the armed conflict.¹⁷⁹ To explain the relationship between humanitarian law and the laws applicable in peacetime, the Chamber held that “[t]he laws of war do not necessarily displace the laws regulating a peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation.”¹⁸⁰ Transposed to the relationship between humanitarian law and human rights law, this means that while humanitarian law applies throughout the territory of the country in a situation of armed conflict, it is not the only relevant body of law, and human rights law may come to add requirements to be observed by the state authorities. This is a convincing approach: indeed, if there is a nexus to the conflict, for instance if the security forces are pursuing a member of an armed group, it would be contrary to the object and purpose of humanitarian law to discard it entirely. It would lead to a splitting of humanitarian law whereby some rules (e.g. on detention) always apply and others (on the conduct of hostilities) do not.

Retaining the undivided application of humanitarian law and human rights law to the entire territory, the better approach is therefore to apply the *lex specialis* rule. As regards the substantive right to life – that is whether a killing is

178 *Prosecutor v. Dusko Tadić*, Case IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 68.

179 *Prosecutor v. Kunarac et al*, IT-96-23&23/1, Appeals Chamber, 12 June 2002, paras. 55–60.

180 *Prosecutor v. Kunarac et al*, IT-96-23&23/1, Appeals Chamber, 12 June 2002, para. 60.

lawful or not –the question of which body of law constitutes the *lex specialis* must be resolved by reference to their underlying object and purpose: human rights law is premised on the use of law-enforcement powers, whereas humanitarian law, in general, is centred on the battlefield (with the exception of occupation, which will be dealt with below). To apply human rights law is therefore only realistic if it is feasible to use the means of law enforcement, thus only in operations conducted by security forces (whether military or police) with some effective control over the situation. In those cases, human rights law constitutes the *lex specialis*. In combat situations, on the other hand, humanitarian law constitutes the *lex specialis*.¹⁸¹

For the conduct of hostilities, human rights law is generally flexible enough to accommodate the *lex specialis* of humanitarian law. This is where the statement of the International Court of Justice comes into play: “The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities”.¹⁸² The only exception to this would be in Article 2 of the European Convention on Human Rights, which does not speak of “arbitrary deprivation of life” but, while containing much stricter requirements, is derogable under Article 15 of the ECHR “in respect of deaths resulting from lawful acts of war”. In the absence of derogations, the Court has nonetheless tacitly resorted to the rules of humanitarian law in situations which were characterized as battlefield situations, and indeed humanitarian law does constitute the *lex specialis* there.

Outside conduct of hostility situations, humanitarian law can usually either be interpreted in the light of¹⁸³ or be complemented by human rights law. Only where the two are incompatible will human rights law prevail.

What is effective control? It will not be possible to answer this question in an entirely satisfactory manner, but guidance can be found in some useful criteria. The geographical criterion, although not the exclusive one, is the main one. Areas are characterized as being under greater or less control of the government forces. If the latter go out to apprehend a rebel in areas far away from the combat zone, they can do so by law-enforcement means. In other words, the closer the situation is to the battlefield, the more humanitarian law will prevail, and vice versa. Other

181 In this sense see also Marco Sassòli, “La Cour Européenne des Droits de L’homme et les Conflits Armés”, in Stephan Breitenmoser, Bernhard Ehrenzeller, Marco Sassòli, Walter Stoffel and Beatrice Wagner Pfeifer (eds.), *Droits de L’homme, Démocratie et Etat De Droit, Liber Amicorum Luzius Wilhaber*, Dike, Zürich, 2007, pp. 709, 721; Marco Sassòli, “Le Droit International Humanitaire, une Lex Specialis par Rapport aux Droits Humains?”, in Andreas Auer, Alexandre Flückiger and Michel Hottelier (eds.), *Etudes en l’honneur du Professeur Giorgio Malinverni: Les Droits Humains et la Constitution*, 2007, p. 394.

182 *Nuclear Weapons* case, above note 46, para. 25; however, the dictum of the International Court of Justice does not make any differentiation between situations or types of armed conflict and was probably meant, without further thought, to imply that humanitarian law is always the *lex specialis* in armed conflict; see, e.g., Leslie Green, “The ‘unified use of force rule’ and the law of armed conflict: a reply to Professor Martin”, *Saskatchewan Law Review*, Vol. 65 (2002), p. 427.

183 Gaggioli and Kolb, above note 119, pp. 141, 148f. These authors consider, for instance, that the jurisprudence of the ECtHR provides interpretation for the principle of precaution.

relevant criteria can be, for instance, the amount of armed resistance met by the security forces, the duration of combats as opposed to isolated or sporadic acts, or the type of weaponry used. In practice, the lines will not always be easy to define. But a coherent interpretation of these existing bodies of law must attempt to provide a framework which gives some direction while at the same time remaining flexible in order to accommodate a large number of possible situations.

One objection to applying human rights law to situations of conflict between the government and armed groups is that it restricts the government without restricting armed opposition groups. Indeed, human rights law traditionally only applies to state authorities. While this is controversial in doctrine, the fact remains that even if armed opposition groups were held to be bound by human rights, only actions by governments will be controlled by international human rights bodies, such as the Human Rights Committee, the European Court of Human Rights or the Inter-American Court and Commission of Human Rights. Is the state then “being required to fight with one hand tied behind its back”?¹⁸⁴ Arguably, no such imbalance between government forces and armed opposition groups is created by the additional restrictions of human rights law. This would be the case only if there were an equality of permissible use of force in place, which the additional requirement for the government would upset. But this is not the case, since any non-governmental group that attacks the government remains criminal under domestic law, and humanitarian law in non-international armed conflict does not shield members of the group from criminalization under domestic law as it shields combatants in international armed conflict.¹⁸⁵

Occupation

Unlike non-international armed conflict, the use of force in international armed conflict is generally characterized by more battlefield-like operations, especially military operations from the air, as in the conflicts between the United States and Afghanistan in 2001, between the Coalition and Iraq in spring 2003, or between Israel and Lebanon in summer 2006. In such situations human rights law would generally not be applicable for lack of effective control.¹⁸⁶ Occupation is different. It raises the question of the relationship between human rights and humanitarian law in a manner much more similar to that of non-international armed conflict.

One of the main obligations of the occupying power according to Article 43 of the 1907 Hague Regulations is to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety”. This provision

184 Françoise Hampson, “Human rights and humanitarian law in internal conflicts”, in Michael 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. 60.

185 Doswald-Beck, above note 147, p. 890.

186 As was the case in ECtHR, *Banković and others v. Belgium and others*, above note 67.

imposes a law enforcement obligation on the occupying authorities: public order is generally restored through police, not military, operations.¹⁸⁷ The particular feature of humanitarian law applicable to situations of occupation is that it presupposes effective authority and control,¹⁸⁸ which are not usually found on the battlefield. The 1907 Hague Regulations also clearly separate the sections on “Hostilities” (Section II) and on “Military authority over the territory of the hostile state” (Section III). In the same spirit, the Fourth Geneva Convention clearly indicates that the normal procedure to ensure public order and safety is through penal legislation, not through combat.¹⁸⁹

Which situations, then, require the occupying power to respect human rights law because it is performing its law-enforcement obligations, and in which situations do ongoing hostilities call for the use of force under humanitarian law? In abstract legal terms, the answer must be the same as proposed above: where the occupying power has effective control, is in a law-enforcement situation and capable of making arrests, it should act in compliance with the requirements of human rights law.¹⁹⁰

The concrete question facing the occupying power will be whether members of the enemy forces or of organized resistance movements can be targeted to be killed (in accordance with the rules governing the conduct of hostilities in international armed conflict) or whether the occupying power’s forces must arrest them because they have sufficient effective control over the situation to do so.

In practice it is therefore necessary to differentiate between various situations of occupation, for while the very definition of “occupation” in humanitarian law presupposes control, there are in reality situations of occupation where control of the territory is only partial. Where hostilities continue or break out anew, humanitarian law on the conduct of hostilities must prevail over human rights law, which presupposes control for its enforcement. The question is, of course, when can hostilities be said to have broken out anew? Not all criminal activity, even if violent, can be treated like an armed attack. What about military resistance by groups that are not formal members of the occupied state’s armed forces? As was suggested at a meeting on the right to life in armed conflict, held by the University Centre for International Humanitarian Law in Geneva in 2005,¹⁹¹ the test for assuming a situation of hostilities could be based on the test used by the ICTY to establish the existence of a non-international armed conflict – that is, a certain

187 Marco Sassòli, “Legislation and maintenance of public order and civil life by occupying powers”, *European Journal of International Law*, Vol. 16 (2005), p. 665.

188 1907 Hague Regulations, Article 42.

189 Fourth Geneva Convention, Articles 64 and 65.

190 In this sense, see Lubell, above note 134, pp. 52–3; see also Melzer, above note 103, pp. 224–30 on the basis that humanitarian law itself leads to this result.

191 University Centre for International Humanitarian Law, Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation, 1–2 September 2005 (hereinafter UCIHL Meeting Report), available at www.adh-geneva.ch/events/expert_meetings.php (last visited 23 July 2008).

minimum intensity and duration of the violence.¹⁹² Such situations would require a military response, whereas isolated or sporadic attacks¹⁹³ by resistance movements could be met by law-enforcement means.¹⁹⁴

The *Al-Skeini* case, although it was not decided in this particular respect, illustrates how complicated the choice between the application of human rights or humanitarian law can become in a situation of occupation – or rather how difficult it is to apply the theory in practice. One of the questions was whether the killing of five persons in security operations by British troops during the occupation of the city of Basra in Iraq in 2003 was lawful under the European Convention on Human Rights. It was undisputed that while there was occupation by British troops in the Al Basra and Maysan provinces of Iraq at the time in question,¹⁹⁵ the United Kingdom possessed no executive, legislative or judicial authority in Basra city. It was there to maintain order in a situation verging on anarchy. The majority in the Court of Appeals found that there was no effective control for the purpose of application of the European Convention on Human Rights.¹⁹⁶

The decision shows that there can be two approaches to the application of human rights in situations of occupation. The majority found that there was not enough effective control even to *apply* the European Convention on Human Rights extraterritorially. Another way of arriving at the same result would be to hold that even though human rights law applies, the question of whether there is a violation of the right to life must be assessed by resort to the rules of international humanitarian law, which prevail as the *lex specialis*.

It is clear that this problem and shift in applicable rules on the use of force is not only of critical importance for the protection of civilians on the ground, but also has major impacts on the soldiers. To avoid violations, soldiers must be given clear rules of engagement and trained accordingly. In practice, this can best be achieved by separating police and military functions.¹⁹⁷ Even then, the distinction between a common criminal and a combatant will sometimes be extremely difficult to make, as has been acknowledged, for instance, in an After Action Report of American forces in Iraq.¹⁹⁸

192 *Prosecutor v. Dusko Tadić*, Case IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70: “protracted violence between governmental authorities and organized armed groups or between such groups within a State”.

193 See also Additional Protocol II, Article 1(2), according to which “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence” do not amount to an armed conflict.

194 UCIHL Meeting Report, Section D4.

195 *Al-Skeini* case (CA), above note 78, para. 119.

196 *Ibid.*, para. 124. The House of Lords arrived at the same result as the majority in the Court of Appeals, but on the basis that the Human Rights Act had no extraterritorial application. *Al-Skeini* case [UKHL], above note 78, esp. paras. 26 and 109–132.

197 See also Watkin, above note 129, p. 24; Sassòli, above note 187, p. 668.

198 “Transitioning from combat to SASO requires a substantial and fundamental shift in attitude. The soldiers have been asked to go from killing the enemy to protecting and interacting, and back to killing again. The constant shift in mental posture greatly complicates things for the average soldier. The soldiers are blurred and confused about the rules of engagement, which continues to raise questions, and issues about force protection while at checkpoints and conducting patrols.” After Action Report, “SUBJECT: Operation Iraqi Freedom After Action Review Comments,” 24 April 2003, conducted by

Investigations, remedies, reparation

Human rights law and humanitarian law differ fundamentally in a number of procedural aspects which have to do with the right to a remedy and to individual standing in human rights law. They also differ, originally, in terms of an individual right to reparation. While humanitarian law does not know such individual standing at international level, the main human rights treaties have a form of individual complaint mechanism that has led to case law on the right to a remedy, the right to an investigation and the right to reparation. Such case law has already started to influence the understanding of humanitarian law and could continue to do so in the future.

Investigations

Humanitarian law has a number of requirements for investigations, primarily for war crimes¹⁹⁹ but also, for instance, for deaths of prisoners of war²⁰⁰ or civilian internees.²⁰¹ Investigatory obligations have also been developed in treaty law, soft law and jurisprudence in human rights law and are now rather more detailed than in international humanitarian law.²⁰² In human rights law, allegations of serious human rights violations, especially allegations of ill-treatment or unlawful killing, must be subject to a prompt, impartial, thorough and independent official investigation. The persons responsible for and carrying out the investigation must be independent from those implicated in the events. The investigation must be capable of leading to a determination not only of the facts, but also of the lawfulness of the acts and the persons responsible. The authorities must have taken reasonable steps available to them to secure evidence concerning the incident, including, *inter*

TCM C/3-15 Infantry, Task Force 1-64 (declassified), cited in Human Rights Watch, *Hearts and Minds*, Annex II, available at www.hrw.org/reports/2003/iraq1003/10.htm (last visited 23 August 2007).

199 This is implicit in the obligation to search for persons alleged to have committed grave breaches and to bring them to justice. Articles 49/50/129/146 respectively of the four Geneva Conventions; Additional Protocol I, Article 85.

200 Third Geneva Convention, Article 121.

201 Fourth Geneva Convention, Article 131.

202 See the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; among the vast body of jurisprudence, see Human Rights Committee: Concluding Observations: Serbia and Montenegro, para. 9, UN Doc. CCPR/CO/81/SEMO, 12 August 2004; Concluding Observations: Brazil, para. 20, UN Doc. CCPR/C/79/Add.66, 24 July 1996; Concluding Observations: Colombia, para. 32 and 34, UN Doc. CCPR/C/79/Add. 76, 5 May 1997; Committee against Torture: Conclusions and Recommendations: Colombia, para. 10(f), UN Doc. CAT/C/CR/31/1, 4 February 1997; I/A Court H R, *Myrna Mack-Chang v. Guatemala*, Judgment of 25 November 2003, Series C No. 101; *Caracazo v. Venezuela (Reparation)*, Judgment of 29 August 2002, Series C No. 95; *Juan Humberto Sánchez v. Honduras*, Judgment of 26 November 2003, Series C No. 99, para. 186; African Commission on Human and Peoples' Rights, *Amnesty International et al. v. Sudan*, 26th and 27th Ordinary Sessions, May 2000, para. 51; Eur Court HR, *Isayeva, Yusupova and Bazayeva v. Russia*, above note 43, paras. 208–213 (summary of constant jurisprudence of the Court).

alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings. In order to ensure public confidence in the investigation, there must be a sufficient element of public scrutiny of it. While the degree of public scrutiny may vary from case to case, the victim's relatives must in all cases be involved in the procedure to the extent necessary to safeguard their legitimate interests, and must be protected from any form of intimidation. The result of the investigation must be made public. The European Court has even gone so far as to establish a presumption of responsibility of the state where individuals are killed in an area within the exclusive control of the authorities,²⁰³ since the events lie within the exclusive knowledge of the authorities.²⁰⁴

Human rights bodies have not hesitated to apply these requirements to investigations in situations of armed conflict.²⁰⁵ Recently, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions lamented the fact that investigations are less frequent and often more lenient in armed conflict situations than in times of peace.²⁰⁶

In this area there is scope for human rights to complement humanitarian law, especially with regard to the use of force or allegations of ill-treatment. Indeed, it is important to distinguish between the substantive law justifying the use of force, which differs in human rights law from that in humanitarian law, and the question of investigation, which in the first place requires a gathering of facts. In the latter respect, there is no contradiction between human rights and humanitarian law. Humanitarian law does not provide for a duty to investigate in such detail, but there is no reason to understand this as a qualified silence in the sense that it would preclude application of the duty under human rights law.

Evidently, it would not be realistic to require an investigation after every single use of force in a combat operation.²⁰⁷ But there is a middle way between reviewing every single shot in an armed conflict and not reviewing any alleged violation at all of the right to life. The reality, in particular of counter-insurgency contexts, is that often the facts are not clear. If there are no investigations, security personnel can all too easily allege that they were acting on the assumption that lethal force was necessary because they were facing imminent attack²⁰⁸ or that the rebels died in crossfire.²⁰⁹ In many such circumstances the only way to achieve

203 *Akkum v. Turkey*, Judgment of 24 March 2005, paras. 208–211.

204 *Ibid.*, para. 211.

205 ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, above note 43, paras. 208–213; I/A Court H R, *Myrna Mack-Chang v. Guatemala*, above note 202; Human Rights Committee: Concluding Observations: Colombia, UN Doc. CCPR/C/79/Add. 76, 5 May 1997, para. 32.

206 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/2006/53m, 8 March 2006, paras. 33–38.

207 Melzer, above note 103, pp. 526 f.

208 As happened in *Gül v. Turkey*, above note 152, paras. 81, 89, or in *Oğur v. Turkey*, above note 157, para. 80.

209 As happened in I/A Court H R, *Escuê-Zapata v. Colombia*, Merits, Reparations and Costs, Judgment of July 4, 2007, Series C No. 165, para. 39.

a result is through an independent investigation in which not only the security personnel can be heard but also witnesses supporting the victims' or their families' view.

There are elements in human rights jurisprudence that are certainly new to situations of armed conflict. Not all requirements of an investigation in peacetime may be directly transposable to situations of armed conflict. Also, investigations can only be conducted if practicable in the prevailing security situation and will have to take the reality of armed conflict into account,²¹⁰ such as problems in gathering evidence in some combat situations, lack of access for the investigating personnel, or the witnesses' need for security. On the other hand, it cannot be said that investigations are per se impossible to conduct in times of armed conflict.²¹¹ In circumstances giving rise to concern as to the legality of the act, especially in cases of targeted killing of individuals, an investigation should at least be conducted when there is reasonable doubt whether the killing was lawful.²¹² While the procedures for investigations in situations of armed conflict will have to be developed further, it is clear that they must comply with the requirements of independence and impartiality. In this respect, military investigations have been found to pose particular challenges in terms of independence.²¹³ Military investigations would have to be particularly analysed to assess their independence and impartiality and the role they allow for victims and their families.

Court scrutiny

Whereas humanitarian law focuses on “the parties to a conflict”, human rights are entirely built around the individual and are formulated as individual entitlements.²¹⁴ This does not imply that there are no rights in humanitarian law. On the contrary, the Geneva Conventions were deliberately formulated to enshrine personal and intangible rights.²¹⁵ But at the international level, human rights law, at least for civil and political rights,²¹⁶ recognizes a right to a remedy – that is, a right

210 Watkin, above note 129, p. 34.

211 Gaggioli and Kolb, above note 119, p. 126.

212 Kretzmer, above note 103, pp. 201, 204.

213 Report of the Special Rapporteur, above note 206, para. 37; see more generally, Federico Andreu, *Fuero military y derecho internacional*, *International Commission of Jurists*, 2003, pp. 112–26; I/A Commission H R, Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev 1, 26 February 1999, Ch. V, paras. 17–60; Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, on the Issue of the administration of justice through military tribunals, UN Doc. E/CN.4/2006/58, 13 January 2006, paras. 32–35.

214 Ben Naftali and Shany, above note 103, pp. 17, 31.

215 Jean Pictet (ed.), *Commentary to the First Geneva Convention*, 1960, pp. 82, 83; see in particular the discussion on Common Article 6/6/6/7 to the four Geneva Conventions; Yoram Dinstein, “The international law of inter-state wars and human rights”, *Israel Yearbook of Human Rights*, Vol. 1 (1971), pp. 139, 147.

216 And see now the newly adopted Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc. A/HRC/8/L.2, 9 June 2008.

to lodge an individual complaint against alleged violations.²¹⁷ Such a right does not exist in humanitarian law.²¹⁸ Most of the case law involving the interplay between human rights and humanitarian law has been decided on the basis of human rights law, because victims could only bring cases to human rights bodies. This is why, seemingly, one of the most dramatic effects of the application of human rights law to situations of armed conflict is that it leads to court scrutiny. Never before have situations of international armed conflict or of military operations abroad been scrutinized as much as in the cases concerning Kosovo, Iraq or Afghanistan. It is sometimes contended that such court scrutiny is inappropriate for military action, but is this really the case?²¹⁹

The necessity to have not only an international criminal court, but also a better supervisory mechanism for humanitarian law or even “a body or tribunal whose function it would be to receive complaints against Governments that flout the provisions of the [Hague and Geneva] Conventions”,²²⁰ has been discussed for many decades.²²¹ At international level such a court or tribunal has never met with the approval of states. Could there be a reason, then, for restricting access to courts, at least at national level? Is it that humanitarian law is not justiciable because of the exceptional nature of military action? Practice shows that this argument does not hold sway, for there is a long history of interpretation of humanitarian law in courts.

Indeed, international courts such as the International Court of Justice, international and hybrid criminal tribunals, and national courts have interpreted international humanitarian law. As indeed have national courts, be they in Israel, Colombia or elsewhere, often with human rights or domestic fundamental rights as the basis for the victim’s complaint and standing. The Supreme Court of

217 See ICCPR, Article 2(3); ECHR, Article 13; ACHR, Article 25; African Charter on Human and Peoples’ Rights, Article 7(1)(a); UN Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Human Rights Law, adopted by GA Res. 60/147 of 16 December 2005, UN Doc. A/RES/60/147, 21 March 2006.

218 Liesbeth Zegveld, “Remedies for victims of violations of international humanitarian law”, *International Review of the Red Cross*, Vol. 84 (851) (September 2003), pp. 497–528.

219 This was, for instance, the argument by the State Attorney’s Office in the *Targeted Killings* case, above note 144, para. 47.

220 Sean MacBride, “Human rights in armed conflict, the inter-relationship between the humanitarian law and the law of human rights”, *IX Revue de Droit Pénal Militaire et de Droit de la Guerre*, 1970, p. 388.

221 See A. H. Robertson, “Humanitarian Law and Human Rights”, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles*, in Honour of Jean Pictet, 1984, pp. 793, 799; Sandoz, Swinarski and Zimmermann, above note 23, paras. 3600–3602; Report of the Secretary General on Respect for Human Rights in Armed Conflict, UN Doc. A/7720, 20 November 1969, para. 230; Hampson, above note 184, p. 71; Dietrich Schindler, “Human rights and humanitarian law: interrelationship of the laws”, *American University Law Review*, Vol. 31 (1982), p. 941. At the 1949 Geneva Conference, not quite with the same idea but in the same direction, France proposed the establishment of a “High International Committee” to “supervise the application of and ensure respect for the Convention[s]”. *Final Record of the Diplomatic Conference of Geneva of 1949*, 1963, vol. 3 annex No. 21 and vol. 2, sec. B, p. 61.

Israel has often had to address the question of justiciability and has stated in this respect:

The Court does not refrain from judicial review merely because the military commander acts outside of Israel, or because his actions have political and military ramifications. When the decisions or acts of the military commander impinge upon human rights, they are justiciable. The door of the Court is open. The argument that the impingement upon human rights is due to security considerations does not rule out judicial review. “Security considerations” or “military necessity” are not magic words ...²²²

Thus there is no reason why actions in armed conflict should not be justiciable. But in the absence of other avenues, most cases have come before criminal courts or human rights bodies.

Clearly courts must take into account the specific nature of war. They have, in practice, referred the discretion of the military commander or the soldier in the midst of an operation. One example of court supervision which leaves discretion to the military commander, taking into account his or her position and point of view, is provided by the cases of the International Military Tribunal at Nuremberg:

We are not called upon to determine whether urgent military necessity for the devastation and destruction of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time ... It is our considered opinion that the conditions as they appeared to the defendant at the time were sufficient, upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment, but he was guilty of no criminal act.²²³

It is sometimes criticized that human rights bodies and courts do not have the required expertise to deal with armed conflict situations.²²⁴ But from the point of view of victims of violations it is difficult to argue that, in the absence of any independent international remedy specifically foreseen for international humanitarian law, recourse to the regional human rights courts and other human rights bodies is not a valid path. Rather, “[t]he fact that an individual has a remedy under

222 *Mara’abe v. The Prime Minister of Israel*, HCJ 7957/04, The Supreme Court Sitting as the High Court of Justice, 15 September 2005, para. 31; See also *Beit Sourik Village Council v. The Government of Israel and the Commander of the IDF Forces in the West Bank*, HCJ 2056/04, The Supreme Court Sitting as the High Court of Justice, 30 June 2004, para. 46f.

223 *Wilhelm List case (Hostages Trial)*, United Nations War Crimes Commission. Law Reports of Trials of War Criminals, Volume VIII, 1949, p. 69, available at www.ess.uwe.ac.uk/WCC/List4.htm (last visited 4 August 2008).

224 UN Sub-Commission on the Promotion and Protection of Human Rights, Working paper by Ms. Hampson and Mr. Salama on the Relationship between Human Rights Law and International Humanitarian Law, UN Doc. E/CN.4/Sub.2/2005/14, 21 June 2005, paras. 9–37.

human rights law gives additional strength to the rules of international humanitarian law corresponding to the human rights norm alleged to be violated".²²⁵ Such independent scrutiny can provide greater protection for the victims or reinforce the protection by other mechanisms and institutions.²²⁶

Another criticism is that persons protected by humanitarian law are usually not in a position to resort to any legal process, and that it is better to have an impartial body which acts on its own initiative rather than judicial mechanisms.²²⁷ It is true that people will often not have access to any judicial protection. The plethora of existing cases, however, is proof in itself that the argument is too short-sighted. It proposes a choice between either a judicial protection mechanism or legal protection, but these are not exclusive alternatives. There are many ways to provide protection to persons in armed conflict, be it through the activities of humanitarian organizations such as the ICRC, political mechanisms such as certain UN fora, legal proceedings, pressure exerted through advocacy groups or decisions by international criminal bodies.²²⁸ Court scrutiny, including through human rights courts or domestic courts giving standing to victims of fundamental rights violations can be a forceful method of protection.

In fact human rights law is not necessarily more protective in terms of substantive rights.²²⁹ One only has to bear in mind two critical restrictions on human rights law: its dependence on some jurisdiction or effective control by the state; and the fact that it is not binding on non-state parties.²³⁰

Also, if human rights bodies completely disregard humanitarian law, especially in a situation where it is the *lex specialis*, or distort human rights by implicitly but not openly employing humanitarian law language, this could lead to a weakening of both bodies of law. It also "precludes a coherent construction of the protective rules in times of armed conflict while favouring fragmentation".²³¹ Clarity as to which norms are being applied to a certain situation would be a preferable manner of protecting victims of armed conflict in the long term. While most international human rights bodies have not applied international humanitarian law directly, as their mandate only encompassed the respective applicable

225 Bothe, above note 4, p. 45; see also Meron, above note 9, p. 247, who writes that "their very idealism and naïveté are their greatest strength"; Reidy, above note 44, p. 529.

226 William Abresch, "A human rights law of internal armed conflict: The European Court of Human Rights in Chechnya", *European Journal of International Law*, Vol. 16 (2005), p. 741; see also Bothe, above note 4, p. 90.

227 Schindler, above note 221, p. 941.

228 An interesting assessment of different mechanisms can be found in Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, pp. 232–77.

229 Aeyal M. Gross, "Human proportions: are human rights the emperor's new clothes of the international law of occupation?", *European Journal of International Law*, Vol. 18 (2007), p. 35. On the more protective aspect of some humanitarian law provisions see Cordula Droege, "The interplay between international humanitarian law and international human rights law in situations of armed conflict", *Israel Law Review*, Vol. 40 (2007), p. 350.

230 Even if one takes the view that human rights bind non-state armed groups, cases can only be brought to international bodies and courts against states.

231 Gaggioli and Kolb, above note 119, p. 126 (2007).

human rights treaties²³², the Inter-American Court has applied humanitarian law by interpreting the American Convention on Human Rights in the light of the Geneva Conventions because of their overlapping content.²³³ The Inter-American Commission is the only body that has expressly assigned to itself the competence to apply humanitarian law.²³⁴

In sum, there is no conflict between human rights law and humanitarian law in respect of legal remedies. Humanitarian law is simply silent on the question of an individual right to a remedy; it does not preclude individual remedies where they exist under other international law or domestic law. Human rights law has reinforced the possibility of alleged victims of violations of human rights and humanitarian law bringing cases before courts and other human rights bodies. This is not in conflict with humanitarian law, but can indeed strengthen compliance with it, albeit through the lens of human rights law.

Reparations

While human rights violations entail an individual right to reparation,²³⁵ the equivalent norms on reparation in the law of international armed conflict only recognise this right, or at least the right to claim it, to the state.²³⁶ The humanitarian law of non-international armed conflict is silent on reparation.

Nothing in international humanitarian law, however, precludes the right to reparation.²³⁷ Many serious violations of humanitarian law simultaneously constitute serious violations of human rights. For the same act – for example, torture – a person can have a right to full reparation because it constitutes a human rights violation, even if no such right exists under humanitarian law. There is an increasing tendency to recognize that states should afford full reparation for violations of humanitarian law as well. The Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law, adopted by the General

232 In two recent cases, the European Court of Human Rights has had to grapple with quite complex questions of international criminal law and IHL but seems to have sought to avoid venturing too much on IHL territory: *Korbely v. Hungary*, Judgment of 19 September 2008, *Koronov v. Latvia*, Judgment of 24 July 2008, para. 122.

233 *Bámaca Velázquez v. Guatemala*, above note 45, paras. 207–209. The Human Rights Committee has stated that it can take other branches of law into account to consider the lawfulness of derogations. Human Rights Committee, General Comment No. 29: States of Emergency (article 4), UN Doc. CCPR/C/21/Rev1/Add.11, 24 July 2001, para. 10.

234 *Abella v. Argentina*, Case 11.137, I/A Cm HR Report No. 55/97, OEA/Ser.L/V/II.98, doc 6 rev, 1997, paras. 157–171.

235 See the UN Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law. In different treaties, this right is derived from norms with varying wordings but essentially the same content; see, e.g., ICCPR, Article 2(3); ECHR, Article 41; CAT, Article 14; ACHR, Article 63.

236 1907 Hague Regulations, Article 3; Additional Protocol I, Article 91; see Emanuela- Chiara Gillard, “Reparation for violations of international humanitarian law”, *International Review of the Red Cross*, Vol. 85 (851) (September 2003), pp. 529–54.

237 Hampson/Salama, above note 224, paras. 20, 49.

Assembly in 2005,²³⁸ are a step in this direction. Similarly, in its Advisory Opinion on the *Wall*, the International Court of Justice held that Israel was under an obligation to make reparation for the damage caused to all natural or legal persons affected by the wall's construction.²³⁹ Also, there is some practice of reparation mechanisms, such as the UN Claims Commission or the Eritrea–Ethiopia Claims Commission, in which individuals can file claims directly, participate to varying degrees in the claims review process and receive compensation directly.²⁴⁰ There is furthermore a wealth of practice in national law concerning reparation after armed conflict.²⁴¹ Article 75 of the Rome Statute of the International Criminal Court marks an important development in that it recognizes the right of victims of international crimes to reparation (but with a margin of discretion for the Court).

Without going into the details of this complex discussion, the main argument against an individual right to reparation is that in times of armed conflict violations can be so massive and widespread and the damage done so overwhelming that it defies the capacity of states, both financial and logistical, to ensure adequate reparation to all victims.²⁴² From the point of view of justice this argument is flawed, because its consequence is that the more widespread and massive the violation, the less right there is to reparation for the victims. On the other hand, admitting an individual claim to reparation for victims of violations of humanitarian law committed on a large scale does bring with it real problems of implementation and the risk of false promises to victims. It will be interesting to follow the case law of the International Criminal Court in this regard, which can rely on an explicit provision on reparation in the Rome Statute (Article 75) and is currently developing an approach to victims' rights. It will probably have to take some more lump-sum-type compensation measures or community-based reparation measures to reach the widest possible number of victims. In any event, it is clear that while the simple statement that there is no individual right to reparation for violations of international humanitarian law is no longer adequate in the light of evolving law and practice, there remain many uncertainties as to the way in which widespread reparations resulting from armed conflict can be adequately ensured.

238 GA Res. 60/147 of 16 December 2005.

239 *Wall* case, above note 47, para. 106. One can speculate whether it held so in the absence of another state to which Israel could have paid compensation. See Pierre d'Argent, "Compliance, cessation, reparation and restitution in the *Wall* Advisory Opinion", in Pierre-Marie Dupuy et al. (eds.), *Völkerrecht Als Wertordnung – Common Values In International Law, Festschrift For Christian Tomuschat*, 2006, pp. 463, 475.

240 See Gillard, above note 236, p. 540.

241 On Germany, see Roland Bank, "The new programs for payments to victims of National Socialist injustice", *German Yearbook of International Law*, Vol. 44 (2001), pp. 307–52; the most comprehensive description of national reparations programmes can be found in Pablo de Greiff (ed.), *The Handbook on Reparations*, Oxford University Press, Oxford, 2006.

242 On this discussion see Elke Schwager and Roland Bank, "An individual right to compensation for victims of armed conflicts?", paper submitted to the ILA Committee on Compensation for Victims of War, pp. 45–8; Pierre d'Argent, "Wrongs of the past, history of the future", *European Journal of International Law*, Vol. 17 (2006), pp. 279, 286.

Conclusion

To sum up, the nature of international humanitarian law, which is not conceived around individual rights, makes it difficult to imagine that it could incorporate all procedural rights that have developed in human rights law. However, increasing awareness of the application of human rights in armed conflict, and also an increasing call for transparency and accountability in military operations, can promote stronger protection of certain rights under international humanitarian law.

How these two bodies of law, which were not originally meant to come into such close contact, will live in harmony in the broader framework of international law remains to be seen over time. But one thing is clear: there is no going back to a complete separation of the two realms. Potentially, a coherent approach to the interpretation of human rights and humanitarian law – maintaining their distinct features – can only contribute to greater protection of individuals in armed conflict.

A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law

Marko Milanović*

Abstract

One of the most powerful methods of inducing changes in outcomes governed by international humanitarian law is to add human rights rules and arguments into the equation. This, indeed, is precisely the point of the whole project of linking these two branches of international law. This article explores the relationship between the two bodies of law, and makes several broad propositions. First, that there is a need for a change in perspective, from examining the relationship of the two regimes as such, to the interaction of particular norms that regulate specific situations. Second, that this interaction will frequently result in a norm conflict, and that we have numerous tools at our disposal for either avoiding or resolving these conflicts. Third, that *lex specialis* is at best a fairly limited tool of norm conflict avoidance, and that it most certainly cannot be used to describe the relationship between human rights and humanitarian law as a whole. Finally, that there are situations where all of our tools will fail us, where a norm conflict will be both unavoidable and unresolvable due to a fundamental incompatibility in the text, object and purpose, and values protected by the interacting norms, and where the only possible solution to the conflict will be a political one. The article identifies three such possible situations of unresolvable antinomy—targeted killings, preventive security detention, and positive obligations during occupation, and addresses recent cases with a norm conflict component, such as *Al-Jedda*, *Behrami*, and *Al-Saadoon*. Though in most cases harmony between human rights and humanitarian law is possible, and indeed desirable, we should not underestimate the practical and political relevance of situations of true norm conflict, which no amount of academic exposition will be able to fix.

1. Introduction

Much has been written on the relationship between international humanitarian law (IHL) and international human rights law (IHRL). So much so, in fact, that it is hard to find something new, yet remotely useful, to say. This article will therefore not attempt to reinvent the wheel but will try to assess the state of

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our effort at explaining the relationship between these two bodies of law and to determine its prospects and limits.

At the outset it must be said that this is not an abstract, academic endeavour. Together with the related question of the extra-territorial application of human rights treaties, the IHL/IHRL project serves several purposes. The first, and the broadest, is the affirmation of an idea: the law applicable in war is no longer solely a law between sovereigns, who agree out of grace and on the basis of reciprocity to limit themselves in their struggles so as to reduce the suffering of innocents. Rather, human beings embroiled in armed conflict still retain those rights that are inherent in their human dignity, which are more, not less, important in wartime, and which apply regardless of considerations of reciprocity between the warring parties.

Consequently, a more radical purpose of the IHL/IHRL project is to shift the balance between effectiveness and humanitarianism, struck by States during the drafting of the major IHL treaties, in the direction of humanitarianism. In other words, what participants in this project really want to do by examining the relationship between IHL and IHRL law is to further humanize IHL,¹ partly by using human rights norms to fill the gaps left un- or sparsely regulated by IHL, and partly by trying to change some outcomes that in fact are determined by IHL by introducing human rights rules and arguments into the equation.

Finally, another purpose of the IHL/IHRL project is the enforcement of IHL through human rights mechanisms.² Thus, even if human rights substantively added nothing to IHL, there would still be a point in regarding IHL and IHRL as two complementary bodies of law. IHL, now (jurisdictionally) framed in human rights terms, could be enforced before political bodies, such as the Human Rights Council or UN political organs more generally, or through judicial and quasi-judicial mechanisms, such as the International Court of Justice, the European Court of Human Rights, the UN treaty bodies or domestic courts.³

In brief, we wish to (boldly) take human rights to places, be they extraterritorial situations, or those of armed conflict, or both, where, as a matter of practical reality, no human rights have gone before. Saying openly that we are participating in a project with pragmatic and transformative ends in mind, rather than engaging in some sort of abstract discovery of the law, does not mean that we as lawyers are doing so illegitimately, or that we are usurping the legislative prerogatives of States. It is States themselves that have affirmed the complementary application of IHL and human rights law, both in the texts of the relevant hu-

¹ See, generally, T Meron, 'The Humanization of Humanitarian Law' (2000) 94 *AJIL* 243.

² See, eg G Verdirame, 'Human Rights in Wartime: A Framework for Analysis' (2008) *EHRLR* 689, 691.

³ An example is the extensive litigation in UK domestic courts under the Human Rights Act 1998 arising from the occupation of Iraq, several cases of which will be referred to throughout this article.

man rights treaties⁴ and in their official pronouncements in international fora.⁵ In practice, States may not have abided by their commitments, but this does not mean that these commitments were not made.

There are limits to what legitimate methods of interpretation can do to harmonize IHL and IHRL. Further, for human rights-based arguments to be even remotely persuasive in regard to situations of armed conflict, and to avoid the impression of a fluffy, utopian human rightist disregard for the realities of international relations, these arguments must meet certain requirements. First, it is apparent from even a cursory examination of the case law on the application of human rights treaties extraterritorially or in times of armed conflict that courts greatly fear over-complexity and their own institutional incompetence, whether perceived or real. A paradigmatic example would be *Bankovic*,⁶ which was at least in part the product of the European Court of Human Rights' apprehensiveness that it lacked both the expertise and a reliable factual record to be applying IHL through IHRL to a situation as politically sensitive as was the NATO bombing of Yugoslavia. Therefore, courts and other relevant bodies need some relatively clear, workable rules on both threshold applicability issues and on substantive issues that can arise from the joint application of IHL and IHRL.

Second, it must also be realized that there is a price to be paid for the joint application of IHL and IHRL. Humanizing IHL may require watering down IHRL to make its application possible and practical. To the extent that war and armed conflict are accepted as a reality, human rights norms cannot be applied in a business-as-usual kind of way, with their interminable casuistry and balancing. Considerations of effectiveness must always be taken into account.

It must also be stressed that if human rights have to be watered down to be applied jointly with IHL, they must not be watered down too much. Not only would this defy the whole purpose of the exercise, but it would also potentially

⁴ See the derogation clauses in the major human rights treaties, two of which explicitly mention 'war' as a situation in which derogations might be appropriate—Art 4, International Covenant on Civil and Political Rights, 99 UNTS 171 (ICCPR); Art 15, European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (ECHR); and Art 27, American Convention on Human Rights, 1144 UNTS 123 (ACHR). See also Art 72 of Additional Protocol I to the Geneva Conventions, which refers to 'other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict' as well as the second preambular paragraph of Additional Protocol II, stating that 'international instruments relating to human rights offer a basic protection to the human person'.

⁵ For a general overview, see C Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 *Intl Rev Red Cross* 501, at 503ff.

⁶ *Bankovic and Others v Belgium and Others* (2001) 11 *BHRC* 435; (2007) 44 *EHRR* SE5. On *Bankovic* and the extraterritorial application of human rights treaties generally, see the contributions in F Coomans & M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2004); M Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *HRLR* 411; O Ben-Naftali & Y Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003–2004) 37 *Israel LR* 17.

compromise the values safeguarded by the human rights regime in peacetime.⁷ For instance, allowing the State to kill combatants or insurgents *under human rights law* without showing the absolute necessity for doing so, or to detain preventively during armed conflict, might lead to allowing the State to do the same outside armed conflict.

Having taken these considerations into account, we can move on to their implications for the relationship between IHL and IHRL. First, in order to be able to provide judges and other decision-makers with workable rules that they could apply, and (more importantly) would be *willing* to apply, the focus of our debates should be shifted from the relationship of the two regimes as such, to the relationship of the particular norms belonging to the two regimes that are controlling specific factual situations. Second, since this relationship is of course but one of many that contribute to the wider phenomenon of the fragmentation of international law,⁸ we must be prepared fully to employ the toolbox that international law provides us for avoiding or resolving conflicts of norms. Third, we must place the *lex specialis* maxim, whose exact nature remains unclear, within that toolbox. Having done so, we will realise that *lex specialis* must be abandoned as a sort of magical, two-word explanation of the relationship between IHL and IHRL, as it confuses far more than it clarifies. Finally, we must be prepared to concede that there are some situations—perhaps not many, but by no means practically irrelevant—where the international lawyer's craft and tools will fail, and where no legal solution can be provided. Such situations of unresolvable conflict or antinomy can be solved only in the manner in which they were created—through the political process. I will address these issues in turn.

2. A Relationship between Norms, Not between Regimes

The relationship between IHL and IHRL, and the fragmentation phenomenon more broadly, are often examined from a high-altitude perspective of a relationship between two or more legal regimes. Though there can be some use in such inquiries, they are unhelpful. When it comes to the relationship between IHL and IHLR in particular, they are not only unhelpful—viz the *lex specialis* mantra—but misleading. To demonstrate this, we need only turn to the *Nuclear Weapons* advisory opinion, where the International Court of Justice (ICJ) remarked that:

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 determined by the applicable *lex specialis*, namely,

⁷ See also the insightful critique by W Schabas, 'Lex Specialis? Belts and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus ad Bellum*' (2007) 40 *Israel LR* 592.

⁸ See, eg A Cassimatis, 'International Humanitarian Law, International Human Rights Law, and the Fragmentation of International Law' (2007) 56 *ICLQ* 623.

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, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁹

The Court in *Nuclear Weapons* did not *really* examine the relationship between IHL and IHRL as regimes. It examined, the relationship between one particular IHRL norm, the right to life, and at that the right to life as it is formulated in Article 6 ICCPR (which is worded differently from Article 2 ECHR, for instance), and the relevant rules of IHL. It was these *specific rules* that were held to be *lex specialis*, in that they could help interpret the ‘arbitrary’ part of Article 6 ICCPR in times of armed conflict. Though the Court pronouncement was thus framed in terms of one particular problem and one particular set of norms, it nonetheless understandably provoked an academic extrapolation to the relationship between IHL and IHRL as a whole. The *Nuclear Weapons* opinion was thus understood as saying that IHL defines what IHRL means in wartime, IHRL guaranteeing no less, but also no more, rights to individuals affected by armed conflict than IHL.¹⁰

The debate has of course evolved since then, and so has the ICJ, whose next pronouncement in the *Wall* advisory opinion was decidedly broader in nature:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.¹¹

As opposed to *Nuclear Weapons*, the Court here does refer to IHL as *lex specialis* to IHRL, ie it considers not only some particular norms, but one regime to be

⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (1996) ICJ Rep 226, para 25.

¹⁰ See, L 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) 37 *Intl Rev Red Cross* 35.

¹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (2004) ICJ Rep 136, para 106.

special to the other. The problem with such a characterization is not just that it is overbroad, but also that the concept of *lex specialis* is vague and can mean at least two radically different things, as I will explain below.¹² It should be noted, in that regard, that when the Court in *Congo v Uganda* quoted its dictum from the *Wall* case,¹³ it dropped the reference to *lex specialis*. As a purely practical matter, the Court does not say anything about which rules fall within which category, and on what basis.

To say, therefore, that the two 'spheres of law are complementary, not mutually exclusive',¹⁴ may be perfectly true, but is equally unhelpful in providing practical solutions. The complementarity claim is only an answer to the equally broad counter-claim that the two regimes are mutually exclusive. To the extent that the latter was for many years the default position, the complementarity claim does have a purpose but beyond that, it does not solve anything. It is the relationships between specific IHL and IHRL norms that need examining.¹⁵ Finally, there is no better proof of the danger in referring to IHL as *lex specialis* to IHRL as a whole than the Bush administration's legal strategy in its 'war on terror' and its argument that, for instance, IHRL protecting Guantanamo detainees was displaced by IHL as *lex specialis*, which accorded them no rights whatsoever.¹⁶

We are past that stage where there is much use in general inquiries as to the relationship between IHL and IHRL as regimes. Moreover, those who continue to oppose the joint application of IHL and IHRL will not be persuaded to the contrary no matter what generalities the ICJ might produce. If this is so, then why bother? It is enough to say that the complementary nature of the relationship between IHL and IHRL is confirmed by numerous pronouncements by States and international political bodies,¹⁷ by international courts and tribunals,¹⁸ by the text of derogation clauses of human rights treaties, and above all else, by the treaties' object and purpose.¹⁹ If human rights accrue to human beings solely by

¹² See also H Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11 *JCSL* 265, 269.

¹³ *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* (2005) ICJ Rep 116, para 216.

¹⁴ Human Rights Committee, General Comment No 31, CCPR/C/21/Rev.1/Add.13 (26 May 2004), para 11.

¹⁵ See Krieger (n 12) 271.

¹⁶ See F Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Treaty Body' (2008) 90 *Intl Rev Red Cross* 549, at 550ff.

¹⁷ See, eg Tehran Conference, General Resolution XXIII, 'Respect for Human Rights in Armed Conflicts' UN doc A/Conf.32/41 (13 May 1968); UNGA Res 2444 (1968); UNGA Res 2647 (1970); UNSC Res 237 (1967), UNSC Res 1649 (2005), UNSC Res 1882 (2009).

¹⁸ See, eg *Nuclear Weapons* (n 9); *Wall* (n 11); *Serrano-Cruz Sisters v El Salvador*, Preliminary Objections, 23 November 2004, Inter-Am Ct HR Series C, No 118, para 112.

¹⁹ See also D McGoldrick, 'Human Rights and Humanitarian Law in the UK Courts' (2007) 40 *Israel LR* 527, 531.

virtue of their humanity, why should these rights then evaporate merely because two States, or a State and a non-State actor, have engaged in an armed conflict? More limited these rights might be, but they cannot be completely extinguished or displaced if their basic universality premise, that they are inherent in the human dignity of every individual, is accepted.²⁰ It is possible for this premise to be contested on ideological grounds but, in *legal* terms, that premise is hard-coded into the relevant international human rights instruments. In other words, it is the *law* that human rights are universal and that they accrue to every human being, war or no war. Nothing more needs to be said, and indeed nothing more *can* be said on the matter.

3. Norm Conflict Avoidance and Norm Conflict Resolution

A. Defining Norm Conflict

To provide a norm conflict perspective on the relationship between IHL and IHRL I must first give both a definition of norm conflict and some other conceptual clarifications.²¹ Broadly, a relationship of conflict exists between two norms if one norm constitutes, has led to or may lead to, a breach of the other.²² With regard to IHL and IHRL norms specifically, the notion of conflict could be defined even more broadly—a norm conflict would exist whenever the application of the two norms leads to two opposite results, for example if IHL provided that a particular use of force was lawful, while IHRL made it unlawful.

A further distinction must be made between apparent and genuine norm conflicts, and consequently between conflict avoidance on the one hand, and conflict resolution on the other. An apparent conflict is one where the content of the two norms is at first glance contradictory, yet the conflict can be avoided, most often by interpretative means. In instances in which all techniques of conflict avoidance fail, a genuine, as opposed to an apparent, conflict will emerge.²³ These true norm conflicts are those that cannot be avoided, but which it might be possible to resolve. Unlike avoidance, which interprets away any incompatibility, norm conflict resolution requires one conflicting norm to prevail, or have priority over, the other.²⁴

An examination of a norm conflict situation will usually proceed in two steps. The first is an inquiry as to whether it is possible to avoid a norm conflict by interpreting the two potentially conflicting norms so as to make them compatible. Second, if avoidance is impossible, the conflict might be resolved by assigning

²⁰ See also Ben-Naftali & Shany (n 6) 41–42; Verdirame (n 2) 691–692.

²¹ See further M Milanovic, ‘Norm Conflict in International Law: Whither Human Rights?’ (2009) 20 *Duke JCIL* (69) and the authorities cited therein.

²² J Pauwelyn, *Conflict of Norms in Public International Law* (CUP, Cambridge 2003) 176.

²³ See Pauwelyn (n 22) 272.

²⁴ See further Milanovic (n 21) 6ff.

priority to one norm over the other. However, a third outcome is also possible, and is in fact far from unlikely—that a norm conflict will not only be unavoidable, but also unresolvable. In such situations, which are a consequence of the diffuse and decentralized nature of the international legal system, there can only be a political solution to the conflict between two equal norms.²⁵ Regrettably a number of the potentially conflicting norms of IHL and IHRL might end up in this third category.

Before venturing into this third category, I will examine the utility of the various tools of norm conflict resolution and avoidance. I will start with methods of norm conflict resolution, to show how impracticable they are in addressing IHL and IHRL norm conflicts.

B. Methods of Norm Conflict Resolution

International law is not, and it might never be, a legal system in which a hierarchy based on the sources of norms plays an important role. Though, for example, a treaty will usually prevail over a customary rule, this is so only because the customary rule is *jus dispositivum*, and applies only so long States do not agree otherwise²⁶. There are four principal ways of resolving norm conflict, which, as stated above, requires the assigning of priority to one norm over another: (i) *jus cogens*, (ii) Article 103 of the UN Charter, (iii) conflict clauses in treaties, and (iv) *lex posterior*.

There is probably no concept that has attracted so much scholarly attention, yet so little practical application, as *jus cogens*. There is not a single case where *jus cogens* was unambiguously the basis for a court ruling that a conflicting rule of international law was null and void. It is indeed hard to imagine a scenario in which *jus cogens* could help resolve a conflict between IHL and IHRL.

Aside from *jus cogens*, there is one other quasi-hierarchical rule of norm conflict resolution that does have practical relevance—Article 103 of the UN Charter. It provides that

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

²⁵ See also Pauwelyn (n 22) 418ff.

²⁶ See International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' UN doc A/CN.4/L.682 (13 April 2006), (ILC Study) para 79ff. See also A Verdross, '*Jus Dispositivum* and *Jus Cogens* in International Law' (1966) 60 *AJIL* 55, 58.

Most importantly, this priority rule extends to State obligations under binding resolutions of the UN Security Council.²⁷ Depending on the situation, the Council can thus inject rules of its own making into the IHL/IHRL calculus, rules that arguably have priority over all others save for *jus cogens*. A good example would be the *Al-Jedda* case,²⁸ where a dual Iraqi/British national was held in security detention by British forces in Iraq on the basis of an authorization of preventive detention by the Security Council in its Resolution 1546 (2004). The House of Lords decided that this authorization prevailed over Article 5 ECHR, which does not allow for detention on preventive grounds, by virtue of Article 103 of the Charter.²⁹

As for conflict clauses, they are used in treaty practice to explicitly give priority to one treaty over another,³⁰ though not nearly often enough.³¹ No such clauses exist in the relevant IHL and IHRL treaties. The closest we come to them are the derogation clauses in human rights treaties, which allow for the temporary suspension of certain rights during an emergency to the extent strictly required by the exigencies of the situation.³² As a practical matter, such derogations are rarely used, particularly in an extraterritorial context, since their use by a State would be interpreted as a concession that the IHRL treaty in question in principle applies extraterritorially to a given situation, and would thus open the State's actions up to judicial scrutiny, even if a curtailed one.³³

Finally, there is that equally magical sibling of *lex specialis* (on which more in a moment), *lex posterior*. In domestic legal systems, which are after all a model for us as to how *any* legal system is supposed to work, if the legislature passes a statute that contradicts a prior statute, the latter in time will prevail, even if it does not contain a clause saying so explicitly. This rule is justified by inferring the relevant intent on the part of the single, uniform legislature, operating within a unified hierarchical system, which is not supposed to issue contradictory commands to citizens. However, whatever its validity in domestic law, this assumption manifestly does not hold true in the international system.³⁴ Which

²⁷ See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, Provisional Measures (1992) ICJ Rep 114 at 126, para 42.

²⁸ *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332 (*Al-Jedda*).

²⁹ See *Al-Jedda* (per Lord Bingham) para 39. See also *Al-Jedda* (per Baroness Hale) paras 126 & 129, and *Al-Jedda* (per Lord Carswell) para 136.

³⁰ Indeed, Article 103 of the Charter is in effect a special, proto-constitutional type of prospective conflict clause.

³¹ See, eg, Arts 237(1) and 311 of the UN Convention on the Law of the Sea (1833 UNTS 396). On conflict clauses in treaties, see generally C Borgen, 'Resolving Treaty Conflicts' (2005) 37 *George Washington ILR* 573, 584–587; ILC Study (n 26) paras 267–271.

³² See n 4 above.

³³ See also McGoldrick (n 19) 555–556.

³⁴ 'There is no single legislative will behind international law. Treaties and custom come about as a result of conflicting motives and objectives—they are "bargains" and

is why the international *lex posterior* rule³⁵ can hardly ever apply to conflicting multilateral law-making treaties, even assuming that they could be termed to relate to the same subject matter, which is a prerequisite for the rule's application. When it comes to the IHL and IHRL treaties in particular, not only is there the obvious problem that the law-making in the two areas temporally occurred in several waves, so that it is somewhat absurd to treat these treaties as successive to the other in a *lex posterior* sense, but there is also not the slightest hint of State intent that the relationship between the two bodies of law should be governed by this rule.

In conclusion, the only two rules of norm conflict resolution that are of practical relevance for the relationship between IHL and IHRL are Article 103 of the Charter and the derogation clauses of human rights treaties. As is also the case more generally, it is the methods of norm conflict avoidance that are far more useful in practical terms.

C. Methods of Norm Conflict Avoidance

Avoidance of norm conflict usually is the first recourse.³⁶ For the purposes of the present article, I propose to (entirely informally) trace the various forms of avoidance on a broad spectrum, ranging from 'consistent' on one end to 'forced' on the other, with 'creative' being somewhere in the middle.

Consistent avoidance happens when the language, object and purpose, and other structural elements of the two potentially or apparently conflicting norms can be reasonably reconciled without much effort. The *Nuclear Weapons* opinion is an example. Article 6 ICCPR prohibits 'arbitrary' deprivations of life, while IHL can tell us what 'arbitrary' means in times of armed conflict. Such a method of interpretation is warranted, *inter alia*, by the principle of systemic integration set out in Article 31(3)(c) VCLT, which requires that other applicable rules of international law be taken into account when interpreting a treaty.

In many cases, the 'fit' between the two norms will be far from perfect. This will usually, but not always, require one of the norms to be 'read down' from what its ordinary meaning would initially suggest, or from how it is ordinarily applied, so as to accommodate the other. For example, I would argue that Security Council resolutions that purport to limit certain human rights have to do so in clear

"package-deals" and often result from spontaneous reactions to events in the environment.' ILC Study (n 26) 34.

³⁵ See Arts 30 and 59 Vienna Convention on the Law of Treaties (VCLT).

³⁶ To give two domestic law examples, consider the constitutional avoidance canon in US constitutional law, whereby a statute will be interpreted so far as possible to not pose a constitutional question or conflict, thus potentially leading to its unconstitutionality—see, eg *INS v St Cyr*, 533 US 289, 299–300 (2001); *Crowell v Benson*, 285 US 22, 62 (1932); or s 3(1) of the UK Human Rights Act 1998, mandating that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with [ECHR] rights.'

and unambiguous terms.³⁷ It is not always other norms of international law that need to be read down to accommodate the growing demands of human rights. In *Al-Adsani*,³⁸ for instance, the European Court of Human Rights (ECtHR) held by 9 votes to 8 that Article 6 ECHR should be read consistently with international rules on State immunity, even in cases of alleged torture.³⁹

Creative avoidance, to put it bluntly, involves a court simply making things up. Such creativity can be employed for good ends or bad, in ways that are legally and logically acceptable or not. One example is the *Bosphorus* line of cases before the ECtHR, in which the Court held that the transfer by States of competencies to international organizations that would be immune from judicial process both internally and before the Court itself would not be a violation of the ECHR so long as the organization in question provided an equivalent level of protection of human rights.⁴⁰ This was, in effect, a reading down of the ECHR for the sake of enhanced international cooperation through various international organizations, above all, the EU.

Another, much less palatable, example would be the *Behrami* case,⁴¹ where the ECtHR simply invented an attribution rule that the acts of peacekeepers on UN Security Council-authorized mission were attributable solely to the UN even if it were particular States, rather than the UN, who had operational command and control. The Court did so, contrary to practically unanimous authority, at least partly in order to avoid an apparent norm conflict between Resolution 1244 (1999), whose vague provisions the States concerned interpreted as authorizing preventive detention without judicial review, and Article 5 ECHR, with Article 103 of the Charter and the approach of English courts in *Al-Jedda* looming in the background.⁴²

Finally, there is what I termed *forced avoidance*, ie situations where a court is faced with a result that it deems to be undesirable (for example, a conflict with a *jus cogens* norm, or an unresolvable norm conflict), yet which it cannot avoid through normal means because the text of the relevant provisions simply cannot allow it under any reasonable interpretation. A court then might resort not just to innovation, but also to the wholesale rewriting of a particular provision or

³⁷ See Milanovic (n 21) 37ff.

³⁸ *Al-Adsani v United Kingdom*, ECHR, App No 35763/97, 21 November 2001, (2002) 34 EHRR 11.

³⁹ See also *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26, [2007] 1 AC 270.

⁴⁰ *M & Co v Federal Republic of Germany*, App No 13258/77, 64 Eur. Comm'n H.R. Dec. & Rep. 138 (1990); *Waite and Kennedy v Germany*, App No 26083/94, (2005) 30 EHRR 261 (1999); *Beer and Regan v Germany*, App No 28934/95, (2001) 33 EHRR 3 (1999); *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, App No 45036/98, 2005-VII ECHR 109 (2006) 42 EHRR 1.

⁴¹ *Behrami and Behrami v France, Saramati v France, Germany and Norway*, App Nos 71412/01 & 78166/01, (2007) 45 EHRR SE10.

⁴² See further M Milanovic & 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.

rule. By and large, such methods are illegitimate, or at the very least improper.⁴³ To paraphrase Lord Bingham's view of such practices in the context of the Human Rights Act 1998, they do not constitute 'judicial interpretation, but judicial vandalism'.⁴⁴

D. Unresolvable Norm Conflicts

Though the international and domestic legal systems have in common both an inbuilt imperative for norm conflict avoidance and many techniques of conflict avoidance, there is a point where the similarities end. In domestic systems, all norm conflicts must eventually be either avoided or resolved, since all forms of legislation at whatever level of governance ultimately fit within a single normative hierarchy. In the international system the avenues of norm conflict resolution are as we have seen at best rudimentary. It therefore knows conflicts that are both unavoidable and unresolvable.⁴⁵

The *Matthews* case before the ECtHR, dealing with the elections in Gibraltar for the European Parliament, is one example.⁴⁶ On the one hand, the ECHR, as interpreted and applied by the ECtHR, qualified the European Parliament as a legislature in respect of which States had to organize free elections. On the other, a treaty concluded between EU members prohibited the UK from extending the franchise for the European Parliament to Gibraltar. The Court thus found the UK responsible for violating the ECHR, irrespective of its other treaty obligations. This did not mean, however, that the treaty prohibiting the extension of the franchise to the inhabitants of Gibraltar was invalid, or that the ECHR prevailed over it in some hierarchical sense. Both treaties were formally of equal stature, and no norm conflict resolution was possible—the UK could not fulfil its obligations under either treaty without violating the other, thereby incurring State responsibility. Only a *political* solution was possible for this norm conflict, based on a political preference for the ECHR among the other EU member States, and an eventual extension of the franchise.⁴⁷

Or take an even better-known case, *Soering*.⁴⁸ There the ECtHR interpreted Article 3 ECHR as setting out a *non-refoulement* obligation, prohibiting the UK from transferring a person to the US if a real risk of that person being subjected to inhuman or degrading treatment in the US was established. On the other end

⁴³ See Pauwelyn (n 22) 244ff.

⁴⁴ *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837, para 30.

⁴⁵ But see Droege (n 5) 524 (arguing that in cases of genuine norm conflict, one of the norms must prevail). With respect, there is no 'must' here. That it is desirable to resolve conflicts is certainly true—but it is by no means possible in all circumstances.

⁴⁶ *Matthews v United Kingdom*, App No 24833/94 (1999) 28 EHRR 361.

⁴⁷ For a fuller account of *Matthews*, see Milanovic (n 21).

⁴⁸ *Soering v United Kingdom* (1989) 11 EHRR 439.

was a valid extradition treaty between the UK and the US, which obliged the UK to extradite Soering, and which specified no exception to that obligation.

The fact that the norm conflicts in *Matthews* and *Soering* were unresolvable does not mean that the two cases were unresolvable. In both cases the Court was asked the only question that it had the jurisdiction to answer—whether the ECHR was violated. In both cases it said yes. In both cases another treaty would have been violated had the State fulfilled its ECHR obligations, but in both cases this simply did not matter for answering the question that was posed to the Court, as all avenues of norm conflict avoidance and resolution were exhausted. The only way that the Court could have avoided the norm conflict in *Soering*, for instance, was by ruling that there was no *non-refoulement* obligation arising under Article 3 ECHR, or by giving this obligation an extremely restricted content. Of course, in its interpretation of the ECHR, the Court made a variety of legal, policy and value choices that rendered such a course undesirable, if not impossible. This shows that avoidance of norm conflict is not some sort of absolute priority, but is a value like any other, which will sometimes prevail, and sometimes not.

To bring this discussion of unresolvable norm conflicts closer to the relationship between IHL and IHRL, I will now turn to *Al-Saadoon*,⁴⁹ which is currently pending before the ECtHR. The applicants were individuals detained by UK troops in Iraq, initially as security detainees on the basis of Resolution 1546. While detained on this basis, the Article 5 ECHR prohibition on preventive detention could be deemed to have been overridden by virtue of Article 103 of the Charter, per *Al-Jedda*.⁵⁰ However, the legal basis for the applicants' detention changed when they were charged with specific crimes by the Iraqi judiciary.⁵¹ Their detention by British forces continued, but now at the behest of the Iraqi government, in effect in a sort of pre-trial detention that is in principle permitted by Article 5(1)(c) ECHR.

As the expiry of their UN mandate and the withdrawal of UK forces from Iraq drew nearer, the Iraqi authorities requested the transfer of the applicants to Iraqi custody. They challenged their impending transfer, first before the UK domestic courts and then before the ECtHR, arguing, *inter alia*, that there was a real risk that they would be subjected to the death penalty by hanging if they were transferred to Iraqi custody, and that this triggered the UK's *non-refoulement* obligations under the ECHR.

The applicants first had to establish that the ECHR applied to them extraterritorially. In *Al-Skeini*,⁵² the UK government conceded that the ECHR applies to

⁴⁹ *R (Al-Saadoon and Mufdhi) v Secretary of State for Defence* [2009] EWCA Civ 7 (*Al-Saadoon CA*); *R (Al-Saadoon and Mufdhi) v Secretary of State for Defence* [2008] EWHC 3098 (*Al-Saadoon HC*).

⁵⁰ See n 28 above.

⁵¹ *Al-Saadoon HC* (n 49) paras 24–31.

⁵² *R (Al-Skeini and Others) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153 (*Al-Skeini HL*); *R (Al-Skeini and Others) v Secretary of State for Defence* [2005] EWCA Civ 1609, [2007] QB 140 (*Al-Skeini CA*).

persons detained by UK forces in Iraq.⁵³ It thus had to come up with something new to deny the extraterritorial applicability of the ECHR in *Al-Saadoon*, and that it did. It argued that the applicants were held by UK forces by order of an Iraqi court, and that the UK had a legal obligation to abide by the ruling of that court and transfer them to the Iraqi authorities, since UK forces were present in Iraq with Iraq's consent. Since it had no independent legal authority to detain the *Al-Saadoon* applicants, the UK government argued that they were not within the UK's jurisdiction within the meaning of Article 1 ECHR.

The Divisional Court did not accept this argument, ruling that the applicants were indeed within the UK's jurisdiction,⁵⁴ but held that the ECHR *non-refoulement* principle had to be qualified (pursuant to a Court of Appeal precedent⁵⁵), because the UK had a legal obligation to transfer the applicants to Iraq.⁵⁶ On appeal, the Court of Appeal agreed with the UK government's argument, holding that the ECHR did not apply because the UK had no independent legal authority to detain the applicants.⁵⁷ The applicants obtained a provisional measures order from the ECtHR prohibiting their transfer to Iraqi authorities, but the UK government decided to disobey the order and transferred the applicants to Iraqi custody.⁵⁸

Let us now examine *Al-Saadoon* from a norm conflict perspective. Accepting the UK's argument, it had an obligation to transfer the applicants to Iraq.⁵⁹ Accepting the applicants' argument, the UK had an ECHR obligation not to do so. In other words, there was a genuine norm conflict *à la Soering* at hand, and no consistent form of avoidance was available, nor could this norm conflict be resolved on the basis of some hierarchical rule. The Court of Appeal in particular thus had to resort to more imaginative forms of avoidance, ranging somewhere from the 'creative' to the 'forced' on my tentative scale. It first held that the ECHR simply did not apply extraterritorially, thus nipping the norm conflict in the bud, because the UK held the applicants solely on the basis of Iraqi legal authority and because it had an obligation to transfer them to Iraq. It then held, relying on its earlier precedent, that even if the ECHR did apply, and if there in principle was an applicable *non-refoulement* obligation, that obligation had to

⁵³ See further T Thienel, 'The ECHR in Iraq. The Judgment of the House of Lords in *R (Al-Skeini) v Secretary of State for Defence*' (2008) 6 *JICJ* 115.

⁵⁴ *Al-Saadoon HC* (n 49) 82.

⁵⁵ *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [2005] QB 643 (B) was essentially *Soering* in an extraterritorial setting.

⁵⁶ *Al-Saadoon HC* (n 49) paras 89–96.

⁵⁷ *Al-Saadoon CA* (n 49) paras 32–40.

⁵⁸ See T Thienel, 'Cooperation in Iraq and the ECHR: An Awful Epilogue', *Invisible College* blog, 21 January 2009, available at <http://invisiblecollege.weblog.leidenuniv.nl/2009/01/21/cooperation-in-iraq-and-the-echr-an-awfu>.

⁵⁹ This obligation would derive from the customary obligation of all states not to interfere with the sovereignty and jurisdiction of other states—see, *mutatis mutandis*, *Asylum (Colombia v Peru)*, (1950) ICJ Rep 275.

be qualified, because the applicants were held on Iraqi soil and under Iraqi legal authority.⁶⁰

The first of the Court's methods of avoidance is entirely unconvincing—there is no principled reason why the applicability of the ECHR should depend on the existence of other international obligations.⁶¹ The UK undoubtedly had an obligation to extradite in *Soering*, but that had no bearing on the applicability of the ECHR. The Court's second method of avoidance is more credible. It is possible to argue that *Soering* is distinguishable in that the applicant in that case was held on UK territory, while the applicants in *Al-Saadoon* were held on Iraqi territory, and that the respect for Iraqi sovereignty warrants a more attenuated application of the ECHR. Such an approach remains questionable, however, because of the values that the *non-refoulement* rule is meant to protect—the prohibition of all kinds of ill-treatment.

In its recent admissibility decision in *Al-Saadoon*, the ECtHR quite correctly decided that the Court of Appeal's first method of norm conflict avoidance was inappropriate, and that the ECHR applied extraterritorially to the applicants, but reserved its judgment on the second method of avoidance for the merits of the case.⁶² If this second method of avoidance fails to convince, as I think it does, it is clear that in *Al-Saadoon* the UK brought itself into a situation of unresolvable norm conflict.⁶³ That conflict only had a political solution: the UK could have flatly refused to surrender the applicants to Iraq; it could have tried to negotiate with Iraq and obtain guarantees that the applicants would not be subjected to the death penalty—though Iraq could of course have always refused to negotiate; or it could have disobeyed its ECHR obligations and surrendered the applicants to Iraq. The UK chose the third option. However, that many might think that it should have opted for the second or the first does not mean that this choice was *legally* warranted. The choice was an entirely political one—but it is one for which the UK has almost certainly incurred State responsibility for violating the ECHR, both with regard to the substance of the *non-refoulement* claim and with regard to the ECtHR's interim measures order.

4. Is *Lex Specialis* a Rule of Conflict Avoidance or of Conflict Resolution?

Despite all that has been written on *lex specialis* and the relationship between IHL and IHRL, the meaning of the maxim remains entirely unclear. We are still unsure whether *lex specialis* is a rule of norm conflict avoidance or a rule of norm

⁶⁰ *Al-Saadoon CA* (n 49) paras 41–51.

⁶¹ See further Milanovic (n 7).

⁶² *Al-Saadoon and Mufdhi v United Kingdom* (dec), App No 61498/08, (2009) 49 EHRR SE11.

⁶³ See also M Cross & S Williams, 'Between the Devil and the Deep Blue Sea: Conflicted Thinking in the *Al-Saadoon* Affair' (2009) 58 ICLQ 689.

conflict resolution, and this has extraordinary consequences for the practical utility of this rule.

That *lex specialis* can mean two essentially different things has long been recognized,⁶⁴ but the importance of this distinction has sometimes been downplayed or overlooked.⁶⁵ To see how the distinction between avoidance and resolution remains fundamental, we need only look at a familiar IHL/IHRL example—the lawfulness of preventive detention.

IHL either authorizes or considers as lawful at least two forms of preventive detention during international armed conflicts. First, under Article 21 of the Third Geneva Convention, prisoners of war may be subjected to internment, ie they may be detained on purely preventive grounds, so that they do not rejoin the hostilities. IHL does not require the detaining power to prove that it is *necessary* to detain POWs. Second, under Articles 41–43 of the Fourth Geneva Conventions, civilians can like combatants also be subjected to internment ‘if the security of the Detaining Power makes it absolutely necessary’. IHL therefore poses a stricter requirement for the internment of civilians than of combatants.

When it comes to IHRL, different instruments regulate detention in different ways. Article 9(1) ICCPR provides that

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Unlike Article 9(1) ICCPR, which sets out a standard prohibiting *arbitrary* detention, Article 5(1) ECHR is much more specific:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.

The list that elaborates on the ‘save in the following cases’ clause comprises of six possible situations, none of which can be reasonably interpreted to allow for preventive security detention.

To briefly pose the problem: if somehow, unfathomably, France decided to declare war and invade the UK, would the detention of French POWs on UK soil constitute a violation of Article 5(1) ECHR, in the absence of a UK derogation? Less fancifully, but with the added problem of extraterritoriality, was the detention of thousands of persons by the UK as an occupying power in Iraq after the

⁶⁴ See, A Lindroos, ‘Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*’ (2005) 74 *Nordic JIL* 27, esp at 46; N Prud’homme, ‘*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?’ (2007) 40 *Israel LR* 355, at 366 ff; Drooge (n 5) 523–524; Krieger (n 12) 268–270; ILC Study (n 26) paras 56–57, and the authorities cited therein.

⁶⁵ See ILC Study (n 26) paras 88–97.

April 2003 invasion also a violation of Article 5(1), prior to the June 2004 Security Council authorization in Resolution 1546 that could prevail over the ECHR? Indeed, not only is this question not fanciful, but it is also one of the many that have been raised in *Al-Sweady*, a case currently pending before the English High Court.⁶⁶

The answer to this question depends on whether the *lex specialis* rule is just a rule of norm conflict avoidance, allowing interpretation of the article 9(1) ICCPR arbitrariness standard by taking into account the rules of IHL, and rendering preventive detention in times of international armed conflict in accordance with IHL non-arbitrary. However, if *lex specialis* is merely a method of avoidance, we would be powerless if the same issue was examined under Article 5(1) ECHR, which allows for no ‘window’ through which IHL could enter; no reasonable interpretation of its text is possible that would reach a compatible result. In the absence of a derogation, it is only if the ECtHR *forcibly* read Article 5 ECHR as if it set out an arbitrariness standard akin to that in Article 9 ICCPR that conflict avoidance would be possible. Not only would such rewriting of the treaty be judicial vandalism, it would also have nothing to do with *lex specialis*.

If, on the other hand, *lex specialis* is not a rule of norm conflict avoidance, but of norm conflict resolution, then and only then could we say that IHL *prevails* over the ECHR in some quasi-hierarchical sense (presumably because States intended it to do so), and that it precludes the UK’s responsibility for failing to abide by the express requirements of Article 5. There is, however, *simply no evidence* that *lex specialis* is in fact a rule of conflict resolution. No treaty says so. It has certainly never been used as such in an IHL/IHRL context, least of all by the ICJ, which has only used it to interpret general IHRL standards such as arbitrariness in light of IHL.⁶⁷ Both the texts of the relevant treaties and the official positions of States do not support an inference of a State intent to override the express language of human rights treaties by having regard to the nebulous *lex specialis* principle,⁶⁸ which unlike *lex posterior* is not even mentioned in the VCLT. If anything, the text of the human rights treaties makes it clear that States are supposed to use derogations to avoid conflicts with IHL.⁶⁹ In *some* cases it might be possible to infer contracting parties’ intent to apply the more specific

⁶⁶ See a recent decision in the case on the Government’s failure to fulfil its disclosure obligations—*R (Al-Sweady and others) v Secretary of State for Defence* [2009] EWHC 1687 (Admin).

⁶⁷ Perhaps the closest to doing so was the Inter-American Commission on Human Rights, which was overruled on that point by the Inter-American Court. See more in C McCarthy, ‘Human Rights and the Laws of War under the American Convention on Human Rights’ (2008) *EHRLR* 762, esp at 767 ff.

⁶⁸ See also ILC Study (n 26) para 104, where the ILC considered that *lex specialis* in the context of the *Nuclear Weapons* case only affected the assessment of the Article 6 ICCPR arbitrariness standard. The ILC does not consider a scenario where no such malleable standard was available.

⁶⁹ See *Wall* (n 11).

treaty *against the express terms* of a more general treaty, but this is most certainly not the case with IHL and IHRL.⁷⁰

More fundamentally, *lex specialis* as a rule of conflict resolution rests on an unstated assumption—that for any given situation at any given point in time there is one, and can *only* be one, expression of State consent or intent as to how that situation is to be regulated.⁷¹ That assumption is manifestly unfounded. As we have seen above, States are, like people, perfectly capable of assuming contradictory commitments. Just as *lex specialis* is unable to resolve conflicts such as those in *Matthews*, *Soering* or *Al-Saadoon*, so it is unable to resolve conflicts between IHL and IHRL. In international law, *lex specialis* is nothing more than a sub-species of harmonious interpretation, a method of norm conflict avoidance.⁷² All it can do is assist in the interpretation of general terms and standards in either IHL or IHRL by reference to more specific norms from the other branch of law. It can hence help us determine whether particular deprivations of life or liberty during an armed conflict are arbitrary or not. It can also work both ways—for instance, the more detailed IHRL norms on fair trial and a developed human rights jurisprudence can help us interpret the more general Common Article 3 requirement for trials satisfying ‘judicial guarantees which are recognized as indispensable by civilized peoples.’⁷³

Lex specialis can do no more than that.⁷⁴ It cannot create hierarchies where they do not exist. Precisely because the use of the term *lex specialis* to describe the relationship between IHRL and IHL creates a false impression of facility, its use should be avoided.⁷⁵ The joint application of two bodies of law indeed requires a great deal of avoidance and creativity, involving a host of different legal, policy and value judgments. To an extent these judgments will be governed by our impression of which norm is more ‘special’ in regard to the subject-matter, parties, level of detail, etc—but that is only one factor out of many. Because *lex specialis*, like other rules of norm conflict avoidance, must operate within the permissible bounds of interpretation, and may not stray into disregarding perfectly clear, yet conflicting, rules, in a number of areas the relationship between IHL and IHRL may actually be that of unresolvable norm conflict.

⁷⁰ But see Krieger (n 12) 272; Droeg (n 5) 524.

⁷¹ See Pauwelyn (n 22) 388.

⁷² See M Akehurst, ‘The Hierarchy of the Sources of International Law’ (1974–1975) 47 *BYIL* 273, stating that ‘*lex specialis* is nothing more than a rule of interpretation’; Pauwelyn (n 22) 410.

⁷³ This is in effect what the US Supreme Court did in *Hamdan v Rumsfeld*, 548 US 557 (2006), fn 66. See M Milanovic, ‘Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli *Targeted Killings* Case’ (2007) 89 *Intl Rev Red Cross* 373, 389 ff. See also Krieger (n 12) 274.

⁷⁴ See also T Thienel, ‘The Georgian Conflict, Racial Discrimination and the ICJ: The Order on Provisional Measures of 15 October 2008’ (2009) 9 *HRLR* 465, 467–469.

⁷⁵ Similarly, on the ineffectiveness and conceptual vagueness of *lex specialis*, see Prud’homme (n 64).

5. Areas of Potentially Unresolvable Norm Conflict

A. Preventive Detention and Judicial Review of Detention

In addition to the grounds of detention, another possible area of unresolvable conflict is that of judicial review of the lawfulness of detention. Here the ICCPR and the ECHR are exactly the same: both of them demand such review, and allow for no exceptions from that rule. Thus, Article 5(4) ECHR provides that:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

while Article 9(4) ICCPR stipulates that

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 5 of the Third Geneva Convention requires no showing of necessity that POWs be detained, subsequent to a determination of their status. Article 5 also requires no judicial process of reviewing their detention. In respect of interned civilians, for whose preventive detention a necessity must be shown, Article 43(1) of the Fourth Geneva Convention requires periodic review ‘by an appropriate court or administrative board’.

The IHRL norm that ‘everyone’ or ‘anyone’ must be able to challenge his detention before *a court*, period, cannot be reconciled—absent a derogation, with the IHL norms that the detention of POWs need not be reviewed at all—while the detention of civilians can be reviewed even by a mere administrative board. The only possible accommodation that IHRL can make for IHL in this respect is to read standards such as ‘speedily’ or ‘without delay’ more loosely in armed conflict, but the core of the unambiguously expressed norm cannot just go away.

Moreover, not even a derogation might be able to completely avoid a conflict between IHRL and IHL in respect of detention. Recall that a State may take measures of derogation only ‘to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.’⁷⁶ Therefore, even if, during an armed conflict, a State party derogated from Article 5 ECHR or Article 9 ICCPR to allow for preventive detention without judicial review, in a manner completely consistent with IHL, this would not necessarily suffice to make that derogation stand—the

⁷⁶ See Art 15 ECHR, Art 4 ICCPR.

measures taken still need to be ‘strictly required’, as a matter of some sort of objective external assessment.⁷⁷

B. Necessity in Targeting

The detention example of unresolvable norm conflict is far-reaching enough, but the next example, targeting, is no less important. In IHL, the traditional position has been that combatants may be targeted so long as they are not *hors de combat*,⁷⁸ and this position holds true with some temporal limitations even for civilians taking a direct part in hostilities.⁷⁹ In other words, one belligerent party does not need to prove any kind of necessity to kill combatants belonging to the other belligerent party, in order to be able to lawfully do so. ‘Those who belong to armed forces or armed groups may be attacked at any time’.⁸⁰

When it comes to IHRL, there are significant variations among the relevant treaties when it comes to conditions under which a State may deprive individuals of life. Article 6(1) ICCPR stipulates that ‘[n]o one shall be arbitrarily deprived of his life’, while Article 4(2) thereof prohibits derogations from this prohibition under any circumstances. Article 2 ECHR prohibits any intentional deprivation of life, save ‘when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.’ On the other hand, Article 15(2) ECHR does allow derogations from the right to life (only) ‘in respect of deaths resulting from lawful acts of war,’ thus opening a window for IHL.

Both the ICCPR and the ECHR can easily be interpreted as requiring a showing of necessity before *any* intentional deprivation of life,⁸¹ while, as we have seen, IHL purposefully does not require such a showing in respect of combatants or civilians taking a direct part in hostilities.⁸² That IHRL necessity standard might be relaxed somewhat to take into account the fact of armed conflict, but it is hard to see how it can be totally extinguished, as IHL warrants, as soon as an armed conflict takes place and solely on the basis of the person’s status.

⁷⁷ See Human Rights Committee, General Comment No 29, CCPR/C/21/Rev.1/Add.11, para 16, where the Committee asserts, perhaps too broadly, that states may never derogate from the requirement for judicial review of detention.

⁷⁸ See Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) 27–29, 145; N Lubell, ‘Challenges in Applying Human Rights Law to Armed Conflict’ (2005) 87 *Intl Rev Red Cross* 737, 745–746.

⁷⁹ See Art 51(3) of Additional Protocol I.

⁸⁰ Y Sandoz et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Geneva 1987) 1453.

⁸¹ See, eg *McCann and Others v United Kingdom*, ECtHR, App No 18984/91, (1996) 21 *EHRR* 97, paras 149–150.

⁸² See also McCarthy (n 67) 773 ff; Krieger (n 12) 280–281.

To see this norm conflict at work, we need only to take a look at the *Targeted Killings* judgment of the Supreme Court of Israel.⁸³ One of the conditions that the Court imposed for targeted killings was that a terrorist may not be targeted if the incidental damage caused to nearby civilians is disproportionate to the direct military advantage anticipated from the elimination of the said terrorist.⁸⁴ This is the IHL proportionality principle, whose purpose is to allow the use of lethal force but to minimize the collateral damage arising from its use.⁸⁵ The Court imposed a further condition—a terrorist may not be targeted if less harmful means can be employed, ie if he can be captured and put on trial. In the Court's own words, '[t]rial is preferable to use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force.'⁸⁶ The Court used the kernel of a human rights rule—that necessity must be shown for any intentional deprivation of life, to restrict the application of an IHL rule—that in armed conflict no necessity need be shown for the killing of combatants or civilians taking a direct part in hostilities.

The Court's holding was not based on *lex specialis* or any other form of mechanical reasoning. It made a policy and value judgment that in the context of the prolonged Israeli occupation of Palestinian territories the traditional IHL answer was no longer satisfactory, and it had a legal basis in human rights law to say so.⁸⁷ When one adversary possesses overwhelming strategic and tactical superiority; in the context of an occupation, especially a prolonged one; during a limited insurgency or non-international armed conflict; in situations, in other words, which lend themselves more easily to non-lethal approaches, the imposition of an IHRL necessity requirement becomes more and more attractive.

It is questionable, however, whether this necessity requirement could be effectively applied in a more traditional battlefield setting. There is perhaps no other area of potential conflict where the infusion of IHRL with IHL could lead to a greater slide into utopia and, consequently, into irrelevance. It might be better to have *some* rules that are effective, than rules that satisfy our moral intuitions but are honoured only in their breach. If the IHRL necessity requirement is to be applied at all in such situations, *contra* IHL, it will have to be read down significantly to be effective, flexible and practicable.⁸⁸ Even if IHRL is read down so far that it would *never* consider as arbitrary a killing of a combatant who is not

⁸³ *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, HCJ 769/02, 46 ILM 375 (2007) (*Targeted Killings*).

⁸⁴ *Targeted Killings* (n 83) para 40.

⁸⁵ See Art 51(5)(b) of Additional Protocol I.

⁸⁶ *Targeted Killings* (n 83) para 40.

⁸⁷ See *Targeted Killings* (n 83) para 40. See also Milanovic (n 73) 390–392.

⁸⁸ Some scholars have resorted to a different, yet with respect to ultimately unconvincing approach to avoiding this norm conflict, by claiming that IHL like IHRL also imposes a necessity requirement for civilians taking a direct part in hostilities, and possibly even combatants—see N Melzer, *Targeted Killing in International Law* (OUP, Oxford 2008) 228, 336 ff, esp at 397; Droege (n 5) 526.

hors de combat, per IHL, this would not be because of the *lex specialis* principle, but because of a policy judgment that IHRL has (forcibly) to be read down far enough to be effective.

C. (Transformative) Occupation

My final example of potentially unresolvable conflict between IHRL and IHL is occupation. Suppose that the UK becomes the belligerent occupant of a territory that has Sharia as part of its domestic law, eg Iran. The Penal Code of Iran prescribes stoning as a punishment for adultery, and even has a stunning provision that stipulates that '[t]he size of the stone used in stoning shall not be too large to kill the convict by one or two throws and at the same time shall not be too small to be called a stone.'⁸⁹ Arguably, since the UK is in effective overall control and thus possessing jurisdiction over a part of Iranian territory, the ICCPR and ECHR are applicable.⁹⁰ Both treaties require the UK to ensure or secure the human rights of all individuals within its jurisdiction, even against violations by other actors. A punishment of stoning for adultery undoubtedly qualifies at the very least as inhuman treatment under either of these treaties.

As for IHL, Article 43 of the Hague Regulations provides that '[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.' Article 64 of the Fourth Geneva Convention is even more pertinent to our example, stipulating that '[t]he penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.'

The example given is at least that of an apparent norm conflict. On one hand, IHRL commands the UK to take all possible measures to prevent the stoning of adulterers in the territory that it has occupied. On the other hand, because it considers occupation to be a temporary situation that requires deference to the displaced sovereign, IHL prohibits the UK from changing the laws of the occupied country, particularly its penal laws.⁹¹ Can these two contradictory obligations somehow be reconciled?⁹²

To do that, we would have to read down either the IHL obligation or the IHRL obligation. When it comes to IHL, Article 43 of the Hague Regulations

⁸⁹ Art 104, Penal Code of Iran.

⁹⁰ Per *Loizidou v Turkey* (1995) 20 EHRR 99; *Wall* (n 11); *Congo v Uganda* (n 13); contra *Al-Skeini HL* (n 52).

⁹¹ See generally M Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 EJIL 661.

⁹² On transformative occupations generally, see A Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 AJIL 580; G Fox, *Humanitarian Occupation* (CUP, Cambridge 2008).

is a somewhat easier target—it prohibits the occupant from altering the domestic law of the occupied territory unless it is ‘absolutely prevented’ from doing so. We can therefore say that the UK’s IHRL obligation to put a stop to any inhuman treatment does, in fact, ‘absolutely prevent’ it from respecting Iran’s domestic law.⁹³ Article 64 of the Fourth Geneva Convention is less malleable—the domestic penal law must be kept in force, with only two possible exceptions. Does maintaining stoning for adultery constitute a threat to the security of the UK, the occupying power? Hardly. Is it an obstacle to the application of the Convention itself? Not really. There is no other obligation of the UK derived from the Convention that it could not fulfil while allowing the courts of the *ancien régime* to go about their brutal business. In reality, therefore, Article 64 can only be read down forcibly, if it is in effect rewritten to accommodate change in domestic laws that are incompatible with the occupant’s IHRL obligations.

If IHL cannot consistently and reasonably be read down to accommodate IHRL, how about IHRL? We could say that the UK’s positive obligation to secure or ensure respect for human rights in occupied territories even by non-State actors is one of due diligence. It requires the State only to do all that it reasonably can to prevent violations.⁹⁴ Because in this particular instance doing so would require the UK to violate some of its other obligations under international law, the UK’s positive obligation should be read as not requiring the UK to do so.

This is a textually and conceptually perfectly reasonable reading down of IHRL, but recalling what I have said above—though a price must be paid if IHRL is to be applied jointly with IHL, that price must not be too steep. I personally—and I suspect most other international lawyers—would never read down IHRL to accommodate stoning for adultery, even if as a technical matter it may be perfectly appropriate to do so. This, however, is simply because of a policy and value judgment that I have made on the issue, because I *care* more about human rights than about consistency in international law in this particular instance. A norm conflict thus becomes unavoidable.

6. Conclusion

Improved enforcement and further humanization of IHL through the application of IHRL is the ultimate goal of this entire project—to bring the States that created these treaties to the logical, legal and moral conclusions that are mandated by their text, but even more so by their fundamental normative underpinnings, the values that inspire them. As we have seen, to have any hope of advancing this goal, we must be practical and be prepared to apply IHRL standards in a more flexible fashion. Yet we also need to drop the pretence, inspired by a false analogy with domestic public law, that States have in their infinite wisdom created two legal regimes that mesh together perfectly. They simply do not, either in the

⁹³ See Sassòli (n 91) 676; Thienel (n 53) 126–127.

⁹⁴ See *Al-Skeini CA* (n 52) para 196.

texts of the treaties, or in the values and policy considerations behind them.⁹⁵ Frequently, their relationship is that of conflict.

To address these norm conflicts, we have a variety of tools at our disposal. The most helpful are those of norm conflict avoidance, which are interpretative in nature. Among these tools, but not among the most useful, is *lex specialis*. To take again preventive detention as an example, if faced with a pure IHL/IHRL case arising from Iraq, such as *Al-Sweady*, the ECtHR might in the end forcibly read down Article 5 ECHR as if setting an arbitrariness standard that could accommodate IHL like Article 9 ICCPR, but this would not be as a consequence of the *lex specialis* principle, but because it weighed the competing policy considerations so as to warrant such a result even in the absence of a derogation.⁹⁶ As is so often the case with legal Latin, *lex specialis* is descriptively misleading, vague in meaning, and of little practical use in application. It should be discarded as a general matter, and in particular it should not be used to describe the relationship between IHL and IHRL as a whole.⁹⁷

More often than not, IHL treaties and human rights treaties can be reconciled and interpreted harmoniously. There *are*, however, instances where this quest for harmony will fail, when the two bodies of law cannot be reconciled, when all legitimate methods of norm conflict avoidance and resolution will be exhausted, and when ultimately a political choice will have to be made as to which of the conflicting norms should be given priority over the other.

That choice can rarely, if ever, be made by a court—sometimes it is only the legislator who produced the antinomy who can provide the remedy for it. The more forced the methods of avoidance, the less legitimate they are; the line between interpretation and legislation may often be a fine one, but it is nonetheless still there. When all methods of norm conflict avoidance and resolution fail, there is nothing shameful in admitting defeat and saying that in this or that particular instance, IHL and IHRL cannot be reconciled. Just like a UK court can, after giving its best, ultimately say that a particular act of Parliament is incompatible with the Human Rights Act, so can it say, in *Al-Sweady* for instance, that the internment of POWs and civilians during the occupation of Iraq was lawful under IHL, but unlawful under the ECHR.⁹⁸

It is, of course, not any easy thing for a court to say, nor should it be. No wonder then that courts rarely, if ever, openly acknowledge the possibility of unresolvable conflict. To take *Al-Skeini* as the prime example, it is often far easier for courts to deny that IHRL applies at all, based on entirely arbitrary criteria (viz that the ECHR applies to a person killed in the custody of UK troops in Basra, but not to persons killed by UK troops on patrol⁹⁹), and switch IHRL on when it becomes morally intolerable not do so, and off when it becomes

⁹⁵ See also Schabas (n 7).

⁹⁶ See also Lindroos (n 64) 42.

⁹⁷ See also Prud'homme (n 64).

⁹⁸ But see Ben-Naftali & Shany (n 6) 103.

⁹⁹ See also Hampson (n 16) 570.

impracticable, rather than address hotly disputed substantive issues which may expose unresolvable norm conflicts. However, norm conflicts are in themselves not so undesirable that they must be avoided or resolved at any cost. They are immanent to the international legal system, due to its decentralized, non-hierarchical nature, and the consensual character of its law-making processes.¹⁰⁰ They occur as much in peacetime as in wartime, intraterritorially as extraterritorially—eg in *Soering* and *Matthews*. Indeed, exposing an unresolvable norm conflict may ultimately prove to be *more* productive than forcibly avoiding it, as nothing will give a better incentive to States to improve the normative framework within which we must operate. And, of course, a good place for States to start would be for them to use mechanisms that are already in place, such as derogations.

¹⁰⁰ See also Lindroos (n 64) 28.

XVI

The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict

Naz K. Modirzadeh*

Introduction

International human rights academics and activists rarely have a great deal to celebrate. Compared to their colleagues in private international law or domestic law, they are faced with creating a convincing account of “real” law. They often work on the most horrifying atrocities committed against individuals around the world, struggling to draw the world’s and the international community’s attention to the plight of subjugated and silenced masses. Like their colleagues who work in the field of international humanitarian law (IHL, or law of armed conflict), they focus on history’s darkest moments, when humanity seems lost or forgotten.

Yet, in the last decade, human rights scholars and advocates working at the cutting edges of academia and litigation have led a tremendous amount of innovation in the literature and in courtrooms and UN committees around the world. They have managed to transform a long-accepted truism of international law, and to

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challenge States and their militaries to fundamentally reconsider the nature and scope of their obligations on the battlefield.

Indeed, the idea of co-application of international humanitarian law¹ and human rights law has drawn a tremendous amount of academic attention and a huge amount of innovation in international and domestic jurisprudence. This transformation, this much-touted shift in the field of international law, is often referred to as the “humanization of humanitarian law”² and, more technically, the “convergence”³ of international human rights law (IHRL) and international humanitarian law. Yet in the current headlong approach into convergence, rights and rights institutions may carry risks to the very goals many humanitarian-minded international lawyers seek to achieve.

The current debates around the applicability of human rights during conflict, the extraterritorial applicability of human rights and the *post facto* enforcement of human rights claims against military personnel engaged in armed combat appear to avoid the central question of whether adding human rights to the legal terrain of war is good—good for civilians, good for the longevity of legal constraints on conduct during conflict and good for the promotion of human rights. Underlying the huge number of scholarly papers on the issue of parallel application of IHRL and IHL,⁴ as well as the increasingly pro-convergence jurisprudence of key international courts, is an assumption that more human rights (in a formal sense) always equal more *enjoyment* of basic rights. To the extent that a major scholarly project seems to be intent on demonstrating that human rights law was always meant to apply during armed conflict and that the main challenge before us is the specific and detailed enforcement of discrete rules of IHRL, we need an honest assessment of what we want human rights law to *do* for us and how the pragmatic and tactical deployment of human rights arguments will affect the overall fate of rights discourse in war.

The goal of this article is not to delve into the legal complexities of various courts’ interpretations of the details of the application of human rights law in war, but rather to take a bird’s-eye view of the debate and to question whether it is a good thing to insist on the extraterritorial applicability of human rights to armed conflict situations. The tone of the many articles and commentaries on the topic of “convergence” suggests that if only the views of various UN treaty bodies and forward-thinking courts were applied fully by the military, it is obvious that the experience of civilians caught up in armed conflict would be improved, that detention would be more humane, that accountability for violations would be increased—that, in short, outcomes would be more *humanitarian*. I aim to question that assumption, and to raise questions about whether even the full realization of the aspirations of human rights scholars and advocates would actually be better for civilians in war.

The real desired impact of insisting on the co-application of human rights law with IHL is far more limited than a frank reading of most of this scholarship would suggest. Indeed, it seems that rather than transforming the very legal framework within which armed conflict occurs the main upshot of promoting parallel application is to increase the available legal forums and accountability measures to which States can be subject *after* alleged violations occur. This article questions whether promotion of full parallel application, with the intent of only changing the framework of *post facto* accountability, actually harms the capacity for law to protect civilians in war. This paper argues that the formalist machinations currently employed to argue that violations of IHL should come within the jurisdictional ambit of human rights instruments and courts may be harmful to the very aims liberal international lawyers seek to achieve. My argument is that parallel application is equally as bad for the Iraqi civilian as it is for the American soldier. As we pull back the layers of legalistic argumentation, the real role of rights discourse and the real function of human rights law on the battlefield seem much less thought-out than leading scholars suggest, and the implications for this new approach to international law seem much more problematic than the current debate on the issue presents.

For the civilian and the soldier, the vague overlap of these two bodies of law is at best incoherent, and at worst raises expectations that cannot be met. The civilian in Basra during the occupation would be told that he might have some human rights claims against the British (in the event that they have a certain kind of control over him), no human rights claims against US forces (because they refuse to recognize the applicability of the law), full human rights claims vis-à-vis the Iraqi transitional government (depending on what stage of the Iraqi transitional government we would be looking at, and depending on the interpretation of what it would mean for human rights obligations to continue to apply to Iraq even after the invasion toppled its pre-existing government), and moderate human rights claims vis-à-vis any European States party to the European Convention on Human Rights that would happen to have any control over an individual Iraqi in the south. Contrary to IHL, where the civilian (or prisoner of war or enemy combatant) is not a rights-holder but a person to whom obligations are owed by a party to the conflict (and therefore where we would look to the behavior of the party to the conflict in order to determine whether there has been a violation of the rules), IHRL raises the expectation that there is a clear duty-bearer who is capable of responding to the rights claim held by any individual on a given territory.

From the perspective of the commander seeking to provide regulations to the soldier based on the State's relevant obligations under international law, rules of warfare and doctrine on the battlefield must be whittled down to clear and brief rules of engagement. While senior commanders, military policymakers and

military lawyers advising high-ranking officers may (and often do) take policy, politics and additional bodies of law into account, the rules that ultimately govern conduct and determine whether soldiers are subject to criminal liability must be those that are clearly recognized by the State in question as applicable to a particular conflict.

Part I sketches the background of the development of IHL and IHRL, and provides an overview of the stakes in the debate over extraterritorial applicability of IHRL in armed conflict. Part II presents a list of ten concerns one might have about the current accepted consensus toward convergence. Part III concludes with a view toward possible pathways forward.

Part I: Background to the Relationship between IHL and IHRL

In this section, I hope to lay out the key signposts in the debate on convergence, pointing out the actors in each salient aspect of the discussion on convergence. My purpose is not to go into the detailed and complex questions involved in each aspect of the debate, but to provide a bird's-eye view of the key questions and the practical implications of a given position. In particular, I want to draw attention to the increasingly common reference in the scholarly literature to a "consensus" or "settled issue" on the first-order questions relating to the applicability of human rights law in conflict.

It may be useful before delving into the key signposts of the debate to review the generic narrative of the question of convergence, one that seems to be accepted by all sides. In presenting this narrative, I am hoping to foreshadow some of the seemingly innocuous assumptions within it that will come back to be important in our critique of contemporary positions on the convergence question.

The first question in the debate over convergence, one that is largely treated in the past tense in contemporary scholarly literature, is whether human rights law applies *at all* during armed conflict. Here, there is usually a reference to the "traditional" or "classical" position of international law, in which human rights was the "law of peace," and IHL the "law of war," with a clear and unquestioned separation between the two. In the "good/bad old days" (depending on who is presenting the intellectual history) of international law, it was clear that the law of peace could not apply during armed conflict because the law of peace addressed the relationship between the State and the citizen/territorial subject during the normal conditions of peace, whereas IHL was a highly specialized legal regime created in close consultation with military personnel for the purposes of regulating the state of exception from day-to-day governance that characterizes warfare. This traditional understanding of the clean separation between the law of peace (human rights) and the

law of war (IHL) accepts that when we are talking about a situation of armed conflict, we will necessarily be in a context where human rights will be impossible to apply, and where there will be little to no accountability for human rights violations. In addition, underlying this “traditional” position seems to be an understanding that those who must deal with the law, enforce it on the ground and be accountable for compliance are very different.

So, if we imagine that the line below is the overall span of a human life, from birth to death,



human rights law addresses every possible way in which this human life might encounter the State, and even how the individual might encounter other private actors *within* the State: the right to education,⁵ the right to basic health care,⁶ the right to shelter,⁷ the right to marry the person of one’s choosing,⁸ the right to parent according to one’s values,⁹ regulation of encounters with police and the courts,¹⁰ regulation of one’s encounter with imprisonment, structuring of paid labor and equality of labor,¹¹ political participation,¹² and religious participation,¹³ among others. The historic singularity of human rights law, and its revolutionary transformation of traditional Westphalian sovereignty, is the notion that the individual has rights on the international stage—that international law can reach into the State and regulate the relationship between the individual and her government. In vesting the individual with rights by virtue of her personhood, IHRL empowers the individual to imagine and pursue a full, rich, emancipated, politically vital existence. IHRL is unlimited in its scope and potential; it quickly moves beyond the basic necessities of bare human sustenance and provides the constitution for a society built on individual choice and engagement. So, we might see our individual’s lifetime as legally covered by IHRL in this manner,



where the scope of IHRL’s influence on the individual’s relationship with the State and public life is limited only by the development and expansion of IHRL itself.

The traditional model conceives that if, in the span of this individual’s life, her State should enter into armed conflict, it is at this very moment that IHRL ceases to

be relevant to her relationship to the State and, instead, IHL alone regulates her relationship to belligerent actors until the end of hostilities.



Again, in this model, IHRL is merely suspended for the duration of armed conflict and is immediately “reactivated” once the State returns to a normal state of governance of its own territory.

At its most basic level, the concept of convergence suggests that because IHRL always applies to individuals in their relationships to the State (except in the limited cases of derogation as allowed under the International Covenant on Civil and Political Rights (ICCPR) but not under a number of other IHRL treaties), it continues to apply during armed conflict, but may be limited or refined by IHL as the *lex specialis*. Convergence argues that IHRL cannot be arbitrarily suspended simply because an armed conflict has broken out on the territory of a State with international obligations under human rights law, but that it may be *limited* in its application by IHL. So, in our individual’s timeline,



IHRL continues to apply *in parallel* to IHL for the duration of the armed conflict, and as before IHL ceases to apply once the armed conflict is over. Theoretically, this would apply for any and all discrete human rights obligations of the State in question: so if a State has ratified the ICCPR; International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture (CAT) and Convention on the Rights of Children (CRC), then that State would remain responsible for its obligations within those treaties (and vis-à-vis the relevant treaty bodies) during the armed conflict, except insofar as particular obligations are altered or limited by the function of IHL. As a result, in the event that our individual’s State finds itself fighting off an invasion from a neighboring enemy, the State would continue to be responsible for the human rights of individuals on its territory for the duration of the armed conflict, while both the State *and* the invading nation would be responsible for IHL vis-à-vis the population.

The first-order question of the convergence debate is whether IHRL and IHL should apply side by side during armed conflict, and how that parallel application can be articulated in theoretical terms and put into practice. As we will see, while the theoretical or principled position for parallel application seems to be dominant (and even wholly uncontroversial at this stage), the question of *how* these bodies of law should apply in tandem, what provisions of human rights law continue to apply to the State and what additional obligations are created by the operation of human rights law are hotly contested.

Assuming the theoretical applicability of human rights law is accepted, the second major question in the debate focuses on extraterritorial applicability of human rights law during armed conflict. This asks whether a given State *carries* its human rights obligations abroad on the backs of its military forces. IHL is by its nature extraterritorial: IHL follows fighting forces and its applicability in a given situation is generally determined by a factual assessment of the circumstances at a given time. For its part, human rights law has traditionally been closely tied to the particular institutions and systems of governance of the State that brings human rights regulations upon itself. The broad question of extraterritorial application of human rights law (within which armed conflict is but a particular instance) concerns whether a State can ever have obligations under its various human rights treaty (or customary law) obligations that extend beyond its territorial borders, its territorial jurisdiction and some limited understanding of foreign territories in which it enforces jurisdiction (such as embassies abroad).

We could imagine this question as having an impact on all sorts of contemporary situations: States could be held responsible for the human rights violations committed by multinational corporations acting abroad, and they could be responsible for violations committed by international financial institutions of which they are members. Here the debate goes beyond whether human rights law continues to apply during armed conflict and its concomitant concerns: whether a State would be responsible to control the human rights violations of an armed group carrying out violations on its territories in a non-international armed conflict; whether a State would be responsible for violations of various civil and political rights while defending itself against an invasion; and whether a State would have obligations to provide humanitarian access under the right to food or other provisions of ICESCR. The question then becomes whether IHRL obligations of a particular State *travel with* that State when it is engaged in military actions abroad. If they do, do they carry the full scope of human rights obligations, or some minimal “core” of rights? Is the State responsible for the institutional context in which individuals enjoy their rights in foreign lands, or only for those encounters between foreign individuals and the State’s representatives? And what is the reach of

national or regional human rights bodies in determining whether States have complied with their human rights obligations in the course of armed conflict?

For the growing number of international bodies, courts and States that argue that, at least in principle, human rights law does travel with the obligated State, the bulk of the legal debate turns to the question of what *level of control* or military involvement is required before the application of human rights law is triggered. Is mere presence enough? Is effective control rising to the level of occupation required? Is the level of control required more constraining than the standard for occupation? Must an individual be in the custody of a State before that State's human rights obligations extend to that individual on foreign soil? These questions—whether human rights law applies extraterritorially to some extent, and, if so, what jurisdictional reach is provided—are at the core of the debate over convergence.¹⁴ Current human rights scholarship and lawyering strongly support the extraterritorial application of human rights law in armed conflict, a position slowly gaining recognition in key domestic and international jurisprudence.¹⁵

Having provided a narrative summary of the development of these areas of law, it may be useful to now provide an overview of the ways that the two bodies of law function. IHL is, if nothing else, grounded in and justified on the basis of its practicality, its intimate connection to military professionals and what they are asked to do in the heat of battle. The defense of IHL against the charge that it is not protective enough, or that it skews the calculus of life and death toward the needs and entitlements of the military, is that this state of affairs is the only way to maintain the legitimacy of the law in the eyes of commanders, that we must be modest in our aims for complex legal restraints during the most brutal and unregulated fog of war. As such, IHL offers three key moments for the law to act: *prior to conflict*, IHL is the basis for military doctrine and training on protection of civilians, proportionality, distinction and other key restraints on warfare; *during conflict*, its provisions allow commanders and instructors to create simple, concrete rules for conduct, and the battle-relevant aspects of IHL provide commanders with the limits on what military personnel may do in the pursuit of their objectives, and clear provisions for the treatment of various categories of individuals; *after hostilities*, IHL provides the grounds for disciplining troops who violate the rules according to national military law grounded in international norms, as well as creates the legal framework for accountability of military personnel and others in the command structure in other legal forums (such as international tribunals, national high courts, the International Criminal Court, etc.).

In practical terms, it is in the first two areas that IHL is most impactful: it has often been noted that *post facto* accountability for IHL is extremely difficult to establish.¹⁶ Liability for violations of provisions related to proportionality, distinction and

other obligations under IHL that involve balancing or a reasonable-commander standard is, in practical terms, usually established only in the most extreme cases of violation.¹⁷ In this sense, the rules of IHL emphasize *a priori* prevention of violations, and focus on the basic protections owed to those individuals *hors de combat* as well as a pragmatic set of detailed rules for treatment of prisoners of war and others detained by parties to the armed conflict. The provisions of IHL are ideally suited for being diluted and distributed in simple terms to military professionals in the battlefield: indeed, the interpretation of IHL rules is often based in the practicality of application in the heat of battle.¹⁸

IHRL is based on a different set of assumptions about the way that States act, and the capacity of the international community to regulate that behavior. Human rights law functions as an agreement by States with other States ratifying not only a set of obligations vis-à-vis those they govern, but also laying out a specific and detailed set of rights claims that can be activated by the population of the ratifying State. Whereas IHL focuses on the obligations of the high contracting parties, focusing on the statuses of those who enjoy particular protections or are owed specific levels of care (with no reference to rights-holders or individuals in a position to make claims against legal obligations), IHRL identifies a broad scope of rights spanning civil and political life; economic, social and cultural rights; and a series of more specific individual rights where the State is expected to take positive action as well as refrain from certain behavior.¹⁹ IHRL sees the greatest potential for achievement of human rights in national implementation of international norms by encouraging domestic absorption of treaty provisions and amendment of domestic laws and practices that potentially violate human rights obligations. Unlike IHL, human rights law very rarely sets out a balancing equation between the entitlements of the State and the rights of the individual: while there are specific arenas in which the interests of the State are weighed against the enjoyment of the right (such as when the government seeks to limit rights during a state of emergency under the derogation provisions of the ICCPR or when States are entitled to limit free expression for public morals or public order reasons), IHRL strictly regulates the actions of the State and insists on the consistent provision of judicial and due process protections for individuals. Perhaps most significantly, international human rights law imagines its arena of application as that of a State in full control of its systems of governance, constantly negotiating—through domestic institutions—its role within the environment of a particular culture and approach to citizenship. Unlike IHL, which assumes the tragic and destructive backdrop of war and is thus modest in its ambition, human rights law lays out the full vision for a future community of the governed endowed with increasingly substantial claims against those in power.

*Part II: A Preliminary List of Critiques: Is More Human Rights Law
Always a Good Thing?*

A common theme in writing and debate on the subject of the parallel application of IHRL and IHL in wartime, particularly regarding extraterritorial applicability of human rights obligations, is the notion that we are witnessing a now-inevitable trend of progress toward more human rights, that the question of convergence is no longer a question of “whether” as much as “how far.” As one author notes, in summarizing a range of articles on the debate, “With respect to the differing opinions, it is submitted here that the continued applicability of IHRL during armed conflict is by now firmly determined.”²⁰ Another leading commentator concludes, albeit with apparent hesitation,

How these two bodies of law, which were not originally meant to come into such close contact, will live in harmony in the broader framework of international law remains to be seen over time. But one thing is clear: there is no going back to a complete separation of the two realms. Potentially, a coherent approach to the interpretation of human rights and humanitarian law—maintaining their distinct features—can only contribute to greater protection of individuals in armed conflict.²¹

One striking aspect of the huge volume of scholarship celebrating and analyzing the co-applicability of IHL and IHRL in armed conflict is the lack of critique of the concepts and assumptions underlying this new legal order. While a number of scholars do seem to recognize the *technical* challenges posed to those responsible for enforcing human rights in battle, the field has not been subject to critical thinking on the possible costs of bringing human rights discourse and human rights frameworks into the realm of war. Given that the very few examples of scholarship rejecting or limiting the applicability of human rights law in war are drafted by those sympathetic to States that object to extraterritorial application of their human rights obligations,²² it is appealing to dismiss critics of convergence as either seeking to avoid regulation of conduct or seeking to maintain the most permissive legal regime possible for troops. Indeed, most scholars and practitioners working on this issue—whether in human rights litigation or those taking a strong academic position favoring convergence—seem to assume that the only possible stance against convergence could be either from States protecting their own interests and the entitlements of the military (read the United States and Israel),²³ or from those military commanders who fear that it will be practically impossible to implement human rights law on the ground. For those engaged in this debate, the very appeal of this rapidly growing genre of scholarship may well be the seemingly clear fault lines: it seems rather intuitive that the “good guys,” the liberal, pro-human

rights lawyers and scholars concerned with States that justify their behavior in the framework of permanent war, would be in favor of the expansion of the human rights regime by any means possible, and through any legal contortions necessary. Equally, it seems clear that the “bad guys,” States that reject these very laws because they are overly restraining or expose them to liability for horrific violations, or conservative scholars and lawyers sympathetic to the military, would be against the application of human rights in the battlefield and would engage in anachronistic arguments about the glorious past of international law when things were clear and laws stayed in their appropriate spaces. Given these alternatives, one would want to be on the side of progress, the future, the best use of the international legal system for the increasing realm of human rights application.

In this sense, the debate over extraterritoriality and convergence, when mapped onto debates over the “war on terror,” and treatment of detainees in the wars of Afghanistan and Iraq, has taken on a politicized tone: it seems natural that those in favor of human rights, humane treatment of individuals in detention and increased regulation of warfare would be on the side of more convergence, while those on the side of powerful States, limitation of individual rights in favor of national security and protection of the entitlements of the military against the involvement of the international community are on the side of discrete application and strong use of the *lex specialis* principle to privilege IHL over IHRL during armed conflict.

In the rest of this section, I would like to unpack these assumptions and take a step back from the overwhelming tone of victory and inevitability that seems to characterize the bulk of scholarship and litigation on the topic of parallel application. I want to ask whether there are reasons why those in favor of human rights law, strengthening enforcement and legitimacy of international law in armed conflict, and holding States accountable for their obligations when they act militarily ought to question the enthusiastic embrace of convergence. Rather than suggesting a particular posture such scholars or lawyers ought to take on the issue, I hope to argue that there must be more principled debate over the issue of whether convergence is a good thing for human rights, for IHL and for the role of international law in armed conflict. It is possible that the remarkably limited amount of critical scholarship on this topic (other than papers drafted by those who take a clear contra-convergence position) reflects the fact that there is nothing concerning here, that indeed there is no aspect of convergence that should raise critical questions. It may be that, when we look at the weight of evidence and legal analysis on the topic, there are no real costs to convergence, and only benefits to be gained—but maybe not.

Below, I present a partial list of concerns I think we ought to have about the move toward extraterritorial application of human rights law in armed conflict, in the form of ten critiques of and questions on the currently dominant approach.

The list is not meant to be exhaustive, nor does every critique apply to every possible instance of parallel application on the ground. Rather, the purpose of the list is to open up space for a pro-rights, pro-civilian protection objection to full-scale convergence, and to encourage a more critical approach to the issue by lawyers and scholars engaged in these two fields.

Rights at the End of a Gun: Do Divergent Foundations Matter?

As though referring to long-lost cousins who have recently become friendly, many scholars and courts discussing the question of convergent application begin or end their analyses by noting that IHRL and IHL have very different backgrounds.²⁴ The common approach to this issue is to articulate that at one time (in the early days of both bodies of law) it was thought that the two were completely distinct, and that they indeed have very different “upbringings” in the context of international law, but that, throughout the 1970s and beyond, this foundational difference has come to matter less and less as IHL and IHRL first were recognized as “complementary” in armed conflict and are now increasingly recognized as “convergent.” This common story of progress acknowledges that there are important normative distinctions between the bodies of law,²⁵ but that as key UN bodies and international courts have come to recognize co-application, these original differences have been surpassed by the recognition that both generally serve to protect “humanity.”²⁶

The debate here tends to focus on two key issues: first, some authors and jurists look to the detailed pedigree of each body of law to determine whether drafters and early commentators in fact envisioned any future convergence. Such authors look to *travaux préparatoires*, early conferences on human rights law, and commentaries on the Geneva Conventions and Additional Protocols in order to argue either that the two bodies of law were never intended to commingle and that convergence is a dangerous departure from foundational intent, or (more commonly) to argue that the seeds of harmonization were present both from the very early days of post-World War II IHL and in the intent of drafters and key commentators alike. This latter group argues that while foundational differences were present, and normative differences persist, early drafters imagined a future where both bodies of law could be utilized to enhance the overall humanitarian goals of international law.²⁷ The second aspect of the debate looks to institutions, on the one hand, pointing out that the early institutional history of the two legal regimes kept them separate and encouraged the creation of two distinct professional fields (often turning to early institutional history of human rights law within the UN and of IHL within the International Committee of the Red Cross (ICRC) and in State conferences), and, on the other, looking to the claims of contemporary institutions about the increased capacity for human rights bodies to engage with IHL.²⁸

For strict separationists, such as those supporting the US position, the foundations of the laws and their differing origins support the sentiment that IHL displaces IHRL and that human rights obligations were certainly not meant to be applied when States act militarily outside of their territories.²⁹ In mining the foundations and historical origins of the two bodies of law from this perspective, the widely acknowledged difference in the spirit and purpose of the laws informs their initial codification as well as their normative and institutional development, pointing to the intent that they be kept separate as the laws of war and the laws of peace. For pro-convergence commentators, the origins of the law, particularly the *travaux préparatoires* of the two Additional Protocols to the 1949 Geneva Conventions, as well as the text of various UN conferences (often noting the 1968 Tehran Conference as a key turning point toward convergence), and the progressive movement of human rights treaties away from any notion of strictly territorial jurisdiction, point to early support for the eventual merging or co-applicability of IHRL and IHL for States when acting outside of their territorial jurisdictions.

To this point, we can see how the profoundly different roots and early articulations of IHRL and IHL could play into the conclusions of either side: either the origins clearly should show us the intended walls between the two bodies of law or the historic and normative differences were only a point on a spectrum toward a more humane and rights-oriented approach to international law in general. Here, I want to suggest that we step back from this perspective of origins and foundations and instead question to what extent the extremely divergent underpinnings and moral philosophies of IHRL and IHL ought to compel critical thinking about supporting the extraterritorial applicability of human rights treaties in armed conflict. That is, rather than pointing to origins as an argument for or against the drafters' *intent* that States should incorporate human rights law into their legal frameworks when fighting or detaining or occupying abroad, I wonder if we should look to origins and foundations to question whether today we *should* promote this type of human rights enforcement.

I want to suggest that the current debate on origins has shied away from the more difficult question of whether human rights law belongs on the battlefield, and whether the foundations of the law should constrain and limit scholars and jurists from moving forward too boldly in articulating the human rights obligations of States at war. In later sections I will ask whether human rights law translates into battle rules in the same way as IHL, but here I want to ask, do we want it to? What costs might be borne by human rights law and the human rights movement if extraterritorial applicability of human rights in armed conflict is taken seriously in the years to come?

It is commonly noted that the history of international humanitarian law rests on a number of factors that explain and ensure its widely recognized universality and legitimacy within a diversity of States. The law, rooted in early notions of chivalry and professional military conduct, was drafted in close coordination with military experts and senior military personnel, and is promulgated with a close eye to the practical challenges faced by military forces. Part of this story of IHL is also about the morbid calculus of the rules, whether we rely on Colonel Draper's retelling of how cynics see the law of war, namely "how to kill your fellow human beings in a nice way,"³⁰ or look to the ways in which IHL allows the lawful killing of combatants and does not make illegal the killing of civilians and those *hors de combat* as long as their deaths are incidental to a lawful attack and not disproportionate to the military advantage anticipated. Despite the very legitimate criticisms of this aspect of IHL—its apparent *inhumanity*, its willingness to allow (or at least not punish) horrific bloodshed of those not involved in hostilities, its blindness to the killing of combatants—it is clear in its objective and simple to understand in its compromises. It is a body of law specifically crafted to regulate moments in human history and relationships between States that have often been thought ungovernable, and it does not pretend to be anything other than the most plausible set of rules for an admittedly terrible context.

One of the differences between IHRL and IHL is that the latter only recognizes obligations of the State toward those who fit into a particular status: protection and rules regarding rights and responsibilities are purely status based, not deriving from one's basic humanity as in human rights law. This is often raised as a point of weakness of IHL, but one could also argue that this aspect of the law of war—the delimitation of a set of protections for the nationals of the enemy—is precise and intentionally limited in its understanding of the ugly nature of the relationship between an invading/attacking State and the enemy population.³¹ There are obligations to those individuals, yes, but it is understood that those obligations are in an environment of duress, fear and belligerency. IHL does not pretend that this relationship, between the forces of the invading military and the civilians of the invaded territory, is anything other than tense and hostile. It does not allow us to assume or pay heed to the claims of the invading forces as to their purposes for invading or their intentions toward the civilian population. It simply sets out the baseline obligations of the enemy military to protect the civilian population and those *hors de combat*, both in active hostilities and under occupied control.

I want to suggest that once we introduce rights talk to this equation, we begin to reshape the relationship of the military forces to the enemy population, perhaps in ways that are not imagined by those who support the extraterritorial applicability of human rights law and its convergence with IHL.

In the voluminous literature on when human rights law begins to apply extraterritorially, the most agreed-upon baseline for the initiation of human rights law obligations is the “effective control” test. The basic argument comes down to exactly at what point an enemy military force begins to have human rights obligations toward a foreign population on the territory of that population. Most scholars agree that under current law, that test—while still unclear and somewhat confusing—relies on a demonstration that the military has “effective control” over a person or territory (and possibly whether the State is responsible for a particular violation—the so-called “cause and effect” test of jurisdiction), which seems to be similar to (though not identical to) the test of occupation.

Again, rather than burrowing into the wide-ranging debates over appropriate activation of extraterritorial jurisdiction I want to argue that whatever our test for the control required for human rights jurisdiction (identical to occupation, capacity to exercise civil administration, physical presence, control over a territorial space analogous to an embassy),³² such application of IHRL in armed conflict locates the moment when human rights start to oblige the State in question on the use of military force. Rather than focusing on the question of the type of control that is being used, or the type of administration that the foreign party can or cannot exercise, I am concerned that *no matter what formulation of extraterritorial jurisdiction is used*, the pro-convergence position bases the applicability of human rights law on the use of armed force in a foreign land.

Should those interested in the long-term development of human rights law encourage such a vision of rights? To what extent does this approach to human rights jurisdiction undermine the very foundations of human rights law, and open up its most basic tenets to being questioned? The relationship imagined between the soldier and the enemy civilian in IHL, and that between the government agent and the “citizen”³³ in IHRL are central to the way the law sets out both obligations and claims, in the ways that the bodies of law create accountability for violations and in the way they task ratifying States with ensuring compliance. In armed conflict, much of the determination of appropriate treatment lies in the mind of the reasonable commander in recognition of the necessity of creating rules that must be able to function and be considered legitimate during combat. In a regular governance context, the determination of rights-respecting conduct lies with a web of institutions, domestic judicial guarantees and international bodies.

A civilian who is made aware of the basic (and rather minimal) obligations of the armed forces of an enemy State for her protection clearly understands the purpose of IHL: to ensure that in the very worst imaginable context, she is guaranteed a basic level of protection—not to be directly targeted if she does not participate in hostilities, not to be tortured if she is detained, to have access to basic lifesaving

humanitarian relief, etc. The logic behind the law is also apparent: this is not a long-term relationship, and the law does not provide the grounds for a good society or interactions based on trust and due process. Rather, this is a set of rules that restricts the military forces while they fight, while recognizing that they *will* fight, and that people (even those not involved in the fighting) will die in the process. The addition of human rights law to this clear and honest (albeit stark) framing of roles and relationships runs the risk of confusing all actors and (more important) raising expectations that can never be met.

It is worthwhile here to look at the language of the much discussed and often criticized UK House of Lords decision in *Al-Skeini*,³⁴ a case where many commentators felt that the Lords did not go far enough in recognizing extraterritorial responsibility, and were overly deferential to the ECtHR decision in *Bankovic* in construing jurisdiction.³⁵ The approach of Lord Brown of Eaton-under-Heywood is worth examining as an exemplar of what many commentators would see as an overly restrictive reading of jurisdiction (and one allowing the military to avoid responsibility for particular acts). Lord Brown begins by setting forth his reading of the *Bankovic* decision as to Article 1, noting the few “circumstances in which the Court has exceptionally recognized the extraterritorial exercise of jurisdiction by a State,” which include

[w]here the State “through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by [the government of that territory]” (para 71) (ie when otherwise there would be a vacuum within a Council of Europe country, the government of that country itself being unable “to fulfil the obligations it had undertaken under the Convention” (para 80) (as in Northern Cyprus[]).³⁶

Based on this reading of *Bankovic*, and arguing that the appellants’ approach to jurisdiction would “stretch to breaking point the concept of jurisdiction extending extra-territorially to those subject to a state’s ‘authority and control,’” Lord Brown concludes that

except where a State really does have effective control of a territory, it cannot hope to secure Convention rights within that territory and, unless it is within the area of the Council of Europe, it is unlikely in any event to find certain of the Convention rights it is bound to secure reconcilable with the customs of the resident population. Indeed it goes further than that. During the period in question here it is common ground that the UK was an occupying power in Southern Iraq and bound as such by Geneva IV and the Hague Regulations. Article 43 of the Hague Regulations provides that the occupant “shall take all measures in his power to restore and ensure, as far as possible, public

order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” The appellants argue that occupation within the meaning of the Hague Regulations necessarily involves the occupant having effective control of the area and so being responsible for securing there all Convention rights and freedoms. So far as this being the case, however, the occupants’ obligation is to respect “the laws in force,” not to introduce laws and the means to enforce them (for example, courts and a justice system) such as to satisfy the requirements of the Convention.³⁷

My point here is that even if we apply the exact same jurisdictional test for extra-territorial application as we would apply for the application of occupation law (the factual test derived from a combination of Hague and Geneva law), doing away with a great deal of the confusion addressed by courts trying to work through this issue, we have not done away with the core problem of extraterritorial applicability during armed conflict. Military occupation is a situation of caretaker governance directly following an invasion or war in which the occupied population has been subjected to the control of the belligerent enemy force because its own government has lost the war. It is inherently temporary and has stringent limitations on the capacity for the State to govern precisely because the drafters of the Fourth Geneva Convention recognized that many occupying States would attempt to create the impression that the population welcomed their presence, that they had created a legitimate governing regime, that they were liberators. Occupation law reminds everyone involved that the relationship is fundamentally one of a dominant, victorious military force and a vanquished, unequal population of “protected persons.” While these persons may hold discrete “rights” vis-à-vis the occupiers,³⁸ the law not only consistently recalls the security needs of the occupying military, it allows the use of force, arbitrary detention and other security measures.

This is not simply a technical *lex specialis* issue, where lawyers can parse out which human rights can be overlooked by the more specific function of a given provision of IHL (such as security detention or limitation of rights to trial). Rather, this is at the very heart of the difference—the critical and necessary difference—between IHRL and IHL. It seems that the pro-convergence argument would hold that occupation is exactly the situation in which human rights law applies extra-territorially (even courts that have restrained extraterritorial jurisdiction during armed conflict acknowledge that occupation may be the archetypal context for extra-territorial human rights obligations to hold). But life under occupation was never meant to be like life in one’s country governed by one’s own leader(s): occupation law secures the minimum protections of the occupied, but it also acts to prevent the occupying power from slipping into the position of the legitimate (read national, territorial) government. Its provisions ensure that the occupying power is *not* able to control the State lawmaking and governance infrastructure in such a

way that would facilitate meaningful human rights compliance. Whatever the specific function of these restraints in a given occupation situation, the normative spirit of the law, the message that it communicates to the occupied population, is clear: the international community does not believe that the occupier is in your country for your good or benefit, and its stay is temporary, potentially difficult, violent and limited. Whatever criticism one has of occupation law, its advantage is that it does not allow us to forget that we are in armed conflict. It does not allow us to pretend that we are in peace, or that the population has consented to its situation.³⁹

My point here is not that it is legally impossible to imagine that an occupying power could be in a position to apply human rights standards: obviously, for the majority of human rights provisions, the occupied territory would already be obliged to respect key rights under its own ratifications, and as the caretaker regime, the occupying power would have a pre-existing IHL obligation to respect those agreements. As Ralph Wilde argues, in criticizing the *Al-Skeini* decision's jurisdictional formula,

In the first place, it is assumed that human rights law properly applied, with all the advantages of limitation clauses, derogations, and, for the ECHR [European Convention on Human Rights], the margin of appreciation, would actually oblige the State to exercise public authority both generally and in particular in a manner that would put it at odds with obligations under the law of occupation. . . . [T]hese assertions presuppose the validity of a particular approach to the relationship between different areas of international law, without having explained the basis for this validity. A clash between two areas of law is feared, and a solution to this clash offered by defining the applicability of one area of law so as to remove it from being in play, without explaining the basis for choosing this particular method of norm clash resolution.⁴⁰

Wilde continues, arguing that the law does not make it clear that human rights law should be rendered inapplicable through the functioning of occupation law's limitation on the governing power of the occupier,

An equally plausible scenario, of course, in light of both the ECHR itself and its relationship to other areas of law, is that a relatively modest set of substantive obligations would actually subsist, qualitatively and quantitatively different from those in play in the State's own territory, even if derived from the same legal source.⁴¹

This argument builds on the idea that those States (primarily the United States and the United Kingdom) who are worried about extraterritorial human rights jurisdiction have little reason to worry, because the actual law-added impact of human rights would be minimal. Wilde approvingly quotes the dictum of Lord Justice Sedley in the *Al-Skeini* decision at the Court of Appeal level, a quote that

merits close reading, as it captures the message one encounters frequently in the convergence literature,

If effective control in the jurisprudence of the [European Court of Human Rights] marches with international humanitarian law and the law of armed conflict, as it clearly seeks to do, it involves two key things: the de facto assumption of civil power by an occupying State and a concomitant obligation to do all that is possible to keep order and protect essential civil rights. It does not make the occupying power the guarantor of rights; nor therefore does it demand sufficient control for all such purposes. What it does is place an obligation on the occupier to do all it can. If this is right, it is not an answer to say that the UK, because it is unable to do everything, is required to guarantee nothing.⁴²

This argument seems like an appealing solution to the problems posed by convergence and extraterritorial applicability. It suggests that clearly the occupying power would not be required to apply the entirety of human rights norms, or *really* be obligated to respect and apply human rights law in the same way that it would at home, but rather to do its best. While this is of course a laudable principle, and we might wish that all occupiers would act in this manner, I question the legal argument and the plausibility of such a solution to the practical challenge of identifying what exactly is the function of human rights law on the battlefield. What rights do the people in this situation actually have against the occupying power? How can we know whether an occupier is doing “all it can”?

Before we enter into the pragmatic and practical problems raised by such a vague legal standard (and I believe there are many), it is worth considering whether one reason we find it so difficult to blend these two bodies of law in practice, even in such a narrow context as envisioned by the *Bankovic* or *Al-Skeini* courts, is that the true import of the genetic difference between IHRL and IHL was not properly heeded. That is, the issue of differing origins, differing foundational philosophies, and differing imagined communities of the law is not simply a historical artifact to be overcome by progress; it reflects the wisdom of not pretending that armed conflict is anything other than what it is: unpredictable, often cruel, bloody and unjust. In valuing foundations and origins in a different light, we are able to see that one reason that human rights law was not originally drafted to apply in extraterritorial exertions of military force and occupation is precisely because the relationship necessary for the spirit and letter of human rights law to hold does not exist between the invaders and the invaded. Nor should it.

Dismissing Dilemmas as “Technical”: Leaving the Hard Cases Untheorized

It is striking how many scholarly articles on convergence and court decisions on the issue of extraterritorial applicability of human rights in armed conflict reference the challenge of practically applying this body of law on top of, through or in addition to IHL. An oft-referenced paragraph from the International Court of Justice’s (ICJ) *Wall* advisory opinion serves as a useful starting point:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.⁴³

Many commentators have noted that this paragraph, and the Court’s subsequent reliance on the *lex specialis* principle to determine which body of law will hold on a particular set of facts, is an unsatisfying and confusing way to approach the actual application of human rights law during armed conflict. The Court does not go on to provide any examples of such a division of applicable law, and its subsequent decision on the issue does little to build on this paragraph’s language. As one scholar has argued, the actual functioning of the *lex specialis* principle is notoriously elusive and provides little in the way of concrete interpretive guidance for solving conflict of laws problems in this arena.⁴⁴

While many scholars and jurists acknowledge the tremendous current confusion on how the convergence principle applies in practice (while reiterating that the current law is indeed that both bodies of law apply in all armed conflicts), few tackle *how* human rights law will actually be applied in the day-to-day military operations that characterize armed action abroad.⁴⁵ These questions are often referred to in an offhand manner as technical matters to be dealt with by those who will be made responsible for applying the vague principles of convergence.⁴⁶ In this section, I want to ask whether this leaves the job of courts and theorists half done: to what extent must human rights law theory be transformed in order to make convergence a coherent reality? To what extent do the possible changes to human rights law that would be wrought by true extraterritorial application have implications for how we think about and theorize human rights norms today? If soldiers become human rights enforcers, if military commanders acting outside the territory of the State party to the human rights treaty are put on the front lines of interpreting human rights provisions, how do these technical and pragmatic choices impact our understanding of rights?

Once again, long-standing differences between IHRL and IHL should inform our understanding of this issue. IHL theory treats the practical realm as sacrosanct:

most serious scholarship or jurisprudence on the laws of war supplements any theoretical argument or model with a claim for why the posited theory is practicable, pragmatically sound, and capable of being applied by the military and to soldiers. For most IHL scholars putting forth theoretical or normative arguments, plausibility to the military planner, the reasonable commander and the military lawyer is almost as important as acceptance by fellow scholars and policymakers.⁴⁷ Human rights scholars, with their focus on a State's obligations to control and shape its own institutions in its own seat of power (its government, its means of coercion, its courts, its police, its school system, its national budget and financial decisions), are not so constrained.

Avoiding the difficult question of practice and operations seems like more than an oversight or a decision to leave those matters to future scholarship and jurisprudence.⁴⁸ While a number of scholars seem to recognize the significant problems posed by convergence to actual military practice during armed conflict, referencing in particular the dilemmas faced by coalition forces that may have different interpretations of the applicability of human rights law (as was the case in Iraq), as well as the means by which the military would be asked to make human rights-based decisions, few present a coherent theory of *how* their ideas can be realized. My sense is that this derives from two underlying problems with the current debate. First, due to the sense that those arguing for convergence are clearly on the "right" side of the debate and that they are obviously making arguments for more humanity and more protection, there is little pressure for those making convergence arguments to normatively justify their positions and ground these normative claims in an understanding of how convergence will actually improve the status of civilians caught up in armed conflict. The operating assumption of pro-convergence scholarship is that more human rights obligations on the battlefield will mean more human rights enjoyment for the affected population. Second, the ubiquitous claim that the main legal battle has been won, that with the three key ICJ decisions (the *Nuclear Weapons* and *Wall* advisory opinions and the *Congo* decision) international law today simply *demand*s convergence, makes it easier to avoid the hard cases of how these vague opinions can be translated into operational guidelines for soldiers.⁴⁹

I question whether this reliance on hyper-positivism is enough to solve the problem. While article after article analyzes the same judicial and quasi-judicial material (the *Loizidou* line of cases at the ECtHR, leading through *Issa*; the key decisions of the IACHR; the ICJ decisions; and the Human Rights Committee's relevant views and General Comment 31) in an effort to meticulously demonstrate exactly how well-founded is the claim that convergence is in fact law, these analyses rarely move into exactly which human rights provisions would converge with

which international humanitarian law norms, how detention operations on the ground would materially change, how commanders would embed human rights interpretation into their orders, how decisions around targeting would be impacted, and how the balance between security of forces and civilians would be struck.⁵⁰ It is worth considering that the reason we see so little of this type of discussion in the voluminous debate on convergence is that the main contribution to battlefield regulation envisioned by those who advocate convergence actually has very little to do with the key areas that IHL regulates. Perhaps advocates of convergence have spent so little time theorizing what exactly will converge—how military lawyers should incorporate human rights law into their advice to commanders, how military planners should use human rights law in their preplanned targeting and how occupation authorities should consider human rights in detention operations—not because these are insignificant concerns, but because they actually imagine that the payoff of activating extraterritorial obligations of human rights will be in the aftermath of war. It is worth remembering that the clear texts of the oft-cited decisions of the ICJ, the ECtHR and the Human Rights Committee certainly do not limit convergence in this manner: the formalist reading of the current majority position seems right—human rights law *does* apply, and it applies extraterritorially.

I would argue that now that advocates of convergence seem to have won the formalist legal battle, they have a responsibility to begin work on the hard cases that have been left to footnotes and marginalia. They must begin to articulate a theory of exactly how human rights go to war, and make a link between vague declarations of applicability and detailed recommendations for practice and operations. Fore-shadowing some of the critiques that will follow, I would argue that this work will be fraught with tensions and difficult choices that have not been properly considered and weighed by advocates thus far.

Lowest-Common-Denominator Governance: Creating a False Sense of Rule of Law

Much of the jurisprudence and literature on extraterritorial application and convergence focuses on the level of effective control required in order for human rights obligations to apply to the State engaging militarily beyond its borders.⁵¹ The upshot of the current approach seems to lie between the “cause and effect” doctrine (rejected in *Bankovic*, but revived in other cases and still promoted by a number of scholars) and the idea that a State acting extraterritorially during armed conflict would have human rights obligations consequent to its degree of control of the territory and population of the invaded State. While the current law is far from

clear, most of it seems to agree that the degree of obligation would increase as a State asserted more control, culminating in detention of persons as the clearest example of control for human rights applicability purposes.

Assuming that this interpretation of contemporary international law is correct, it seems to me that this encourages us to take a lowest-common-denominator approach to governance, and the ways in which human rights are respected in a real place with an actual population.⁵² It is important to note here that IHL is not a legal regime that is concerned with governance: while of course there are provisions in occupation law about how an occupying power should engage in the act of administering a territory that it controls, those rules do not purport to promote a good governance agenda, or to lay the foundations for democratic or rights-respecting statecraft.

When we make the move to add human rights law (and, its important corollary, the *expectation* and *reliance* of the members of the population that they have legitimate human rights claims against various foreign State entities as represented through their militaries) in concert with increasing degrees of effective control, it strikes me that we treat governance as something that can be parceled out, diminished to some set of basics, and diluted to a generic palette of tasks that could be equally borne and applied by any actor who happens to be part of the invading/occupying forces. The reliance on control as the central mechanism by which human rights law applies extraterritorially during armed conflict seems to threaten the very core of human rights principles: that they are intimately tied to the way in which a State governs, the ways in which it communicates its system of governance to its people, and the means by which it demonstrates its accountability to their rights claims and rights enjoyment over time. How can enemy soldiers step into this governance function? What is lost when we minimize the act of governing to the levers of control that may or may not be in place at a given time? Unlike targeting decisions, orders regarding proportionality assessments or civil-military cooperation in humanitarian assistance operations, rights do not function in minute-by-minute decisions taken by commanders and soldiers; they are based on a relationship, a two-way exchange between the rights-holder and the duty-bearer. How can building a prison, erecting a checkpoint or detaining a group of young men provide the appropriate foundations for human rights to function?⁵³

It seems worth considering that this approach to human rights applicability encourages us to see governance as synonymous with control: whoever happens to be able to exert brute force over the civilians at a given moment in the conflict such that they have some sliding degree of control will have some sliding degree of human rights obligations. I am not making a pragmatic argument here (see the above critique for that point), though there are clearly many ways in which this

system seems patently unworkable in actual conflict. Rather, I want to put forward the argument that such an approach to human rights obligations *and* human rights claims (meaning what the civilians hold in their hand, what they are able to understand, who they are able to turn to in real time) harms human rights law in ways that are not currently being measured by proponents of convergence.

Lowest-common-denominator governance has costs in the ways I have discussed above, but I think the inclusion of rights talk in effective military control also allows us to avoid the ways in which armed conflict actually impacts how people caught in its chaos experience justice. As documented extensively elsewhere, efforts to foster and sustain the rule of law in Iraq have not proved effective.⁵⁴ To the extent that any semblance of rule of law existed prior to the 2003 invasion, the war, subsequent occupation and conflict between armed groups have devastated the ability of Iraqi citizens to access and rely upon the legal system. Human rights law is at the core of the concept of rule of law, especially in the sense that it grounds this often-nebulous concept to a set of treaties and mechanisms. Human rights imagine the full human being living her day-to-day life and interacting with organs of the state in a myriad of ways.

The legal claim that human rights law now applies extraterritorially to States in armed conflict, and the increasing embrace of convergence in the practice of international non-governmental organizations (INGOs),⁵⁵ humanitarian organizations, UN agencies⁵⁶ and other key actors on the ground, allows us to feel that we are doing something to improve the experience of rule of law in countries like Iraq, or that we are increasing the capacity of the population to raise claims against the invading or occupying army. While we know that the actual legal system of Iraq has been decimated by years of conflict, sanctions, and now occupation and internal conflict, the use of rights talk—and the constant reference to the human rights obligations of coalition actors—masks the real cost that this has on the capacity of Iraqis to enjoy human rights by emphasizing international obligations and fancy legal argumentation. But replacing the domestic legal system with “the international community” or with the legal system of another country (the domestically accepted human rights obligations of the Netherlands, United Kingdom, Canada, etc.) does not necessarily improve the experience of law or the accountability of actors vis-à-vis the Iraqi civilian.

International rights mean little without local law and order. Pretending otherwise, or focusing energies on supporting rare “impact litigation” connecting a handful of victims with prominent human rights lawyers in Europe or civil rights organizations in the United States, does not change that. Such litigation, and findings of individual liability of soldiers for human rights violations, may improve the Dutch, British or Canadian legal order and it may over time improve the behavior

of these States' militaries in actions around the world, but it does not necessarily increase the rights enjoyment of Iraqis.

My point here is not to say that such cases are unimportant or that we should not value their potential for positive transformation of military behavior and public attitudes back home toward the actions of their States abroad. My concern is that the increasing sense among human rights lawyers and scholars that there is "no difference" between IHL and IHRL is disconnected from reality as experienced by civilians in the countries most affected by these debates.⁵⁷ Furthermore, the increasingly legalistic insistence on convergence allows us to pretend that international law is doing more for civilians in armed conflict than it actually does (or can). IHL, which renders discussions of governance and rule of law as (at best) out of place and (at worst) insulting, prohibits us from making such a slide, and forces us to properly ascertain the horrible impact of war on affected populations' experience of day-to-day justice.

Can the Moral Force of Human Rights Withstand Their Formal Application in Armed Conflict? Setting Human Rights Up to Fail

The current focus on legalistic convergence (as opposed to actual operational practice and concrete examples of parallel application) undermines the moral power of human rights law, and threatens to diminish the hard-fought gains of human rights norms and rights discourse in the past several decades. To put it simply, we all know at an intuitive level that an Iraqi in Iraq under occupation cannot possibly enjoy the same human rights as I can as an American citizen in the United States. Yet, there is no way (so far) to translate that basic commonsense idea in discussions of international legal application. If the Iraqi cannot have the same rights during conflict or occupation as I do during peacetime in my home State, but human rights lawyers want to argue that he "has human rights," what rights should he have? What does human rights mean if we strip it down this way, if we pick at which rights can be enforced in which circumstances by particular armies at particular times?

As I have noted above in a different context, claiming that international law now recognizes the (full) applicability of IHRL to States fighting outside of their own borders creates expectations among the civilian population (as well it should). If I am told I have a bundle of rights, who has the duties? How do I claim them? Where do I go? This is a very different matter from explaining to the civilian population that the armed forces or the occupying power have an obligation to minimize civilian harm, to provide adequate access to basic lifesaving goods and not to attack civilians. Human rights is a set of negative *and* positive obligations, but more than that it is a manner of relating, one that is anathema to the relationship between

soldiers and enemy civilians. The call for extraterritorial human rights application in armed conflict implicates human rights language and the promise of human rights in the very ugly business of control by an enemy military. Can this be expressed to the civilian population in a way that does not permanently pervert that population's appreciation for human rights law? After the conflict is over, and the enemy forces are gone, will the civilians—now again citizens, no longer categorized by their status—be able to see human rights law in the same light? If convergence fails to deliver in any meaningful way in terms of material changes to the experience of civilians in armed conflict (and, given the lack of development of concrete operational rules for how military lawyers, planners and commanders might change their behavior as a result of adding human rights law to IHL, we have good reason to believe this might be the case), will human rights law and rights discourse suffer lasting damage?

It is worth noting that the international community has invested tremendous resources in increasing the awareness of and respect for human rights among populations in the developing world—particularly in the Middle East⁵⁸—against significant cultural and religious objections to universal rights. Human rights law has a long way to go before it is accepted as the framework for the relationship between the governed and the governors: how is this regime affected by the declaration that any military force that happens to act on the territory has human rights obligations equivalent to those held by the home State?

This is another way in which the distinction between IHL and IHRL reflects a serious and deep difference. As reflected in emerging scholarship, IHL has not historically had a “culture problem”: one finds very few debates in the post–World War II writing on IHL discussing cultural relativism versus universalism, multiple or plural interpretations of proportionality and distinction based on local norms, or different approaches to detention based on custom.⁵⁹ Whether well-founded or not, IHL has generally been able to comfortably claim universal adherence and acceptance based on its practical credentials, its lack of the “name and shame” approach to enforcement and monitoring, and its profound respect for the sovereign. IHL focuses (with some important exceptions) on the behavior of the professional military, and relies on its very limited scope of application and limited relevance to how States govern people's daily lives to assert its relatively unchallenged dominance over the norms regulating armed conflict.

In this light, if we consider the objections of the United Kingdom to full extraterritorial application of the CAT, arguing that it “could not have taken legislative or judicial measures of the kind required by Article 2 of the CAT in Iraq since legislative authority was in the hands of the Coalition Provisional Authority and judicial authority was in the hands of the Iraqi courts,”⁶⁰ it seems that the current

pro-convergence position would ask us to respond by accusing the British of seeking to maximize their military entitlements as an occupying power (including the power to interrogate security detainees or keep individuals in administrative detention with very minimal fair trial guarantees), while actively trying to avoid the increased protective and rights-based regulations of the CAT. However, one could also argue that there would be valid concern on the part of an Iraqi that the British ability to craft and make decisions based on human rights *ought to be* limited, precisely because we would not want the British—as a military occupier—to have the kind of influence over Iraqi institutions that would arguably be necessary to fully respect human rights law vis-à-vis Iraqi individuals who find themselves before the courts. IHL keeps the British position limited: they have responsibility over their own actions vis-à-vis enemy civilians when they are taken into custody, when they are on the opposite end of a gun and when they are within the range of a bomb.

Human rights law asks that the State with obligations to an individual takes real steps to permanently transform institutions that structurally violate rights. How will the still-fragile worldwide acceptance of human rights law and rights discourse fare as military forces are encouraged to take the helm of such transformations? Do we want to encourage foreign invading States to promote a human rights agenda vis-à-vis the population under attack? Can human rights law be respected in this manner, and would the population accept such an articulation of human rights? To put it another way, while I understand the short-term gains of demanding that the British respect human rights law in their actions in Iraq (one could perhaps argue that it would result in better trials, or less torture, though again this has yet to be convincingly demonstrated by any argument about *how* human rights law would materially change the current panoply of rules under IHL), I do not *want* an occupying power that has invaded my State to be recognized by the international community as having a “rights-based” relationship with my population. I do not want that State to be in a position to argue that it has to engage in certain institutional changes in order to be able to comply with its human rights obligations back home. I do not want a State that has no relationship to civil society in my country, has no long-term understanding of my population, its history, its religious values, etc., to have a hand in shaping its human rights framework simply by virtue of its choice to invade.

Seen in this light, the aggressive promotion of full convergence by some human rights bodies and human rights lawyers seems to flip the legitimacy of the rights regime. One might argue that the current interpretation of extraterritorial applicability of IHRL in armed conflict is much more limited than I am suggesting—that human rights really apply only when the invading/attacking/belligerent State is in a quasi-governing stance vis-à-vis my population. But, given that there are no

coherent legal grounds for this limitation, the concerns raised here should give pause to the march toward convergence. If convergence applies to detention today, how can we know whether it will be said to apply to speech, religion, education and elections tomorrow? What if it is argued (as one could well imagine in Iraq) that the invading or occupying State is in fact far better suited and experienced to enforce human rights law in these sectors than the host State?

In this sense, in a context where human rights norms are currently under attack in much of the world for representing the wish of Western States to change developing countries, and where human rights discourse has recently had to defend itself after being marshaled by those who used human rights arguments to support the invasion of Iraq, the dilemmas of convergence raised here ought to be considered as serious threats to the legitimacy of the human rights project. The pro-convergence position imagines a world in which the duty-bearers of rights held by individuals have an exchangeable responsibility that can be shifted between States, coalitions of States and even international organizations that happen to be acting upon a civilian population at any given time during armed conflict. Today, my human rights might be owed by the armed forces that happen to be transferring through my village, tomorrow by my own State, the next day by the coalition forces that will occupy for several months. Something is lost in this shift, in this exchange. The governor-governed relationship that is central to the corpus of human rights, and central to rights talk and rights advocacy, is not only about who is held responsible before an international court, or what State holds the *duty*. It also empowers the rights-holder, and provides the central logic for the legitimacy of human rights law in gaining State consent and popular universality: the bonds of trust, geography, home, kinship, culture, refuge and family that create the context in which the governor-governed relationship takes shape mean that the rights-holder has a clear sense of *who* owes him respect of his rights, and *why*. It gives the rights-holder the agency to *change* and *impact* the duty-bearer. IHL not only has no such provisions; it is inherently opposed to such a conception of relations.⁶¹ The admixture of what makes IHL legitimate and what makes IHRL legitimate may delegitimize both bodies of law, and impact the ways in which the law is able to regulate.

The Call for “Basic” Rights: Reintroducing a Hierarchy of Rights?

A survey of the scholarly literature on the parallel application of IHRL and IHL, as well as the key judicial and quasi-judicial documents on this fiercely debated topic, reveals the repeated use of phrases such as “basic” rights, “hard-core” rights or “core” provisions of human rights law.⁶² This language seems appealing, in that it appears to refer to some previously agreed-upon, truly vital subset of human rights provisions, and to argue that we must simply take that agreed-upon set of

“super-rights” and insist that they apply extraterritorially to States engaged in armed conflict. However, this language, and this frequent invocation of “basic” rights, is deeply problematic, and goes against the dominant (and, until now, victorious) trend in human rights law and scholarship to insist that human rights are indivisible and cannot be picked apart or prioritized on the basis of which rights are more “serious” or “urgent” than others.⁶³ Indeed, it is often noted that part of the reason that the derogation clause of the ICCPR was not replicated in subsequent human rights treaties is for the precise reason that it seemed to encourage a sense that there were some rights that were considered more important by the international community than others. It is surprising to see human rights proponents referencing a return to some vague conception of basic or fluid rights, insofar as the human rights movement spent many years convincing States that such an approach to their obligations was unacceptable and went against the spirit of key treaties.

From a legal interpretation perspective, the problem of how to respond to the human rights lawyers who claim that only some rights must be applied by States acting abroad has been recognized by a number of courts. As the much-criticized *Bankovic* court points out in rejecting the “cause and effect” theory of extraterritorial IHRL applicability, the obligations of the ECHR should not be “divided and tailored in accordance with the particular circumstances of the extra-territorial act in question.”⁶⁴ The *Al-Skeini* decision (also disputed by proponents of convergence for not going far enough in recognizing extraterritorial obligations in armed conflict) references this language of the ECtHR and states,

In other words, the whole package of rights applies and must be secured where a contracting state has jurisdiction. This merely reflects the normal understanding that a contracting state cannot pick and choose among the rights in the Convention: it must secure them all to everyone within its jurisdiction. If that is so, then it suggests that the obligation under article 1 can arise only where the contracting state has such effective control of the territory of another state that it could secure to everyone in the territory all the rights and freedoms in Section 1 of the Convention.⁶⁵

Similarly, the recent Canada Federal Court of Appeal decision rejecting extraterritorial application of the Canadian Charter of Rights and Freedoms to Canadian Forces in Afghanistan states,

Surely, Canadian law, including the *Canadian Charter of Rights and Freedoms*, either applies in relation to the detention of individuals by the Canadian Forces in Afghanistan, or it does not. It cannot be that the Charter will not apply where the

breach of a detainee's purported Charter rights is of a minor or technical nature, but will apply where the breach puts the detainee's fundamental rights at risk.

That is, it cannot be that it is the nature or quality of the Charter breach that creates extraterritorial jurisdiction, where it does not otherwise exist. This would be a completely unprincipled approach to the exercise of extraterritorial jurisdiction.⁶⁶

Yet, from a practical and strategic perspective, convergence (in the extraterritorial application sense) makes it virtually impossible *not* to prioritize rights or reintroduce the long-dead notion of a hierarchy of rights. As the Court of Appeal in *Al-Skeini* notes, "No doubt it is absurd to expect occupying forces in the near-chaos of Iraq to enforce the right to marry vouchsafed by Art. 12 or the equality guarantees vouchsafed by Art. 14. But I do not think effective control involves this."⁶⁷ Indeed, the argument for parallel application would be incredibly difficult to make to States (and their militaries) without some degree of limitation on the entire scope of rights provided in the relevant treaties (particularly when advocates of extraterritorial application argue that rights would increase with the level of control, suggesting that some minimal rights would apply with minimal control or during active hostilities). This reference to some inherent limitation to which human rights would actually oblige States acting militarily abroad (which has a very weak legal basis outside of the non-derogable provisions of the ICCPR) seems directed to those States (mainly the United States and United Kingdom) concerned about extraterritorial jurisdiction, assuring them that there is no actual expectation that they would be required to apply many of the relevant treaty obligations.

This may be a good strategic approach for arguing that extraterritorial application of IHRL in armed conflict is a reasonable expectation, or one that we can imagine taking hold in practice, but it is exceptionally difficult to uphold from both a legal *and* principled perspective. What would it look like to actually determine which rights apply with a given level of control? Who would determine which are "core" rights and which are those rights that could be left out of the equation? The military? The UN treaty body? Again, some seem to argue that States would be required to apply only the non-derogable provisions of the ICCPR, but what about the many other treaties implicated when courts speak of the applicability of "international human rights law"?⁶⁸ More important perhaps, to what extent do these arguments—once put into practice—threaten the indivisibility principle of human rights law? Do we open the door for States to argue that *other* situations would justify applying rights obligations on a sliding scale? This seems like a difficult conundrum to escape from: once advocates argue for the parallel applicability of international human rights law in armed conflict, once courts recognize that

these rights apply according to some degree of control, the temptation to pick and choose rights is almost unavoidable. Such a move comes with real risks for the coherence of human rights law and its stability.

***Lex Specialis* as Everything and Nothing: Diluting the Clarity of IHL?**

One response to the above critique is to rely on the *lex specialis* principle to determine when IHRL will fill gaps in IHL, on using IHRL as a supplementary legal regime that is often overridden by the laws of war.⁶⁹ While the principle presents an appealing mechanism, it seems to be utilized by scholars and jurists across the spectrum of views on convergence to advocate for their approach to the dilemma. As one author notes, “[E]ven more worrying is the fact that the broadness of this principle allows manipulation of the law, a maneuvering of the law that supports diametrically opposed arguments from supporters that are both for and against the compartmentalization of international humanitarian law and international human rights law.”⁷⁰

Some would argue that the actual impact of convergence and extraterritorial applicability as recognized by courts is strongly limited by this principle—that when we seek to actually make sense of how rules and behavior would be impacted by the decisions of the ICJ the changes in rules that apply in combat would be minimal. Proponents of this view would argue that, for example, in developing rules of engagement for a particular theater, military planners and lawyers would almost always find themselves in a situation where IHL addresses the behavior they seek to address. In this way, *lex specialis* functions to render relatively meaningless the legal principle of convergence: yes, the laws may formally apply simultaneously during armed conflict, but in any given factual situation the relevant human rights norm (freedom of movement, freedom from torture, the right to life, freedom from arbitrary detention) would be trumped by the more specific or more clearly applicable IHL rule (military necessity, proportionality, distinction, prohibition on torture, treatment of prisoners).⁷¹

Such an approach might serve to address the lack of clarity and minimal operational guidance provided by current legal interpretations of convergence and extraterritorial applicability, and might allow States to continue to craft rules that are seen as compliant with the law while the norms are still being figured out. However, as a long-term approach to the question of parallel application, particularly for States and military professionals seeking to comply with changing norms, as well as for the coherence of both legal systems, this way of looking at the problem seems lacking in a number of ways. First, such an approach would seem to gut the very notion of convergence, and render the claim that both bodies of law apply somewhat incredulous. Second, there may well be situations of

substantive law where a human rights claim could be made and not dismissed by the *lex specialis* of IHL. This might be the case where IHL is completely silent on a matter that is explicitly addressed by IHRL,⁷² or where human rights law provides much richer detail on a given situation than the basic rule of IHL (such as in detention situations).⁷³

As noted in the introduction to this article, however, the bulk of the power of IHL to regulate and to protect lies in the development of clear rules and clear guidance to commanders and soldiers *before* combat decisions are made.⁷⁴ To the extent that even the most sophisticated scholars of international law seem to find the principle of *lex specialis* difficult to work with and lacking in specifics, it seems unlikely that an approach that relies heavily on this principle will serve to protect rights *or* enhance the clarity of existing rules. Indeed, one risk of the current lack of practice-oriented theories for understanding and interpreting State obligations to apply and differentiate the two bodies of law is not only that human rights law will not actually be added to the rules in any meaningful way, but also that the clarity of IHL rules will be blurred in the process.

One-Way Convergence? The Question of Distinct Professional Cultures and Languages

One needs only to attend any academic conference or panel on IHL and IHRL in order to observe the vast differences between the professions, academic cultures and approaches to theory, lawyering and practice. Without claiming that these are essential characteristics, or that there is never overlap between those who focus on either of these bodies of law, I want to argue there that these professional identities matter and have an impact on how we ought to understand the implications of convergence in practice as the field emerges.

Before the very recent trend toward seeing IHRL and IHL as subsets of the same legal field, the educational and professional choices leading to becoming a practitioner or specialist in either field were quite divergent. While both are, of course, fields of public international law and share affinities of background and training to some extent, the “typical” IHRL scholar/lawyer and IHL expert are two rather different characters. Traditionally, those interested in IHL have had professional experience in the military, in government or with the ICRC. Many scholars who have had such professional experience remain closely connected to the relatively small community of IHL practitioners and scholars, often meeting at the same academic conferences and relatively familiar with the range of perspectives within their ranks on the key debates. Many IHL scholars remain actively engaged in the application of principles, either through advising States or international tribunals, contributing to ICRC and other expert processes, or working closely with those who train

military lawyers and humanitarian actors. While there have been significant efforts to increase the training and academic development of IHL in the developing world, most scholarship, commentary and expertise on this body of law continues to stem from the West.

Human rights lawyers, advocates and practitioners are a much less well-defined group, and represent a much larger body of professionals. Firstly, not all human rights practitioners are lawyers, and many have professional backgrounds in advocacy organizations, non-governmental groups, domestic civil rights and human rights organizations, and community-based organizations. Scholars of human rights law are also drawn not only from the legal discipline, but also from philosophy, political science and anthropology. There is no institution in human rights that matches the history, power and influence of the ICRC, and while there are some leading global non-governmental organizations (NGOs), they enjoy less of a direct link to State policymaking than their counterparts at the ICRC. While today there are a number of State-based human rights institutions and departments in ministries of foreign affairs, many human rights lawyers consider themselves to be advocates of victims against the State and its machinery. As human rights law has enjoyed tremendous popularity as a field of study in the global south, its lawyers, scholars and experts represent a diverse group of leading thinkers and practitioners around the world.

The above caricatures are just that, caricatures, but they serve to emphasize that as these two fields merge more and more, and as convergence begins to trickle through to lawyering, scholarship, training and implementation, there may be real differences of approach, engagement and professional styles that are underappreciated in the current debate. As more and more prominent human rights organizations (such as Human Rights Watch and Amnesty International) take on IHL in their monitoring, reporting and advocacy,⁷⁵ it remains to be seen whether a third professional community of those who work specifically on convergence will emerge. Alternatively IHL may have to expand its ranks to include human rights lawyers that may have wildly different perceptions of the laws of armed conflict, how its rules are and should be interpreted and applied, and how practitioners concerned with either or both bodies of law should engage with State actors and the military.

One might argue that there is real value in the two professions remaining distinct and maintaining their divergent internal cultures. To the extent that human rights lawyers and advocates come to speak in the language of IHL, with its acceptance of civilian deaths that are not excessive in relation to the military advantage anticipated, its recognition of the massive destruction to military objects waged in war, its constant balancing of humanity against the powerful argument of military

necessity, and its faith in the decision making of the reasonable commander, will something be lost in the advocacy for the rights of individuals? Will the moral core of human rights lawyering, and its insistence on the promise of aspirational goals, be lost as these lawyers and scholars immerse themselves in the technicalities of warfighting? Do we want to maintain a space in international law and policy for the voice of human rights advocates that speak purely in the language of human rights and do not need to acquiesce to military entitlements in the same way that IHL lawyers and scholars must? In the sense that convergence focuses on how human rights law comes into the realm controlled by IHL, will the conversation and conversion go only one way, without demanding the IHL lawyers and scholars also become conversant with human rights law and its tremendous history of internal theoretical debates?

To some extent, the substance of human rights claims, as well as the style of human rights argumentation and advocacy, currently seems incongruous with the substance and approach of IHL. Today, the human rights advocate would stick out at a meeting of IHL experts. The human rights lawyer would probably make awkward references to peace, bring up questions of *jus ad bellum*,⁷⁶ passionately emphasize the rights of individuals to their claims, and stress the obligation of States to investigate and punish every act of State-sponsored killing. Most IHL lawyers would likely be polite, but see little opportunity to engage on the technicalities of targeting, on the number of civilians who could be killed in an otherwise legal attack without giving rise to liability or on the highly detailed debate over when civilians can be said to be directly participating in hostilities.⁷⁷ The convergence of the two bodies of law could dramatically change this conversation: it could foster a new group of professionals who would be wholly comfortable with such language, and who could easily discuss which human rights rules would be trumped during an air campaign. This might ease the integration of the two bodies of law, it might even lead to solutions to some of the critiques I have listed here. But it might also diminish the capacity of the human rights movement to speak with a clear voice and to advocate on behalf of individuals against States. Both professions are vital to the protection of civilians in armed conflict *and* to the lives those civilians are able to lead once armed conflict has ended. My argument is not that one is morally superior to the other, but rather that their distinction, even their distaste for one another's approach to the key issues, to States and to the military, is vital to the functioning of the separate bodies of law, and to their capacity to marshal future lawyers and professionals to their ranks.

Human Rights Bodies in the Chain of Command: Incompatible Systems of Accountability?

To the extent that convergence suggests that IHRL applies during armed conflict and side by side with IHL, how can we understand the ways in which human rights bodies will come to address States engaged in armed conflict, and how might the military enforcement structure incorporate human rights law?

IHL relies on its own internal governance and enforcement structures: the reason that it travels so well is that it relies on the training, command structure and disciplinary machinery of the military. Theoretically at least, IHL should apply just as efficiently and effectively in a jungle war with little to no judicial mechanisms as in a prolonged air war over an enemy capital. IHRL, on the other hand, is rooted in institutions, in the particular infrastructure of a State's approach to governance, in the transformation—over time—of a State into a more human rights-respecting and rights-enforcing space. This transformative goal is geographically bound. It relates to shifts in culture, to alterations in domestic law that reflect the incorporation of human rights norms into the national system, and to the development of a long-term relationship between the State and international treaty bodies and other human rights mechanisms.

As the two merge, and as the conception of human rights jurisdiction expands, various (and perhaps all) human rights bodies will be in a position to consider the application of their particular treaties to situations of armed conflict, perhaps simultaneously addressing a State's compliance with human rights norms on its own territory, as well as its behavior in a far-off conflict. To the extent that the function of human rights law during armed conflict opens up the conflict to the inquiry and interpretation of human rights bodies, the more those bodies will be in a position to pass judgment not only on a State's compliance with a given human rights treaty, but also on that State's compliance with IHL *as interpreted through the lens of human rights law*. That is, in order to determine exactly *how* a given human rights treaty applies in a situation of armed conflict outside the territory of the obligated State, a given treaty body would need to first assess that there is in fact an armed conflict, use either *lex specialis* or some other mechanism in order to determine which body of rules applies to the situation before it, determine whether human rights law applies to those areas where IHL is (supposedly) silent, and then determine what level of violation of a human rights provision has occurred and what remedy should be made available to the claimant.

Such a scenario involves a number of significant steps. First, it suggests that human rights bodies will increasingly be getting involved in the notoriously difficult task of classification of conflict. Second, they would need to—at the very least—engage in enough analysis of IHL in order to determine which facts and legal issues

are relevant and within their scope of review (in individual complaint cases, in court cases and in assessing State party reports). And finally, depending on their answers to these questions, the human rights bodies would be in a position to interpret, reflect upon and judge military behavior that falls within both categories of law, or where IHL is (supposedly) silent (targeting of civilians taking a direct part in hostilities, curfew regulations, treatment of women in detention, judicial due process of administrative detainees, etc.).⁷⁸

This might be something to celebrate: one might argue that this opens up the traditionally insular field of IHL to a much broader scope of interrogation and analysis, and that it extends the conversation on IHL compliance beyond military tribunals or special courts. However, as such jurisprudence and quasi-jurisprudence develops in the Human Rights Committee; the Committee against Torture; the Committee on Economic, Social and Cultural Rights; the ECtHR; the IACHR; and other venues, we might ask whether such varied analysis and feedback to States on detailed issues of IHL is in fact *good* for the protection of civilians in armed conflict. Depending on the State, they may be subject to the views of a range of treaty bodies, which may have wide-ranging assessments of the critical issues listed above. How should States respond to this? At what level would we measure compliance?

The cost is not just in the possibility for a cacophony of conflicting or incoherent views on issues such as classification or direct participation in hostilities. It is also the possibility that these bodies would not be seen as legitimate to provide detailed analysis of legal issues seen as the province of military professionals. Would all human rights bodies begin to seek out IHL experts to bring specialization on these issues to their ranks? How would their views be weighed against domestic State interpretations of IHL? The more we move away from broad, vague generalities (“human rights law applies during armed conflict”) and toward specific assessments of military conduct in conflict, the more we must ask whether human rights bodies are the appropriate or competent organs to address issues of IHL. What are the risks to the legitimacy of both these bodies *and* human rights law if States disregard much of their analysis (as has arguably been the case with the Human Rights Committee’s General Comment No. 31)?

Undermining Sovereignty and Long-Term Rights Development

While scholars and human rights bodies have explored the obligations of non-State or private actors, ultimately human rights law centers on the sovereign State as the only entity with legal obligations under the law. This is more than a legalistic matter of jurisdiction or obligation; it is also critical to how human rights law develops, and its long-term vision for transforming those States that subject themselves to the human rights regime. It recognizes that as States open themselves to

the scrutiny of human rights bodies, as they engage with NGOs and other human rights actors, as their domestic courts and internal State regulations come to absorb human rights norms, the relationship between the governor and the governed improves by becoming more transparent, accountable and democratic. For many States, their compliance with human rights law has been linked to their economic development, their good relations with other States and their reputations on the international stage.

One dilemma that has received little or no attention in the literature on convergence and in the work of human rights lawyers encouraging an expansion of extraterritorial applicability of human rights law is how these developments endanger the sovereignty of those States on which foreign militaries act, and how in turn this impacts the long-term development and growth of human rights enjoyment. While there has been so much focus on chastising those powerful States that reject or severely limit extraterritorial applicability, there seems to have been very little attention paid to those States that have been or will be invaded, occupied, bombed and otherwise subjected to the possibility of extraterritorial application of *other States' human rights obligations*. I imagine that part of the reason for this is that the sovereignty argument is easily manipulable by States such as the United States that reject extraterritorial applicability or like the United Kingdom, which is seeking to limit the contexts in which human rights principles would apply to the military. Another reason may be that thus far specially impacted States (almost uniformly in the developing world) have not verbalized a concern about this matter.

The *Al-Skeini* court touches on this issue with language that has been widely criticized by scholars. First, in approvingly citing the *Bankovic* court's finding that the ECHR is "essentially regional," and deeply rooted in the notion of the cultural and legal space of the Council of Europe, the House of Lords notes,

The essentially regional nature of the Convention is relevant to the way that the court operates. It has judges elected from all the contracting states, not from anywhere else. The judges purport to interpret and apply the various rights in the Convention in accordance with what they conceive to be developments in prevailing attitudes of the contracting states. This is obvious from the court's jurisprudence on such matters as the death penalty, sex discrimination, homosexuality and transsexuals. The result is a body of law which may reflect the values of the contracting states, but which most certainly does not reflect those in many other parts of the world. So the idea that the United Kingdom was obliged to secure observance of all the rights and freedoms as interpreted by the European Court in the utterly different society of southern Iraq is manifestly absurd. Hence, as noted in *Bankovic* [citation omitted], the court had "so far" recognised jurisdiction based on effective control only in the case of territory which would normally be covered by the Convention. If it went further, the court

would run the risk not only of colliding with the jurisdiction of other human rights bodies but of being accused of human rights imperialism.⁷⁹

In the latter part of the decision, again in language that seems to have been dismissed by scholars,⁸⁰ Lord Brown, in citing the Article 43 Hague constraints on transformation of the territory by an occupying power, notes,

The appellants argue that occupation within the meaning of the Hague Regulations necessarily involves the occupant having effective control of the area and so being responsible for securing there all Convention rights and freedoms. So far as this being the case, however, the occupants' obligation is to respect "the laws in force," not to introduce laws and means to enforce them (for example, courts and a justice system) such as to satisfy the requirements of the Convention. Often (for example where Sharia law is in force) Convention rights would clearly be incompatible with the laws of the territory occupied.⁸¹

Lord Brown later refers to the reasoning behind the general limitation on extraterritorial application of domestic laws: "The essential rationale underlying the presumption against extraterritoriality is that ordinarily it is inappropriate for one sovereign legislature to intrude upon the preserve of another."⁸²

Ralph Wilde may well be correct that these positions represent "crude chauvinism,"⁸³ or "orientalist positioning of Islam and Europe as normative opposites."⁸⁴ He might even be right that "subjecting the UK presence in Iraq to the regulation of human rights law would have the effect of mitigating, not exacerbating, the colonial nature of the occupation."⁸⁵ I am not seeking to defend the actual position of either the Lord Justice, or to comment on the possible conflicts between Shari'a (or any other domestic or regional set of norms) and international human rights law.⁸⁶ Rather, I want to argue that human rights lawyers and those seeking to expand extraterritorial applicability of human rights law have been surprisingly silent on this issue. It seems that, taken from the perspective of a State (and its population) on which extraterritorial application of human rights would play out, the risk of human rights imperialism, or colonialism and transformation buttressed with the language of human rights (and imposed through the means of military control), may be neither preposterous nor ill founded.

This is one of the ways in which the lack of rigor and clarity in the arguments for extraterritoriality has a cost in understanding the risks posed by its increasing application. It is important to be very clear here about what is actually envisioned when we speak of extraterritorial applicability of human rights law in armed conflict. I raise this because it is very common to dismiss the above concern by noting that "most of the rights" would apply regardless of extraterritorial applicability due

to the legal obligations of the invaded or occupied State. This is a faulty argument, and it slides over the more transformative and radical implications of extraterritoriality. Of course an occupying power would be responsible to apply the human rights norms that the occupied State has consented to, as well as all *jus cogens* and customary norms that the State would equally be obliged to respect. But that is *not* the grounds for triggering human rights obligations as imagined by proponents of convergence. Rather, the strong convergence argument suggests that an invading State brings with it its own human rights obligations, as well as its own *domestic* interpretations of how those human rights apply. Any other conclusion would go against the very purpose of extraterritorial jurisdiction.

This is less a claim about culture than it is one of the dangerous potential for undermining not only the sovereignty of invaded States, but more specifically their own domestic understandings of the interpretation and application of international human rights law. If we take extraterritoriality seriously, if we assume that advocates of convergence are being honest when they suggest that the full range of human rights obligations should apply in armed conflict, then how can this problem be avoided? Here, those who favor extraterritoriality tend to make an appealing and emotional argument that one sees repeated in both the literature and recent court decisions. In the widely cited language from the ECtHR's *Issa* decision (which many convergence scholars see as moving away from *Bankovic*), the Court states,

Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating—whether lawfully or unlawfully—in the latter State [citations omitted]. Accountability in such situations stems from *the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.*⁸⁷

A scholarly assessment of this language in *Issa* adds, “It is a strange idea, indeed, to suggest that a country's law cannot apply to criminal conduct of its nationals, to say nothing of its very agents, just because they are abroad when they violate the law.”⁸⁸ One can see why this is such a compelling argument, and why it urges us to rally around the applicability of the law. It seems to say, “If extraterritoriality is not enforced, it would make a mockery of human rights, it would allow States to run rampant simply because they acted outside of their own territories.” This is, however, a deeply flawed argument, and it takes our attention away from the real costs at stake here. First, we must clearly distinguish extraterritorial application of human rights law from State responsibility for the acts of its agents, which is regulated

through rules on State responsibility, attribution and domestic criminal law. We do not need the extraterritorial application of human rights law in armed conflict to create criminal liability for agents of the State that commit crimes abroad while acting with the color of State authority. Second, and this point is often lost in the discussion, extraterritorial application of full human rights treaties in armed conflict makes a significant jump from existing narrow exceptions to territorial jurisdiction by addressing the conduct of the State and its agents vis-à-vis the nationals of *another* State, a State with its own human rights relationship to individuals on its territory. And finally, of course, it is not as though States acting abroad in armed conflict would be engaging in unregulated mayhem were it not for the extraterritorial application of human rights law, would be free to commit wanton crimes against the population of another State by virtue of their border-crossing. Indeed, the bulk of the entire field of international humanitarian law is dedicated to the regulation of exactly the moment when one State crosses the border of another State and engages in armed conflict there.

If extraterritorial applicability of human rights law in armed conflict grows and expands in the ways promoted by convergence advocates, these dilemmas go beyond the level of the abstract, and position weak States at a tremendous disadvantage in understanding and consenting to the laws that would be in force on their territories to their peoples. In an important recent Canadian case regarding detention and transfer of detainees in Afghanistan, we see this argument playing out in greater detail than anywhere else. The human rights lawyers arguing for the applicability of the Canadian Charter of Human Rights and Freedoms to Canadian detention operations make a curious argument to overcome the sovereignty problem, claiming, as Justice Mactavish states,

[t]hat the Government of Afghanistan has implicitly consented to an extension of Canadian jurisdiction to its soil. As evidence of this, the applicants point to the fact that Afghanistan has surrendered significant powers to Canada, including, most importantly, the usual State monopoly over the use of coercive power within its territory.⁸⁹

I can understand that as a tactical maneuver this approach may have extended the applicability of the law. However, from a principled perspective, I wonder how many human rights advocates would want to share with their colleagues in Afghanistan (or Iraq or Pakistan) that due to their State's "consent" to the presence of foreign military forces on their territory, they had in fact ceded sovereignty over the laws applicable to their own citizens to the governments controlling those foreign militaries? Relying on Canadian precedent on the question of extraterritorial

jurisdiction generally, Justice Mactavish rejects this aspect of the argument, noting that “there has been no consent by the Government of Afghanistan to having Canadian Charter rights conferred on its citizens, within its territory.”⁹⁰

It may be that human rights advocates have shied away from acknowledging this critique, or engaging seriously with the costs posed to human rights law and third-world sovereignty by the extraterritoriality argument, because some of the claims I have posed above (the local laws problem, the sovereignty problem, and the colonialism problem) seem to be (perhaps disingenuously) cited by those who oppose extraterritoriality from the posture of defending the US or Israeli positions.⁹¹ It may well be that opposing or questioning extraterritorial application of human rights law in armed conflict makes for strange or distasteful bedfellows in some cases. However, this is no reason to avoid critical inquiries into the implications of the arguments currently posed before courts and human rights bodies and in scholarship promoting a more robust application of one State’s legal obligations and interpretations on the territory of another, particularly in light of contemporary politics around the misappropriation of human rights discourse by military interventionists.

Once human rights lawyers in the West go down this road, it may be very difficult to pull back and limit the sweeping legal arguments that are currently being made. One could imagine that beyond the dilemmas raised above, this could pose real risks to the long-term development of human rights law in countries that experience this type of extraterritorial jurisdiction being claimed and played out on their territories—though, significantly, not actually litigated on their territories or by their courts or judges.

Bad Lawyering? Asking IHRL to Do the Hard Work of Transforming IHL and Global Politics

A final concern relates to some of the issues raised immediately above, but goes to the heart of what proponents of convergence claim in legal argumentation, and what they actually seem to be seeking in terms of outcomes.

A first critique focuses on the gap between the legal claim that the full scope of human rights law applies once extraterritorial jurisdiction is activated in armed conflict, and the actual cases and examples we see brought forward by human rights lawyers and scholars. As I have noted above, as a matter of legal interpretation, it is difficult to identify any intrinsic limitation on the scope of human rights obligations that would apply to a State once we determine that extraterritoriality applies. That is, while scholars seem to want to argue that we should not worry, that the actual scope of human rights law implied in convergence is narrow or reasonable, this goes against the principle of indivisibility and leaves open the

determination of which rights apply when (allowing States to pick and choose, to argue that “positive” obligations do not apply, or that only certain “negative” obligations are truly binding).

As I have argued above, in order for extraterritoriality to mean anything, and in order for *lex specialis* to be able to function as between two bodies of law, then human rights law must substantively add something to the current set of obligations and protections laid out in IHL. This seems only logical. If scholars and advocates are vigorously fighting for human rights law, arguing that the lack of application of this law would allow States to commit violations they would otherwise be prevented from committing at home, or that the true spirit of human rights law means that it must be applicable to an obliged State wherever it chooses to extend its authority, then surely they must believe that there are real, material aspects from the corpus of human rights law that will add to, transform, enhance or build upon the existing obligations of IHL. Yet, curiously, very few scholars or advocates have put forward such concrete proposals or examples of the substantive, normative contribution of human rights law application.

Instead, in the range of cases where advocates have sought to hold States accountable for their domestic human rights obligations in military action abroad, they seem to focus on substantive rules of human rights that have their exact corollaries in the protections of IHL. Most of the cases focus on torture or death in detention, transfer of detainees to custody where there is a risk of torture, targeting of civilians alleged to be participating in hostilities and killing of civilians. There is an excellent tactical reason for this: of all the differences between IHL and IHRL, perhaps the most important in this arena is that human rights law provides standing for individuals to claim their rights under international law, and to seek redress and remedy for violations against them. IHL, on the contrary, provides no such standing, and currently provides no avenues for individual complaints of violation under international humanitarian law or any obligation for violating States to provide redress or remedy to those against whom war crimes or grave breaches have been perpetrated.

Thus, the convergence of IHRL and IHL, and the extraterritorial application of human rights law in armed conflict, provides a crucially important and potentially revolutionary ability for individuals and their advocates to bring cases against States for violations. Because of the way that *lex specialis* functions, the procedural opening—the granting of standing to individuals—allows courts to assess and provide remedy for violations that are simultaneously contrary to a State’s obligations both under IHRL and under IHL. Looking at the current cases, it may well be that the most important takeaway of all of this technical, lengthy debate over extraterritoriality, formal applicability of human rights law and parallel obligations comes

down to, in practical terms, the possibility to bring individual claims against the State for damages or other remedy.

One might argue that this will have incredibly powerful implications for the protection of civilians in armed conflict. The more States are on alert that they may be subject to liability and findings for remedy in human rights bodies or under their domestic human rights law, the more they will improve their standards, limit violations of IHL, and take greater care with proportionality and distinction. Yet, it seems to me that such a position involves making tremendous sacrifices and ignoring considerable risks in order to gain the rare opportunity to bring such cases before courts. If human rights advocates are claiming that the true vision of extra-territorial applicability of human rights in armed conflict is that States will now be bound by the full panoply of human rights in their relationships with individuals on the territories they invade, but with the real intention of using these arguments to open up the opportunity to bring individual cases that involve violations of IHL, these advocates risk being blind to how the full force of their arguments will impact human rights law and practice in the long term.

In this light, the actual practice of convergence and extraterritoriality (as opposed to the soaring claims of its proponents) seems to be the best attempt at a workable solution to the problem of the lack of serious enforcement of IHL, and the lack of any capacity for individuals to demand that States recompense them for the damages wrought during war. While instrumentalizing human rights in this manner may provide short-term payoffs (one victim may receive compensation, one family may ensure that its son is not transferred to brutal detention conditions), it leaves unaddressed and untheorized the broader implications for how law functions in war. Also, this approach seems to make a promise that human rights lawyers do not intend to keep: it signals to individuals on the territory of an invaded State that those military forces who invade, occupy or detain have a qualitatively different relationship with them than that provided by IHL; it suggests that these individuals ought to expect a different type of behavior by these forces. Part of the reason we do not see much discussion of how this vision of the law will work in practice may be that there is actually little intent to develop rules for battlefield lawyering or training of soldiers, but only to create a mechanism for accountability *after* violations have taken place. This abdicates the responsibility set up by speaking in the language of human rights. Ultimately, having human rights *claims* means being able to know whom to go to to get the water turned on, to get food for your children, and to complain to when the police harass you or when your political party is shut down.

The paltry literature on what exactly a war imbued with human rights looks like *for the people living through it* leaves us wondering whether convergence can ever

live up to its formalist promise that the law will be there, that the parties must apply all (or some?) of their human rights obligations in addition to their international humanitarian law responsibilities. What claims will people have in the midst of conflict? To whom should they take these claims? In coalition situations, which party is responsible to answer to the valid (at least legally) rights claims that convergence seems to encourage? Inviting reliance by civilians can be good for their human rights enjoyment only if we have some sense of the way in which the system will work. If the only purpose is to create claims after violations have occurred in a far-off land, it is not clear how this actually respects the human rights that convergence seeks to identify and demand.

Using human rights law, and the broad legal claim of extraterritoriality for this much narrower purpose, avoids doing the hard work of actually transforming and re-envisioning IHL in the way that most advocates would want. It allows lawyers to turn to the legalistic machinations of jurisdiction instead of advocating for the wholesale reconsideration of accountability in the laws of war. This is an important debate, one that must be had and one that is surely influenced by the ways that human rights law has transformed our global legal culture. As long as we pretend that the debate is about the full application of human rights law, when it is primarily about accountability mechanisms and remedies for victims of IHL violations, I would argue that we are not having the challenging and critical political battles that need to be fought in order to achieve the deeper ends of extraterritoriality. In this way, extraterritoriality takes energy away from the efforts to strengthen IHL and to make States more accountable for their actions in armed conflict.

A similar critique, and one that will likely be popular with those who oppose extraterritoriality on grounds of protecting military entitlements, is that the arguments for convergence and extraterritorial application can sometimes shade into backdoor pacifism. That is, to the extent that over-regulating the battlespace is not actually meant to develop a robust set of actual human rights obligations and their interpretations when taken to war, but instead meant to change the calculus for States when entering into armed conflict, joining coalitions or contributing troops to peace enforcement operations, this strikes me also as a misuse of human rights law and language. If advocates believe that human rights law (standing on its own, as applied to States on their own territories and through traditional mechanisms of human rights monitoring and enforcement) should in fact *prevent* States from going to war, or that it adds serious considerations to the *jus ad bellum* questions of the legality of war, then they should say so, and they should expand the provisions of human rights law that seem to support such an outcome.⁹² Advocating for an unclear, vague, confusing admixture of human rights and IHL on the battlefield with the ultimate goal of influencing *jus ad bellum* encourages bad lawyering and

avoids the much more compelling debates that could be taking place within human rights law about the costs of war itself.

Part III. Looking Ahead

If scholars and practitioners weigh the costs and risks I have discussed above, they should consider new approaches that address these dilemmas honestly and rigorously. With the goal of increasing protection of civilians in armed conflict, securing the human rights of all individuals, and enhancing the clarity and effectiveness of the regulations of parties to armed conflict, how might the field react to some of the above critiques? In this section, I want to propose some possible ways forward, not necessarily as pragmatic solutions to knotty legal problems, but to recast the question of how human rights law impacts the role of law in armed conflict.

There is no question that the interplay between international human rights law and international humanitarian law is here to stay. There is no going back to a clean separation between the two fields, if such a separation ever existed. More and more the key actors in armed conflict (militaries, State policymakers, humanitarian organizations, human rights groups) are merging the two discourses and identifying tools that draw on rules and mechanisms from both fields. How might we imagine paths ahead that recast the question of convergence? These four paths forward are not actually meant to be a practical list of approaches that I am necessarily advocating, or a list that does not entail dilemmas of its own. But, given the critiques above, and assuming we want to be more honest and rigorous about what we are doing in this area of law and policy, these possibilities suggest some ways that we might rethink the entire question of extraterritorial application of human rights in armed conflict.

Create New, Leaner Body of “Human Rights at War”

One possibility is that human rights scholars and practitioners, rather than focusing on the rules of international humanitarian law or how human rights law can directly interact with those rules, develop and expand a new field of “human rights at war.” Such a project might take a number of forms. The central feature would be that it would focus on building consensus around the key aspects of human rights law that could practically apply during armed conflict, and focus on the ways in which human rights bodies and mechanisms could interpret and enhance such tools.

At the most ambitious level, this would involve strengthening or redrafting those aspects of human rights law that would severely limit the capacity of States to enter into armed conflict, and would develop the rules of IHRL to take a strong

position on *jus ad bellum* determinations. As some scholars have suggested, there is much in the corpus and drafting background of human rights law that suggests a strongly contra-conflict posture. Here, lawyers and policymakers would identify and build upon those trends within the law, working with States to highlight the ways in which their human rights obligations bind them to limit their engagement in armed action altogether.

Such a human rights law of war, unhindered by the constraints of IHL, might even be proposed as a direct challenge to IHL—rethinking central assumptions and concepts that structure our contemporary thinking on justice in war. A law of human rights at war might directly question current understandings of proportionality, distinction, precautionary measures, occupation and treatment of detainees, using the drastically different language and approach of human rights law to rethink these categories in a far more civilian-protective mode. One could imagine that such a development of human rights would blend legal understandings of *jus ad bellum*, *jus in bello*, and post-conflict and stability operations to create an overall set of obligations for States that fight.⁹³

While such an approach would certainly face a profound challenge in implementing a transformation of this scale, efforts in this direction would sharpen arguments *between* IHL and IHRL, and would insist on keeping in the foreground the serious (and I would argue, necessary) tensions between the two fields. Indeed, debates between States and scholars on such an approach could illuminate the ways in which human rights law and practice, outside of the well-defined and narrow discourse of IHL, might reshape our understanding of the normative constraints on armed conflict and the duties owed to civilians.

A less ambitious approach within this category would be a project among State parties to human rights treaties, human rights bodies and scholars to actively identify a subset of human rights provisions that create the toolkit of “human rights at war.” Here, human rights advocates and scholars would have to be honest in acknowledging that they do not foresee the entirety of human rights law applying in armed conflict. Rather, they would identify the key provisions of human rights law that, different from protections and obligations already enshrined in IHL, would substantively add to what civilians could expect from State parties to armed conflict, and what civilians could demand under human rights law. This might involve a gathering of States to clarify consensus around key provisions, moving away from the current confusion of multiple layers of litigation, regional human rights bodies and domestic interpretations of convergence, providing support for this leaner, thinner body of human rights law.

Such an approach would provide an opportunity for the development of a new cadre of professionals: individuals with experience, background and influence in

both IHL and IHRL, equipped with the tools of fact-finding and advocacy common to human rights, but also able to engage with military professionals and State policymakers in discussing the difficult choices that must be made during armed conflict. State involvement, buy-in and consent would be critical to such an enterprise, mitigating some of the legitimacy challenges discussed above.

While perhaps more pragmatic than the current approach, such a step would involve the risk of diminishing and narrowing human rights protections, and conceding that indivisibility would have to give way to the desire to introduce at least some robust human rights protections that all States understand must be operationalized and applied throughout their military planning and practice. Further, such an approach might lead to new engagements between human rights advocates and military professionals, focusing on those legal provisions that—through negotiation—are seen as applying in parallel to IHL provisions.

Develop and Strengthen Accountability Mechanisms in IHL

A second possible approach to the dilemmas discussed above might focus entirely on innovating around accountability mechanisms in IHL. Perhaps inspired by the ICJ's vague call for parallel application of the two bodies of law, such an approach might involve efforts to enhance existing accountability mechanisms within IHL (most existing Geneva Convention mechanisms are currently moribund) or to introduce some of the monitoring and accountability mechanisms present in the human rights system to IHL.⁹⁴

At the strongest level, this could involve introducing a mechanism for individual complaints or individual standing under IHL at the international level. Examples might include creating mechanisms for individuals to make claims against the State domestically, or a centrally located international body that would hear claims, interpret the rules of IHL according to specific fact situations, and provide decisions, remedies and redress. Such a development would be outside of, and in addition to, existing mechanisms for internal military discipline, domestic war crimes legislation and international criminal law. Rather, such a body would focus solely on individual complaints against the State for violations of IHL in armed conflict (because this would not involve substantive human rights law, the mechanism would by nature have extraterritorial reach, applicable to any States engaging in the armed conflict at issue in the case).⁹⁵ In addition to hearing complaints and adjudicating cases, one could imagine that such a mechanism could also have a body that would oversee and interpret the rules of IHL in the same vein as many of the UN human rights treaty bodies.

Such an approach would involve a new drafting process, perhaps similar to the optional protocols created subsequent to a number of human rights treaties,

seeking the consent of States to such a mechanism and creating new procedures for individual complaints cognizant of the particular needs of the IHL system, and calibrated to the realities of armed conflict. Given the deep dilemmas present in making the current legal interpretations of convergence a reality, one might argue that such an approach, while requiring major efforts at bringing together States and initiating a new process, holds a greater promise of long-term success and real results for victims than the divergent and often conflicting approaches of individual States to extraterritorial application of human rights in armed conflict.

This approach would have the advantage of creating a standardized mechanism for monitoring and accountability. Rather than relying on rare cases brought on behalf of individuals in foreign courts, States would be required to implement the necessary procedures within their armed forces to monitor compliance, investigate violations and alter behavior in response to findings of the new accountability mechanism. Because the military would necessarily be involved in such a process, the incentives to comply and participate would also be higher than the current approach of extraterritorial human rights application.

Finally, such an approach would have an additional advantage compared to the jurisdiction of human rights bodies: because it would be working with IHL, which binds non-State actors, it may also be in a position to hear individual claims against armed groups. While seeking redress or compensation from such groups would provide a major obstacle, the legal framework would exist to explore ways in which non-State parties to an armed conflict could also be brought into the accountability system.

Strengthen Territorial-State Mechanisms for Holding Actors Accountable for Violations

A third approach would indeed look to convergence, but a different breed of this argument than I have challenged in this paper. This possibility would seek to strengthen and embolden domestic human rights obligations and mechanisms during armed conflict (whether non-international or international). That is, this approach would focus on the continued parallel application of human rights law during armed conflict per the current dominant legal consensus, but *not* extraterritorial application of these rules.

As human rights advocates have pointed out in arguing for extraterritorial application of human rights law as a means (the only means) for accountability, we see contemporary cases where the United States and other States deny that they are engaged in an international armed conflict in countries such as Iraq, creating a gap in protective rules. As many have pointed out, the rules of non-international armed conflict are ill-suited to these contemporary situations, where major States

are involved in massive combat, stability and State-building operations on the territory of another State, but without the rule framework of international armed conflict or occupation. In such a situation, it is less clear that IHL by itself is able to cover adequately the encounters between troops and Iraqis, or provide a clear set of roles and responsibilities for all actors involved. At first glance, it *does* appear that extraterritoriality, applied through the home State of the military forces, is the only available answer. Yet here it seems that advocates of extraterritoriality forget the role of the territorial State.

One approach to increasing protection in these contexts would be to insist that host States harness their power to hold all parties on their territory accountable for compliance with IHRL. In Iraq today, it is the Iraqi government that has the clearest and most well understood human rights obligations vis-à-vis the Iraqi people. This obligation to protect the rights of the people extends not only to the acts of the Iraqi State, but also implies that the government will protect Iraqis from any threats to their human rights that occur in Iraq.

In this model, human rights advocates and scholars would focus their energies not on extraterritorial application of human rights law in armed conflict, but rather on the ways that parallel application and convergence strengthen the hand of invaded States to insist that all actors comply with the *territorial State's* human rights obligations. Here, one could imagine that advocates could work with territorial-State courts and human rights bodies, strengthen their power to monitor and investigate abuses, and monitor closely the bilateral agreements and immunity clauses entered into by the territorial State with foreign States and their troops.

Of course, the reality is that the legal systems in many countries in the midst of or recovering from armed conflict are not well equipped to monitor and enforce human rights law. And for most Iraqis, the foreign military forces on their territory are not seen as accountable to Iraq, its government or its people. I am not suggesting that turning to Iraqi institutions to enforce and investigate human rights violations by those on its territory or within its jurisdiction would necessarily provide better results in the short term. It probably would not. Not only do Iraqi human rights organs and courts lack the capacity to adequately investigate alleged human rights violations by military forces or private military contractors, but they are faced with various immunity agreements, as well as the political impossibility of taking on a tremendous power imbalance. However, such efforts would allow the citizens and civilians in the State to understand what human rights law can actually promise them, and would provide a much more clear-eyed understanding of the current state of how human rights law applies in armed conflict.

Rather than drawing our attention to impractical legal claims for extraterritorial application, or emphasizing legal formality with no real intention of altering the substantive rules affecting invading State behavior, such an approach would build on human rights obligations where they are strongest, and empower the affected State to enhance accountability and transparency in the long term. Even if efforts to investigate and hold accountable foreign States fail, such a process, and such a public debate within the country itself, would make real the true promise of what human rights law and human rights discourse can do in a situation of conflict. To the extent that the current insistence on extraterritoriality is a tactical attempt to take advantage of more sophisticated and better understood courts in Europe, the United States and Canada in order to litigate complex human rights issues, it denies those who hold the rights in question the power to truly take ownership of their claims.

Indeed, this approach might flip the current power dynamic of human rights advocacy, shifting the center of gravity of the debate and its language away from Western capitals and toward the States most impacted by armed conflict (such as Iraq, Afghanistan and Pakistan). We might imagine that local human rights organizations and advocates would take the lead on determining how to craft human rights strategies appropriate to armed conflict, building their capacity to work with both human rights and IHL, and working with domestic lawyers and laws to enhance enforcement. This approach would also have the payoff of building up these domestic institutions for the long term: as parallel application of human rights and IHL would always be in the background, domestic human rights and legal mechanisms would increase their capacity to deal not only with foreign militaries, but also with the violations committed by internal armed groups operating within the State.

Move from Law to Policy, Emphasizing Pragmatism over Formal Legal Rules

In this final path, human rights advocates and scholars would need to get their hands dirty in actual military policymaking and planning. Rather than insisting on formal normative consensus, or repeatedly citing unclear and relatively impractical legal definitions of “effective control,” “cause and effect” and other grounds for human rights jurisdiction, those following this approach would make a definitive turn away from law and toward policy.

Leaving behind the normative certainty of convergence and the trump card of rights talk, advocates and scholars might instead seek to formulate human rights in the language of military policy and planning. We increasingly see that the military references much of its behavior on policy grounds. Thus, detainee treatment going above the standards of IHL (such as providing advocates for detainees going before

boards, or providing compensation for civilian victims of attacks) is often explained not on the basis of IHL (where States would normally deny that they have such obligations) or formal human rights obligation, but rather as a matter of policy (a policy that may well be presented as influenced by a number of factors including human rights, counterterrorism and nation building).

It may well be that human rights talk and rights culture have, to varying degrees based on the country in question and its domestic rhetoric around rights and international law, been absorbed into military and State thinking on strategic and policy decisions on the ground. Indeed, one could likely trace the human rights origins of key provisions in individual coalition member's detention policies in Iraq and Afghanistan, or in important paragraphs of their bilateral security arrangements with those nations. Human rights actors and scholars can and should be proud of such impact on strategy and policymaking, and that the absorption of human rights norms into bilateral agreements,⁹⁶ detention policies, rules of engagement, counterinsurgency doctrine⁹⁷ and even individual orders in the field may well result in improved conditions and treatment of civilians and prisoners inspired by the content of human rights instruments.

But we should not forget that there is a difference between decision making and conduct on the basis of policy, and obligations to act as a matter of law. At the margins, and in areas where interpretations of law are wildly divergent, formalism may still matter. To the extent that concerns about the specifics of applying convergence, or "operationalizing" its norms, are dismissed by States with claims that human rights law is already applied as a matter of policy, or that it is already part and parcel of any on-the-ground decision-making environment, it is worth pointing out that when a detainee brings a claim for remedy on the basis of international human rights law, or when a humanitarian organization is attempting to understand its roles and responsibilities on the ground, actual legal obligations will determine outcomes.

However, this approach could be the most impactful of all in terms of real change to State and military behavior, and tangible increases in protection, treatment and respect for basic rights. While it involves considerable sacrifices in terms of the types of argumentation available to human rights advocates, and while it moves away from the current focus on litigation, this approach would facilitate more fluid negotiations with the military planners and decisionmakers on the ground and at the capital level, leaving law and obligations out of the room and focusing on the practical ways in which States can improve their outcomes by incorporating human rights principles into the day-to-day operations of soldiers. I imagine that one reason this approach would be unattractive to many human rights advocates is that it would involve, first, promoting human rights in a context

that might involve justifying these principles on the basis of counterterrorism, counterinsurgency, increased cooperation of the population with the military, increased acquiescence of the population to the policy desires of foreign States, etc. Second, such an approach would necessarily mean getting involved with the ugly realities of military decision making, accepting that not all legal rights-holders will be granted protections in the same way, and that military security will likely always trump policy-based rights and protections. Finally, contrary to much of human rights advocacy that relies on soliciting public support and eliciting public outrage, this approach would likely need to be confidential, involving little engagement with the public and focusing on identifying compelling and practical tools that will convince States that it is in their interests to embrace aspects of human rights into their military policies, rules of engagement and orders.

That said, this approach may facilitate a discussion and practical engagement with human rights in armed conflict that moves out of academic scholarship and discussions at conferences over *lex specialis*, and shifts to the real choices human rights advocates expect military leaders and soldiers to make on the ground. Rather than engaging in an adversarial conversation mediated by courts or human rights bodies, this approach would ask that human rights advocates envision rights through the prism of armed conflict, and from the perspective of the military. This raises a number of serious concerns about the extent to which this would still be human rights advocacy as we know it, but it may also pave the way for actual and significant changes in on-the-ground decisions, and in the ability of individuals caught in armed conflict to lead more dignified lives.

Notes

1. I will use IHL and LOAC (law of armed conflict) interchangeably throughout, while acknowledging and appreciating Yoram Dinstein's call to refer to this body of law as LOAC exclusively. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT* 13–14 (2004).

2. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 239, 243–44 (2000). Meron's article was part of the first wave of work on this issue, and did not call for the full implementation of human rights in international armed conflict as it is sometimes imagined today.

3. I will be using the terms "convergence," "parallel application" and "co-application" interchangeably to refer to the concept that international human rights law and international humanitarian law are applicable simultaneously during armed conflict, and that States are obligated to comply with obligations under both bodies of law (including obligations to report to relevant legal bodies, cooperate with organizations, etc.), and that to some extent, individual soldiers can potentially be liable for violations of either or both bodies of law for their conduct during hostilities outside of the territorial State. While it could be argued that "convergence" and "parallel application" represent different methods of co-applicability, with the former indicating a sudden

moment when both bodies of law come together and create a single legal framework blending provisions from both regimes, and the latter representing dual and *distinct* legal frameworks that apply independently of one another until and unless they come into direct contact, the literature seems to treat the two terms as having the same meaning and resulting in similar implications in terms of legal framework.

4. Any argument that attempts to take on a topic on which there has been so much scholarship runs the risk of becoming mired in a literature review or a rehashing of existing material. There is a tremendous amount of writing on both the general topic of overlap between IHRL and IHL, and the various subtopics within the broad issue of convergence. Indeed, two recent full volumes of law journals were dedicated exactly to this issue. See 40 ISRAEL LAW REVIEW (2007); 90 INTERNATIONAL REVIEW OF THE RED CROSS (2008). For an understanding of the broad issues related to overlap and convergence, see, e.g., Noam Lubell, *Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate*, 40 ISRAEL LAW REVIEW 648 (2007); for a focus on human rights law in occupation, see Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1, 8 (2007); Danio Campanelli, *The Law of Military Occupation Put to the Test of Human Rights Law*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 653 (2008); for a clear articulation of the contra-convergence position, see Michael J. Dennis, *Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict*, 40 ISRAEL LAW REVIEW 453 (2007); for a very useful and comprehensive review of the relevant international jurisprudence on the debate, see John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*, 39 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1447 (2006); for the leading analysis of how human rights norms might impact right to life and use of force issues, see Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 9 (2004).

5. International Covenant on Economic, Social and Cultural Rights art. 13, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), 993 U.N.T.S. 3 [hereinafter ICESCR].

6. *Id.*, art. 12.

7. *Id.*, art. 11.

8. *Id.*, art. 10(1).

9. International Covenant on Civil and Political Rights art. 18, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 [hereinafter ICCPR].

10. *Id.*, arts. 9, 14.

11. ICESCR, *supra* note 5, art. 8.

12. ICCPR, *supra* note 9, art. 25.

13. *Id.*, art. 18.

14. Because of the sheer volume of writing on this issue in recent years, my goal here is not to do justice to the many contributions on the question of convergence, nor to focus on the nuance within each sub-issue of the debate. Rather, I want to try to give a rough map of the key issues in the debate, before moving into the critique. For a more detailed review of the current debate, see Lubell, *supra* note 4.

15. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 216 (Dec. 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9) [hereinafter Wall Advisory Opinion]; Issa and Others v. Turkey, App. No. 31821/96, 41 Eur. Ct. H.R. Rep. 567 (2004) [hereinafter Issa]; U.N. Human Rights Committee, *General Comment No. 31: The Nature of the*

General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter General Comment No. 31]; Françoise J. Hampson, *The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 549 (2008).

16. See generally Dieter Fleck, *Individual and State Responsibility for Violations of the Ius in Bello: An Imperfect Balance*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES (SYMPOSIUM IN HONOUR OF KNUT IPSEN) 171 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007). Fleck notes,

It is not only the *lex specialis* character of international humanitarian law, but even more so the particular deficiencies of law application in international armed conflicts, non-international armed conflicts and internal disturbances which makes the exercise of individual and international responsibility a complex, difficult and often hopeless task. Lawyers, tasked to find appropriate remedies for violations of international humanitarian law, are navigating in foggy areas in which relevant provisions are not too systematic and more than often competing interests obscure what should be achieved for restoring peace and justice.

Id. at 173.

17. *E.g.*, Prosecutor v. Galic, Case No. IT-98-29-T, Judgment and Order, ¶¶ 706, 719 (Dec. 5, 2003).

18. See, e.g., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 950, ¶ 3346 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987), which notes,

Thus historically, the law of armed conflict was created largely in the heat of battle, and the weight and obligation of its implementation and development rests primarily on the shoulders of those who exercise military command in the field. To withdraw this fundamental responsibility—which has always been that of military commanders—from them, would undoubtedly have constituted a serious error, and the Protocol was careful to avoid this.

19. *E.g.*, ICCPR, *supra* note 9, arts. 18, 19; ICESCR, *supra* note 5, arts. 9, 11; Convention on the Elimination of All Forms of Discrimination against Women arts. 13, 14, Dec. 18, 1979, 1249 U.N.T.S. 13; International Convention on the Elimination of All Forms of Racial Discrimination arts. 2, 5, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD].

20. Lubell, *supra* note 4, at 650.

21. Cordula Droegge, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 501, 548 (2008). See also Lubell, *supra* note 4, at 660, which concludes, using the analogy of a difficult but worthwhile romantic relationship that seems common in this genre of scholarship:

It is clear that while International Humanitarian Law and International Human Rights Law have been engaged in a relationship for many years, there are still some rocky patches that need to be navigated before we can be assured that the two branches of law can live together happily ever after.

22. See, e.g., Dennis, *supra* note 4, at 453–502. Mr. Dennis is a long-standing attorney in the Office of the Legal Adviser, US Department of State.

23. One author notes, “Few states have contested, vis-à-vis the human rights bodies, the application of the human rights treaties abroad. Apart from Israel, it is doubtful whether any state

has consistently objected to the extraterritorial application of human rights instruments.” Droege, *supra* note 21, at 519.

24. See, e.g., Watkin, *supra* note 4, at 9 (noting that “[t]he normative framework of international humanitarian law differs in many respects from that of international human rights law”). The relative or married couple metaphor is seen often in writing on this topic. See, e.g., Robert Kolb, *The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, 80 INTERNATIONAL REVIEW OF THE RED CROSS, 409 (1998) (noting, “Today there can no longer be any doubt: international humanitarian law and international human rights law are near relations”). See also Louise Doswald-Beck & Sylvain Vit , *International Humanitarian Law and Human Rights Law*, 293 INTERNATIONAL REVIEW OF THE RED CROSS (1993) 94–119, at 94 (stating that “as human rights law and humanitarian law have totally different historical origins, the codification of these laws has until very recently followed entirely different lines”).

25. Dennis, *supra* note 4, at 453.

26. See, e.g., Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 183 (Dec. 10, 1998) (noting that “[t]he general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’etre* of international humanitarian law and human rights law”).

27. Meron, *supra* note 2, at 239.

28. Hampson, *supra* note 15, at 561. See also Nancie Prud’homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 ISRAEL LAW REVIEW 356 (2007).

29. Dennis, *supra* note 4, at 453.

30. G.I.A.D. Draper, *The Relationship between the Human Rights Regime and the Law of Armed Conflict*, 1 ISRAEL YEARBOOK OF HUMAN RIGHTS 191 (1971).

31. See Dan E. Stigall, Christopher L. Blakesley & Chris Jenks, *Human Rights and Military Decisions: Counterinsurgency and Trends in the International Law of Armed Conflict*, 30 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 1367, 1370 (2009) [hereinafter Stigall et al.].

32. See, e.g., Ralph Wilde, *Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties*, 40 ISRAEL LAW REVIEW 503, 516 (2007).

33. Human rights are not based on the status of citizenship in any formal sense; I use the term here to denote the concept of a member of a community, a person in a society that relates to a government, a member of a civil polity. While, of course, human rights protections extend to individuals who find themselves on the territory of an obliged State even for a short period of time, the bulk of human rights law, jurisprudence and scholarship focuses on the relationship between the governed and the governors, those who are part of a society for the long term and those who are in power in that society.

34. Al-Skeini v. Secretary of State for Defence [2007] UKHL 26 [hereinafter Al-Skeini (HL)].

35. See, e.g., Wilde, *supra* note 32, and Hampson, *supra* note 15, for critiques of the Al-Skeini (HL) decision.

36. Al-Skeini (HL), *supra* note 34, ¶ 109.

37. *Id.*, ¶¶ 127, 129.

38. See DINSTEIN, *supra* note 1, at 21–22.

39. One of the rare articles to take a critical view of convergence theories from the perspective of concern for civilians (as opposed to from a military or State entitlement perspective) is an important piece by Tel Aviv University Professor Aeyal Gross, questioning the application of human rights law in the most long-standing military occupation in contemporary history, that of Israel in the Occupied Palestinian Territory. Gross argues that

[rights] analysis is usually best at identifying and treating individual localized violations, which are deemed the exception in a regime where democracy and human rights are the norm. In the context of occupation, where the norm is the denial of rights and the lack of democracy, rights analysis may distort the picture by pointing to rights denial as the exception rather than the norm. Rights analysis is weak at creating structural changes. The result, even if the rights of the people living under occupation prevail in specific cases, may often be the legitimization of rights' denial rather than the opposite: cases where individuals win rights' victories may create the myth of a "benign occupation" that protects human rights even though they are mostly denied.

Gross, *supra* note 4, at 8. Gross's significant article seems to have gained little notice in the literature on convergence, and I hope to argue here that his analysis can and should be expanded to include situations beyond the Israeli/Palestinian conflict, and the specifics of long-term occupation.

40. Wilde, *supra* note 32, at 518–19.

41. *Id.* at 519.

42. *Al-Skeini v. Sec. of State for Defence* [2005] EWCA 1609 (Civ.), ¶¶ 196–97, *quoted in* Wilde, *supra* note 32, at 519 [hereinafter *Al-Skeini* (Civ.)].

43. Wall Advisory Opinion, *supra* note 15, ¶ 106.

44. *Prud'homme*, *supra* note 28.

45. The *Al-Skeini* decision recognizes the problem in reviewing existing ECtHR decisions, noting,

The problem which the House has to face, quite squarely, is that the judgments and decisions of the European Court do not speak with one voice. If the differences were merely in emphasis, they could be shrugged off as being of no great significance. In reality, however, some of them appear much more serious and so present considerable difficulties for national courts which have to try to follow the jurisprudence of the European Court.

Al-Skeini (HL), *supra* note 34, ¶ 67.

In its leading case on this issue, the Canada Federal Court of Appeal also recognizes the challenge posed to national courts attempting to understand the current interpretation of the law on this issue, noting that "the current state of international jurisprudence in this area is somewhat uncertain." *Amnesty International Canada v. Canada* (Chief of the Defence Staff), [2008] 4 F.C. 546, ¶ 214 [hereinafter *Amnesty v. Canada*]. A range of scholars across the spectrum of the debate has also recognized the lack of clarity on this issue. *See, e.g.,* Dennis, *supra* note 4, at 482 (noting that "there is no clear understanding concerning the precise manner in which the obligations assumed by states under international human rights treaties interact with the *lex specialis* of international humanitarian law, if it is assumed the former apply extraterritorially during periods of armed conflict and military occupation"); Françoise Hampson, *Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS* 485, 510 (Michael N. Schmitt ed., 2009) (Vol. 85, US Naval War College International Law Studies) (noting that "[h]uman rights bodies and the ICJ are of the view that [human rights law] also applies to cases of military occupation but it is not clear how human rights bodies understand the concept of occupation, and the application of human rights law is not free of theoretical and practical difficulties. What is wholly unclear is the extent to which and the manner in which it applies in other extraterritorial circumstances, particularly to the conduct of military operations"); Stigall et al., *supra* note 31, at 1372 (stating that "various countries, regional organizations and international organizations differ in their position on the proper extraterritorial application or jurisdictional scope of their own and

international human rights norms”); Droegge, *supra* note 21, at 502 (reiterating the current confusion over how the two bodies of law can apply coherently, and stating that “[j]urisprudence on concrete cases will, hopefully, provide more clarity over time. . . . [S]ome areas are becoming clearer and in other areas patterns are emerging but are not consolidated”).

46. This is not a new observation, and is certainly not a critique that applies equally across the board. Several scholars, particularly in the newest iterations of the debate, do seek to propose improved theoretical models for applying *lex specialis*, for harmonizing IHRL and IHL. In addition, some recognize the current paucity of thinking within pro-convergence scholarship on application. Citing another notoriously vague phrase in the (quasi-)jurisprudence on the issue, the UN Human Rights Committee’s language in General Comment 31 noting that “[w]hile in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive,” the author notes,

Such generalizations are unlikely to offer solace to those tasked with the responsibility for implementation of the complementarity principle in the field. Thus, given the adoption of this doctrine, there would appear to be merit in exploring the capacity for a joint general comment between the Committee bodies, which could offer guidance on how to address the challenges and obstacles associated with the application of human rights norms during armed conflict and their relationship with international humanitarian law. In the absence of such direction, the clarity and precision necessary to implement complementarity will remain missing.

John Tobin, *Seeking Clarity in Relation to the Principle of Complementarity: Reflections on the Recent Contributions of Some International Bodies*, 8 MELBOURNE JOURNAL OF INTERNATIONAL LAW 356, 366 (2007).

47. Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, 194 MILITARY LAW REVIEW 1, 51 (2007).

48. In a striking example, one scholar states, “This article holds that, undoubtedly, human rights law speaks about and to armed conflict,” and then appends the following footnote to the sentence: “Admittedly such an application does raise some difficulties.” Karima Bennouna, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 UC DAVIS JOURNAL OF INTERNATIONAL LAW AND POLICY 171, 196 n.125 (2004).

49. I am not suggesting that human rights law is necessarily more difficult to translate into military application or that it would be impossible to craft tactical battle rules based on human rights law—rather that this work seems not to have been done by many promoting extraterritorial applicability. Dale Stephens addresses this issue elegantly in his analysis of the debate over the relationship between the two bodies of law. Dale Stephens, *Human Rights and Armed Conflict: The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 YALE HUMAN RIGHTS & DEVELOPMENT LAW JOURNAL 1 (2001).

50. It is telling that the two leading articles providing such a clear-eyed and practical-minded overview of how LOAC practice and theory would be impacted by co-application are written by senior military law scholars. Watkin, *supra* note 4, at 9; and Stephens, *supra* note 49.

51. Wall Advisory Opinion, *supra* note 15, ¶ 111; General Comment No. 31, *supra* note 15, ¶ 10; Bankovic v. Belgium et al., App. No. 52207/99, 2001-XII Eur. Ct. H.R. 333; Issa *supra* note 15; Coard et al. v. the United States, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, Sept. 29, 1999.

52. Françoise Hampson’s assessment is incredibly useful to keep in mind here. She notes, “Human rights more generally refers to values and precepts that may (or should) be the basis of

policy decisions, such as the rule of law, democracy, participation, transparency and accountability. Human rights in this sense is part of the ‘good governance’ agenda.” Hampson, *supra* note 45, at 486.

53. One scholar, after providing an exhaustive review of the relevant case law, concludes, It thus appears that states remain bound by human rights law even when engaged in hostilities far from their home territories. Even during the invasion phase of an armed conflict, it would seem that a state would exercise sufficient control over any individuals with whom its forces come in contact for those individuals to fall within the scope of beneficiaries of that state’s human rights obligations. This, however, does not mean that the content of those obligations would be the same as if the individuals in question were within the home territory of that state. The scope of the obligation, at least in terms of the level of obligation as explained above, will vary with the degree of control exercised in the circumstances. Once an individual is taken into detention by the state, the degree of control over the individual will clearly have increased.

Cerone, *supra* note 4, at 1507.

54. Haider Ala Hamoudi, *Reconsidering the ‘Rule of Law’ in Iraq*, JURIST, Sept. 8, 2009, <http://jurist.law.pitt.edu/forumy/2009/09/reconsidering-rule-of-law-in-iraq.php>.

55. See, e.g., Brief for Interights et al. as Amici Curiae Supporting Appellants and Respondents, Al-Skeini (HL), available at <http://www.interights.org/view-document/index.htm?id=245>; see generally Rachel Brett, *Non-governmental Human Rights Organizations and International Humanitarian Law*, 80 INTERNATIONAL REVIEW OF THE RED CROSS 531–36 (1998).

56. S.C. Res. 1894, U.N. Doc. S/RES/1894 (Nov. 11, 2009) (noting “that the deliberate targeting of civilians as such and other protected persons, and the commission of systematic, flagrant and widespread violations of applicable international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security . . .”); GERARD MCHUGH, STRENGTHENING PROTECTION OF CHILDREN THROUGH ACCOUNTABILITY: THE ROLE OF THE UN SECURITY COUNCIL IN HOLDING TO ACCOUNT PERSISTENT VIOLATORS OF CHILDREN’S RIGHTS AND PROTECTIONS IN SITUATIONS OF ARMED CONFLICT (2009) (in a report discussing the role of the UN Security Council in holding violators of children’s rights and protections in armed conflict accountable, noting that “[t]he term ‘children’s rights and protections’ is used throughout this report to include the human rights of children as specified in the Convention on the Rights of the Child and other international human rights Covenants and treaties, as well as the protections afforded to children (by virtue of the obligations to parties to armed conflict) in situations of armed conflict under applicable treaty-based and customary international humanitarian law”).

57. Program on Humanitarian Policy and Conflict Research at Harvard University, Live Seminar: Human Rights in the Battlefield: Litigating Violations in Iraq (Sept. 22, 2009), <http://ihlforum.ning.com/events/human-rights-in-the> (password required).

58. See, e.g., Office of the United Nations High Commissioner for Human Rights, *Summary of National Initiatives Undertaken within the World Programme for Human Rights Education (2005–Ongoing)*, <http://www2.ohchr.org/english/issues/education/training/Summary-national-initiatives2005-2009.htm> (last visited Nov. 16, 2009); Alfred M. Boll, *The Asian Values Debate and Its Relevance to International Humanitarian Law*, 83 INTERNATIONAL REVIEW OF THE RED CROSS 45 (2001).

59. See, e.g., René Provost, *International Committee of the Red Widget? The Diversity Debate and International Humanitarian Law*, 40 ISRAEL LAW REVIEW 614 (2007); Ramesh Thakur, *Global Norms and International Humanitarian Law: An Asian Perspective*, 83 INTERNATIONAL REVIEW OF THE RED CROSS 19 (2001).

60. Al-Skeini v. Secretary of State for Defence [2004] EWHC 2911 ¶ 103 (Admin.).

61. A slightly different way of thinking about this is presented in the excellent and thought-provoking piece by Aeyal Gross, who notes,

[G]overnment-governed relationships exist during occupation as well, although they assume a different nature because the ruled have not given their consent and the ruler is not accountable. Transplanting human rights to a situation of occupation may thus blur its inherently undemocratic rights-denying nature, and confer upon it the perceived legitimacy of an accountable regime.

Gross, *supra* note 4, at 33.

62. See, e.g., Bennoune, *supra* note 48, at 205 (noting specific rights that would apply in the Iraq war); Cerone, *supra* note 4, at 1498–1507 (arguing that the level of obligation of States acting abroad varies in current legal interpretation, and that there is likely a “variable scope of obligation,” where so-called negative rights would apply frequently extraterritorially, and so-called positive rights might apply according to a reasonableness test where “the adoption of affirmative measures is only required when and to the extent that the relevant party de jure or de facto enjoys a position of control that would make the adoption of such measures reasonable.” *Id.* at 1505); Stigall et al., *supra* note 31, at 1375 (arguing that “[t]he proper rule in situations of military occupation or control is to apply basic human rights norms extraterritorially . . .”).

63. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action* art. 5, U.N. Doc. A/CONF.157/24 pt. 1 (July 12, 1993) (declaring that “[a]ll human rights are universal, indivisible and interdependent and interrelated”); International Conference on Human Rights, April 22–May 13, 1968, *Proclamation of Teheran* art. 3, U.N. Doc. A/CONF. 32/41 (May 13, 1968) (“Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible”).

64. Bankovic, *supra* note 51, ¶ 75.

65. Al-Skeini (HL), *supra* note 34, ¶ 79.

66. Amnesty v. Canada, *supra* note 45, ¶¶ 310, 311.

67. Al-Skeini (Civ.), *supra* note 42, ¶ 196.

68. I am not addressing here the question of an occupying power’s (in the IHL sense) obligation to apply the laws in force in the occupied territory. In reality, of course, most of the “core” rights that are regularly referenced as applying extraterritorially would indeed apply through this mechanism. But the convergence argument seems to want to avoid limiting the extraterritorial applicability of IHRL to situations of military occupation, and indeed its insistence on the additional application of IHRL would suggest that its proponents believe that *some* obligations would be added on top of the already existing obligations under IHL.

69. Many authors refer to the principle as one tool for resolving the problems that arise from parallel application. For a comprehensive treatment of the history of this principle in addressing convergence, see Prud’homme, *supra* note 28, at 355–78.

70. *Id.* at 383.

71. There remains, of course, the major issue of accountability and enforcement mechanisms (human rights principles that would not be negated by even the most muscular use of *lex specialis*), which I will address in below sections.

72. See Hampson, *supra* note 15, at 560.

73. For a useful attempt at clarifying the various ways in which the rules would interact, and how *lex specialis* might operate in context, see Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Co-application of Humanitarian Law and Human Rights Law to the Occupied Territories*, 37 ISRAEL LAW REVIEW 17 (2004).

74. Hampson notes,

The solution to the *lex specialis* problem in practice has to be capable of being applied by those involved at the time they act or take decisions. It cannot be determined after the event, even if that is when it is enforced. . . . Some way needs to be found to develop a coherent approach to the problem.

Hampson, *supra* note 15, at 562.

75. One scholar notes,

A further explanation for the increased interest in IHL among human rights groups has been the increasingly technocratic and professional nature of some international human rights work. Becoming versed in the intricacies of IHL has allowed human rights advocates to talk like experts and to find a place at the table with military officials and government representatives, debating the choice of targets. This was a pragmatic endeavor which in many ways made sense. Still, too many important concessions can be made for a place at the table when the terms of the discussion held there have already been set.

Bennoun, *supra* note 48, at 222.

76. See *id.* at 214 (noting that “when a war is patently illegal, . . . if the only mode of analyzing the conflict is humanitarian law, then the central illegality, which is the wellspring of all other violations, will be overlooked”). An interesting argument is made by William A. Schabas, in one of the very few analyses critiquing the impact that convergence might have on human rights law and practice, who notes, in illustrating how IHL does not consider the “legitimate aim” (in a human rights law sense) of a State in assessing the legality of a military attack,

This is where the attempts to marry international human rights law and international humanitarian law break down. International human rights law is not indifferent and does not look favorably upon unjust war. Indeed, it might be said that there is an anti-war or pacifist dimension to international human rights law that is largely absent—for understandable and logical reasons—from international humanitarian law.

William A. 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 ISRAEL LAW REVIEW 592, 607 (2007).

77. By way of example, one former Pentagon targeting specialist who went on to become a military analyst at Human Rights Watch has noted that “[t]he administration of President George W. Bush sanctioned up to 30 civilian deaths for each attack on a high-value target in the Iraq war.” Suzanne Koelbl, *The Pentagon Official Who Came in from the Cold*, SPIEGEL ONLINE INTERNATIONAL, Apr. 3, 2009, <http://www.spiegel.de/international/world/0,1518,617279,00.html> (last visited Nov. 11, 2009). Whether or not this is an accurate number, the point is that IHL forces us to speak in such terms, and its language is often focused on precisely such an impossible calculus. Many human rights lawyers and advocates find this very concept repugnant; indeed, they find such an approach anathema to the notion of human rights. Human rights lawyers’ arguments and claims, *outside of IHL*, may be critical to ultimately changing the way States understand armed conflict, or the degree of support that home-State populations are willing to grant for political decisions taken to go to war or behavior in war. The more they are brought into the language and discourse of IHL, the more they are complicit in the balancing of military necessity and humanity, the less they are able to fulfill this vital function. See Sharon Otterman, *The Calculus of Civilian Casualties*, NEW YORK TIMES NEWS BLOG, <http://thelede.blogs.nytimes.com/2009/01/06/the-calculus-of-civilian-casualties/> (Jan. 6, 2009) (noting that

the acceptance of thirty civilian deaths per high-value target was also reiterated by General T. Michael Moseley).

78. In her subtle and pragmatic analysis of the issues facing human rights bodies that take on issues of international humanitarian law, Françoise Hampson sets out the dilemmas the current array of legal options presents to human rights bodies seeking to utilize *lex specialis*, engaging in classification and determining in what instances human rights law would demand a higher level of protection than international humanitarian law. She is ultimately critical of the current approach of human rights courts to the issue of extraterritorial application (to the extent that the interpretation is limited to situations of occupation, however defined, and situations of detention) for ignoring the ICJ decision that human rights law continues to apply in armed conflict and because it would allow States a much broader leeway than they would receive from the same human rights courts in situations of non-international armed conflict. Ultimately, despite the significant challenges she illuminates, Hampson is optimistic (I would argue overly so), noting that “[t]he test for any solution is that it must be both coherent and practical and should seek to avoid diminishing existing protection. It ought to be possible to achieve consensus on the implications in practice on the simultaneous applicability of IHL and human rights law.” Hampson, *supra* note 15, at 572.

79. Al-Skeini (HL), *supra* note 34, ¶ 78.

80. See, e.g., Stigall et al., *supra* note 31, at 1375 (stating that “[t]he suggestion that application of these norms extraterritorially is a form of cultural imperialism is preposterous”).

81. Al-Skeini (HL), *supra* note 34, ¶ 129.

82. *Id.*, ¶ 141.

83. Wilde, *supra* note 32, at 522.

84. *Id.* at 521.

85. *Id.* at 522.

86. For an analysis of the relationship between Islamic law and international human rights law, see Naz K. Modirzadeh, *Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds*, 19 HARVARD HUMAN RIGHTS JOURNAL 181 (2004).

87. Issa, *supra* note 15, ¶ 71 [emphasis added].

88. Stigall et al., *supra* note 31, at 1375.

89. Amnesty v. Canada, *supra* note 45, ¶ 152.

90. *Id.*, ¶ 172.

91. See, e.g., Dennis, *supra* note 4, at 471–72.

92. Two scholars discussed above do make such a bold claim, and wisely bypass the well-trod convergence/extraterritoriality arguments in order to argue that human rights law actually demands that States avoid war. See Schabas, *supra* note 76; Bennouna, *supra* note 48.

93. There is some development in this direction in recent scholarship, providing an aggressive frontal challenge to IHL and its underpinnings from the perspective of human rights law and moral philosophy. See David S. Koller, *The Moral Imperative: Toward a Human Rights-Based Law of War*, 46 HARVARD INTERNATIONAL LAW JOURNAL 231 (2005) (stating that “the commonly shared understanding of the concept of human rights provides a solid basis for drafting replacements for the IHL principles of discrimination, and proportionality, resulting in a human rights-based law of war.” *Id.* at 243–44). See also Bennouna, discussed *supra* note 48.

94. See Watkin, *supra* note 4, at 9 (noting that “[t]he approach to the control of force in armed conflict as the exclusive domain of international humanitarian law is facing an intensified effort to have it encompass human rights norms and their associated accountability structure”).

95. One scholar considers such a possibility, but ultimately rejects it:

It might be tempting to propose a radical solution: the creation of a right of individual petition for violations of IHL which would be submitted to a new dispute settlement mechanism, and the exclusion of such cases from human rights bodies. This would only work if the ICJ accepted that a rigid distinction had been created between IHL and human rights law.

Hampson, *supra* note 15, at 572.

96. Arrangement for the Transfer of Detainees Between the Government of Canada and the Government of the Islamic Republic of Afghanistan, Can.-Afg., May 3, 2007, *available at* http://www.afghanistan.gc.ca/canada-afghanistan/documents/arrangement_detainee.aspx?lang=eng.

97. See HEADQUARTERS, DEPARTMENT OF THE ARMY & HEADQUARTERS, MARINE CORPS COMBAT DEVELOPMENT COMMAND, FM 3-24/MCWP 3-33.5, THE US ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL (University of Chicago Press 2007) (2006).

17 International Humanitarian Law and International Human Rights Law

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(p. 381) 17 International Humanitarian Law and International Human Rights Law

1. Introduction

While international human rights law (IHRL), unlike international humanitarian law (IHL), was not founded specifically to protect people affected by armed conflicts, both branches of international law apply simultaneously during such conflicts. This raises the question of how they interrelate and also how possible contradictions between them can be resolved. After summarizing the traditional differences between the two branches, the chapter then determines when both branches apply simultaneously. Only then can the main question discussed in this chapter be approached: what law applies if, on a particular issue, the two branches contradict each other or otherwise lead to divergent results. Finally, the chapter briefly discusses whether the use of enforcement mechanisms created within one branch can help enforce the norms of the other.

2. Traditional Differences

Traditionally, analysts have stressed just how different IHL and IHRL are.¹ The former developed to regulate international armed conflicts (IACs), and therefore a comparison inevitably takes, as its starting point, the law applicable to such conflicts. Most contemporary armed conflicts, however, are not of an international character (and represent situations where the differences mentioned hereafter are less important).

IHL is one of the oldest branches of international law, while it has only been since the Second World War that international law has concerned itself with the protection of the human rights of all individuals who find themselves under the jurisdiction of a state. Despite all political correctness reigning in international fora, controversies about universality affect IHRL far more than IHL. On the other hand, because of the philosophical axiom driving IHRL, and as it applies to everyone everywhere, it has a much greater impact on public opinion and international politics than IHL. This is because IHL is applicable only in armed conflicts, which are themselves to be avoided in our era, where the use of force (p. 382) in international relations has been outlawed. In reality, IHL is therefore increasingly influenced by human rights-like thinking.

While IHL applies only in armed conflicts, IHRL was primarily conceived for peacetime situations, although it also applies in times of armed conflict (see below part 3.A 'Material Scope of Armed Conflict'). The protection IHL offers individuals has not been expressed, as in IHRL, in terms of subjective rights of persons: rather, it results from objective rules of behaviour for states, armed groups, and (through them) individuals.

IACs are necessarily regulated by international law and all rules of IHL are conceived as applying universally. On the other hand, regional rules and mechanisms feature greatly in IHRL, and even today human rights are still seen as being governed mainly by national (constitutional) law. IHRL only provides for a framework and minimum requirements for domestic rules. As human rights cannot be protected and regulated solely by international rules, IHRL requires domestic legislation to guarantee the protected rights. Conversely, a number of issues arising in armed conflicts (eg the treatment of prisoners of war (POWs) or the conduct of hostilities) are exclusively regulated by IHL and do not necessarily require domestic law regulation, nor a legal basis in domestic law.

Both branches of international law are today largely codified. IHL, however, is codified in a broadly coherent international system of binding universal instruments, of which the more recent or specific clarify their relationship to the older or more general treaties. IHRL, conversely, is codified in an impressive number of instruments—both universal and regional, and binding and exhortatory, with some encompassing the whole range of human rights, others dealing with specific rights, and yet others focusing only on implementation. These instruments emerge, develop, are implemented and die in a relatively organic, uncoordinated manner.

As for their beneficiaries, IHRL requires that all human beings benefit equally from its protection, while the traditional approach of IHL, consistent with its development as inter-state law, has essentially been to protect enemy nationals. To protect them when they are in the power of a belligerent party, the IHL of IACs therefore defines a category of ‘protected persons’, which consists basically of enemy nationals who enjoy its full protection.² Those who are not ‘protected persons’ do benefit from a growing number of protective rules, which are particularly significant in non-international armed conflicts (NIACs), but which do not offer the full protection foreseen for ‘protected persons’. When it comes to protection against (the effects of) hostilities, IHL is based upon the fundamental distinction between civilians and combatants, a distinction irrelevant for IHRL. The latter only admits differences in protection based upon the conduct of the individual in question, not upon their status. More generally, and beyond that between civilians and combatants, many other distinctions influence the determination of applicable IHL rules. Such distinctions play no role in IHRL, where, on the contrary, the principle of equality features prominently.

When it comes to protected rights, if rules of IHL are translated into rights and these are compared with those enshrined in IHRL, it becomes apparent that IHRL covers (p. 383) virtually all issues of human existence, most of which are not regulated by IHL (eg freedom of opinion, freedom of association, the right to social security, and so on). In armed conflicts, IHL only covers some human rights: those that are particularly endangered by armed conflicts³ and are not, as such, incompatible with the very nature of armed conflicts.⁴ Under IHL, these few rights are protected through much more detailed regulations that are better adapted to the specific problems arising in armed conflicts than the articulation of the same rights under IHRL, where they are formulated in a much more general, abstract manner.⁵ In addition, IHL regulates some problems of vital import for protection in armed conflicts, which cannot meaningfully be translated into human rights (eg who may participate in hostilities, who may use the emblem of the red cross/red crescent, etc).

Ever since it was first codified, IHL has protected civil and political rights;⁶ economic, social, and cultural rights;⁷ and collective or group rights.⁸ It has never distinguished between rules imposing a positive obligation on the state and those requiring the state to abstain from certain conduct. The positive obligation to collect and care for the wounded and sick is, for example, one of the oldest rules of modern, codified IHL,⁹ which has always contained obligations not only to respect, but also to protect persons (including from the acts of private actors).¹⁰

When comparing their substantive rules, the differences between IHL and IHRL should not be over-emphasized. Both branches have the same aim—to ensure the respect for the lives and dignity of human beings—and the conduct or result required by both branches is the same on most issues. This convergence in substantive protection is even growing, in particular because the IHL applicable to NIACs (the most frequently occurring type) is increasingly influenced by IHRL and its implementation mechanisms. During armed conflicts, both branches prohibit the killing of civilians and detainees, torture, rape, and the taking of hostages. They both require the collection of and care for wounded and sick, humane treatment of detainees, and the respect of judicial guarantees in any trial. Simply, one of the two branches provides more detailed regulations, depending on the given

situation. Their substantive rules actually differ significantly only in two respects: on the use of force against persons who are legitimate targets under IHL and on the admissible reasons, legal basis, and necessary procedural guarantees for interning enemies.

(p. 384) As explained in chapter 7 'International Humanitarian Law and the Conduct of Hostilities' in this book, under IHL rules on the conduct of hostilities, the use of deadly force against combatants and civilians directly participating in hostilities is considered legitimate. Under IHRL, use of lethal force is admissible only in extreme situations, after warnings and the attempt to arrest the target have been exhausted (where feasible). Under IHRL, the proportionality evaluation takes the right to life of the targeted individual into account. In addition, under IHRL each violent death must give rise to an inquiry, while the obligation is limited to special cases under IHL: deaths of POWs or civilian internees and cases of suspected war crimes. This makes it particularly important to determine the applicable rules in two types of situations. The first is where the dividing line between peace and armed conflict is blurred, for example at the lower threshold of violence sufficient for the law of NIACs to apply, or along the continuum between peacekeeping and peace enforcement operations. The second situation is where IHRL governs certain conduct even in armed conflicts, for example in law enforcement operations in NIACs or in occupied territories in IACs.¹¹

Chapter 12 'Detention in Armed Conflict' in this book discusses the admissibility of detaining enemies. Under IHL of IACs, combatants may be detained as POWs until the end of active hostilities without judicial control, and civilians may be detained for imperative security reasons upon individual determination by a body, which must not necessarily be a fully independent and impartial tribunal in the sense of IHRL. Under IHRL instruments, admissible reasons for depriving anyone of their liberty are explicitly or implicitly limited. Furthermore, a domestic legal basis must exist for detention, and detailed procedural guarantees apply.

Particularly because of the two differences discussed above, it is crucial to determine the relationship between IHL and IHRL where they differ on substance. This is the main focus of this chapter. First however, we must clarify when these regimes apply. Indeed, if only one branch applies, the question of compatibility does not arise and contradiction is impossible. Hopefully, there exists no situation in which neither of the two branches applies, although this has been argued frequently in recent years.

3. When Do Both Branches Apply Simultaneously?

The first line of defence adopted by states wishing to disregard the substantive rules of IHL or IHRL is to claim that they do not apply. In some cases, the same objections are levelled to dispute the applicability of both branches. Examples include the arguments that neither branch binds international organizations (and that the conduct in question is only attributable to an international organization), or that UN Security Council resolutions prevail over obligations under both branches. Such objections are not of interest for this chapter. Most objections, however, concern only one branch, or apply differently in the case of the two branches. They are discussed below.

(p. 385) A. Material Scope of Application

IHL only applies to armed conflicts and its treaty rules sharply distinguish between IACs and NIACs, although the alleged customary rules (deduced from official practice) converge for both types of conflicts.¹² Controversies about whether a situation constitutes an IAC, a NIAC, or whether it is not an armed conflict at all (see chapter 2 'Classification of Armed Conflicts' in this book) obviously have implications for whether the IHRL answer to a certain question can at all be contradicted by the IHL answer. In addition, it is controversial how many rules of IHL of IACs equally apply *qua* customary law to NIACs, which in turn determines whether or not IHL and IHRL may at all contradict each other on a certain issue

arising in a NIAC. Due to the increasing convergence of IHL of IACs and NIACs, there is an inevitable, but in my view highly questionable¹³ tendency in scholarly writings, jurisprudence, and the views of most states to consider that the relationship between IHL and IHRL is the same in both kinds of conflicts.

IHRL protects human beings in all situations. Its applicability during armed conflicts has been re-affirmed time and time again by the UN Security Council, the International Court of Justice (ICJ), regional human rights courts, the UN General Assembly, and the UN Human Rights Council (and its predecessor) and its Special Procedures.¹⁴

B. Possibility of Derogations

The European Convention on Human Rights (ECHR) contains a clause permitting a state to, '[i]n time of war or other public emergency threatening the life of the nation', take measures derogating from some of the rights protected by the Convention, but only 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with ... other obligations under international law'.¹⁵ Moreover, the derogating state must inform the Council of Europe of the measures taken and provide justification. At least for IACs, the European Court of Human Rights (ECtHR) considers that an explicit derogation is not necessary.¹⁶ However, some 'core human rights' are non-derogable. They include the right to life as well as prohibitions against torture, slavery, and the application of retroactive criminal laws. Other IHRL instruments contain similar provisions for situations threatening the life of the nation, but their lists of non-derogable rights are more extensive.¹⁷

(p. 386) Armed conflicts certainly constitute a situation 'threatening the life of the nation'. In my view, this must be equally true when a NIAC is conducted extraterritorially, without really threatening the life of the intervening state, as long as the life of the host state is threatened. The reference to 'other obligations' ensures that IHL constitutes, in armed conflicts, the minimum threshold below which derogations of human rights law may not extend. In addition, even where a derogation is admissible, arguably human rights bodies (and national courts) may verify in every individual case whether it is proportionate to the threat, namely that it is 'strictly required by the exigencies of the situation'.

IHL was made for armed conflicts, which are, by definition, situations of necessity. Derogations from IHL based on a state of necessity are therefore not permitted, except where specifically foreseen by an IHL rule.¹⁸ One of those rules is article 5 of Geneva Convention IV (GCIV), which allows for derogations. On their own territories, states may thus limit the rights of protected persons who are 'definitely suspected of or engaged in activities hostile to the security of the State', if the exercise of those rights would be 'prejudicial to the security of such State'. In occupied territories, the same provision permits states to limit the communication rights set out in GCIV in the case of a protected person 'detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power'. The rights to humane treatment and fair trial are, however, reserved. Independently of the relationship between IHL and IHRL when both apply, any derogation of rights protected by IHL that is not admissible under this provision would also be inadmissible under IHRL, because of the latter's requirement that derogations be compatible with 'other international obligations'.

C. Geographical Scope of Application

The controversies about the geographical scope of application of IHL are discussed in chapter 3 'The Temporal and Geographic Reach of International Humanitarian Law' in this

book, but they have a particular impact on whether IHL and IHRL must be reconciled concerning a given problem.

The issue of whether IHRL applies extraterritorially is even more controversial than IHL's extraterritorial application. Most regional human rights conventions clearly indicate that the states parties must secure the rights listed in those conventions for everyone within their jurisdiction.¹⁹ This includes in occupied territory.²⁰ At the universal level, however, according to the text of the International Covenant on Civil and Political Rights (ICCPR), a Party undertakes 'to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction the rights recognized in the present Covenant ...'.²¹ This wording and the negotiating history lean towards understanding territory and jurisdiction as cumulative conditions under the ICCPR.²² Therefore several states, such as the US and Israel, deny (p. 387) that the ICCPR is applicable extraterritorially. The ICJ,²³ the United Nations Human Rights Committee (UNHRC),²⁴ and other states²⁵ are, however, of the opinion that the ICCPR applies in occupied territory. Indeed, from a teleological point of view, it is the occupying power rather than the territorial state that can actually violate or protect the rights of individuals in such cases. However, a limitation of the extraterritorial application of certain rights, in particular of economic, social, and cultural rights, results from the limited legislative powers of occupying powers under the law of occupation.²⁶

If IHRL applies extraterritorially, the next question that arises is when a person can be considered to be under a state's jurisdiction. The jurisprudence of human rights bodies is evolving and not always coherent, but it now clearly suggests that not only territorial control, but also control over persons (such as those detained), is sufficient to constitute jurisdiction.²⁷ Some isolated cases go even further, and certain authors go as far as to conclude that a person is under the jurisdiction of a state as soon as the latter can affect their rights.²⁸ One solution to this question lies in adopting a functional approach, requiring a different degree of territorial/personal control for every right protected or even for every obligation resulting from a right (eg positive and negative obligations).²⁹ Such a 'sliding scale' approach would reconcile the object and purpose of human rights—to protect everyone—with both the need not to bind states by guarantees they cannot deliver outside territory they fully control (in particular, obligations to protect and to fulfil) and concerns about the sovereignty of the territorial state. The latter interest may be encroached upon by foreign forces present with the state's consent, if the former protect and fulfil human rights with respect to the general population and not only in relation to their own conduct.

D. IHL Only Applies to Conduct That Has a Nexus with an Armed Conflict

Even during an armed conflict and on territory controlled by a party, conduct is only governed by IHL if it has a nexus to the armed conflict.³⁰ The nexus concept has been developed mainly in the context of international criminal jurisprudence (through the requirement that a war crime has a nexus to the conflict),³¹ but the nexus required for the applicability (p. 388) of IHL rules (which may or may not be the same) remains largely underexplored. The type and degree of nexus required would likely differ for different rules of IHL. In any case, if certain conduct has no nexus with the conflict, it can only be governed by IHRL (if attributable to a state or, possibly, an armed group). No contradiction with IHL is possible in such cases.

E. Addressees

1. Armed non-state actors

Most participants in the most frequent armed conflicts today, which are not of an international character, are armed non-state actors (ANSAs). The latter are directly addressed by both treaty and customary IHL. On the other hand, IHRL is traditionally held to bind only states. Only very few scholars advocated that entities other than the state—and ANSAs more problematically—had IHRL obligations.³² While it remains a minority view, the claim has gained traction in recent years. It is also reflected in the terminology employed by international organs, which previously referred to human rights ‘abuses’ committed by ANSAs, but now increasingly refer to human rights ‘violations’.³³ The Office of the UN High Commissioner for Human Rights has recently stated that ‘[i]t is increasingly considered that *under certain circumstances* non-state actors can also be bound by international human rights law and can assume, voluntarily or not, obligations to respect, protect and fulfill human rights’.³⁴ Even the most state-centric body, the UN Security Council, refers to ANSAs in a manner that suggests that the latter have human rights obligations.³⁵ One treaty that is seen by many as an IHRL instrument—the Optional Protocol on Children in Armed Conflict—arguably also directly addresses ANSAs.³⁶

However, it is not very clear precisely what ‘circumstances’ need to be present for IHRL obligations to attach to armed groups. The practice of certain international bodies suggests (p. 389) that armed groups that are de facto authorities are bound by IHRL, due to their control of territory and the governmental functions they exercise therein.³⁷ One scholar has argued that this is the result of the recent debate on states’ extraterritorial human rights obligations.³⁸ Shrouded in similar uncertainty is the question of exactly *which* IHRL norms may bind ANSAs.³⁹ In any case, many of them have to be reformulated to become meaningful for armed groups.⁴⁰ Under one view, the more territorial control a group has and/or the more governmental functions it exercises, the more IHRL obligations attach to it.⁴¹ It has, understandably, been easier for states to accept that armed groups may be bound by ‘negative’ obligations to *refrain* from particular conduct (such as, eg, recruiting children into their armed forces)⁴² than by ‘positive’ obligations (such as, eg, the provision of education and health care in territories under their control), as the latter are functions considered to be proper to government.⁴³

If one accepts that ANSAs are bound by the positive obligations in IHRL, it remains to be delimited exactly which norms they are bound to uphold. Are they bound only by positive obligations on issues that—to use IHL terminology—have a ‘nexus’ with the armed conflict? Or do those obligations stretch to cover all of the everyday rights of persons under their control? In order to respect certain positive obligations, such as that to provide a fair trial, may an armed group legislate, or is it expected to implement the laws of the state whose territory it has taken over (similar to what an occupying power is supposed to do under GCIV)?

2. Individuals

At least those rules of IHL the violation of which constitutes a war crime apply to every act committed with a nexus to the conflict,⁴⁴ even if the perpetrator does not belong to any party to the conflict and acts outside any structure of authority. Many claim that even beyond war crimes some IHL rules bind individuals, because the parties to a treaty so intended, because the treaties are self-executing, or because (it is claimed) all rules of customary IHL are binding upon individuals.⁴⁵ Violations of some IHRL rules are also criminalized as international crimes and therefore bind individuals.

For the remaining rules, as discussed above in section 3.E.1 'Armed non-state actors' dealing with armed groups, different theories have been put forward to support claims that IHRL binds all those who exercise governmental authority, or even every organ of society. (p. 390) Some instruments also prescribe duties for individuals.⁴⁶ In addition, states not only have an obligation to respect human rights, but also to protect the rights of individuals under their jurisdiction against other individuals.⁴⁷ This must be implemented, *inter alia*, through legislative measures that are, by definition, binding upon individuals. In addition, some states have provided victims of IHRL violations access to tort claims against those responsible.⁴⁸ States have attempted to specify international legal obligations and best practices for private military and security companies working in conflict areas (whose employees are, obviously, individuals), many of which are based upon IHRL.⁴⁹ Finally, companies have more or less voluntarily accepted codes of conduct⁵⁰ that are often based upon IHL and IHRL provisions, translated to reflect the specificities of private companies.⁵¹

4. How to Deal with Divergences if Both Branches Apply?

When both IHL and IHRL apply and lead to divergent results, the nature of the relationship between them is a controversial matter, regarding both the terminology used to reflect the relationship and the practical outcomes of it. At the centre of these controversies is the *lex specialis* principle, increasingly contested in scholarly writings. Some preliminary issues that blur the debate must first be discussed. I then suggest solutions, which I derive from a correct understanding of the *lex specialis* principle, but which do not differ greatly from solutions found by those who reject the term.

A. The Traditional Starting Point: the *Lex Specialis* Principle

Traditionally, the problems of application and interpretation caused by the overlapping of IHL and IHRL are resolved by invoking the maxim *lex specialis derogat legi generali*, namely the more special rule prevails over the more general rule, discussed further below. The ICJ has considered that '[t]he test of what is an arbitrary deprivation of life ... falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which (p. 391) is designed to regulate the conduct of hostilities.'⁵² The Inter-American Commission on Human Rights, for its part, has affirmed that:

... in a situation of armed conflict, the test for assessing the observance of a particular right [protected by the American Declaration of the Rights and Duties of Man 1948], may, under given circumstances, be distinct from that applicable in a time of peace. For that reason, the standard to be applied must be deduced by reference to the applicable *lex specialis*.⁵³

As for the UNHRC, it writes that 'more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights'.⁵⁴ Depending on how the *lex specialis* principle is understood, the Committee's statement can be considered as supporting the principle. The International Law Commission has also used *lex specialis* to discuss the relationship between IHL and IHRL in the Report of its Study Group on the Fragmentation of International Law.⁵⁵

B. Alternatives to the *Lex Specialis* Principle

The ECtHR has avoided using the term '*lex specialis*', but has recently finally accepted that human rights guarantees 'should be accommodated, as far as possible' within applicable provisions of IHL treaties.⁵⁶ In scholarly writings, the employment of the *lex specialis* principle to discuss the relationship between IHL and IHRL is increasingly contested.⁵⁷ Although scholars invariably point out that the ICJ dropped the term in the latest relevant

case,⁵⁸ the ICJ did not provide any suggestions for alternative ways that contradictions between the two branches could be resolved.

Some of the critics want to apply IHL and IHRL cumulatively.⁵⁹ They may indeed base their views upon what international tribunals actually do and upon a textual reading of most resolutions of the Security Council.⁶⁰ However, in practice, this would mean IHRL (p. 392) completely overriding IHL on crucial issues like the admissible degree of the use of force and the admissible reasons of detention, because states would always have to respect the more demanding and restrictive standards of IHRL to comply with their international obligations (unless, of course, they derogate from their IHRL obligations). This leads to unrealistic results that are not even suggested by proponents of this approach (eg under the ECHR POWs could not be interned or combatants could only be attacked if they presented an immediate threat to human life).

Others seek to solve possible contradictions through systemic integration or interpretation, taking other applicable rules of international law into account, as prescribed by article 31(3)(c) of the Vienna Convention on the Law of Treaties 1969.⁶¹ This is indeed what the ECtHR claimed to do when it ‘accommodated’ the requirements of article 5 of the ECHR within IHL.⁶² However, it is not possible to add—to a list of five exhaustively enumerated reasons justifying a deprivation of liberty in article 5 of the ECHR—a *sixth* admissible reason, and consider this addition an ‘interpretation’ of the original five reasons. This case can only be solved by letting the IHL provisions prevail as *lex specialis* (while admittedly for other human rights instruments, the same result can be achieved by merely interpreting the term ‘arbitrary’ in the prohibitions on deprivations of life and personal liberty in light of the applicable IHL).

Still other scholars suggest a flexible set of variables, depending on the case to be decided. They want to find the solution on a spectrum between, on the one hand, situations where IHRL is only breached if IHL is breached and, on the other hand, situations in which the two branches have to be blended, rather than necessarily taking a uniform approach to the interaction across the board.⁶³ It may indeed be the case that in actual practice the relationship between IHL and IHRL varies depending on the subject matter or rules in question. This may be an intellectually correct description of what human rights organs and decision makers do, but it is too sophisticated an approach to be applied in practice by a soldier who has to decide in split seconds whether to target under IHL, or to issue a warning and attempt arrest under IHRL. It opens the door to abuse, subjectivity, and manipulation.

Finally, some go one step further and seek, in some cases, to abandon, at least for international law, the pretence that the legal order provides only one solution—and therefore I would add *any solution*. They prefer to solve the few real conflicts through the political process.⁶⁴ This is, in my view, a surrender of law as a distinct science. The grand delusion of law, but at the same time the essence of the rule of law, is that decision-makers apply norms, including when they contradict other norms, according to legal rules and *not* according to policy preferences.

(p. 393) C. Factors Blurring the Debate on What Prevails When IHL and IHRL Contradict Each Other

Debates on what applies when IHL and IHRL differ are often confused by unresolved controversies about questions that have nothing to do with the relationship between IHL and IHRL, but rather involve uncertainties pertaining either to one or the other of the two branches, to definitions and terminology, or to the understanding of what the term *lex specialis* means.

1. What is a contradiction?

First, one needs to clarify when two rules may be considered to lead to different solutions.⁶⁵ The most restrictive understanding is that two rules only differ if one prescribes certain conduct that the other rule prohibits (all other divergences requiring merely systemic interpretation of rules in conformity with the rest of international law).⁶⁶ If this is correct, the only contradiction between IHL and IHRL I am aware of is that between the prohibition on bringing civilians before military courts under the jurisprudence of the ECtHR⁶⁷ and the obligation of an occupying power to try civilians for security offences *only* before its military courts⁶⁸ under IHL applicable in military occupation (the establishment of civilian courts by an occupying power being tantamount to annexation).

A broader understanding of contradictions would also cover *potential* conflicts, namely situations in which IHL does not prohibit or—according to many—even authorizes conduct prohibited by IHRL (eg, interning enemy combatants without any individual procedure to determine the legality of such internment).⁶⁹ Although below I will explain my doubts as to whether many IHL rules actually authorize conduct, it remains that I prefer this wider understanding of contradictions. Moreover, I suggest applying the *lex specialis* principle equally when a rule of either branch provides additional details as compared to the other. I admit, however, that such cases may simply be solved by systemic interpretation or integration.

2. Does IHL provide for authorizations?

If IHL does provide for authorizations, such authorizations may either contradict prohibitions foreseen in IHRL or provide the legal basis required by IHRL for legitimate limitations on human rights. In a discussion of the relationship between IHL and IHRL, it is therefore necessary to enquire whether IHL contains such authorizations.

When Henry Dunant initiated the codification of modern IHL after the battle of Solferino, it was seen as requiring states (and, later, armed groups) to do certain things—for (p. 394) example, to collect and care for the wounded and sick—and as prohibiting other things—for instance, attacks on medical personnel. All existing treaty IHL may still be read in this sense. Some states, in particular the US since the beginning of its ‘war on terror’, increasingly argue, however, that IHL equally provides authorization for certain conduct. The question of whether states need authorization under international law at all or whether it is sufficient that they do not violate legal prohibitions has haunted international law since the famous *Lotus* case before the Permanent Court of International Justice in 1927.⁷⁰ In the field of IHL, the famous Martens Clause of 1899 adds complexity to this debate, according to which:

... in cases not included in the Regulations ... 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.⁷¹

This fundamental challenge for the theory of international (humanitarian) law is overshadowed by a very practical requirement of IHRL. Interferences in human rights, in particular in the rights to life and personal freedom, must have a legal basis.⁷²

For IACs, it is difficult to deny that IHL contains certain authorizations. Many consider that combatant privilege implies a ‘right to kill’ enemy combatants.⁷³ Article 43(2) of API indeed states that ‘combatants ... have the right to participate directly in hostilities’. Concerning the deprivation of personal freedom of POWs, the case is even clearer. Article 21 of GCIII states: ‘[t]he Detaining Power may subject prisoners of war to internment’. No state has legislated to provide a legal basis for interning POWs or to provide for any procedure for deciding to intern them, which would be required by most domestic laws and IHRL, if IHL

itself did not authorize, and constitute a sufficient legal basis for, the internment of POWs without any individual assessment.

Treaty IHL of NIACs does not contain any similar explicit rules that could be seen as authorizing deliberate killings or detention without trial. Admittedly, neither does it prohibit detention without trial or targeting members of armed groups (except if they have laid down their arms). For such issues not regulated by an IHL rule as the *lex specialis*, one would therefore normally have to look to the IHRL rule, which allows deliberate killings only if they are absolutely necessary to protect human life (or to quell a riot),⁷⁴ and internment only where there is a legal basis and the possibility to challenge the detention's lawfulness before a court.⁷⁵ However, if the IHL of IACs was applied by analogy or *qua* customary law to NIACs, targeted killings of suspected associates of Al Qaeda would be authorized (as (p. 395) the Obama Administration argued). Similarly, the internment of members of armed groups based upon the 'laws of war' and in the absence of individual determination would be authorized (as the Bush Administration initially argued for those held in Guantánamo).⁷⁶

In December 2015, states adopted, by consensus, a resolution entitled 'Strengthening international humanitarian law protecting persons deprived of their liberty' which, however, recognized in a preambular paragraph that 'under international humanitarian law (IHL) States [but, interestingly, not armed groups] have in all forms of armed conflicts ... the power to detain'.⁷⁷ This would mean that IHL, which was intended to protect those affected by armed conflicts, has become a justification for denying persons detained by states in NIACs protections under IHRL and domestic legislation. I have serious doubts as to whether any human rights body or domestic judge would recognize such an inherent authorization to detain in NIACs as a sufficient legal basis for depriving persons of their freedom. I doubt even more that such alleged IHL authorization may, as *lex specialis*, dispense with *habeas corpus* guarantees under IHRL. For the time being, UK courts share both doubts.⁷⁸ The possible legal reasons to justify such authorization—an analogy to IHL of IACs (which is very different in this respect), or an alleged customary rule (which fortunately lacks sufficiently widespread state practice)—are, in my view, very weak.

3. Controversies concerning the meaning and applicability of the *lex specialis* principle

The meaning of the *lex specialis* principle and its field of application are controversial even among those who use this terminology. Some claim it applies only to contradictions between rules of the same treaty or the same branch of international law.⁷⁹ I have myself expressed doubt as to whether the principle can resolve contradictions between customary rules, if these are—as they should traditionally be—derived from state practice and *opinio juris* (however, I admitted that the *lex specialis* principle may be used when customary rules are derived from written texts).⁸⁰

The relationship between the *lex posterior* principle (namely that the later rule prevails over the earlier rule) and the *lex specialis* principle is not without controversy either. In my view, the *lex specialis* principle is only meaningful if it prevails over the *lex posterior* principle.⁸¹ In any case, for regimes such as IHL and IHRL, which are constantly developed by (p. 396) new treaties, soft law, state practice, and jurisprudence, it would be difficult to determine the *lex posterior*. Some use the *lex specialis* principle only to avoid norm conflicts through interpretation and not to solve norm conflicts.⁸² However, a strict distinction between norm conflict avoidance and norm conflict resolution is artificial, especially in international law.

Finally, and most importantly, the very meaning of the principle, in particular when applied to the relationship between IHL and IHRL, is controversial. Some hold that it concerns the relationship between two branches of law.⁸³ They conclude that in armed conflicts, IHL always prevails. For some persons, who could be called ‘absolute IHL supremacists’, any silence in IHL is qualified and means no rule of international law regulates the respective conduct or issue. This approach, in effect, denies that IHRL applies to armed conflicts.

Others, whom I would label ‘moderate IHL supremacists’, admit that issues not regulated by IHL (such as freedom of opinion or the press, or the right to form trade unions) remain governed by IHRL in an armed conflict (except if the state concerned derogates from the respective right). However, they contend that as soon as any regulation by IHL exists, it must prevail as *lex specialis*, at least in the case of a genuine norm conflict that cannot be avoided by suitably interpreting the rules of both branches.⁸⁴

A third approach borrows from IHRL the rule of interpretation according to which, in case of contradiction between IHRL rules, the most protective prevails.⁸⁵ This view neglects that the object and purpose of IHL is not only to offer the best possible protection to individuals, but also to find a balance between humanity and military necessity. These ‘protection supremacists’, in fact, adopt a cumulative approach to the relationship between the two branches, which results, in practice, in IHRL (which, in theory, prescribes more far-reaching prohibitions and other obligations) prevailing on any issue regulated by both branches. They forget that unrealistic rules do not offer any protection in practice and undermine the willingness of parties, and individual fighters, to comply with any rules of international law in an armed conflict.

What remains is a probably majoritarian view that I would label ‘the common contact surface area’ (between each of the norms and the facts of the case)⁸⁶ approach, which seeks to determine the *lex specialis* in every case of application, based upon logic and the overall systemic purposes of international law. I will detail this approach and explain why it leads to the same results as those reached by most scholars who criticize use of the *lex specialis* principle to describe the relationship between IHL and IHRL.

(p. 397) D. Suggested: A Nuanced and Case-by-Case Determination of the *Lex Specialis*

I have tried elsewhere to explore what the *lex specialis* principle means in general, and concerning IHL and IHRL in particular.⁸⁷ In my view, the principle does not indicate an inherent quality of one branch of law. It is not because IHL applies to and was designed for armed conflicts that it always constitutes the *lex specialis*.⁸⁸ In an armed conflict, IHL constitutes the *lex specialis* on certain questions, whereas IHRL is *lex specialis* on others.⁸⁹ This is, however, largely a question of terminology. One would reach the same practical results by considering that some issues are governed by IHL as *lex specialis*, and others by IHRL as the *lex generalis* (as long as one admits that the *lex generalis* may prevail even on issues on which the *lex specialis* contains a rule).

I do not believe the principle determines, once and for all, the relationship between two rules. Rather, it determines which rule prevails over another in a particular situation.⁹⁰ Each case must be analysed individually.⁹¹ Several factors must be weighed to determine which rule, in relation to a certain problem, is special. Specialty, in the logical sense, implies that the norm that applies to a certain set of facts must give way to the norm that applies to that same set of facts as well as to an additional fact that is present in a given situation. Between two applicable rules, the one which has the larger ‘common contact surface area’ with the facts of the problems at hand applies. It is the norm with the more precise or narrower material and/or personal scope of application that prevails.⁹² Precision requires that the norm addressing a problem explicitly prevails over the one that treats it implicitly, one that provides more details prevails over another’s generality,⁹³ and a more

restrictive norm prevails over one that covers a problem fully but in a less exacting manner.⁹⁴

A less formal (and less objective) factor that permits determination of the *lex specialis* is the conformity of the solution to the systemic objectives of the law.⁹⁵ Characterizing this solution as '*lex specialis*' perhaps constitutes misuse of language. The systemic order of international law is a normative postulate founded upon value judgments.⁹⁶ In particular when formal standards do not indicate a clear result, this teleological criterion must weigh in, even though it creates space for subjective value judgments.⁹⁷

(p. 398) In my view, most who apply both branches (which is not the case for some IHRL mechanisms) apply the 'common contact area' approach, even if they do not call this operation the determination of the *lex specialis*, but systemic integration or interpretation. To call this mere interpretation is, in my view, abusive if one branch contains no term that could be interpreted by taking the other branch into account, and also when it comes to the application of concurrent customary rules. The practical results of my approach are very similar, but hopefully more predictable, than those derived from situating an issue on a spectrum according to a flexible set of variables.⁹⁸

To reject the *lex specialis* principle because its applicability and meaning are controversial⁹⁹ is as justifiable as rejecting the right to self-defence in the *jus ad bellum* or the precautionary principle in international environmental law, because their meanings are subject to many controversies. The almost allergic reaction of some to the term *lex specialis* is, in my view, caused by a fear of being seen to be among the ranks of the absolute or moderate IHL supremacists (who use this term), or, more practically, as supporting drone attacks against suspected Al Qaeda operatives or indefinite detention in Guantánamo. In reality, those attacks and detentions are justified by the US and its supporters by a combination of interpretations about the geographical scope of IHL and its validity as a source of authorization, as well as broad conceptions concerning NIACs, legitimate targets of attacks, and enemy combatants.

In practice, for IACs, IHL is generally the more specific regime and corresponds to the overall normative purpose of international law. The situation in occupied territories is more nuanced. In particular when it comes to the use of force, the *lex specialis* has to be determined according to whether certain conduct is part of a law enforcement operation or a military operation, simply because IHL of military occupation does not contain detailed rules on how an occupying power may (indeed, must) restore and maintain law and order.¹⁰⁰

In NIACs, the determination of the *lex specialis* is more difficult for several reasons. First, IHL rules applicable in such conflicts are often determined by analogy to those applicable to IACs (an operation often disguised as the search for customary law). Historically, the push in favour of such analogies originated in humanitarian attempts to carry definitions, prohibitions, and prescriptions over to the realm of NIACs, but today, the analogies are also made with respect to 'authorizations'. Second, if IHL protections in NIACs are mainly situated in customary law, the question arises whether customary IHL of NIACs and customary IHRL in NIACs exist separately, or whether, based upon practice and *opinio juris*, only one rule of customary law rule applicable to a certain problem can exist (and no *lex specialis* determination is therefore necessary).

Third, it is unclear whether the more limited regulatory density of IHL of NIACs necessarily makes IHRL, as interpreted and developed by judicial bodies and soft law, the *lex specialis*. Furthermore, does the *lex specialis* change each time either a human rights body (p. 399) clarifies IHRL or an international criminal tribunal clarifies IHL? Fourth, if armed groups are only bound by IHL, but governments also by IHRL, both sides do not have to fight according to the same rules, because the government would, in some circumstances, have to apply the more protective *lex specialis* IHRL, while the armed group the less protective

IHL. In my view, this is acceptable, because the equality of belligerents is a principle of IHL and not of IHRL.¹⁰¹ The same question arises even if it is held that armed groups are bound by IHRL, because the rules of the latter for armed groups are not the same as for states.¹⁰²

Fifth, this problem of asymmetry also exists in the opposite sense, privileging governments, as neither IHL nor IHRL prohibit a state from prosecuting rebels who committed acts of hostility against government soldiers or military objectives. Even those who claim that rebels may legislate will find it difficult to argue that such legislation binds government soldiers when they are not under rebel control. Sixth, even persons who are not under the control of a state are protected by IHRL vis-à-vis that state if they find themselves on its territory.¹⁰³ It may nevertheless be that the determination of which obligation constitutes the *lex specialis* for the state must be different for persons who are under the control of an armed group than for those who are not.

Despite all this, as mentioned in section 2 ‘Traditional Differences’ above, even in NIACs both branches lead to the same results on most issues. It is only on the admissibility of attacks against and internment of rebel fighters that IHL leads to different and clearly less protective results than IHRL (at least according to the majority of commentators, who applies to NIACs the same rules as IACs by analogy or *qua* customary law). Possible solutions are discussed in chapters 7 ‘International Humanitarian Law and the Conduct of Hostilities’ and 11 ‘Weapons’ in this volume, and I have explained my opinion elsewhere.¹⁰⁴

5. Implementation of the Rules of One Branch by the Mechanisms of the Other Branch

Apart from the general implementation mechanisms of public international law, to which both branches belong, each branch has its own distinct enforcement mechanisms. They are applied by distinct epistemic communities, which have a tendency to persist in their traditional approaches even when dealing with the other branch. In addition, transparency and democratic control play a greater role for IHRL, while criminalization of certain violations and enforcement through (international) criminal tribunals have recently played a much greater role for IHL. This leads to distinct challenges for evidence gathering and standards of proof. At least traditionally, and putting the international criminal law aspect aside, investigations and international and domestic judicial processes play a greater role for IHRL. In contrast, the approach of the IHL implementation mechanism par excellence—the ICRC—is focused on practical results for war victims, action in the field, access, dialogue, cooperation with parties, and confidentiality. Nevertheless, on both sides of the divide, the implementing mechanisms of one branch increasingly take the other branch into account.

(p. 400) A. Human Rights Mechanisms Increasingly Refer to and Enforce IHL

As states reject new mechanisms dealing with violations of IHL during armed conflict,¹⁰⁵ it is not astonishing that victims, non-governmental organizations (NGOs), and states turn to a variety of IHRL mechanisms—some of which lead to binding decisions and can be triggered by individual victims of IHRL violations—to enforce respect for IHL. For this purpose, claimants have to couch IHL violations in IHRL language, which is not particularly arduous given the increasing convergence of the substantive rules of both branches, as demonstrated above. UN Charter-based mechanisms have historically labelled IHL as ‘human rights in armed conflicts’¹⁰⁶ and in its Universal Periodic Review of the human rights performance of all states the UN Human Rights Council is entrusted, ‘given the complementary and mutually interrelated nature of international human rights law and

international humanitarian law, ... [with taking] into account applicable international humanitarian law'.¹⁰⁷

Regional and universal IHRL treaty bodies may base their references to IHL on a variety of reasons. They must verify that derogations are compatible with IHL.¹⁰⁸ In line with this, the ECHR considers the right to life as non-derogable, except for 'lawful acts of war'.¹⁰⁹ IHL defines what is lawful in 'war'. It may also be considered to specify what action may be 'lawfully taken for the purpose of quelling insurrection',¹¹⁰ in which case a derogation is not even necessary under the ECHR in a NIAC. More broadly, many terms in IHL treaties, such as the prohibitions of 'arbitrary' killings and detention, may and must be interpreted taking other applicable rules of international law into account, which include, in armed conflicts, those of IHL. Finally, as explained in section 4 'How to Deal with Divergences if Both Branches Apply' above, most IHRL treaty bodies take IHL into account as the *lex specialis*, and recently even the ECtHR, which was for a long time reluctant to apply IHL, has decided that it must 'accommodate' the ECHR with respect to applicable IHL.

As long as states refuse to accept efficient IHL enforcement mechanisms, the turn to IHRL mechanisms is inevitable. It is nevertheless not without risks. The epistemic IHRL community is distinct from the IHL community. As explained, there are fundamental differences in structure, approach, and values between IHL and IHRL. Judges and members of other IHRL bodies are often not familiar with IHL and with the practical problems its implementation raises, particularly from a military perspective. Therefore, decisions by IHRL bodies that declare they have taken IHL into account contribute as much to the substantive fragmentation of international law as if they had based their decisions, even in armed conflicts, exclusively on IHRL. Finally, as violations of IHL are much more widely criminalized as war crimes, the finding of an IHRL violation in an armed conflict may be based upon (p. 401) standards of proof that would never be sufficient to try a war criminal, but give the erroneous impression (and sometimes even explicitly state) that war crimes were committed.

B. The ICRC Increasingly Refers to and Enforces IHRL

The main international body implementing IHL, the ICRC, has for a long time been engaged in activities in situations of internal violence similar to those it performs in IACs. During such situations, IHL does not apply. In the past, implicitly, and today more and more explicitly—while maintaining its pragmatic, cooperative, and victim-oriented approach—the ICRC must therefore refer to the applicable international standards in IHRL. Even in armed conflicts, the ICRC increasingly refers explicitly to IHRL where IHL provides no rules or insufficiently detailed rules, for example, on procedural principles and safeguards for internment or administrative detention in NIACs,¹¹¹ or on the rules applicable to law enforcement in armed conflicts.¹¹²

6. Concluding Observations

Some of the situations for which the interplay between IHL and IHRL are discussed are not armed conflicts and therefore only IHRL applies, subject to debate over its active personal and territorial scope of application. Today, genuine armed conflicts are mainly not of an international character. In such situations, the relationship between IHL and IHRL is particularly controversial and difficult to determine. Nevertheless, both IHL and IHRL lead, in most cases, to the same results. The few instances where the results differ reflect the characteristic problems the regimes were intended to govern. The applicable rules should therefore not be the same; otherwise they would be unrealistic and fail to meet with respect.

Even in those instances when results differ, states could do a lot to harmonize their obligations under both branches, by resorting to derogations permitted under IHRL, one of the means offered by international law to harmonize their IHRL obligations with their IHL obligations. Beyond this, legal reasoning allows for differentiated solutions on when and on which issues one or the other branch prevails. Whether this reasoning is labelled the search for the *lex specialis*, systemic integration or interpretation, or whether a new flexible sliding scale taking several factors into account is applied, the result is often the same.

Lawyers must, however, be careful to ensure that the results of such reasoning are realistic for those engaged on the ground. In an ideal world, armed forces and armed groups could apply one set of rules, or, after a binary, alternative determination, either IHL or IHRL. This ideal world does not exist in today's armed conflicts. Their feature is precisely that the full spectrum of laws applies to everyone involved: IHL, made for armed conflicts but leaving some questions open, in particular in NIACs; IHRL, made for the relations between a state (p. 402) and its citizens, but also applicable to (or at least containing values that must protect) people confronted with agents of a state acting outside its borders; not to mention domestic law (of the territorial state and the home state in case of action by international forces). It is also normal that there is no general answer as to how these laws interrelate and which one prevails. In my view, everything depends on where on the spectrum between the typical armed conflict problems for which IHL was made, and the typical peacetime problems for which IHRL was made, a certain event is situated. Therefore, the relationship between IHL and IHRL depends on many variables. The identity and weight of those variables is the subject of additional controversies among lawyers.

Many will consider this nuanced line, which I call the determination of the *lex specialis* (while others insist it has nothing to do with the principle), and which admittedly is unable to provide solutions and can only list arguments in relation to some important issues, as unrealistic. In my view, military operations—difficult to classify and often covering the full spectrum from hostilities to law enforcement—require those involved, at increasingly lower hierarchical levels, to apply, simultaneously, a patchwork of complicated and controversial rules. However, they are not and should not be left alone in working out solutions to practical problems. This is true for government forces, but even more so for armed groups; otherwise every hope that they respect IHL vanishes. All those involved need the best possible training and clear instructions for every sortie; instructions anyway do not simply translate the law, but are often—for tactical, policy, or perception reasons—more restrictive than the law would permit.

In addition, international lawyers and practitioners should meet, not to reaffirm their theories or to conclude that the old rules are not adequate for new situations, but to clarify the interplay between the existing rules agreed upon by states. This includes explaining the few issues on which there are genuine divergences of views, the (often rather limited) practical impact of those divergences, and exploring the possible solutions available. Although this may sound like heresy to state representatives obsessed with sovereignty, such a process must include representatives of armed groups and deal with the specific difficulties such groups are confronted with. States, NGOs, and in addition, when discussing the relationship between the two branches, scholars should not be driven by their preferred outcomes and preconceived ideas of their epistemic communities to characterize the solutions of the other branch either as unrealistic or as inhumane. IHRL can be realistic and IHL can be humane.

Footnotes:

* I would like to warmly thank Ms. Yvette Issar, LL.M., then research assistant and doctoral candidate at the University of Geneva, for her research, for her useful and challenging comments and for having revised this text, which has been written in 2016 and only very slightly updated in 2019.

1 See for an extreme view Henri Meyrowitz, 'Le droit de la guerre et les droits de l'homme' (1972) 88(5) *Rev Droit Pen Mil & Droit Guerre* 1059.

2 See 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 4; 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 4.

3 Such as the rights to life, health, and personal freedom.

4 For instance, the right to peace is by definition violated in armed conflicts and cannot be protected by IHL. The exercise of the right to self-determination through the use of force is one of the situations to which IHL of IACs applies, but that right cannot be protected by IHL.

5 Thus the detailed precautionary measures in attack mentioned in 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 (API) article 57 translate the right to life and physical integrity of civilians into detailed rules of behaviour for those who conduct hostilities.

6 Thus API article 41 protects the right to life of those who are *hors de combat*.

7 Thus 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 protects the right to health of wounded soldiers.

8 Thus API articles 55–56 protect the right to a healthy environment.

9 See currently GCI article 12 and Geneva Conventions Common Article 3(2).

10 See GCI article 12; 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 12 October 1949) 75 UNTS 85 (GCII) article 13(2); GCIV article 27.

11 International Committee of the Red Cross (ICRC), 'The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms, Expert Meeting Report' (ICRC 2013) iii, 6, 14, 16, 59.

12 See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules* (CUP 2005) (CIHL).

13 See Marco Sassòli, 'The Convergence of the International Humanitarian Law of Non-International and of International Armed Conflicts: Dark Side of a Good Idea', in Giovanni Biaggini, Oliver Diggelmann, and Christine Kaufmann (eds), *Polis und Kosmopolis: Festschrift für Daniel Thürer* (Nomos 2015) 678.

14 See, for a comprehensive overview, Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Isr L Rev* 310, 314–17, 320–24.

15 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953, 213 UNTS 222 (ECHR) article 15.

- 16** *Hassan v UK* App No 29750/09 (ECtHR, 16 September 2014) paras 99–103.
- 17** See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 4; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143 (ACHR) article 27.
- 18** ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* UN Doc A/56/10 (November 2001), *Commentary*, article 25, [19], and [21]. The ICJ left this question open: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) [2004] ICJ Rep 136 (*Palestinian Wall* case) para 140.
- 19** ACHR article 1; ECHR article 1.
- 20** *Loizidou v Turkey* ECHR 1996-VI 2216 para 56; *Cyprus v Turkey* ECHR 2001-IV para 77.
- 21** ICCPR article 2(1) (emphasis added).
- 22** See Michael J Dennis, ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’ (2005) 99 *AJIL* 119, 123–4.
- 23** *Palestinian Wall* case, paras 107–112; *Armed Activities on the Territory of the Congo (Dem Rep Congo v Uganda)* (Merits) [2005] ICJ Rep 168 (*Armed Activities* case), paras 216–217.
- 24** UN Human Rights Committee (UNHRC), ‘Concluding Observations of the Human Rights Committee: Israel’ UN Doc CCPR/C/79/Add.93 (18 August 1998) para 10; UNHRC, ‘General Comment No 31 [80], The Nature of the General Legal Obligation on States Parties to the Covenant’ UN Doc CCPR/C/21/Rev.1/Add.13 (General Comment No 31) (26 May 2004) para 10.
- 25** UK Ministry of Defence (MoD), *The Manual of the Law of Armed Conflict* (OUP 2004) 282.
- 26** The ICJ held in the *Palestinian Wall* case, para 112 that an occupying power was only bound by economic social and cultural rights ‘[i]n the exercise of the powers available to it on this basis’, but had in addition ‘an obligation not to raise any obstacle to the exercise of such rights in those fields’ where it had no jurisdiction.
- 27** *Hassan* (above n 16) paras 75–76. A comprehensive overview may be found in *Al Skeini v UK* App No 55721/07 (ECtHR, 7 July 2011) paras 130–42.
- 28** Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (OUP 2010) 220–4.
- 29** See John Cerone, ‘Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations’ (2006) 39 *Vand J Transnat’l L* 1447, 1494–507; Ralph Wilde, ‘Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties’, in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights: Towards a New Merger in International Law* (Martinus Nijhoff 2008) 144–52.
- 30** *Prosecutor v Tadić* (Judgment) ICTY-94-1 (7 May 1997) paras 573–575.
- 31** See Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005) 38–61.
- 32** August Reinisch, ‘The Changing International Legal Framework for Dealing with Non-State Actors’, in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005) 38, referred to a ‘radical conceptual change in the way we use and think about human rights’ and ‘a new awareness of the need to protect human rights, beyond the classic paradigm of the powerful state against the weak individual, to include protection against increasingly powerful non-state actors’. See also Daragh Murray, *Human Rights Obligations of Non-State*

Armed Groups (Hart 2016); Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (OUP 2017); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006); Andrea Bianchi, 'Globalization of Human Rights: The Role of Non-state Actors', in Gunther Teubner (ed), *Global Law Without a State* (Dartmouth 1997); Tilman Rodenhäuser, *Organizing Rebellion, Non-State Armed Groups under International Humanitarian Law, Human Rights Law and International Criminal Law* (OUP 2018) 115–212,

33 The term 'abuse' was preferred for armed groups, as the traditional view held that strictly speaking armed groups could not 'violate' human rights. For an endorsement of the traditional approach by an eminent human rights defender, see Nigel S Rodley, 'Can Armed Opposition Groups Violate Human Rights Standards?', in Kathleen Mahoney and Paul Mahoney (eds) *Human Rights in the Twenty-First Century* (Kluwer 1993) 297.

34 Office of the High Commissioner for Human Rights (OHCHR), *International Legal Protection of Human Rights in Armed Conflicts* (United Nations 2011) 24 (emphasis added).

35 See Aristoteles Constantinides, 'Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council' (2010) 4 *HR&ILD* 89.

36 See Seura Yun, 'Breaking Imaginary Barriers: Obligations of Armed Non-State Actors under General Human Rights Law—the Case of the Optional Protocol to the Convention on the Rights of the Child' [2014] *JIHLS* 213, saying that 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) 2171 UNTS 227 article 4(1), prescribing that armed groups 'should' not engage in certain conduct, was meant to create full legal obligations. The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 22 October 2009; entered into force 6 December 2012) (2010) 49 ILM 83, article 7(1) also addresses armed groups.

37 See Constantinides (above n 35) 101–3.

38 Yaël Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 *Cornell ILJ* 21, 25–7.

39 *ibid* 22; Jonathan Somer, 'Education and Armed Non-State Actors: Towards a Comprehensive Agenda' (Background Paper for the PEIC/Geneva Call Workshop, PEIC 2015), 26.

40 Ronen (above n 38) 30–1: 'The existing human rights catalogue is, by definition, a catalogue of human rights in state-individual relations. An international human rights catalogue tailored for other relationships, namely between individuals and actors other than states, might well differ from the one currently prevailing.' See also Murray (above n 32) 172–202, proposing a graduated application of IHRL obligations to NSAGs, and 205–71, testing such approach with respect to the right to prosecution, detention, and the right to health.

41 See Ronen (above n 38); Fortin (above n 32) 240–84, and Murray (above n 32) 120–54.

42 See UNSC, 'Report of the Secretary-General on Children and Armed Conflict' UN Doc S/2002/1299 (2002) para 3; UNHRC, 'Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy' UN Doc A/HRC/15/58 (2010) para 16.

43 Somer (above n 39) 26.

- 44** *Prosecutor v Tadić* (Decision on the Defence Motion on Jurisdiction) ICTY-94-1 (2 October 1995) para 70; *Prosecutor v Akayesu* (Judgment) ICTR-96-4-A, A Ch (1 June 2001) paras 425–446.
- 45** See Lindsey Cameron and Vincent Chetail, *Privatizing War, Private Military and Security Companies under Public International Law* (CUP 2013) 350–82, with further references.
- 46** Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Resolution 217 A(III) (UDHR) article 29; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 articles 27, 28.
- 47** See eg *Mahmut Kaya v Turkey, Merits, App No 22535/93*, ECHR 2000-III, Judgment of 28 March 2000, especially [85]–[101].
- 48** See the US Alien Torts Claims Act 28 USC para 1350.
- 49** See 'Montreux Document on Pertinent International Legal Obligations and Good Practices of States Related to Operations of Private Military and Security Companies during Armed Conflicts, 17 September 2008' (Swiss Department of Foreign Affairs and ICRC).
- 50** See eg Organisation for Economic Co-Operation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (2000 rev, OECD 2008); 'Voluntary Principles for Security and Human Rights' www.voluntaryprinciples.org; 'The International Code of Conduct for Private Security Service Providers (ICoC)' (9 November 2010) http://icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf.
- 51** See also generally on human rights obligations of business companies United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (HR/PUB/11/04) (UN 2011). See also specifically on private military and security companies Lindsey Cameron, 'Private Military Companies: Their Status under International Humanitarian Law and Its Impact on their Regulation' (2006) 863 *IRRC* 574, 595–6, and Nicki Boldt, 'Outsourcing War: Private Military Companies and International Humanitarian Law' (2004) 47 *German YB Int'l L* 502, at 529, on private military companies' self-imposed codes of conduct.
- 52** *Legality of the Threat of Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 66 (*Nuclear Weapons*), para 25.
- 53** *Coard v United States*, Case No 10.951, Report No 109/99, IACommHR (29 September 1999) paras 38–44; see also Inter-American Commission of Human Rights (IACommHR), 'Detainees in Guantánamo Bay, Cuba (Request for Precautionary Measures)' (2002) 41 *ILM* 532.
- 54** General Comment No 31 (above n 24), para 11.
- 55** International Law Commission (ILC), 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission' UN Doc A/CN.4/L.682 (1 May–9 June and 3 July–11 August 2006, finalized by Martti Koskenniemi) paras 104–105.
- 56** *Hassan* (above n 16), para 104.
- 57** Nancie Prud'homme, 'Lex Specialis: Oversimplifying A More Complex and Multifaceted Relationship?' (2007) 40 *ILR* 356, 378–86; Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (CUP 2015) 88, 95, 99, 103–4; Marko Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law', in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 98, 115, 116, 124; Françoise Hampson and Noam Lubell, 'Amicus Curiae Brief Submitted to the

ECtHR in *Hassan v UK* (Human Rights Centre University of Essex 2014) 18 www.essex.ac.uk/hrc/documents/practice/amicus-curiae.pdf.

58 *Armed Activities* case para 216.

59 Walter Kälin, *Human Rights in Times of Occupation: The Case of Kuwait* (Stämpfli 1994) 27.

60 Gloria Gaggioli, *L'influence mutuelle entre les Droits de l'Homme et le droit international humanitaire à la lumière du droit à la vie* (Pedone 2013) 39–40.

61 Jean D'Aspremont and Elodie Tranchez, 'The Quest for a Non-Conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?', in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Elgar 2013) 235–8, with further references.

62 *Hassan* (above n 16) para 104.

63 Hampson and Lubell (above n 57), paras 26–30. Their approach seems to develop the 'theory of harmonization' suggested by Prud'homme (above n 57) 386–93.

64 Milanović, 'Norm Conflicts' (above n 57) 98, 124.

65 See, for what follows, Joost Pauwelyn, *Conflict of Norms in Public International Law, How WTO Law Relates to other Rules of International Law* (CUP 2004) 164–200.

66 Wilfred Jenks, 'Conflict of Law-Making Treaties' (1953) 30 *BYIL* 401, 426; Wolfram Karl, 'Conflicts between Treaties', in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law, Vol VII* (North-Holland 1984) 468; Hans Kelsen, *Reine Rechtslehre* (2nd edn, Verlag Franz Deuticke 1960) 209; Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction: The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35 *JWT* 1081, 1084.

67 *Cyprus v Turkey* (above n 20) paras 354–59.

68 GCIV article 66.

69 Koskeniemi (above n 55) paras 24–25; Gaggioli (above n 60) 51; Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented System: The Doctrine of Lex Specialis' (2005) 74 *Nordic J Int'l L* 27, 46; Pauwelyn (above n 65) 167–70.

70 *SS Lotus (France v Turkey)* (Judgment) PCIJ Series A No 10 para 53.

71 Preamble of Hague 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).

72 See eg ICCPR articles 6 and 9(1); Human Rights Committee (HRC), 'General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' CCPR/C/GC/36 (30 October 2018) paras 11 and 13 https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf; HRC, 'General Comment No. 35—Article 9 (Liberty and Security of Person) CCPR/C/GC/35 (16 December 2014) para 11.

73 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn, CUP 2010) 33.

74 See eg ECHR article 2.

75 See eg *ibid* article 5.

76 Marco Sassòli, 'The International Legal Framework for Fighting Terrorists According to the Bush and Obama Administrations: Same or Different, Correct or Incorrect' (2011) *Proceedings of the 104th Annual Meeting of the ASIL* 277.

77 See Resolution 1, 'Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty', 32nd International Conference of the Red Cross and the Red Crescent 32IC/15/R1 (10 December 2015) para 1.

78 *Serdar Mohammed v Ministry of Defence* (2 May 2014) [2014] EWHC 1369 (QB), confirmed by the UK Court of Appeal, Civil Division, *Serdar Mohammed v Secretary of State for Defence* (30 June 2015) [2015] EWCA Civ 843, [2016] 2 WLR 247; and UN Working Group on Arbitrary Detention 'Report: United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court' UN Doc A/HRC/30/37 (6 July 2015) annex paras 31 and 96. The UK Supreme Court left this question open in *Abd Ali Hameed Al Waheed v Ministry of Defence and Serdar Mohammed v Ministry of Defence* (17 January 2017) [2017] UKSC 1 and [2017] UKSC 2 paras 14, 16, 44, 61, 133.

79 Oberleitner (above n 57) 89; Prud'homme (above n 57) 379–80; D'Aspremont and Tranchez (above n 61) 229–30.

80 Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Ben-Naftali (ed) (above n 57) 34, 72.

81 Thus also Marko Milanovic, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law', in Jens D Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 111.

82 Oberleitner (above n 57) 99; D'Aspremont and Tranchez (above n 61) 234; (if at all) Milanovic, 'The Lost Origins of Lex Specialis' (above n 81) 27–9.

83 This was the approach of the US under the Bush Administration (see 'Response of the US to the Request for Precautionary Measures on Behalf of the Detainees in Guantánamo Bay, Cuba', reprinted in (2002) 41 *ILM* 1015, 1020–1); UN Human Rights Committee 'Comments by the Government of the United States of America on the concluding observations of the Human Rights Committee' UN Doc CCPR/C/USA/CO/3/Rev.1/Add.112 (10 October 2007) para 12, and sometimes of Israel (Second Periodic Report of Israel UN Doc CCPR/C/ISR/2001/2 (4 December 2001) para 8) and Russia (*Georgia v Russia (II)* App No 38263/08 (ECtHR, 13 December 2011) para 69).

84 Heike Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11 *JC & SL* 265, 272; Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) *IRRC* 501, 524.

85 See Gloria Gaggioli and Robert Kolb, 'A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights' (2007) 37 *Isr YB HR* 115, 122, and *Juan Carlos Abella v Argentina* (Case No 11.137) Inter-American Commission of Human Rights (1997) paras 164–165, contradicting how it actually dealt with the case and later explained the *lex specialis* principle (*Abella* *ibid* paras 166–170, 176–189).

86 These terms were first used by Mary Ellen Walker, LLM Student at the Geneva Academy of International Humanitarian Law and Human Rights in my 2007–2008 IHL course.

87 Marco Sassòli, 'Le Droit International Humanitaire, une Lex Specialis par Rapport aux Droits Humains?', in Andreas Auer et al (eds), *Les Droits de l'Homme et la Constitution, Etudes en l'Honneur du Professeur Giorgio Malinverni* (Schulthess 2007) 375.

88 Oberleitner (above n 57) 97.

- 89** *ibid* 95, 101–3; Milanovic, ‘Norm Conflicts’ (above n 57) 116; Noam Lubell, ‘Challenges in Applying Human Rights Law to Armed Conflict’ (2005) 87 *IRRC* 737, 752.
- 90** Koskenniemi (above n 55) para 112; Krieger (above n 84) 269, 271; Philip Alston, Jason Morgan-Foster, and William Abresch, ‘The Competence of the UN Human Rights Council and Its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the “War on Terror” ’ (2008) 19 *EJIL* 183, 192; ILC, *Report of the International Law Commission on the Work of its 56th Session* UN Doc A/59/10 (3 May–4 June, 5 July–6 August 2004) para 304; Gaggioli (above n 60) 56–8, provides an example.
- 91** Lindroos (above n 69) 42.
- 92** Norberto Bobbio, ‘Des Critères pour Résoudre les Antinomies’, in C Perelman (ed), *Les Antinomies en Droit: Études* (Bruylant 1965) 244.
- 93** See eg Seyed-Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Martinus Nijhoff 2003) 124.
- 94** See eg the ECtHR concerning the relationship between ECHR articles 13 and 5(4), *Brannigan and McBride v UK* (1993) Series A No 258, 57 para 76.
- 95** Koskenniemi (above n 55), para 107.
- 96** Krieger (above n 84) 280.
- 97** Bobbio (above n 92) 240–1. See also Jenks (above n 66) 401, 450.
- 98** For details of the practical consequences I derive from my understanding of the *lex specialis* principle, see Sassòli, ‘The Role of Human Rights’ (above n 80) 72–8, 84–6, and 92–3.
- 99** Prud’homme (above n 57) 381–3; Milanovic, ‘Norm Conflicts’ (above n 57) 98 and 124; more nuanced, Andrew Clapham, ‘The Complex Relationship between the Geneva Conventions and International Human Rights Law’, in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions, A Commentary* (OUP 2015) 729.
- 100** ICRC, *Expert Meeting, Occupation and Other Forms of Administration of Foreign Territory* (ICRC 2012) 109–30.
- 101** See Marco Sassòli, ‘Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law’ (2010) 1 *JIHLS* 5, 20.
- 102** Murray (above n 32) 178; Fortin (above n 32) 160–70.
- 103** *Ilascu and others v Moldova and Russian Federation* ECHR 2004-VII para 333.
- 104** See Sassòli, ‘The Role of Human Rights’ (above 80) 78–93.
- 105** See the refusal of states to agree, after eight years of extensive consultations on a new mechanism proposed by the ICRC and Switzerland to strengthen compliance with IHL: 33rd International Conference of the Red Cross and the Red Crescent, ICRC and Switzerland, ‘Factual Report on the Proceedings of the Intergovernmental Process on Strengthening Respect for IHL’, Document 33IC/19/9.2 https://rcrcconference.org/app/uploads/2019/10/33IC-IHL-Compliance-factual-report_en.pdf.
- 106** See, UNGA Resolution 2444 (XXIII) (19 December 1968); ‘Human Rights in Armed Conflicts, Resolution XXIII of the International Conference on Human Rights, Teheran’ A/CONF.32/41 (12 May 1968).
- 107** UN Human Rights Council, ‘Resolution 5/1 of 18 June 2007, Annex: United Nations Human Rights Council: Institution-Building’, para 2, endorsed by UNGA Resolution 62/219 A/RES/62/219 (28 February 2008).

108 ECHR article 15; ICCPR article 4; ACHR article 27.

109 ECHR article 15(2).

110 *ibid* article 2(2).

111 Jelena Pejic, 'Procedural Principles and Safeguards for Internment: Administrative Detention in Armed Conflicts and Other Situations of Violence' (2005) 87 *IRRC* 375, 377-9, later published as ICRC, ICRC Guidelines, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', annex 1 to the ICRC's report, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', 30th International Conference of the Red Cross and Red Crescent (October 2007) 30IC/07/8.4.

112 See ICRC, 'The Use of Force in Armed Conflicts' (above n 11).

21 Implementation and Enforcement of International Humanitarian Law

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Introductory Remarks

1. *Implementation and enforcement in general.* In every legal order, there are actions or omissions that violate legal rules and obligations. This is true with regard to the international legal order and the rules of international humanitarian law as well. Although violations of international humanitarian law could mean that most horrible crimes are committed during armed conflicts, as attacking and killing civilians, they do *not* mean that the international legal order or international humanitarian law is not law anymore. In the twenty-first century, there is no place for the claim '*inter arma silent leges*'.¹ This does mean that there is—as in a national legal order—the need for a lawful counter-reaction in order to show that the violation of a certain humanitarian rule is a violation of *law*.² However, one of the peculiarities of international law is that its legal rules are not implemented and enforced via a central body or hierarchical institutions. In this respect, it differs fundamentally from domestic law.³ This general feature of the international legal order as an order of co-ordination does not exclude elements of hierarchy or weak forms of constitutionalization in some areas of international law.⁴ Such elements can be seen in the proliferation of international courts and tribunals,⁵ and in the area of the preservation of international peace and security. Within the latter, the Security Council, acting under Chapter VII Charter of the United Nations (UN), has the main competences.⁶ Apart from this, enforcement of international law lies with individual members of the international community, who have recourse to different enforcement methods.

(p. 691) 2. There are positive and negative structural features of this decentralized implementation: (1) Flexibility: there is no *per se* limited number of means of implementing in international law and international humanitarian law (no *numerus clausus*); therefore, different means of implementation can be modified and combined. (2) Power-sensibility: the *de facto* power of the subject (i.e. the state) implementing international humanitarian law is often decisive. This can be called the power-sensibility of the different means of implementation. (3) Overlapping norms and competences: due to the lack of a clear hierarchy of rules, there is the problem of overlapping areas of international law and overlapping competences of courts and tribunals. (4) Implementation deficits of rules protecting common values: there is a structural problem in the implementation of common values and concerns, especially with regard to obligations *erga omnes* and *jus cogens* norms.

3. Apart from these general features and problems of a decentralized implementation, there is an additional underlying problem in implementing and enforcing international humanitarian law. International humanitarian law has a *telos* that points in two different directions: on the one hand, there is the clear aim of international humanitarian law, especially after World War II (WWII), to not allow any kind of total or unlimited warfare. The main purpose of international humanitarian law is to restrict the methods and means of warfare and to protect certain persons and objects, above all to protect civilians and civilian objects. On the other hand, there is the need of not prohibiting the use of weapons altogether, since states are allowed to use military means in order to exercise their right of self-defence as confirmed in Article 51 UN Charter. Hence, humanitarian law tries to humanize an area which is *per se* inhumane. Implementing and enforcing law in such circumstances is one of the greatest efforts a legal order has to cope with.

4. In order to classify the various lawful reactions to violations of international law and international humanitarian law, the following differentiation seems to be convincing: *first*, there are so-called bilateral confrontative forms of implementation and enforcement of international legal obligations. This is mainly an implementation by lawful countermeasures, i.e. retorsions and reprisals.⁷ They are regarded as traditional forms of the enforcement of international law obligations by states.⁸ *Second*, there are non-confrontative means of implementation and enforcement in a general sense. This includes, for instance, the international law of state responsibility.⁹ Part of these non-confrontative means are all means of peaceful settlement according to Article 33 UN Charter.¹⁰ *Third*, there are non-confrontative means of implementation and enforcement by decisions and opinions of courts and tribunals. Most importantly, the decisions and opinions of the ICJ implement international humanitarian law. Apart from this, human rights bodies and courts are important in implementing the law applicable to armed conflicts.¹¹ A special kind of this way of implementing international humanitarian law is the criminal prosecution of certain individuals by national or international or hybrid courts or tribunals. The punishment of individuals as war criminals seems essential for the effective enforcement of international humanitarian law.¹² *Fourth*, there are special forms of implementation and (p. 692) enforcement which can be found only with regard to certain branches of international law. A special form of the implementation of international humanitarian law is the system of collective security, with the Security Council acting under Chapter VII Charter of the UN.¹³ International humanitarian law itself has developed specific instruments to secure both interstate and domestic enforcement. These support the institutions of protecting powers and substitutes (Article 5 AP I)¹⁴ and the International Fact-Finding Commission (Article 90 AP I).¹⁵

5. Within each individual state, continuous efforts are required to implement international humanitarian law effectively. Activities of states, international organizations, courts and tribunals, non-governmental organizations (NGOs), and individuals remain essential for the success of these efforts. The competence and responsibilities of the various actors and the interplay of their activities to ensure respect of international humanitarian law shall be discussed in this chapter.

I. General

21.01

Violations of international humanitarian law have been committed by parties to nearly every armed conflict. However, both published reports and internal findings show that the protective provisions of international humanitarian law have prevented or reduced great suffering in many cases.

Rules of law that are valid must be generally obeyed and must be effectively accepted as a common standard of official behaviour.¹⁶ International law faces similar problems concerning violations as other legal systems. This is not an excuse for violations, but it stresses that the realization of legal obligations largely depends on the effectiveness of law enforcement and implementation. One necessary condition for the effective implementation of humanitarian law is that its contents are known by persons involved in a conflict, especially the combatants, that those persons are aware that violations carry disciplinary or penal consequences, and that they realize that persistent breaches may lead to an escalation of the conflict. In this regard, compliance with humanitarian law is in the interest of every individual party to an armed conflict. The developments in many recent conflicts indicate that public opinion, particularly the mass media and information via social media and the internet, can be in a position to keep conflicts under surveillance and to document breaches of international humanitarian law to a certain extent.¹⁷ Furthermore, there is a growing tendency to use different means of public documentation as a tool to deter abuses

as well as to lay the foundations for later prosecutions. In recent times, the *Al-Werfalli* Case¹⁸ of the International Criminal Court (ICC) with regard to war crimes in Libya in 2016/2017 and—in the (p. 693) past—the inquiries of the Security Council and the Commission on Human Rights in the case of the Former Yugoslavia may be seen in this light.¹⁹ Apart from this, military leaders and responsible political organs are under an obligation to investigate possible breaches of humanitarian law, to suppress them, and to document corresponding investigations and measures taken.²⁰

21.02

Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control (Article 1 common to the Geneva Conventions; Article 1, para. 1, AP I; Rule 139 CIHL).

1. The wording of Article 1 common to the Geneva Convention and Article 1, para. 1, AP I states that the parties of the Geneva Conventions ‘undertake to respect and ensure respect for the present Convention in all circumstances’. These unconditional obligations do not depend on reciprocity.²¹ They are valid in regard to international armed conflicts covered by the GC and the AP I, and in regard to those duties in non-international armed conflicts that are embodied in Article 3 GC²² or spelt out in more detail, for example in AP II,²³ Article 1 GC forms part of customary international law.²⁴ According to this, a state is obliged to ensure that the rules of the GC and AP I are not violated by its organs or by any subjects²⁵ under its jurisdiction (persons acting under the command and—at least: overall—control of the state without belonging to its armed forces)²⁶ and to do everything within its possibilities to ensure universal compliance with the ‘humanitarian principles underlying the Conventions’.²⁷ Hence, it cannot be argued that violations of the GC, of the AP I and of customary law with the same content are lawful because of recourse to certain circumstances precluding wrongfulness, as for instance self-defence, consent of the victim state, a state of necessity, etc. Article 1 GC rejects the *tu quoque*- or *do-ut-des*²⁸-principle. This means the obligations of the GC and the AP I are not based on reciprocity.²⁹

(p. 694) 2. The obligation to ensure respect for international humanitarian law in all circumstances entails, for instance, using all possibilities of diplomatic action, resorting to the protecting powers institution and its substitutes, enforcing the system of prosecution and extradition of war criminals, calling upon the Fact-Finding Commission or using the naming and shaming of parties that breach the *jus in bello*.

3. These obligations have to be fulfilled by a state even if the Security Council authorizes the use of military means, as the armed forces remain under the command and control of that state; additionally, it is the UN’s duty to ensure respect for international humanitarian law.³⁰ That the obligations of states and the UN to respect and to ensure respect of humanitarian law have to be combined is expressly laid down in Article 89 AP I which states a duty of co-operation for certain serious violations.³¹

4. It is debatable whether it is convincing that Article 1 GC and Article 1, para. 1, AP I additionally obliges all parties of the GC and the AP I to take all possible steps at all times to ensure that these rules applicable in armed conflicts are respected by all other states. According to this reading, states and international organizations would have to take an active part in ensuring compliance and would also have to react against violations of these laws.³² This interpretation would mean that Article 1 GC imposes a universal obligation for states and international organizations that does not derive from other provisions of the Geneva Conventions.³³

21.03

States engaged in military co-operation must ensure legal interoperability in the event of any difference in legal obligations that may become relevant for certain operations. While such a difference would not exclude military co-operation as such, no state may request any act or omission, which would contravene any legal obligation of the requesting state or even the requested state. States bearing certain legal obligations may be obliged to encourage other states to accept them (Article 21 ClusterConv).

In armed conflicts, where a coalition of states against an adversary is involved, the difference in legal obligations can make co-operation difficult. If a coalition of states is using military means often some of the states are parties to the AP I and AP II, but others are only bound by the Hague and Geneva Conventions and the relevant customary humanitarian law.³⁴ This gap between different *jus in bello* obligations is especially relevant in non-international armed conflicts, as the AP II entails twenty-eight Articles and more detailed norms and obligations than Article 3 GC and the customary law applicable in non-international armed conflict. Different obligations from international human rights treaties and other peacetime law applicable in armed conflicts³⁵ make it necessary to find a common legal ground for military co-operation as well. Military co-operation is not excluded because of such differences. However, no state may request anything from another state in a coalition which contravenes any legal obligation of the (p. 695) two states.³⁶ This limitation can be deduced from general rules of international treaty law: according to these rules, every state party to a treaty may not act contrary to the treaty obligations and has to do everything possible so that the treaty obligations are fulfilled.³⁷ Additionally, a treaty applicable in armed conflicts—because of its wording, object, and purpose—can lay down the duty of states parties to encourage other states to accept the treaty obligations.

21.04

The following factors can induce the parties to an armed conflict to ensure compliance with and counteract breaches of international humanitarian law:

- **consideration for public opinion,**
- **reciprocal interests of the parties to the conflict,**
- **maintenance of discipline,**
- **fear of reprisals,**
- **penal and disciplinary measures,**
- **liability for compensation,**
- **activities of protecting powers,**
- **international fact finding,**
- **the activities of the International Committee of the Red Cross (ICRC),**
- **the activities of the United Nations (UN),**
- **diplomatic activities,**
- **activities of NGOs,**
- **national implementing measures,**

- **dissemination of humanitarian law, and**
- **the personal conviction and responsibility of the individual.**

The obligation to observe international humanitarian law addresses itself both to states parties to the conflict and to individuals, mainly combatants and civilians directly participating in hostilities. The incentives for states and individuals to comply with the law are diverse.³⁸

1. Public opinion. In the days of mass media, and an increasing number of social media tools including the possibility to spread information via the Internet within a country and across borders, the role which public opinion plays in humanitarian law enforcement seems to grow both within states parties to a conflict and in other countries. There are historical examples of this as well. An important one is the US entry into WWII after breaches of international humanitarian law committed in territories of, and occupied by, the German Reich. The course of the Vietnam conflict was clearly influenced by public opinion both from within the US and from outside. Pictures broadcast from Iraq, the Former Yugoslavia, Somalia, and information via the Internet about the civil war in Libya contributed to the willingness of the community of states to attempt to contain these conflicts.³⁹ Pictures of victims after the use of gas during the armed conflict in Syria in (p. 696) 2018 caused air strikes by the US, UK, and France against Syria.⁴⁰ However, that public opinion can be manipulated through false information was seen already at the beginning of the 1990s, for instance, with regard to incidents after the invasion of Kuwait.⁴¹ Apart from this, in non-international armed conflicts in undemocratic societies, as in Syria, it can be difficult to distinguish information about breaches of humanitarian law by state troops or insurgents from pure propaganda.⁴² Some stress that the twenty-first century is a 'post-truth era' and that hybrid warfare is 'characterised by the tactical use of mass disinformation campaigns over social media and fake news'.⁴³ Nevertheless, there seems to be the chance that new technological tools and even artificial intelligence might help actors, like NGOs, to find out which information about violations of humanitarian law and human rights are correct. These NGOs can collect data, via new big data based tools or without, is possible even if there is no free press in a state where an armed conflict takes place.⁴⁴ Nevertheless, in times of the dissemination of information via social media platforms to differentiate between fake news, deep fake, propaganda, and true information is a task that can hardly be solved without the help and technical expertise of the companies hosting the relevant platforms. Hence, if states respond to the call for proportional regulation of these companies in the future in order to diminish fake news and deep fakes this will help to ensure compliance with and counteract breaches of international humanitarian law.⁴⁵

2. Reciprocal interests of the parties. An important element in guaranteeing respect for humanitarian law results from the idea of reciprocity.⁴⁶ No party to a conflict can expect its opponent to observe the rules of warfare which it does not itself respect. The expectation of mutual advantages is one of the guarantees for the implementation of international law in general⁴⁷ as well as international humanitarian law specifically.⁴⁸ Therefore, implementation and enforcement of international humanitarian law in those armed conflicts, where a party decides not to obey humanitarian law at all, becomes extremely difficult. This is true with regard to so-called asymmetric armed conflicts, where insurgents or (p. 697) terrorist groups fight against a state and want to obtain a military advantage or reach a political aim by violating relevant rules, as for instance by attacking civilians.

3. Fear of reprisals. A violation of international humanitarian law can be countered by the opponent through an act that is usually contrary to international law (reprisal). This breach of international law as a reprisal finds its justification in the principle of reciprocity and in the lack of a centralized power at the international plane that is able to enforce and implement international rules. If reprisals are used to stop the violation of rules of

humanitarian law, in particular, there exists the danger of a further escalation. International humanitarian law after WWII, human rights law applicable in armed conflicts, and norms of *jus cogens*, as well as the principle of proportionality limit (expressly or inherently) the permissibility of reprisals.⁴⁹ The protection of certain persons and objects under all circumstances is an important feature of humanitarian law.

4. Penal and disciplinary measures. Fear of criminal or disciplinary sanctions, in addition to the deterrent effect of past convictions, is another means by which adherence to humanitarian law can be guaranteed. The evolution of international criminal law and the establishment of the ICC, post-conflict international criminal courts, and tribunals, where war crimes can be prosecuted, are important and necessary improvements for the implementation of humanitarian law when states themselves are not willing or not able to prosecute war criminals. However, these repressive measures, after a violation of humanitarian law, are not sufficient. Rather, as a preventive measure, it is the duty of superiors to make their troops aware that the conduct of war is subject to limitations and that adherence to the rules of warfare is in the interest of every single combatant. A precondition for this is that international humanitarian law has been implemented in national law and is made generally known to the troops,⁵⁰ inter alia via military manuals⁵¹.

5. Liability for compensation. Non-confrontative means of implementation. International law makes it possible that a state can claim compensation for a breach of international law.⁵² This instrument is not fully standardized but could be a useful means of guaranteeing the application of humanitarian law.⁵³ Claims for compensation made against Iraq after the 1990–1991 Gulf War —however, because of the breach of *jus ad bellum*—are an example.⁵⁴ For international armed conflicts, Article 3 HC (p. 698) IV,⁵⁵ reaffirmed by Article 91 AP I, provides that states are liable to pay compensation for violations of international humanitarian law committed by their armed forces. These provisions, which are part of customary law, confirm obligations of states to make payments if the conditions are fulfilled. However, after armed conflicts full compensation can be a heavy burden for the economy of a state.⁵⁶ On the other hand, payments must only be made for *violations* of international humanitarian law. Hence, if a state acts (mainly) in conformity with the *jus in bello*, no or only minor compensations have to be paid. The legal evaluation of unlawful actions of states has been facilitated by the completion and final adoption in 2001 of the International Law Commission's (ILC) Articles on Responsibility of States (ARS).⁵⁷ These Articles are not part of a treaty, yet they have exerted considerable influence, and are rightly conceived in jurisprudence and legal literature as an important reference document reiterating many rules of customary international law.⁵⁸ The basic rule stresses the obligation of Article 3 HC IV, Article 91 AP I that every unlawful act which can be attributed to a state, obliges that state to pay compensation for the damages caused. Furthermore, the fundamental character of certain humanitarian standards⁵⁹ as obligations *erga omnes* underlines that all states can be held to have a legal interest in their protection.⁶⁰ The ICJ has again confirmed this principle,⁶¹ but the exact consequences that the *erga omnes* principle might have in this context are not yet clear.⁶² While state practice and jurisprudence still seem to deny that international law offers rights to individuals corresponding to the duties of states to (p. 699) comply with international humanitarian law,⁶³ remedies to ensure compliance with international humanitarian law widely depend on individual initiatives within the executive branches of states and/or civil society.⁶⁴ A national legal order could provide a legal basis so that individuals can claim monetary compensation from that state because of violations of international humanitarian law which caused damages or injuries. Nevertheless, claims on this basis have not been successful in recent years.⁶⁵

6. *The role of protecting powers.* One institution to secure enforcement of international humanitarian law is that of protecting powers. It has not been implemented in many recent conflicts, but Article 5 AP I reaffirms the duty of the parties to international armed conflicts to secure the supervision and implementation of the Geneva Conventions and AP I by the application of the system of protecting powers.⁶⁶

7. *The International Committee of the Red Cross.* The ICRC provides protection and assistance to victims of armed conflict and acts as a guardian of international humanitarian law. It has the task of ensuring observation of the rights of protected persons (prisoners of war, wounded and shipwrecked persons, civilians, etc.) and may also assume the role of a substitute of a protecting power.⁶⁷ The work of the ICRC is important not only in international armed conflicts, but also in non-international armed conflicts and in the so-called 'war on terror' or so-called war against terrorist groups⁶⁸ as Al-Qaida or ISIS.⁶⁹ It seems important to note, that today the ICRC uses big data tools, and internet (p. 700) based tools to interact with parties to armed conflicts and help parties to implement their obligations.⁷⁰

8. *The United Nations.* Various UN bodies have stressed the need to strengthen the protection of victims of armed conflicts and to ensure compliance with international humanitarian law.⁷¹

A specific form of implementing international humanitarian law can be seen at the activities of the Security Council. The Security Council is a quasi-central body, although the international legal order only entails few elements of a hierarchy, and it plays a special role in the implementation and enforcement of international humanitarian law. Chapter VII of the UN Charter grants the Security Council the competence to employ coercive measures against a threat to or breach of peace or against an act of aggression (Article 39 *et seq.* UN Charter). As every armed conflict which is covered by international humanitarian law, is *prima facie* a situation falling under Article 39 UN Charter, the Security Council competence of Chapter VII can be an enforcement mechanism concerning the rules of humanitarian law⁷² if the Security Council decides to act. Since 1989, this coercive competence of the Security Council has come to practical existence.⁷³ Armed conflicts, serious and continuous human rights violations, acts of terrorism, and the proliferation of weapons of mass destruction have been considered to constitute threats to the peace by the Council. The Security Council has, in particular, called on parties to international or non-international armed conflicts to ensure the safety of civilian populations and to fully respect human rights and international humanitarian law.

Nevertheless, the Security Council is without or with limited power in recent armed conflicts, as well, like the one in Syria, if one or more permanent members veto resolutions.⁷⁴ A veto is less probable if the fight against terrorist groups, like ISIS in Syria, is the aim of a resolution.⁷⁵ During the armed conflict in Syria the Security Council was able to pass resolutions that condemned the use of chemical weapons.⁷⁶ Besides, the Security Council authorized humanitarian aid in Syria,⁷⁷ and stressed that there are neutral observers during the evacuation of Aleppo.⁷⁸ Earlier on, invoking its responsibility for world (p. 701) peace, the Security Council condemned—for instance—the attacks of 9/11,⁷⁹ supported the fight against terrorists and Taliban in Afghanistan,⁸⁰ and passed a resolution in regard to the civil war in Libya.⁸¹ In the Libyan conflict, as during the conflict in the Former Yugoslavia,⁸² the Security Council prohibited military flights in Libyan airspace and authorized enforcement of control and aid measures by armed force to ensure the protection of civilians. In the Yugoslav conflict, it appointed an impartial commission of experts to investigate reports of violations of international human rights provisions.⁸³ In this and other conflicts, the Security Council has also endorsed the prosecution of war crimes and crimes against humanity.⁸⁴ In the Darfur conflict in Sudan and in the non-international armed conflict in Libya, the Council even transferred the case to the ICC.⁸⁵

However, a similar resolution was vetoed with regard to war crimes committed during the war in Syria.⁸⁶ These actions were based upon Chapter VII of the UN Charter.⁸⁷

In regard to general questions⁸⁸ and at critical stages, these activities were supported by the General Assembly (GA). The GA, for example, condemned the violation of human rights⁸⁹ and the use of chemical weapons in Syria.⁹⁰ Besides, the GA requested the Secretary-General to submit a comprehensive report after the fall of Srebrenica.⁹¹ They are supported as well by the Secretary-General, who, for example, appointed an independent inquiry into the action of the UN during the 1994 genocide in Rwanda.⁹²(p. 702) In many cases, however, as in Syria, although the Security Council agreed in some resolutions, grave atrocities remained without sanctions, as the Security Council did not find the necessary support from some of its members for forceful actions. If one looks at the activities of the Security Council acting under Chapter VII before, during or after an armed conflict covered by international humanitarian law, one has to conclude that the Council helps to implement and enforce international humanitarian law *inter alia* by stressing the responsibility of *all parties* of a conflict to obey these rules, by reiterating that both human rights law and international humanitarian law has to be obeyed, by establishing certain no-fly zones and weapon embargos. Besides, as mentioned above, the Security Council can refer situations to the ICC and did establish post-conflict international or internationalized criminal courts or tribunals, where war crimes can be prosecuted. Other important means used by the Security Council are the offer of good offices, the dispatch of observer missions, and the initiation of operations of peacekeeping, peace-enforcement, or peacebuilding. Acting under Chapter VII, the Security Council can resort—and has resorted—to a great variety of peaceful measures and to different military means to promote respect for humanitarian principles.

This practice confirmed that serious and continuing violations of human rights and international humanitarian law by a state are no longer considered an internal affair, and that the community of states can intervene through its co-operative organs. Most importantly, sufficient political will on the part of the world community and especially the veto powers remains necessary for the effective use of the available instruments.

9. Third states. States not party to the original conflict may intervene against grave breaches⁹³ of international humanitarian law, although the legality of a humanitarian intervention is disputed if there is no Security Council resolution authorizing the intervention⁹⁴ and so-called responsibility to protect (RtoP)⁹⁵ is not part of customary international law. In any case, the protection of individuals and their human rights, according to modern international law, is no longer the internal affair of a state, and the possibility exists for interventions by international organizations (UN)⁹⁶ or regional organizations or arrangements.⁹⁷

(p. 703) **10. Non-governmental organizations.** In addition to the ICRC, NGOs have increased activities in assisting victims of armed conflicts during the recent decades and finding evidence for violations of humanitarian law.⁹⁸ Some NGOs have exerted considerable influence on public opinion and developed professional services in the political arena and at field level.⁹⁹

11. National implementing measures. In implementing their obligations under international humanitarian law,¹⁰⁰ many states have issued military manuals,¹⁰¹ enacted legal provisions, and developed national activities supporting a system of compliance.¹⁰²

II. Public Opinion

21.05

Public reports on violations of international law may render an essential contribution to enforcing behaviour in compliance with international law. To this end, considering the global information network, the media (press, radio broadcasting, television, Internet) can be employed today in an incomparably better way and thus more efficient manner than has been the case in previous armed conflicts. When offences against international law become known, each party to the conflict must expect that truthful reports on its violations of international law will impair the fighting morale of its forces and support by its own population.

1. Reference has already been made to the increasing significance of public opinion for enforcement of international humanitarian law¹⁰³ and the problem to differentiate between facts and covert propaganda, as there is the possibility to spread information via social media platforms from fake accounts. Public opinion has initiated political decision-making on international peace operations, supported the prosecution of war crimes and influenced humanitarian assistance at a worldwide scale.

2. The new Internet based tools today make it easier and faster for information about massacres and other violations of humanitarian law to cross borders, even if some states censor unwanted information. In comparison with traditional mass media, Internet based communication and information distribution makes it possible that sometimes real-time data are available nearly worldwide and that private individuals (p. 704) and non-state groups can spread their information nearly as successful as a state can via the traditional tools of mass media.¹⁰⁴ Through the Internet and the use of big data analysis of information that is (semi)publicly available at the Internet, more information can be gathered and distributed and more transparency could be reached with regard to violations of humanitarian law. However, new kinds of propaganda¹⁰⁵ via trolls and social bots and delusion have been developed and can be spread via the Internet on a nearly global scale.¹⁰⁶

III. Reciprocal Interests of the Parties to the Conflict

21.06

Only those who themselves comply with the provisions of international humanitarian law can expect the adversary to observe the dictates of humanity in an armed conflict. No one shall be guided by the suspicion that soldiers of the other party to the conflict might not observe these rules. Soldiers must treat their opponents in the same manner that they themselves wish to be treated.

Although humanitarian protection may not be made subject to reciprocity and Article 1 GC rejects the *tu quoque*- or *do-ut-des*-principle,¹⁰⁷ the expectation of reciprocal behaviour will be as a state interest a driving force to motivate for better compliance. Therefore, in conflicts where it is clear that one actor, for instance a terrorist group or a militarily weak state, is deliberately or regularly committing war crimes and other violations of humanitarian law as a means of warfare, special efforts are necessary by other parties so that their combatants uphold their duties in respect to the legal rules applicable. The negative psychological effects of the non-fulfilment of relevant rules by one side have to be answered with special support and measures motivating the adversary combatants to comply with the legal standards. Such support can be expressed at the international level by Security Council Resolutions naming the violations and war crimes, and by stressing the need to comply with humanitarian and human rights law for all sides.¹⁰⁸ Even more important measures and support have to be given by the national states that are parties to a conflict: they have to train and to instruct combatants in regard to those special

circumstances when the adversary is willing to break all legal rules in order to escalate the conflict, to undermine the morale of the other side or to mislead them to not obey the law.

(p. 705) IV. Maintenance of Discipline

21.07

Ordering or tolerating violations of international law leads to subordinates' doubts as to the justification of their own side's activities. It can also undermine the authority of the military leader giving such an order and can jeopardize the discipline of the forces.

Violations of the laws of war have a negative influence on subordinates in many regards. They can lead to relaxation of discipline, as they may favour a propensity among subordinates to disregard international humanitarian law. A superior who acts contrary to international law endangers his own authority. He undermines the law in general and cannot expect that his orders will be followed unquestioningly in the future.

V. Reprisals

21.08

The use of reprisals can cause an adversary, who is contravening international law, to cease that violation. Reprisals are permissible only in exceptional cases and for the purpose of enforcing compliance with international law. They require a decision at the highest political level (see Sections 7.40-7.43).

1. Reprisals are a means of enforcement of international law in general and a means of enforcement of international humanitarian law. Reprisals are countermeasures that justify the infringement of the rights of a subject of international law which itself is violating the law. This justification is given if and only if the following conditions are met: reprisals are aimed to stop the ongoing unlawful conduct; to this aim, any resort to reprisals must be necessary and proportional in regard to the ongoing unlawful conduct and the damage caused; reprisals must end if the unlawful conduct of the adversary ends.¹⁰⁹ Most scholars, therefore, agree that if a state A destroys weapons or the facilities to produce such weapons located in state B and those weapons were used by state B in the past to kill its own population the conditions for a lawful reprisal are not met by state A, as there is no ongoing unlawful conduct by state B against state A.¹¹⁰ Besides, a reprisal is unlawful and must not be used if there exists a prohibition or limitation. Such prohibitions and limitations are norms of *jus cogens* and self-contained regimes.¹¹¹ They can be laid down in an international treaty or customary law.¹¹²

Since WWII, international humanitarian law has expressly prohibited reprisals against protected persons and objects, that is the wounded, sick, and shipwrecked (Article 46 (p. 706) GC I; Article 47 GC II; Article 20 AP I), prisoners of war (Article 13, para. 3, GC III), civilians (Article 33, para. 3, GC IV; Article 51, para. 6, AP I;¹¹³ Article 3, para. 2, MinesProt) and civilian objects (Article 52, para. 1, AP I), cultural property (Article 4, para. 4, CultPropConv; Articles 52, para. 1, and 53, lit. c, AP I), objects indispensable to the survival of the civilian population (Article 54, para. 4, AP I), and the natural environment (Article 55, para. 2, AP I) as well as works and installations containing dangerous forces (Article 56, para. 4, AP I). The express prohibitions of reprisal secure the legal protection of the named persons and objects. They state the core of the humanization of humanitarian law and are an important protection against the psychological *do-ut-des* effect:¹¹⁴ there is no justification for the violation of such protected persons or objects to become a means of enforcement. The prohibitions in humanitarian law against damaging persons in situations where reprisals would be lawful, according to general international law, is in accordance

with the concept of human dignity.¹¹⁵ Besides, if no prohibition of reprisals is part of humanitarian law or other branches of international law, the general conditions, outlined above, have to be met.

2. In any case, the decision to take retaliatory measures lies at the political level. A military leader does not have the right to decide to answer an unlawful act of his opponent with an unlawful act of his own. Such measures constitute violations or grave breaches of humanitarian law and may result in disciplinary or criminal proceedings.¹¹⁶

VI. Command Responsibility

21.09

The command responsibility of superiors is not only relevant for the conduct of military operations (see above, Sections 2.39-2.47), but likewise for criminal and disciplinary procedures.

Military commanders are responsible for the conduct of operations by their units and subordinates. This includes the obligation to ensure the lawful conduct of the mission. The behaviour of military commanders invokes state responsibility, and also individual responsibility under international and national criminal law and under disciplinary law.¹¹⁷

VII. Penal and Disciplinary Measures

21.10

Each member of the armed forces who has violated the rules of international humanitarian law must be aware of the fact that he or she can be prosecuted according to penal or disciplinary provisions.

1. This provision refers to every violation, both grave breaches,¹¹⁸ that is war crimes¹¹⁹ and others. The consequences of a grave breach are always of a penal nature—there is the (p. 707) duty to prosecute or extradite. Other violations may be punished through disciplinary procedures.

2. The development of international criminal law is decisive for the implementation and enforcement of international humanitarian law. International law norms for the punishment of war crimes have evolved along with the development of international humanitarian law. They are understood primarily as a means of enforcement of the latter. However, the development of international treaty law on the punishment of war criminals has lagged behind the developmental pace of rules on warfare.¹²⁰ The punishment of war criminals by the injured state was thus based primarily upon customary international law, disregarding the amnesty clauses of peace treaties pre-dating WWI that concerned the punishment of war crimes.¹²¹ Although rules on criminal sanctions have been part of the first military manual, the so-called Lieber Code 1863,¹²² the Hague Conventions of 1899 and 1907 contained no express regulation of individual responsibility for offences against the laws and practices of war. However, specific indications of the right or possibility of criminal prosecution for war crimes are to be found in Articles 30, 41, and 56, para. 2, HagueReg 1907. Article 41 HagueReg addresses the violation of ceasefire terms by private individuals and provides that compensation from and punishment of the accused parties can be demanded. Pursuant to Article 56, para. 2, HagueReg, all ‘seizure of, destruction or wilful damage’ to common and institutional property, historical monuments, or works of art and science is prohibited and punishable. A comparable rule is found in Article 28 of the Geneva Convention of 1906, pursuant to which the states parties agreed ‘to repress, in time of war, individual acts of robbery and ill-treatment of the sick and wounded of the armies, as well as to punish, as usurpations of military insignias, the wrongful use of the flag and brassard of the Red Cross by military persons or private individuals not protected by the present

convention.’ These provisions assume the right or obligation to punish individuals, but fail to incorporate detailed regulations for prosecution. Thus, although a series of treaties governing the rules of warfare already existed before WWI, an international treaty securing an enforcement mechanism for the punishment of war criminals was lacking and recourse to customary international law was necessary.

3. At the end of WWI, the punishment of those who had violated customary or treaty-made rules of warfare was considered at the preparatory meeting for the Paris Peace Conferences. This meeting established a Commission whose task was to investigate responsibility for the outbreak of the war. More specifically, the Commission was responsible for determining offences against the rules of warfare committed by Germany and its (p. 708) allies and was mandated to establish a criminal court for the prosecution of responsible individuals. The Commission listed thirty-two war crimes.¹²³ The Treaty of Versailles¹²⁴ planned for punishment of individuals who had violated rules of warfare through the military tribunals of the Allied and Associated Powers (Articles 228–30), whereby offenders were to be handed over by the German Reich. This form of prosecution broke down when the German government¹²⁵ refused to surrender individuals accused of having committed war crimes. Instead, the punishment of war criminals was undertaken, although inadequately, by the Supreme Court of the German Reich (*Reichsgericht*) on the basis of a law passed on 18 December 1919.¹²⁶ After the establishment of the League of Nations, the Commission entrusted with the preparation of a statute for the High Court of International Justice made an attempt to develop a code on international criminal law. The proposals submitted in 1920 proposed punishment of violations of international law through an international court.¹²⁷ However, the recommendation was not pursued further in the League of Nations. Proposals for the punishment of war crimes are found in the Geneva Convention of 1929.¹²⁸ Despite these first steps, at the outbreak of WWII, no general international law codification existed concerning the prosecution of war crimes. Nevertheless, the various attempts and proposals for regulation of this problem made it (p. 709) clear that there were three possible types of tribunal for the punishment of war crimes: an international criminal court, the courts of the injured state, or the courts of the war criminal’s home state. If punishment is to be pursued by the home state, the prosecution of war criminals can only be regarded as an effective means of enforcement of the law of war if this state is under an obligation to prosecute (i.e. Article 56, para. 2, HagueReg).

4. Already during WWII, the intention was voiced to punish German and Japanese war criminals.¹²⁹ In 1943, stepping into the place of unofficial bodies, as the London International Assembly, the UN War Crimes Commission was established by the meeting of the Allied and Dominions representatives held in London, and entrusted with preparation to that end.¹³⁰ At the end of 1943, a programme for the prosecution of war criminals was agreed upon at the Moscow Conference between the major powers (the US, the UK, and the former USSR).¹³¹ On 8 August 1945, the US, the UK, France, and the former USSR signed the agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers which nineteen other states ratified before the conclusion of the Nuremberg Trials. An integral part of this agreement is the Charter of the International Military Tribunal, located in an annex.¹³² According to Article 6, lit. a-c, of the Charter, the Tribunal was competent to try crimes against the peace, war crimes, and crimes against humanity which constitute three different offences.¹³³ Article 6, lit. a, of the Charter defines the concept of war crimes as: ‘violations of the laws or customs of war. Such violation shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.’ To prove the legitimacy of punishment based upon this agreement the

Tribunal stated that these acts had long been recognized as war crimes, either as customary or treaty law. Reference was made in this (p. 710) respect to Articles 46, 50, 52, and 56 HagueReg and to Articles 2, 3, 4, 46, and 51 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War.¹³⁴

In addition to the Germans, Japan's political and military decision-makers were also subjected to criminal prosecutions after WWII. Through a proclamation by the chief commanding officers of the Allied armed forces on 19 January 1946, an International Military Tribunal for the Far East was established and the Statute of the Tribunal was appended to it. Japan accepted the judgments passed by the International Military Tribunal in the San Francisco Peace Treaty.¹³⁵ The International Military Tribunals of Nuremberg and Tokyo conducted trials and imposed penalties against a number of German and Japanese actors. Further trials against groups of German persons were carried out by American military courts on the basis of Control Council Law No. 10 (Kontrollratsgesetz Nr. 10),¹³⁶ which followed the provisions of the Nuremberg Statutes with modifications. Similar war crimes trials took place against Japanese military personnel before courts in the US, the UK, Australia, Canada, and the Netherlands.¹³⁷

5. A substantial number of war crimes are covered by the Four Geneva Conventions of 1949 and the two Additional Protocols. Although the ICRC did not fully succeed in introducing its detailed Articles for punishing war criminals which would serve as a model for the legislation,¹³⁸ the Geneva Conventions contain rules governing the prosecution of grave breaches of the Conventions, nearly identical in all four Conventions (Articles 49–52 GC I; Articles 50–3 GC II; Articles 129–32 GC III; Articles 146–9 GC IV). Specific abuses committed against persons or goods protected by the Convention are defined here as falling into this category (cf. Article 50 GC I, Article 51 GC II, Article 130 GC III, Article 147 GC IV). These rules offer national legislatures sufficient grounds for the prosecution of war crimes. A number of breaches named in the Conventions had already previously been recognized as war crimes by customary international law. The second Convention contains special provisions resulting from the problems posed by naval warfare.¹³⁹ The same holds true for GC III which lays down individual standards of conduct in an effort to protect prisoners of war and makes violations of these provisions a grave breach of the Convention (Article 13 GC III). GC IV expands the scope of obligations, thus expanding the meaning of 'grave breach' (Article 147 GC IV). These provisions circumscribe the necessary elements of a criminal offence, yet without the precision of a national penal code. Concrete statements about the range of punishments are not included. An exception is made regarding the prosecution of criminal offences against (p. 711) prisoners of war (Articles 82–108 GC III: penal and disciplinary sanctions). However, the parties to GC III are only obliged to enact 'all legislation necessary to provide effective penal sanctions' (Article 129, para. 1, GC III). The Geneva Conventions did not decide that prosecution of war criminals should be done by the state to which the transgressor belongs as each party shall be 'under the obligation to search for persons alleged to have committed [...] such grave breaches, and shall bring such persons, *regardless of their nationality*, before its own courts' (Article 129, para. 2, GC III). Corresponding obligations to investigate and prosecute exist in Article 49, para. 2, GC I; Article 50, para. 2, GC II; and Article 146, para. 2, GC IV. This duty does not create any monopoly on investigation and prosecution on the side of the home state. The ability to investigate and prosecute is left fully open to other states. In this respect, other states interested in prosecuting war crimes are as much empowered to do so as the custodial state (for prisoners of war or internees).

6. In accordance with these articles, the home state of the offender, instead of conducting a prosecution itself, can hand such a person over for trial to another state interested in the prosecution, provided that sufficient incriminatory evidence is produced (cf. Article 49, para. 2, GC I; Article 50, para. 2, GC II; Article 129, para. 2, GC III, and Article 146, para. 2, GC IV). The principle *aut dedere aut judicare* is thus part of the Geneva Conventions. The

extent to which such extradition is possible is regulated by the domestic law of the home state. Normally, the state interested in prosecution will most likely be either the injured state or the home state of the accused. However, extradition is not limited to these states. A request for extradition can be made by all parties to the Conventions, even by states neutral in the conflict, as long as they demonstrate an interest in the prosecution of the grave breaches committed and produce corresponding incriminating evidence. With this, international humanitarian law secures the prosecution of war criminals by all states.¹⁴⁰ The punishment of prisoners of war in the custodial state for grave breaches can occur under the terms of either the custodial state's domestic law or international (and thus also international humanitarian) law (Article 99, para. 1, GC III). The above-mentioned lack of precision in the Geneva Conventions is balanced by the fact that Articles 84–108 GC III contain a list of guarantees for the criminal proceedings with regard to prisoners of war as well as limits to sentences. However, this applies only to individuals that are combatants mentioned in Article 4 GC III. If there are any doubts 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 persons shall be protected by GC III until their status has determined by a competent tribunal (Article 5, para. 2, GC III).¹⁴¹ It does not apply to those persons that do not fall in the category of combatants, but are offensive civilians as they take a direct part in hostilities, whether they are called terrorists, freedom fighters, insurgents, rebels, unlawful combatants etc. (p. 712) (Article 51, para. 3, AP I). The protection of GC III does not apply, as well, if a spy is detained during armed conflict as spies do not have the right to the status of a prisoner of war (Article 46, para. 1, AP I). The same is true if an individual is a mercenary as defined by the laws of war (Article 47 AP I). However, for offensive civilians, spies and mercenaries Article 3 GC, Article 75 AP I, and the relevant international human rights are applicable.¹⁴² Equally, rules of ad hoc international criminal courts, as the ICTY Statute or the Statute of the International Tribunal for Rwanda, are based on the prosecution of war criminals in accordance with international law.¹⁴³ The same is true for the ICC based on the Rome Statute.¹⁴⁴

7. No explicit regulation is to be found in the Geneva Conventions governing the prosecution of war criminals in instances where the accused individual acted under orders.¹⁴⁵ The Geneva Conventions make it clear, however, that both the person who acts and that person's commander may have committed a grave breach (Article 49, para. 2, GC I; Article 50, para. 2, GC II; Articles 129, para. 2, GC III; Articles 146, para. 2, GC IV). The practice of the trials against war criminals immediately following WWII is consistent with this language. The Geneva Conventions deny a war criminal's claim that he acted as an organ of state and that his behaviour is therefore attributable to the state only, and not to him personally.¹⁴⁶ However, no indication is given of the extent to which following orders can exonerate a subordinate. The Geneva Conventions do not provide that grave breaches can also be committed through acts of omission, although the International Military Tribunals immediately following WWII have recognized these as violations. AP I lists further grave breaches; examples are Article 11, para. 4 and Article 85, paras 3 and 4, AP I. The Geneva Conventions are also expanded by Articles 86–7 AP I in that both acts and omissions can be qualified as grave breaches. AP II, on the other hand, does not mention grave breaches with regard to non-international armed conflicts. Article 6 AP II, nevertheless, regulates prosecution and punishment of criminal offences connected with the armed conflict. AP II presumes the application of domestic criminal law, whereby the procedure of the trial and the domestic power of sentence and punishment is subordinate to the demands of the Protocol.

(p. 713) **8.** Beyond the rules of the Geneva Convention and AP I and AP II, efforts were made in the UN to create a comprehensive international criminal law modelled on the London Agreement of 8 August 1945. These endeavours have remained unsuccessful for a long time. The ILC in particular had increased its efforts to create a Code of Crimes Against the Peace and Security of Mankind.¹⁴⁷ These efforts were influenced by violations of the prohibition on war and of international humanitarian law committed in the international and non-international armed conflicts during the 1980s and 1990s.¹⁴⁸ Finally, the ILC drafted Articles on the Prevention and Punishment of Crimes Against Humanity in 2019.¹⁴⁹ These articles include a definition of crimes against humanity (Article 2 ILC Draft Articles), and stress that the rules shall apply, whether or not the crimes are committed in time of armed conflict (Article 3, para. 2, ILC Draft Articles). States are obliged to criminalize these acts under their criminal law; and Article 6, para. 4 states that the fact that an offence was committed pursuant to an order is not a reason to exclude criminal responsibility of a subordinate. The Draft Articles show as well that since many years a broad *opinio iuris* exists that individuals who commit war crimes, crimes against peace, or crimes against humanity can be held responsible for those acts under national or international criminal law.¹⁵⁰ This proposition has been supported by the decisions of the Security Council, the first in 1992 and 1994, to create for instance the ICTY and the ICTR, in order to prosecute those who have committed serious violations of international humanitarian law in the Former Yugoslavia and in Rwanda.¹⁵¹

9. The creation of the ICC in 1998 was a breakthrough in this development.¹⁵² The Court came into being on 1 July 2002 and has jurisdiction for all states parties on genocide (Articles 5 and 6 ICC Statute), crimes against humanity (Article 7 ICC Statute), war crimes (Article 8 ICC Statute), and—for those states parties that have ratified the new amendment—for crimes of aggression (Article 8^{bis} ICC Statute).¹⁵³ The ICC acts according to clear provisions on the responsibility of commanders and other superiors.¹⁵⁴ Its jurisdiction is limited to ‘the most serious crimes of concern to the international community as a whole’¹⁵⁵ and it is complementary to that of national criminal justice systems.¹⁵⁶ Co-operation with the Security Council is secured by the fact that the latter, by means of a resolution adopted under Chapter VII of the UN Charter, may block the (p. 714) ‘commencement or continuation of investigations for a period up to 12 months’.¹⁵⁷ The US has even entered into a series of bilateral treaties to ensure that no US servicemember serving in UN-authorized operations will be transferred to the jurisdiction of the Court.¹⁵⁸ Nevertheless, in 2020, the ICC decided to authorize the opening of an investigation into crimes against humanity and war crimes committed in Afghanistan since 1 May 2003 under the jurisdiction of the Court.¹⁵⁹ Despite the criticism by some African states because of an ‘African bias’ of the ICC, as Burundi, South Africa, and Gambia, and by other states, as Russia, and the USA,¹⁶⁰ the ICC has proven to be impartial, fair, and free from political influence as far as possible.¹⁶¹ In 2012, ten years after coming to force, the ICC issued its first decision against Thomas Lubanga Dyilo who was found guilty of the war crimes of enlisting and conscripting of children under the age of fifteen years and using them to participate actively in hostilities.¹⁶² Two more war criminals from African states have been convicted since then.¹⁶³

10. Apart from this, to strengthen national criminal jurisdiction, internationalized or mixed criminal courts or tribunals have been established, inter alia, in Sierra Leone, East Timor, Kosovo, and Cambodia.¹⁶⁴ They may be seen as another means in a development to ensure the prosecution of genocide and other serious violations of international humanitarian law which is still incomplete.

11. A primary duty in prosecuting violations of humanitarian law lies within the hands of the state to which the offender belongs. That state has the main opportunity and, therefore, a duty to punish. The aim of the punishment is twofold: the effectiveness of international (p. 715) humanitarian law shall be secured and the discipline of the troops shall be maintained. The influential 1863 Lieber Code,¹⁶⁵ the first national military manual,¹⁶⁶ states that, for prosecution, military jurisdiction can be based on statute or on the common law of war (Article 13 Lieber Code). However, for a conviction, certain procedural rights and the principle of proportionality have to be observed according to that Code.¹⁶⁷ State practice supports the view that the *right* to bring an individual of the enemy troops before a court because of violations of the laws of war was part of customary international law, even during the time the Lieber Code was published. Whether there has been an equivalent *duty* of states to punish violations of the laws of war was more doubtful; state practice and the writings of the academics of that time, however, seem to indicate so.¹⁶⁸

12. Today, in accordance with Article 49, para. 2, GC I, and likewise Article 50, para. 2, GC II, Article 129, para. 2, GC III, and Article 146, para. 2, GC IV, every state party is under an obligation to investigate persons accused of commissioning or ordering a grave breach. The provisions of the Geneva Conventions explicitly state that the commission of a grave breach and an order that leads to one are equally serious. The commander and the subordinate who acts on the command are equally responsible. The subordinate cannot escape penal responsibility through reference to orders. The same conclusion can be inferred from the objective and purpose of the indicated provisions. In this respect, again, the 1863 Lieber Code¹⁶⁹ and early international agreements can also be invoked. Article 11, para. 3, Lieber Code states: 'Offences to the contrary [*i.e. violations of the laws of war*] shall be severely punished, and *especially so if committed by officers*.'¹⁷⁰ Article 11 exemplifies the principles and fundamentals of the Code and of the embodied modern or civilised laws of war;¹⁷¹ it does not only codify the limits of the right to harm the enemy, but also stipulates an individual criminal responsibility if the rules of the laws of war are not obeyed. The Code did not recognize the defence of a superior order.

13. The 1922 Washington Treaty Relating to the Use of Submarines and Noxious Gases in Warfare (which never entered into force), already intended to eliminate the defence (p. 716) of following orders for violations committed under higher command.¹⁷² A similar regulation is found in the Nuremberg Charter of 8 August 1945.¹⁷³ Whether a subordinate has the right to refuse an order in such cases has not yet been dealt with in international treaties. A right to refuse an order violating international humanitarian law was not included in AP I, too.

14. In accordance with Article 86, para. 2, AP I, superiors whose subordinates violate the Convention will not be relieved of criminal or disciplinary responsibility if they were aware, or under the circumstances should have been aware, that the subordinate was committing or was going to commit such a violation. The superior will be held accountable if he or she has failed to take all 'feasible measures' within his or her power to foreclose or repress such violation, and if the person committing such violation was under his or her command.¹⁷⁴ Article 86, para. 2, AP I is to be read in connection with Article 87 AP I (Duty of Military Commanders). It underlines that the states parties shall require that a failure to act is as culpable as an action if both a duty and possibility to act exist.

15. The superior's responsibility for actions is a logical consequence of Article 1, No. 1, HagueReg, according to which militia and volunteer corps fall under the HagueReg only if they are commanded 'by a person responsible for his subordinates'.¹⁷⁵ The same notion is to be found in Article 39 GC III, according to which each prisoner of war camp is placed under the immediate authority of a responsible commissioned officer. From that

responsibility results the superior's specific accountability for violations by his or her subordinates.

16. The Geneva Conventions in Article 49, para. 2, GC I, likewise Article 50, para. 2, GC II, Article 129, para. 2, GC III, and Article 146, para. 2, GC IV oblige states to take action if they receive knowledge that grave breaches have been committed. Such obligation does not only come into existence if states are exhorted by other states to initiate investigations. Investigations must be made in any case. Further, it is of no consequence who has committed a breach. Investigations and eventual prosecutions must be initiated against nationals and citizens of allies, as well as citizens of opponent states.

17. Even if the home state does not itself undertake the investigation and ensuing prosecution, it is obliged under Article 49, para. 2, GC I, likewise Article 50, para. 2, GC II, (p. 717) Article 129, para. 2, GC III, and Article 146, para. 2, GC IV to *extradite* alleged violators to another interested state party for trial, as long as such state party can produce a *prima facie* case against the suspects. In this regard, the general principle of international law is reflected, in which the state having custody over the accused person is itself under an obligation either to prosecute or to extradite the suspect. Article 49, para. 2, GC I, and likewise Article 50, para. 2, GC II, Article 129, para. 2, GC III, and Article 146, para. 2, GC IV do not contain a further specification of the potential states which may ask for extradition if they are interested in prosecuting. The only restrictions provided by the Geneva Conventions in this respect are the reference to the domestic law of the extraditing state and the requirement of sufficient incriminating evidence.

1. War Crimes at National Courts

21.11

The four Geneva Conventions and Additional Protocol I oblige the contracting parties to make grave breaches of the protective provisions liable to punishment and to take all suitable measures to ensure compliance with international humanitarian law (Articles 49, 50 GC I; Articles 50, 51 GC II; Articles 129, 130 GC III; Articles 146, 147 GC IV; Article 85 AP I).

1. These provisions impose a twofold obligation on the contracting states. They must shape their domestic law, in particular, their criminal law and military codes of discipline, so that the punishment of grave breaches¹⁷⁶ of international humanitarian law is ensured.¹⁷⁷ Hence, national courts, including court martials,¹⁷⁸ play an important role with regard to the punishment of grave breaches.¹⁷⁹ This assumes that both the elements constituting the offence and the range of punishment are established for each offence. Such an obligation already exists in times of peace. In addition, the contracting parties must employ further measures to ensure that the additional protective provisions of the Convention are observed and that offences which do not constitute grave breaches are prosecuted according to domestic law. This follows from Article 49, para. 3, GC I, Article 50, para. 3, GC II, Article 129, para. 3, GC III, and Article 146, para. 3, GC IV.

2. Article 85, para. 1, AP I ensures that the provisions of the four Geneva Conventions for the punishment of violations and grave breaches are applied to the punishment of corresponding violations and grave breaches of AP I.¹⁸⁰ Apart from that, Article 85, paras 2 and (p. 718) 4, AP I elaborate and expand the provisions of the four Geneva Conventions concerning protected persons and objects.

3. In accordance with Article 49, para. 4, GC I, Article 50, para. 1, GC II, Article 129, para. 1, GC III, and Article 146, para. 1, GC IV parties are not entirely free in organizing the legal

procedure. Minimum standards of humanitarian law, as stated in Articles 99–108 GC III and Article 75 AP I, and relevant human rights law, must be respected.

21.12

States shall make the following grave breaches of international humanitarian law liable to punishment and prosecution (Article 49 GC I; Article 50 GC II; Article 129 GC III; Article 146 GC IV; Article 85 AP I).

1. The indicated provisions list the grave breaches. They are tailored to the objectives of the Geneva Conventions, as supplemented by Article 85, paras 2–4, AP I. Rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have helped to clarify the definition of war crimes and contributed to the alignment of international humanitarian law norms applicable in international and non-international armed conflicts.¹⁸¹ Further clarifications are given by the ICC¹⁸² and by the ICC Statute. For the description of war crimes in a broad meaning, i.e. crimes according to the rules applicable during international armed conflicts and non-international armed conflicts, according to the ICC Statute, see Article 8, para. 2, lit. a, and lit. b (international armed conflict), lit. c, and lit. e (non-international armed conflict) ICC Statute.¹⁸³ Article 8, para. 2, lit. a, lists the grave breaches of humanitarian law which are contained in the Geneva Conventions. It was an important step forward that Article 8 ICC Statute entails the prohibition of war crimes in international and non-international armed conflicts, even though the threshold in non-international conflicts is still too high.¹⁸⁴ In non-international armed conflicts, for instance, intentional causing of excessive collateral damage is not a war crime according to the ICC Statute. However, it constitutes a war crime during international armed conflicts (Article 8, para. 2, lit. b (iv) ICC Statute). Moreover, until 2010 it was a (p. 719) major lacuna of the ICC Statute that the use of chemical weapons was not listed as a war crime in non-international armed conflicts.¹⁸⁵ The Kampala amendments changed that, but they are only binding upon those states parties that have ratified the amendment.¹⁸⁶

a) Indictable offences against protected persons (wounded, sick, medical personnel, chaplains, prisoners of war, inhabitants of occupied territory, other civilians), such as wilful killing, mutilation, torture, or inhumane treatment, including biological experiments, wilfully causing great suffering, serious injury to body or health, taking of hostages (Articles 3, 49–51 GC I; Articles 3, 50, 51 GC II; Articles 3, 129, 130 GC III; Articles 3, 146, 147 GC IV; Articles 11, para. 2, and 85, para. 3, lit. a, AP I).

2. Protected persons include civilians, as well as the civilian population (Article 4 GC IV; Articles 50 and 85, paras 3 and 4, AP I); the wounded and sick on land (Article 13 GC I)¹⁸⁷ as well as shipwrecked (Article 13 GC II),¹⁸⁸ and prisoners of war (Article 4 GC III). This category includes persons who have participated in military operations and fallen into enemy hands (Articles 44, 45 AP I).¹⁸⁹ Injured, sick, and shipwrecked according to the Additional Protocol I include persons whether military or civilian (Article 8, lit. a and lit. b, AP I);¹⁹⁰ the same is true with regard to religious personnel (Article 8, lit. d, AP I).¹⁹¹ This includes persons that are *hors de combat* ¹⁹² (Article 85, paras 2–4, esp. para. 3, lit. e, AP I).

(p. 720) 3. The term ‘wilful killing’ covers all cases in which a protected person is killed, that is the death of a protected person is caused¹⁹³ and the perpetrator had the intent, i.e. meant to kill the person or was aware that the death would occur (Article 30, para. 2, ICC Statute). ‘Wilful killing’ includes active deeds as well as omissions if the omission was committed with intent to cause the death of a protected person. Hence, the reduction of

rations for prisoners of war resulting in their starvation falls into the category of wilful killing.¹⁹⁴

4. ‘Mutilation’ comprises any serious invasion of physical integrity that causes residual damage.¹⁹⁵ The scope of this grave breach of international humanitarian law overlaps with that of serious injury of physical body or health.¹⁹⁶

5. ‘Torture’ as well as ‘cruel’ and ‘humiliating and degrading’, i.e. inhumane treatment is mentioned in the common Article 3 GC and refers to cases in which suffering is inflicted upon persons, for example in order to extract confessions or information from them or from other persons.¹⁹⁷ For a more accurate interpretation of this provision, the 1984 Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment can be applied as there is no definition of torture in a humanitarian law treaty. This provides that torture comprises any treatment by which severe physical or mental pain or suffering is inflicted.¹⁹⁸

6. The prohibition of inhumane treatment refers to Article 3, para. 1, lit. c, GC, Article 12 GC II, Article 13 GC III, and Article 27 GC IV. All protected persons must be treated humanely. The obligation of humane treatment is a *Leitmotiv* for the four Geneva Conventions. The principle originates from The Hague Convention, prohibiting, inter alia, unnecessary suffering (Art 23 lit. e HagReg). The word ‘treatment’ must be understood in the broadest possible sense, involving acts or omissions. It principally prohibits any use of force or intimidation which cannot be justified by military necessity. On this basis, the term is not limited to the physical condition of the person concerned. On the contrary, any treatment which substantially injures human dignity, constitutes a violation.¹⁹⁹ Complete isolation from the external world or from family members would fall under this category.

7. The prohibition of ‘biological experiments’ refers to experiments on the human body or health (cf. Articles 12 GC I, and 12 GC II, Article 50 GC I). This means that the use of prisoners of war or protected persons for medical or scientific experiments is prohibited (Articles 13 GC III; 32 GC IV, and 11 AP I).²⁰⁰ Such experiments are given, if the (p. 721) intent of the experiment was non-therapeutic, and it was not justified by medical reasons (cf. Article 32 GC IV). Hence, medical care is not forbidden, even when it entails new medical procedures. But then it is essential at all times that the sole purpose of such treatment is to improve the state of health of the person concerned. In practice, the differentiation between medical care and medical experimentation may cause difficulties. In consequence, special significance is attached to the free consent of the person in question to the medical treatment.²⁰¹

8. The prohibition of ‘wilfully causing great suffering’ corresponds in essence with the prohibition of torture and inhumane treatment, including biological experimentation. It includes both infliction of suffering as punishment or revenge and that brought about by other motives, for example through unmitigated cruelty. Pursuant to the wording of the four Conventions, this prohibition does not refer exclusively to physical suffering, but it applies equally to mental suffering.²⁰² Thus, solitary confinement and penal measures may also fall within the notion of ‘wilfully causing great suffering’ and ‘inhumane treatment’.

9. The prohibition of wilfully causing ‘serious injury to body or health’ protects persons against physical damage.

10. A wilful attack directed in violation of the Protocol against the civilian population or individual civilians not taking direct part in hostilities which results in death or grave detriment to body or health, constitutes a grave breach according to Article 85, para. 3, lit. a, AP I (see also Article 147 GC IV; Article 8, para. 2., lit. a (i), lit. b (i), lit. c (i), lit. e (i), ICC Statute). A prohibition of attacks upon the civilian population or individual civilians is laid down in Article 51, para. 2, AP I.²⁰³ In this context, the terms ‘civilian population’, ‘civilians’, and ‘attack’ are defined in Articles 49 and 50 AP I. Civilians are all those persons who are not members of the armed forces in accordance with Article 43 AP I or members of

the regular or irregular forces according to Article 4 lit. A, paras 1, 2, 3, and 6 GC III. This means that terrorists are civilians as long as they do not meet the threshold of the definitions of Article 4 lit. A, paras 1, 2, 3, and 6 GC III and Article 43 AP I. In any case of doubt, a person is presumed to be a civilian (Article 50, para. 1, AP I). This rule of doubt is in conformity with the aim of humanitarian law to secure, as far as possible, the protection of civilians during armed conflict. Besides, the civilian population is the sum of all civilians (Article 50, para. 2, AP I), and this group does not lose its civilian status if individuals, who are not civilians or are offensive civilians, are part of it. However, as mentioned above, civilians are not protected in any circumstances against direct attacks and excessive collateral damage and other rules of humanitarian law (cf. Part IV AP I). They are protected only if and as long as they do not take a direct part in hostilities (Article 51, para. 3, AP I). According to the ICRC an act by a civilian must meet the following cumulative criteria: 1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and 2. there must be a direct causal link between the act and the (p. 722) 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).²⁰⁴

11. The term ‘attacks’ includes both offensive and defensive use of force against the opponent, whether by land, air, or sea, wherever it takes place, may it be in the opponent’s state territory or in the territory of a party to the conflict controlled by the opponent (Article 49, paras 1, 2, and 3, AP I), that is any combat action. A grave breach of AP I is committed if an attack is directed against the civilian population or individual civilians.²⁰⁵ Such an attack may be obviously directed against civilians, as certain weapons are used without a degree of error in targeting and if military objectives are not located close to the civilians. Attacks which incidentally harm the civilian population, do not fall under the prohibition of Article 85, para. 3, lit. a, AP I, but may be a war crime according to Article 85, para. 3, lit. c, AP I and Article 8, para. 2, lit. b (iv), ICC Statute if they are excessive and if committed during an international armed conflict.²⁰⁶

12. As a general rule the prerequisite for a grave breach, and hence a war crime, is intent (Article 30 ICC Statute). The attack must be intentionally directed at the civilian population or individual civilians, and the intent must embrace physical consequences. If this is not the case, there is no grave breach given, but rather a violation of the Protocol which gives rise to disciplinary proceedings.

13. In accordance with Article 51, para. 2, AP I, even a threat made with the primary goal of spreading fear throughout the civilian population is forbidden. Such offences are breaches, but not grave breaches, of the Protocol.

b) Compelling prisoners of war and civilians to serve in the forces of the adversary (Articles 129-31 GC III, 147 GC IV).

14. This prohibition derives from Article 130 GC III which forbids to force prisoners of war into such service and the compulsion of a prisoner of war to serve in the fighting forces of the detaining power and is included in Article 8, para. 2, lit. a (v), ICC Statute.²⁰⁷ In accordance with Article 23, para. 2, HagueReg, it is forbidden for the belligerent country to enlist nationals of the opposing party to participate in the conduct of war against their own country. This is also true in the case where they were enlisted before the outbreak of war. It is likewise prohibited to impose an obligation on the civilian population of an occupied area to serve in the occupier’s forces or to work for military purposes.²⁰⁸ The rationale, according to Article 52 HagueReg, is that the population should not be obliged (p. 723) to

participate in the conduct of war against its homeland. In the war crime trials after WWII, several judgments condemned violations of this principle.²⁰⁹

**c) Deportation, illegal transfer, or confinement of protected civilians
(Articles 146-8 GC IV; Articles 50, 51, 57, 85, para. 4, lit. a, AP I).**

15. The prohibition of unlawful deportation or transfer of civilians²¹⁰ results from Article 147 GC IV and is laid down in Article 8, para. 2, lit. a (vii), ICC Statute.²¹¹ It includes breaches of Articles 45 and 49 GC IV. A transfer of the population is allowed only if it serves the security of the population involved. Deportation for the deployment of labour is forbidden, whether or not such labour is of military or civilian significance.²¹² A number of war criminals were convicted of violations against this principle after WWII.²¹³ Today, Article 49 GC IV contains the necessary clarification. Individual or mass deportations, as well as displacement of protected persons from occupied areas to territories of the occupying power or elsewhere, is forbidden, regardless of the reasons underlying such displacement. Article 45 GC IV also forbids to transfer protected persons to another power.

16. A special provision on the protection of children is laid down in Article 78 AP I which provides that evacuation of children, who are not nationals of the evacuating power, is acceptable only if it is a temporary evacuation, and if there are compelling reasons of the health or for medical treatment or their safety and, if possible, the written consent of the parents or those primarily responsible for the care of children is given. Evacuation of children from an occupied area, however, is not permitted for reasons of safety, as expressly stated in Article 48 AP I. A violation of Article 78 AP I constitutes a breach of the prohibition of 'unlawful transfer'.²¹⁴

17. The prohibition of unlawful confinement of civilians can create practical problems. The occupying power has the right to take prisoners under certain conditions, for its security or for criminal prosecution. However, confinement or internment is forbidden if it is unlawful. What is 'unlawful' is laid down not only in humanitarian law, especially Article 3 GC, but as well in the national laws of the relevant state and the applicable human rights, as laid down in relevant treaties or customary law.²¹⁵

(p. 724)

d) Starvation of civilians by destroying, removing, or rendering useless objects indispensable to the survival of the civilian population, for example foodstuffs, means for the production of foodstuffs, drinking water installations and supplies, and irrigation works (Article 54 AP I; Article 14 AP II).

18. In accordance with Article 51 AP I and Article 13 AP II, the civilian population and individual civilians enjoy general protection from dangers arising from military action. This principle is enforced by Article 54, paras 1 and 2, AP I and Article 14 AP II which prohibit the starvation of the civilian population as a method of warfare. The objective is to preserve facilities, institutions, and objects indispensable to the survival of the civilian population. This is laid down as well in Article 8, para. 2, lit. b (xxv), ICC Statute for international armed conflicts.²¹⁶ The same prohibition is still missing in the ICC Statute for non-international armed conflicts, however.

19. Even though these codifications were introduced into international humanitarian law by the Additional Protocols, their foundation was laid in Articles 23 and 53 GC IV. Pursuant to these provisions, passage is to be guaranteed for shipments of medicines and medical supplies, objects necessary for religious services, and essential foodstuffs, clothing, and

medicines for those in special need of protection. Article 53 GC IV prohibits unnecessary destruction of movable and immovable property.²¹⁷

20. The catalogue of grave breaches contained in Article 85 AP I does not expressly mention the violation of Article 54 AP I. However, starvation of a population through destruction of facilities, institutions, and objects necessary for survival always constitutes an attack on the civilian population (Article 85, para. 3, lit. a, AP I).

e) Destruction or appropriation of goods, carried out unlawfully and wantonly without any military necessity (Article 50 GC I; Article 147 GC IV).

21. This prohibition summarizes a number of grave breaches of the Geneva Conventions (see as well, Article 8, para. 2, lit. b (xiii), ICC Statute).²¹⁸ In accordance with Article 50 GC I, the destruction and appropriation of protected goods (i.e. property protected by the convention) constitutes a grave breach if it is not justified by military necessity, and if protected goods are taken on a large scale, unlawfully, and arbitrarily. The term 'property protected by the convention' is defined in Articles 33–36 GC I. Medical institutions, whether fixed or mobile, come within the ambit of this provision. Other goods protected under GC II include mobile medical units, coastal rescue craft, hospital ships, transport ships for the wounded, and air ambulances (Articles 22–25, 27, 28, 38, and 39 GC II). Finally, GC IV prohibits the destruction of property within the occupied territory by an occupying power (Article 53 GC IV), unless destruction is absolutely necessary to fulfil military objectives. Not included in this prohibition is the destruction of property on the battlefield.

22. The expropriation of protected objects is also forbidden unless the special requirements of the Geneva Conventions for such types of appropriations are met.

(p. 725)

f) Launching an indiscriminate attack in the knowledge that it will have adverse effects on civilian life and civilian objects (Article 85, para. 3, lit. b, AP I).

23. See Article 8, para. 2, lit. b (iv), ICC Statute.²¹⁹ The prohibition, and punishment as a grave breach, of an (indiscriminate) attack in the knowledge that such attack will have adverse effects on civilian life and civilian objects which would be clearly excessive in relation to the military advantage (collateral damage) corresponds with Article 85, para. 3, lit. b, and Article 51, para. 4, AP I. This prohibition is a concretization of the obligations enshrined in Articles 48 and 52 AP I.²²⁰ The regulation of Article 85, para. 3, lit. b, AP I serves to reinforce the general principle that military actions must be aimed against combatants or/military objects (Articles 48 and 52 AP I). The term 'civilian objects', i.e. objects which are not military objectives, is defined in Article 52 AP I.

24. The regulation of Article 85, para. 3, lit. b, AP I contains two qualifications: the indiscriminate attack must be intentional and it must be known in advance that this attack will lead to a disproportionately high (excessive) loss of life, injury of civilians, or damage to civilian objects.

25. Specification of which collateral damage is considered 'excessive' or disproportionate can be found in Article 57, para. 2, lit. a (iii), AP I.²²¹ This provides that a balance is required between concrete, and direct military advantage, and the requirement that the civilian population, and civilian objects are protected. However, Article 57, para. 2, lit. a, AP I is broader in regard to the situations covered than the penal standard in Article 85, para. 3, AP I. Article 57, para. 2, lit. a (i) and (ii), AP I require particular precautionary measures when planning and carrying out attacks. An attack, however, will only be considered illegal when the prerequisites of Article 57, para. 2, lit. a (iii), AP I are fulfilled, that is when the

precautionary measures were manifestly insufficient. A serious breach of AP I is committed, however, when knowledge of the disproportionality of collateral damage is given.²²²

26. An attack on civilians with the ‘primary goal’ of spreading terror throughout the civilian population is, pursuant to Article 51, para. 2 (second sentence), AP I, strictly forbidden in international armed conflict, and according to Article 13, para. 2 (second sentence), AP II in non-international armed conflicts,²²³ although in practice these types of terror attacks were and are frequently committed. The violation of the prohibition constitutes—*a maiore ad minus*—a grave breach according to Article 85, para. 3, lit. a, AP I as it is prohibited to make the civilian population or individual civilian the object of an attack. Prominent examples of violations of this rule since WWII are the Iraqi attacks on Israeli cities during the Gulf War (1991), the bombardment by the Yugoslav Army and Serbian militia during the Yugoslav conflict (1991–1992)²²⁴ and the bombardment and the use of chemical weapons against civilians during the war in Syria since 2011.

g) Launching an attack against works or installations containing dangerous forces (dams, dykes, and nuclear electricity-generating stations), expecting that such an (p. 726) attack will cause excessive loss of life, injury to civilians, or damage to civilian objects (Article 85, para. 3, lit. c, AP I; Article 15 AP II).

27. This regulation is based on Article 85, para. 3, lit. c, AP I. Reference is made to Article 56 AP I, by which these installations enjoy protection, even against reprisals (Article 56, para. 4, AP I), although the protection is not an absolute (Article 56, para. 2, AP I). Installations of this sort must not be attacked even if they are of military significance to the extent that the attack can lead to the release of dangerous forces (overflow, radioactivity) which would lead to excessive injuries of the civilian population. This holds equally true whether the destruction of such facilities is deliberate or the incidental result of strikes of other military objects.

28. A comparable rule is found in Article 15 AP II for non-international armed conflicts. AP II, however, does not recognize the concept of grave breaches, and prosecution of breaches have to be based on domestic criminal law.

h) Launching an attack against an undefended locality, demilitarized zone, or neutralized zone (Article 85, para. 3, lit. d, AP I; Article 15 AP II).

29. See Article 8, para. 2, lit. b (v), ICC Statute. Undefended localities are protected by Article 59 AP I.²²⁵ Localities of this sort may not be attacked by the parties to the conflict for any reason. The same is true for demilitarized zones, according to Article 60 AP I.²²⁶ A grave breach of international humanitarian law is committed during an international armed conflict if an undefended locality or demilitarized zone is intentionally made the object of an attack which results in death or serious harm to the physical integrity or health of persons in the area (Article 85, para. 3, lit. d, AP I).

i) Launching an attack against defenceless persons (Article 85, para. 3, lit. e, AP I).

30. See Article 8, para. 2, lit. b (vi), ICC Statute.²²⁷ The category of defenceless persons is defined by Article 41 AP I. This notion includes persons who find themselves under the control of a hostile party, who unmistakably announce their intention to surrender, or who are unconscious or otherwise unable to defend themselves due to injury or sickness, as long as they refrain from hostile actions and do not attempt to escape. A grave breach is

committed if the attacker knows that the person is incapable of fighting. It is not sufficient, however, to state that the attacker was obliged to infer this from the circumstances.²²⁸

j) Unjustifiable delay in the repatriation of prisoners of war and civilians (Article 85, para. 4, lit. b, AP I).

31. In accordance with Article 109 GC III, seriously wounded or seriously ill prisoners of war must be repatriated to their own countries even during a military conflict. In addition, after the termination of the hostilities, an obligation exists to immediately release and repatriate prisoners of war. Unjustifiable delay in repatriation constitutes a grave breach of humanitarian law. A delay is unjustifiable when there are no objective reasons for it and when the delay furthers none of the reasons which the custodian state has invoked.

(p. 727) **32.** The situation concerning the civilian population differs from that of prisoners of war. In accordance with Article 35 GC IV, all protected persons, who wish to leave the conflict area during the course of the conflict, have the right to do so, as long as their departure does not conflict with national interest of the state. In other words, a grave breach is committed if civilians are denied departure without sufficient reason.²²⁹

33. A grave breach is also committed according to Article 85, para. 4, lit. b, AP I if a civilian population, lawfully displaced in accordance with Article 49 GC IV, is not allowed to return promptly. This should be differentiated from the rule contained in Article 85, para. 4, lit. a, AP I which provides that a grave breach is committed if the occupying power either uses a part of its own civilian population to colonize an occupied territory (in violation of Article 49 GC IV) or expatriates segments of the civilian population native to an occupied territory (in violation of Article 49 GC IV). Article 49 GC IV sets strict limits on the resettlement of civilian populations native to occupied territories. Violations of these constitute grave breaches under Article 147 GC IV. In this respect, Article 85, para. 4, lit. a, AP I has a merely repetitive character.

34. On the other hand, the classification of the colonization of an occupied territory by the occupying power's civilian population as a grave breach is new to humanitarian law. The reasons underlying this reclassification (Article 49, para. 6, GC IV) as a grave breach are experiences in the Middle East, as well as the desire to protect established populations from foreign infiltration and control. In addition, this provision is intended to prevent the creeping annexation of occupied territories. It has gained significance in the light of the Yugoslav conflict.

k) The practice of apartheid and other inhumane and degrading practices based on racial discrimination (Article 85, para. 4, lit. c, AP I).

35. See Article 8, para. 2, lit. b (xxi), ICC Statute.²³⁰ Examples of such serious breaches include segregation on the basis of race within prisoner-of-war camps, or bad treatment (or worse) handling of specific ethnic groups. Most of the practices condemned here fall under the category of 'inhumane practices'. The notion of 'apartheid' is defined by the International Convention on the Suppression and Punishment of the Crime of Apartheid,²³¹ and the term 'racial discrimination' is derived from Article 1 of the International Convention on the Elimination of all Forms of Racial Discrimination, GA Res. 2106 A (XX) of 21 December 1965.²³²

l) Extensive destruction of cultural property and places of worship (Article 85, para. 4, lit. d, AP I; Article 16 AP II).

36. See Article 8, para. 2, lit. b (ix), ICC Statute.²³³ Articles 53 AP I and 16 AP II, without prejudice to the Hague Convention for Protection of Cultural Property in the Event (p. 728) of Armed Conflict,²³⁴ forbid all acts of hostility directed against historical monuments, works of art, or places of worship which constitute the cultural or intellectual heritage of peoples and which have been given special protection based upon specific conventions, for example within the framework of a competent international organization.²³⁵ More specifically, it is forbidden to use such acts to attain military objectives.²³⁶

37. According to Article 85, para. 4, lit. d, AP I, a breach of the duty to protect cultural property constitutes a grave breach of the Protocol if the attack was directed at such a protected object. No violation occurs if the object attacked was being used primarily to support military objectives (Article 53, lit. b, AP I) or was located in the immediate vicinity of a military facility. The violation can be attributed to any military leader, even one in charge of a small unit, as long as that leader was competent to decide upon the target of the attack concerned.

m) Prevention of a fair and regular trial (Article 3, para. 3, lit. d, GC I; Article 3, para. 1, lit. d, GC III; Article 85, para. 4, lit. e, AP I).

38. See Article 8, para. 2, lit. a (vi), ICC Statute.²³⁷ GC Article 3, para. 1, lit. d, prohibits the ‘passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples’. Article 50 GC I does not classify this violation as a grave breach of this Convention. The situation in GC III and GC IV is different as laid down in Article 130 GC III and Article 147 GC IV.

39. Articles 99–108 GC III and Articles 71–75 and 126 GC IV contain corresponding procedural guarantees, as does Article 75 AP I.²³⁸

40. According to Article 130 GC III and Article 147 GC IV, the wilful deprivation of a prisoner of war’s right to a ‘fair and regular trial’, as described in GC III and IV, is a grave breach. This principle is also found in Article 85, para. 4, lit. e, AP I, where it is expanded to encompass all by the Conventions or in Article 85, para. 2, AP I protected persons.

n) Perfidious (Article 37 AP I) use of recognized protective signs (Article 53, para. 1, GC I; Article 45 GC II; Article 85, para. 3, lit. f, AP I; Article 12 AP II).

41. See Article 8, para. 2, lit. b (vii), ICC Statute.²³⁹ The improper use of the Red Cross or Red Crescent emblem or any other protective emblems, signs, or signals which create such illusion was originally forbidden by Article 53, para. 1, GC I. Article 45 GC II prohibits the misuse of emblems designated for hospital ships. Article 38 AP I expands this prohibition to include improper use of the Red Cross and misuse of all other symbols, markings, or signals adopted by the Geneva Conventions and this Protocol.²⁴⁰ This includes emblems of the UN. The abuse of any other international symbols, markings, or signals, such as the flag of truce, is also prohibited.

(p. 729) **42.** According to Article 85, para. 3, lit. f, AP I, perfidious use of the distinctive emblems of the Red Cross or other protective signs in violation of Article 37 AP I is a grave breach if it is wilfully committed and leads to death or serious injury to body or health. The word ‘perfidious’, as used in Article 85, para. 3, lit. f, AP I makes clear that the action must be intended to deceive the opponent. Unintentional use of these symbols does not constitute a grave breach.

o) Use of prohibited weapons.

43. See Article 8, para. 2, lit. b (xvii)–(xx), ICC Statute with regard to the use during international armed conflicts,²⁴¹ and Article 8, para. 2, lit. e (xiii)–(xv), ICC Statute with regard to the use during non-international armed conflicts.²⁴² These prohibitive norms are based upon Article 23 HagueReg and specific international treaties. Forbidden weapons include particularly weapons of mass destruction, like chemical weapons, and those which cause superfluous injury and unnecessary suffering.²⁴³ It was an important amendment of the ICC Statute to include as a war crime the use of chemical weapons during non-international armed conflicts (Article 8, para. 2, lit. e (xiii)–(xv), ICC Statute).²⁴⁴ It will be seen whether the use of all or certain autonomous or semi-autonomous weapons will fall under this prohibition at some point in the future.²⁴⁵ The consensus of states in this regard will depend on the fact whether autonomous weapons can be used as ‘smart’ weapons, or are weapons which cause superfluous injury and unnecessary suffering, as they are not reliable in practice.²⁴⁶

44. Neither the Geneva nor the Hague Law regard the infringement of this provision as a grave breach. Its characterization as a war crime in national laws is nonetheless, at least for the states parties to the ICC Statute, necessary. For other states, who are not party to the ICC it is allowed. This supports the special significance placed upon these prohibitions for humanitarian purposes.²⁴⁷ This is especially true with regard to the use of chemical weapons, even in non-international armed conflicts. After the use of these weapons in Syria there was a broad consensus of state representatives that there is no justification of the use of chemical weapons against persons and that an absolute prohibition of the use of this kind of chemical weapons is part of customary law.

21.13

Serious violations of international humanitarian law are covered by the general subject matters in national penal codes, which particularly include offences against:

- **life;**
- **body and health;**
- **personal liberty;**
- (p. 730) — **personal property;**
- **offences constituting a public danger; and**
- **offences committed in the execution of official duties.**

1. The regulations concerning all the grave breaches listed in Section 21.13 are part of most national criminal law statutes. The injury and killing of civilians, as well as the seizure or destruction of property during armed conflicts, violate numerous penal provisions. The actions may be justified if a person acts in self-defence. However, there is no justification for violations of international humanitarian law if this justification is not laid down or not coherent with international humanitarian law.

2. Offences during an armed conflict of which the collective shame lies in the killing of one or more individuals, normally include offences causing the death of protected persons, for example by starving persons to death, through indiscriminate attacks, through assaults on facilities containing dangerous forces, through aggression against undefended localities,

through perfidious and unauthorized use of recognized protective symbols, or by the use of forbidden weapons.

3. If the above-mentioned actions lead to non-fatal personal injury, then the violations will be termed as offences against the bodily integrity of others. These provisions protect the bodily integrity and health of all persons, where the effects of violations can be either physical or psychological in nature.

4. Compelling prisoners of war or civilians to serve in the armed forces of the adversary constitutes a statutory crime. The same applies to hostage-taking, deportation, illegal transfer, or confinement of protected civilians and unjustifiable delay in the repatriation of prisoners of war and civilians.

5. The destruction of public and private property as well as its unjust expropriation, neither of which is permissible under the laws of armed conflict, is likewise punishable under national law.

21.14

The misuse of the emblem of the Red Cross, the Red Crescent, or the Red Crystal or the heraldic emblem of Switzerland should constitute an offence under national penal law, liable to a fine (see above Section 12.31).

States must prevent and repress any misuse of the emblem of the Red Cross, Red Crescent, or Red Crystal (Article 53 GC I; Articles 41, 43 and 45 GC II; Articles 37 and 85, para. 3, lit. f, AP I, and Article 12 AP II). This obligation includes the Swiss coat of arms by reason of the tribute paid to Switzerland by the adoption of the reversed Federal colours and of the confusion which may arise between the arms of Switzerland and the distinctive emblems under the Geneva Conventions (Article 53, para. 2, GC I). The proper use of the distinctive emblems is regulated by states parties to the Geneva Conventions together with the Red Cross and Red Crescent movements in their International Conferences.²⁴⁸ It is punishable as a grave breach if wilfully committed and causing death or serious injury. An administrative offence is committed whenever the Red Cross or Red Crescent are used without authorization if the conditions required in Section 21.10 have not occurred.

(p. 731) **21.15**

The abuse of distinctive emblems and names which, according to the rules of international law, are equal in status to the Red Cross should also be prosecuted.

Distinctive emblems other than the Red Cross, Red Crescent, or Red Crystal include the UN emblem, the emblem of the CultPropConv, and the emblems marking hospital and safety zones, internment camps, civil defence, and prisoner-of-war camps.

2. War Crimes at International Courts

21.16

War crimes and crimes against humanity, which are not properly prosecuted in national penal procedures may be brought to the International Criminal Court (ICC) or an ad hoc tribunal established for such purpose.

The jurisdiction of the ICC, which is complementary to national criminal jurisdictions, is limited to the most serious crimes of concern to the international community as a whole (Article 5 ICC Statute).²⁴⁹ International ad hoc tribunals were established after WWII to prosecute crimes committed by German and Japanese actors and more recently for war

crimes committed in the Former Yugoslavia and in Rwanda. Internationalized criminal courts (mixed courts) were created in Sierra Leone, East Timor, Kosovo, and Cambodia.²⁵⁰

3. Disciplinary Action

21.17

National disciplinary measures against members of the armed forces (see above, Section 2.51) remain unaffected.

The maintenance of military discipline, which is important for any armed forces, shall be used to ensure compliance with international humanitarian law. This may lead to measures additional to and independent from penal prosecution.

21.18

A disciplinary superior, who learns about incidents substantiating suspicion that international law has been violated, shall clarify the facts and consider whether disciplinary measures are to be taken. If the disciplinary offence constitutes a criminal offence, the case shall be referred to the appropriate criminal prosecution authority.

1. Not only can criminal responsibility attach to superiors for a grave breach by their subordinates, but the officers themselves are generally under an obligation to prevent such injuries, to report the violations if necessary (Article 87, para. 1, AP I), and further, to impose disciplinary or criminal punishment (Article 87, para. 3, AP I).
2. The question of whether disciplinary punishment is sufficient or whether the case should be referred to criminal prosecutors is decided according to national law. The (p. 732) possibility of disciplinary punishment by the military remains even after a case has been handed over to the prosecutor (Article 87, para. 3, AP I).

VIII. Reparation

21.19

A party to a conflict, which does not comply with the provisions of international humanitarian law, shall be liable to make reparation. It shall be responsible for all acts committed by persons forming part of its armed forces (Article 91 AP I; Article 3 HC IV). Forms of reparation include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

1. The obligation to compensate by a state or belligerent party that violates the provisions of the laws of war can be traced to Article 91 AP I which has the same wording as Article 3 HC IV *verbatim*.²⁵¹ According to these rules, the state is responsible for all acts committed by persons forming part of its armed forces. At the time that Article 3 HC IV was laid down, it was considered as an effective tool for making reparation in the case of breaches of the HagueReg. It corresponds with the general rule, as developed both in state practice and jurisprudence that a breach of international law caused by a state will invoke its responsibility. However, not in every single case of wrongful personal conduct is the responsibility of states or international organizations involved.²⁵² Where such responsibility exists, not only compensation, but also other forms of reparation including restitution, rehabilitation, satisfaction, and guarantees of non-repetition must be considered.

2. The obligation to provide compensation for violations of international humanitarian law applies equally to each party to the conflict, whether aggressor or defender. Pursuant to the object and purpose of Article 3 HC IV and Article 91 AP I, compensation must be paid if the violation of international humanitarian law causes compensable damages (personal injuries, material and property damage, etc.). The sentence of Article 3 HC IV and Article 91 AP I is clear on the point that every act of a member of the armed forces, whether or not committed according to orders of a superior, and whether or not falling within the realm of military duties, is attributable to the relevant state. Thus, in this sense, the liability is strict. It is a challenge for the state parties to interpret this norm in a coherent way if autonomous weapons are used and these weapons violate certain rules of international humanitarian law, as for instance the prohibition of attacking civilians. However, if autonomous weapons act instead of members of the armed forces during an armed conflict and substitute individuals as part of armed forces an analogous interpretation of this rule means that a state is responsible for all acts committed by autonomous weapons used by its armed forces if a weapon violates international humanitarian law.

3. In practice, state responsibility for breaches of international humanitarian law has often been neglected. Almost always, victor states have demanded reparation without ensuring compensation for each individual violation.²⁵³ In some cases, states have arranged (p. 733) for the payment of compensation for accidental damage²⁵⁴ or even—as during the recent armed conflict in Afghanistan—for *ex gratia* payments if civilians were damaged or killed or civilian objects and property are destroyed but a violation of the laws of war is not given or cannot be proofed (as for instance in a case of so-called non-excessive collateral damage).²⁵⁵ Also, beyond such cases, there is a practice of claims commissions established by states willing or persuaded by other states or ordered by the Security Council under Chapter VII to bring redress in specific situations of a breach of *jus in bello* or *jus ad bellum*.²⁵⁶

4. The final adoption in 2001 of the International Law Commission's Articles on Responsibility of States (ARS)²⁵⁷ has confirmed that state responsibility extends to breaches of international humanitarian law which may be attributed to the state. This attribution may be made to acts committed by armed forces (Articles 4–7 ARS) of a state,²⁵⁸ irrespective of whether the act was committed in an international or non-international armed conflict. It may also include armed private entities, like terrorist groups, if a state has effective or overall control with regard to these groups (Article 8 ARS) or be made *ex post facto* to acts of members of armed opposition groups if their insurrectional movement was successful (Article 10 ARS). In all these cases, individual crimes and other violations of international law—as they are internationally wrongful acts of a state—entail state responsibility.

5. State practice and jurisprudence have so far denied that international law offers rights to individuals, corresponding to the duties of states, to comply with international humanitarian law. After several years' debate, the UN Commission on Human Rights has prepared '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', adopted by the General Assembly in December 2005.²⁵⁹ According to this document, the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law includes, (p. 734) *inter alia*, the duty: (a) to take appropriate measures to prevent violations; (b) to investigate violations effectively, promptly, thoroughly, and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (c) to provide victims with equal and effective access to justice; and (d) to provide adequate, effective and prompt reparation for harm suffered, as well as, access to relevant information concerning violations and reparation mechanisms.²⁶⁰ The document confirms the responsibility of states to provide remedies and reparation for gross violations. Its

adoption has been facilitated by avoiding the controversial question of individual rights, except for the plea that states should provide access to justice, reparation for harm suffered, and access to relevant information. Thus, states are called on to close gaps which continue to exist in current international law. These duties might overlap with duties laid down in human right treaties, as the European Convention on Human Rights (ECHR), especially the procedural aspect of the human right to life.²⁶¹

6. The International Law Association (ILA) established a Committee on Compensation for Victims of War²⁶² and issued a Declaration of 'International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)' in 2010²⁶³ and a Declaration 'Reparation for Victims of Armed Conflict (Procedural Principles)' in 2014.²⁶⁴ The 2010 Declaration was a step forward in further stressing and clarifying the rules of international humanitarian law and general international law in this field. The main rule is the right to reparation, as '[v]ictims of armed conflict have a right to reparation from the responsible parties' (Article 6). The notions of victim, and responsible party, as well as the concepts of restitution, compensation, satisfaction are clarified in the 2010 Declaration. Responsible parties are states and international organizations and may also include non-state actors other than international organizations (Article 5 2010 Declaration). The Commentary to the 2010 Articles rightly states that there is a notable trend towards recognizing an individual right to reparation.²⁶⁵ This is in line with Article 75 ICC Statute, as the ICC may award reparation and such an order can be requested by the victim. Besides, a duty of states is included as an assurance that victims have a right to reparation under national law (Article 13 2010 Declaration). Along these lines, states shall develop practical solutions for different situations.

(p. 735) 7. In some armed conflicts and situations of counterinsurgency, warfare condolence payments (compensations *ex gratia*), as mentioned above,²⁶⁶ are seen by some states as a tool 'to win the peace', that is to create trust in situations where civilians are inadvertently killed by a combatant of another state.²⁶⁷ These payments are not seen by the states as an admission of liability, and they are not required by international law as long as there is no violation of humanitarian international law that caused the death or injury. However, the payments may reflect a local custom of financial compensation. Moral, ethical, and strategic reasons can demand such payments if they can be seen in the context of a broader process of reconciliation.²⁶⁸

IX. Protecting Powers and their Substitutes

21.20

At the beginning of a conflict, the parties to the conflict have the duty to appoint protecting powers, which safeguard their interests (Article 5, para. 1, AP I). For this purpose, each party to the conflict shall designate a protecting power (Article 8, para. 1, GC I; Article 8, para. 1, GC II; Article 8, para. 1, GC III; Article 9, para. 1, GC IV). The party involved shall, without delay and for the same purpose, permit the activities of a protecting power, which has been acknowledged by it as such, after designation by the adverse party. The International Committee of the Red Cross may assist in the designation of protecting powers (Article 5, para. 3, AP I).

1. A protecting power is an important means for the implementation of humanitarian law during an international armed conflict. A protecting power has to implement humanitarian law by supervision, inspection, assistance, and transmissions. It has the right to inspect prisoner-of-war camps, to assist in judicial proceedings, to deliver notes to the belligerents, and to render good offices.²⁶⁹ Through a protecting power, a kind of neutral supervision is created that functions as a tool for the implementation of international humanitarian law, even though the protecting power is obliged to advocate the interests of the party to the

conflict that it represents. First of all, a state has to agree to be a protecting power. The state has to be neutral or not party to the conflict and must be designated by a party to the conflict and accepted by the adverse party as a protecting power. Usually, there is an agreement between the protected state, the protecting power, and the host state with regard to the special tasks of the protecting power. The duties of the protecting power end with the demise of the protected state or with the restoration of diplomatic relations between the parties of the armed conflict. If no state agrees to be a protecting power, the ICRC can act as a substitute. The same is true in non-international armed conflicts: the ICRC offers to perform the function of a protecting power; however, the parties to a non-international armed conflict have to accept such offers.

(p. 736) **2.** The institution of the protecting power developed during the Franco-Prussian War of 1870–1871 and was incorporated—after WWI—into an international agreement for the first time in Article 86 (Organization of Control) of the 1929 Geneva Convention relative to the Treatment of Prisoners of War.²⁷⁰ During WWII, most belligerents party to the 1929 Convention appointed protecting powers. All 1949 Geneva Conventions contain provisions regarding protecting powers (Articles 8–10 GC I; Articles 8–10 GC II; Articles 8–10 GC III; and Articles 9–11, 30 GC IV). According to this, the parties to an armed conflict are obliged to appoint protecting powers. They regulate the procedure of appointment and the functions of the protecting powers. With this, the Geneva Conventions try to fill in the lacunae of the 1929 Convention. Rules concerning protecting powers are further improved in Article 5 AP I with regard to international armed conflicts. Additionally, the 1961 Vienna Convention on Diplomatic Relations remains applicable as there is an overlap between the law of diplomacy and international humanitarian law after an armed conflict has begun (Article 5, para. 6, AP I).²⁷¹ Special regulations bind states parties to the 1999 Second Protocol²⁷² to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.²⁷³ Apart from this treaty law, the institution of a protecting power is an established rule of customary international law.

3. There are four possibilities for the appointment of a protecting power: *first*, the appointment may be made through a trilateral agreement between the determining party, the opposing party, and the protecting power. In this case, a belligerent state appoints a state not party to the conflict to safeguard its interests in view of the other parties engaged in the conflict. The prospective protecting power, as well as the state with which the party is engaged in armed conflict, must agree to this selection. The *second*, and more likely, possibility is that the appointment of protecting powers will be accomplished through the mediation efforts of the ICRC. The reasons why states could not agree on the appointment of protecting powers are irrelevant for the involvement of the ICRC. In order to achieve the appointment of protecting powers, the ICRC can summon a party—this is the *third* procedure—to present it with a list of at least five states that it judges to be acceptable to act as a protecting power against the hostile party. Each opposing party can be called concurrently to submit a list of at least five states which they would recognize as protecting powers. The ICRC then compares both lists and requests the consent of a state specified on both lists to act as a protecting power. If no appointment of a protecting power is reached through this method, *fourth*, the possibility exists that the parties designate the ICRC or another international organization, which offers all guarantees of impartiality and efficacy, to act as a substitute.²⁷⁴

4. The competences of the protecting powers are not completely defined. As follows from the Geneva Conventions, it is the duty of the protecting powers to safeguard the interests of the party to the conflict which has appointed them (Article 8, para. 1, first sentence, GC I) and to encourage compliance with international humanitarian law in an impartial (p. 737) manner. According to Article 126, paras 1–3, GC III, the representatives or delegates of the protecting powers have a free right of access to prisoners of war.²⁷⁵ According to Article 143, paras 1–4, GC IV, they have the right to enter all places where protected persons, as

civilians, may be. This is particularly true for places of internment, confinement, or work. In accordance with Article 30 GC IV, protected persons can appeal to the protecting powers, the ICRC and similar organizations, and of any other organization that might assist them. According to Article 105, para. 5, GC III, the representatives of protecting powers have the right to attend trials of war criminals. The same holds true for trials of civilians in occupied territories (Article 74, para. 1, GC IV). Finally, in accordance with Article 55, para. 3, GC IV, it can be determined by protecting powers whether sufficient foodstuffs and medical supplies are available in occupied territories. In addition, according to Article 5 CultPropReg, protecting powers can also verify violations of cultural property.

5. The system of protecting powers was reaffirmed in Article 5, para. 1, AP I. Although in many recent armed conflicts, no protecting powers were designated,²⁷⁶ the ICRC plays a crucial role for monitoring the implementation of humanitarian law. Even during the so-called war on terror, and the establishment of military tribunals (not court martials) outside the state territory of the detaining state,²⁷⁷ it is the ICRC which was and is able to visit prisoners on a regular basis and write confidential reports to the detaining state.²⁷⁸ This is at least a basis for some kind of accountability, although it is not possible for the ICRC to prevent torture or cruel, inhuman, and degrading punishment if state officials justify, order, and finance these most severe violations of humanitarian law.

21.21

If there is no protecting power, the parties to the conflict are obliged to accept an offer of the International Committee of the Red Cross or of any other impartial and efficient organization to act as a substitute (Article 5, para. 4, AP I).

If no protecting power has been designated, the parties to the conflict shall recognize the ICRC or another impartial organization as a substitute (Article 10 GC I; Article 5, para. 4, AP I). Despite the slightly ambiguous wording in Article 5, para. 4, AP I, a corresponding obligation to accept exists. Only this interpretation of the duties contained in Article 5, para. 1, AP I allows parties of an armed conflict to avail themselves of the system of protecting powers.²⁷⁹

(p. 738) X. International Fact-Finding

21.22

The International Humanitarian Fact-Finding Commission—IHFFC—(Article 90 AP I) was established in 1991. It is comprised of fifteen independent members and shall investigate any incident alleged to be a grave breach or a serious violation of the rules of international humanitarian law within states, which have recognized the competence of the Commission.

1. Whereas fact-finding and enquiry is—in general terms—a recognized form of international dispute settlement through the process of elucidating facts according to Chapter VI UN Charter,²⁸⁰ there are the special rules of Article 52 GC I, Article 53 GC II, Article 132 GC III, and Article 149 GC IV in international humanitarian law. Those rules provide for the creation of a fact-finding commission upon the request of one party to a conflict.²⁸¹ Although the *ICRC Commentary* has always seen this provision as binding,²⁸² such an investigation has never yet been conducted. The probability for this is also slight, as the accused party can escape simply by refusing to permit an international investigation of the incident.

2. Article 90 AP I is a step forward in supporting impartial investigations as it establishes the International Humanitarian Fact-Finding Commission, and creates a special tool for the implementation of AP I and the Geneva Conventions (Article 90, para. 2, lit. c, AP I). Composed of fifteen individuals, acting in their personal capacity, the IHFFC is a permanent, impartial, and independent body with its seat in Berne/Switzerland.²⁸³ The IHFFC has to investigate allegations of grave breaches and serious violations of international humanitarian law (Article 90, para. 2, lit. c, AP I). A party can declare, by or after signing or ratifying AP I, that it recognizes the competence of such a fact-finding commission vis-à-vis every other contracting party, which accepts the same obligation. Such declarations of acceptance of the Commission's competence have presently been submitted by seventy-seven states;²⁸⁴ the IHFFC was constituted in 1991. The main functions of the Commission are fact-finding and conciliation in international armed conflicts: the investigation of all activities alleged to constitute a grave breach or other serious violation of the Geneva Conventions or AP I; good offices contributing to adherence to the Geneva Conventions and AP I; other investigations at the request of one party to a conflict and with the agreement of the other. The last function means that even states, not party to AP I can ask for the help of the Commission. If all parties to the conflict agree then the Commission shall accept to make enquiries into alleged violations of international law in non-international armed conflicts as well.²⁸⁵ Hence, although the (p. 739) Commission cannot inquire into any facts unless it has been seized by the relevant party to the conflict, it may take initiatives within its mandate and offer its services. Such offers can be made in non-international armed conflicts, as well.

3. In accordance with Article 90, para. 5, lit. c, AP I, the Commission does not publicly communicate the results of its fact-finding, unless all parties to the conflict so request. This provision may, in effect, strengthens the initiative of states to take necessary measures within their own responsibility, without pressure from outside. As the results of other fact-finding activities, in particular those by UN bodies or the Joint Investigation Teams (JITs),²⁸⁶ are by nature available for public discussion, states might have a national interest in seizing the Commission rather than other fact-finding mechanism. In practice, however, the services of the Commission have hardly been used so far.²⁸⁷ In May 2017, it was announced by the Commission that it would lead an independent forensic investigation in Ukraine.²⁸⁸

21.23

In the case of serious violations, states are further bound to act, jointly or individually, in co-operation with the UN and conformity with the UN Charter (Article 89 AP I).

1. Article 89 AP I is the result of a long debate over whether to prohibit all reprisals or to allow them only under strictly limited conditions.²⁸⁹ Article 89 AP I does not explain which actions states or the UN respectively may take to ensure the observance of international humanitarian law. This may be deplored, as mechanisms agreed under the 1949 Geneva Conventions have not been used so far: Articles 52 GC I, 53 GC II, 132 GC III, 149 GC IV provide for formal inquiries at the request of a party to the conflict concerning any alleged violation. Even procedural aspects, including the choice of an umpire, are addressed in these provisions, but states have never put them into practice. It may be preferable to states to convene a meeting for consideration of general problems concerning the application of international humanitarian law. This possibility is provided for in Article 7 AP I, but procedural thresholds are rather high: Switzerland, as depositary of AP I, shall convene such meeting 'at the request of one or more of [the parties to AP I] and upon the approval of the majority of [all parties]'. Thus, each request made must find the approval by

a majority of all (presently 174)²⁹⁰ states parties, before states may be convened for its consideration.

2. The most likely measures may arise from fact-finding by competent UN bodies, as has been the case for instance in the Former Yugoslavia, and from Security Council action (p. 740) under Chapter VII of the UN Charter, that is economic and military measures.²⁹¹ The Security Council has taken this path in recent years, in particular in the cases of Iraq (1991), Somalia (1992), and the Former Yugoslavia (1991–1995), East Timor (1999), Kosovo (1999), Afghanistan (2000–2002), Sierra Leone (2003), Liberia (2003), Haiti (2004), Sudan (2005), and Libya (2011)²⁹² and in rare cases in recent years, when no veto state blocked the council, in Syria.²⁹³

3. Since the end of the so-called Cold War, with Security Council Resolution 688 of 5 April 1991, serious violations of human rights are classified as a threat to the peace and security of the region, thus clearing the way for Security Council activities based on Chapter VII of the Charter.²⁹⁴ The line adopted in Resolution 688 was also pursued by the Security Council in the case of Somalia. Resolution 794 of 3 December 1992 focuses exclusively on serious human rights violations which justify measures pursuant to Chapter VII. The Security Council dealt with the incidents in Former Yugoslavia as a result of violations of international humanitarian law. Resolutions 764 of 13 July 1992 and 780 of 6 October 1992 emphasized the obligation of parties to the conflict to obey international humanitarian law and initiated steps towards the prosecution of war criminals.²⁹⁵

XI. The International Committee of the Red Cross

21.24

The International Committee of the Red Cross (ICRC) is an impartial, neutral, and independent humanitarian 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. The ICRC is an organization based in Swiss law. The members of its governing board (the Committee) are Swiss citizens, yet the delegates acting in its name are of various nationality. The Geneva Conventions and their Additional Protocols recognize the special status of the ICRC at the international level and assign specific tasks to it, including visiting prisoners of war, civilian internees and detainees, carrying out its activities in occupied territories, providing relief to persons in need, selecting and transmitting information concerning missing persons (Central Tracing Agency), and offering its good offices to facilitate the establishment of hospital and safety zones. The ICRC's mission is to promote the faithful application of the principles and rules of international humanitarian law by the parties to an armed conflict, whether international or not and, in general, to strengthen the protection of victims of armed conflicts through international law. In humanitarian matters, it serves as a neutral intermediary between belligerents and has a general right of initiative. Owing to its humanitarian activities in situations of violence, which are guided by the principles of humanity, impartiality, neutrality, (p. 741) independence, voluntary service, unity, and universality, the ICRC enjoys high respect and deserves support.

1. The ICRC was established in 1863 and is, in practice, the organ which serves as a guardian of international humanitarian law.²⁹⁶ It is an independent humanitarian organization that has a status of its own and is recognized as a privileged non-state actor with a limited personality under international law.²⁹⁷ It monitors observance of the four Geneva Conventions and their Additional Protocols and directs the International Red Cross

and Red Crescent Movement. Due to the nature of its organization, it is assured that the ICRC performs its duties independently of government influence (including the Swiss government). The ICRC has continuous or temporary delegations in foreign countries which represent its interests to the host state's authorities.

2. According to its own Statutes and the Statutes of the Movement,²⁹⁸ the duties of the ICRC are *inter alia*: to secure observance of the basic principles of the Red Cross; to work towards the strengthening of international humanitarian law; to enforce humanitarian measures in civil wars and domestic conflicts; and to serve as protection and aid for military and civilian victims in such conflicts and as a mediator in humanitarian questions between parties to the conflict. In addition, the ICRC performs duties assigned to it by the Geneva Conventions and Additional Protocols (Article 81, para. 1, AP I). Among these are, the visiting of prisoners of war and interned civilians (Article 126, paras 1, 4, GC III), the protection of the rights of those living in occupied territories (Article 143, paras 1, 5, GC IV), as well as the maintenance of the International Tracing Service and the rights to take any humanitarian initiative that it deems necessary are of importance. Additionally, the ICRC is a possible substitute for a protecting power.²⁹⁹ The duties and rights of the ICRC are not limited to international armed conflicts. Common Article 3, para. 2, GC states that the ICRC, as an impartial humanitarian body, can offer its services to each party of a non-international conflict as well.

3. It is generally recognized that the ICRC monitors observance of international humanitarian law and has to react to serious breaches of international law whether it is an international armed conflict or non-international armed conflict.³⁰⁰ The ICRC may notify one party of violations complained of by another party and in this way initiate dialogue between the two conflicting parties.³⁰¹ ICRC activities in case of violations of international humanitarian law are generally based on confidential and bilateral representations. They are aimed at influencing states and non-state actors through persuasion. It is only under (p. 742) very exceptional and strict conditions that the ICRC resorts to a public denunciation of violations of international humanitarian law.³⁰²

XII. Implementation Roles of the UN

21.25

Competent organs of the UN shall promote universal respect for, and observance of, human rights and fundamental freedoms, in peacetime as in times of armed conflict.

The UN is committed 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person' and 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained' (Preamble, paras 2 and 3, UN Charter). Much more than a mere political programme, this commitment is an essential element for maintaining and restoring international peace and security. It is mandatory of all competent organs of the UN and fully includes the task to promote universal respect for, and observance of, human rights and fundamental freedoms. Compliance with international humanitarian law is a necessary element of this task and this entails particular responsibilities for the General Assembly, the Security Council, and the Secretary-General, in peacetime and in times of armed conflict.

21.26

The competence of human rights bodies and courts established under human rights conventions is generally limited to the determination of whether a given act was in violation of the relevant human rights norm. This does not preclude, however, taking into consideration provisions of international humanitarian law in order to interpret such norm. It may also

be considered that human rights bodies have a responsibility to investigate those limitations of human rights in armed conflicts, which may apply under the *lex specialis* role of international humanitarian law (see above, Sections 14.02-14.04). Hence, international humanitarian law may be dealt with even by human rights organs, which can thus provide support to ensure respect for international humanitarian law.

1. *Non-confrontative means of implementation by courts and tribunals: human rights bodies.* References to human rights and fundamental freedoms, which are made in the Preamble and Articles 1, para. 3, 55, lit. c, and 56 UN Charter, must be understood today as determinations that establish firm legal commitments for states.³⁰³ Many states are parties to universal and/or regional human rights treaties.³⁰⁴ The core of the human rights obligations form part of *jus cogens*.³⁰⁵ Accordingly, international bodies, supported by states, NGOs, and individuals, have lent their voice for strengthening the protection of human (p. 743) rights in armed conflicts. The ICJ has stated that human rights are applicable during armed conflict.³⁰⁶ The former Commission on Human Rights has initiated an assessment and documentation of human rights violations committed during fighting in the Former Yugoslavia (mass shootings, torture, rape, ethnically motivated expulsions) and authorized criminal prosecution for these actions in its special session in August 1992.³⁰⁷ Specialized bodies, such as the Committee Against Torture (CAT) and the Committee on the Elimination of Racial Discrimination (CERD), have also been invoked to deal with situations in armed conflicts. Considering the close interrelationship between human rights in armed conflicts and international humanitarian law,³⁰⁸ human rights bodies are to apply norms of international humanitarian law in certain circumstances. In any event, human rights bodies have a responsibility to investigate those limitations of human rights in armed conflicts which may apply under the *lex specialis* rule of international humanitarian law.³⁰⁹ Notwithstanding this situation, it may be suggested that human rights bodies acting fully within their mandate may provide support to ensure respect not only for human rights but also for international humanitarian law.

2. The competence of human rights bodies for violations of international humanitarian law is an indirect one, as each of these bodies' works under a particular mandate that is distinct from the responsibility of states to respect and ensure respect for international humanitarian law. The competence of human rights bodies for violations of international humanitarian law depends on the applicability of human rights during armed conflicts³¹⁰ and—if the military measures take place in another state—on the question of extraterritorial jurisdiction of the state's parties.³¹¹

3. Regional human rights bodies have effectively supported this development. The relationship between human rights and international humanitarian law has been dealt with (p. 744) *inter alia* in the jurisprudence under the ECHR³¹² and the ACHR. Already in 2001, the Inter-American Court of Human Rights (IACtHR) stated that it did not have the competence to determine whether a given act was in violation of the Geneva Conventions or treaties other than the ACHR.³¹³ However, it has also confirmed that this does not preclude to take into consideration provisions of international humanitarian law in order to interpret the ACHR.³¹⁴ The European Court of Human Rights (ECtHR) ruled in several cases on the violation of human rights during an armed conflict in the past,³¹⁵ and has to do this in the near future.³¹⁶ In earlier cases—concerning Northern Ireland, Cyprus, and Chechnya—where operations had been conducted by armed forces although the existence of an armed conflict was denied by the state concerned, the Court applied human rights law directly; *lex specialis* rules of international humanitarian law were not yet considered relevant.³¹⁷

XIII. The Security Council and International Humanitarian Law

21.27

The Security Council may emphasize the direct responsibility of states and armed groups under international humanitarian law.

1. Under Chapter VII of the UN Charter, the Security Council is empowered to take far-reaching decisions to maintain or restore international peace and security. In doing so, the Council enjoys considerable discretion and, while its decisions are binding on member states in accordance with Article 25 UN Charter, no judicial control is expressly provided.³¹⁸ This does not mean, however, that the Security Council is not obliged to act within the framework of the UN Charter and must not violate, at least, norms of *jus cogens*.³¹⁹ Whereas in the years between 1945 and 1990, enforcement measures under Chapter VII could be agreed upon only very occasionally (North Korea 1950–1953, (p. 745) Southern Rhodesia 1965–1970, and South Africa 1966–1990), the historical change marked by the end of the Cold War in 1989 has provided better conditions for the Council's decision-making, although the armed conflict in Syria and other violations of humanitarian law in recent years proofed again that those states that possess veto powers are willing to block resolutions that seem to be contrary to their national interests, even if extreme human suffering is unfolding and will not be ended.³²⁰
2. With Security Council Resolution 688 (1991), the consequences of the serious violations of human rights in parts of Iraq have expressly been classified as a threat to the peace and security of the region, thus clearing the way for activities based on Chapter VII of the Charter. The Security Council had addressed serious human rights violations in South Rhodesia in Resolutions 217 (1965) and 221 (1966), but its measures were justified by the danger of military conflict between South Rhodesia and neighbouring states caused by the flow of refugees.
3. The line adopted in Resolution 688 was also pursued by the Security Council in the cases of Liberia and Somalia. The Preamble of Resolution 788 (1992) determined that 'the deterioration of the situation in Liberia constitutes a threat to international peace and security, in particular in West Africa as a whole'. And the Preamble of Resolution 794 (1992) focuses on 'the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance', to constitute a threat to international peace and security justifying measures pursuant to Chapter VII.
4. The Security Council entered the case of the Former Yugoslavia as a result of violations of international humanitarian law. Resolutions 764 (1992) and 780 (1992) emphasized the obligation of parties to the conflict to obey international humanitarian law and initiated steps towards the prosecution of war criminals. Hence, the serious violations of international humanitarian law legitimized Chapter VII measures.
5. Traditionally, it was assumed that the Security Council could act under Chapter VII of the UN Charter only in cases of an armed attack as a violation of the *jus ad bellum* and could uphold the respect for international humanitarian law as well as human rights only in this context. But this connection is not necessary to trigger actions of the Security Council based on Chapter VII. For example, in the case of Darfur, the Security Council has condemned the violation of international humanitarian law and invoked Chapter VII in 2007, although the situation had not developed out of an act of aggression.³²¹ In 2020, similar resolutions of the Security Council were adopted with regard to South Sudan (SC Res. 2514 (2020)).³²² The same was true in regard to Libya, and the Security Council authorized all necessary measures to, inter alia, protect civilians in Libya (Security Council Resolution 1973 (2011)).³²³ The responsibility of states and armed groups under

international humanitarian law and applicable human rights law remains an important element for the restoration of peace and security and is an important element in the (p. 746) deliberations of the Security Council as long as veto powers do not block the Council, as often with regard to the current armed conflict in Syria.³²⁴

21.28

The Security Council may take action if the safe and unimpeded access of humanitarian personnel to civilian populations in need is denied.

Access to civilian populations is an essential prerequisite for assisting them in armed conflicts and post-conflict situations. Since many years, the Security Council underlines ‘the importance of safe and unhindered access of humanitarian personnel to civilians in armed conflict’.³²⁵ As host-nation consent to such access must not be withheld arbitrarily,³²⁶ ad hoc decisions should also be considered, where necessary.

21.29

The Security Council should initiate fact-finding missions to conflict areas with a view to identifying the specific requirements for humanitarian assistance, and in particular, obtaining safe and meaningful access to vulnerable populations.

Specific requirements for humanitarian assistance must be identified at field level to ensure that assistance can be provided in an effective manner. Today, such fact-finding is widely dependent on initiatives of states, the ICRC, NGOs, and individuals. The Security Council should seek objective advice on existing needs and base its decisions on a more regular fact-finding in this respect. Besides, the Security Council should evaluate and provide for the use of digital tools as—*inter alia*—big data analysis and artificial intelligence could be used for fact-finding and support fact-finding missions.³²⁷

21.30

The Security Council should take effective measures to bring perpetrators of grave violations of international humanitarian and human rights law to justice.

Even before the ICC was established, the Security Council was instrumental in establishing ad hoc tribunals for the purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law. Thus, the Council adopted the Statutes for the ICTY³²⁸ and the ICTR.³²⁹ It also paved the way for the Agreement for and Statute of the Special Court for Sierra Leone of 16 January 2002.³³⁰ Serious Crimes Panels in the District Court of Dili (East Timor)³³¹ and ‘Regulations 64’ Panels in the Courts of Kosovo³³² have contributed to a practice of the courts which was, and still is, supported by the international community.³³³

21.31

The Security Council may consider the establishment of arrangements addressing post-conflict peacebuilding and reconciliation.

Truth and reconciliation commissions of different types have been established to consolidate the peace process after conflicts in *inter alia* Argentina, Chile, Chad, Colombia, El Salvador, East Timor, Ghana, Guatemala, Haiti, Liberia, Morocco, Nepal, Nigeria, Panama, Paraguay, Peru, Philippines, Serbia and Montenegro, Sri Lanka, Sierra Leone, (p. 747) South Africa, South Korea, Uganda, and Uruguay.³³⁴ Truth commissions are institutions established to collect the facts of a prior conflict, and they aim for reconciliation. Their competences vary and can include the making of recommendations,

even in regard to reparations and amnesties, yet they have no binding legal consequences.³³⁵ While each of them was created by an international treaty, especially peace agreements, national legislation, or decree, some of them have been successfully brokered by the UN, using persuasion rather than enforceable action. This is true, for instance, in regard to El Salvador's Commission on the Truth about the 12-Year War in El Salvador. Its members were appointed by the UN in consultation with the parties.³³⁶ The extent to which this process could be supported by peace operations on a more regular basis deserves consideration, although there are several legal problems in connection with Truth Commissions.³³⁷

XIV. Diplomatic Activities

21.32

Compliance with international law may be ensured by using protest, good offices, mediation, investigation, and diplomatic intervention, whether by neutral states, international bodies, religious organizations, or humanitarian organizations, as well as by sanctions decided upon by the UN Security Council.

1. When violations of international humanitarian law reach a certain gravity, they can and have to trigger reactions from other states.³³⁸ Apart from measures taken by the UN,³³⁹ it is possible that individual states, the ICRC, or humanitarian organizations engage in diplomatic intervention. With this intervention, in addition to the influence of bad publicity, diplomatic pressure can be brought to bear on the state to adhere to humanitarian provisions. Examples can be found in the recent history of international law, in which states have countered massive breaches of international law with sanctions, although they themselves were not directly involved in the conflict, as after the illegal annexation of the Crimea in 2014 by Russia. An early example involves sanctions imposed by the community of states in response to the taking of hostages at the US Embassy in Teheran.³⁴⁰ The ICJ upheld this concerted action in its later decision.³⁴¹

2. Sanctions can be based, not only on the violation of the *jus ad bellum*, but as well on the obligation of states to ensure respect of international humanitarian law, as stated in Article 1 common to the Geneva Conventions and Article 1, para. 1, AP I.³⁴² They (p. 748) may include preventive measures to promote compliance and states should act jointly to achieve this goal. An example is the 2005 'EU Guidelines on promoting compliance with international humanitarian law', that were updated in 2009.³⁴³ The Guidelines stress the obligation of states and non-states actors, as well as the political and humanitarian interest in improving compliance with international humanitarian law throughout the world. The ICRC has welcomed these Guidelines.³⁴⁴

XV. The Role of Non-Governmental Organizations

21.33

Non-governmental organizations (NGOs) have an important role to play in conflict prevention, conflict resolution, and post-conflict reconstruction. The influence of NGOs has been supported by the courage, devotion, and compassion of individuals, and in turn, the role of individuals for the implementation and development of international humanitarian law has clearly been increased by NGOs during their activities. This role has already

been indispensable in the past, and it is challenging states at present and in the foreseeable future.

NGOs have an important role in addition to and independent from governments, international organizations, and the ICRC.³⁴⁵ Although not all NGOs serve strictly humanitarian purposes, many of them, including Amnesty International,³⁴⁶ Human Rights Watch,³⁴⁷ Médecins sans Frontières,³⁴⁸ and others, may offer professional services which may be indispensable for the victims of armed conflicts and should be accepted and supported by states. NGOs may help to collect information about violations of humanitarian law, especially if they are in areas where no press or independent observer are allowed or via new digital tools and big data analysis and may help to publish violations of humanitarian law, even in non-international armed conflicts. They can help to stabilize post-conflict situations, for instance, by initiating truth commissions.³⁴⁹ In this context as well, the role of individuals for the implementation of humanitarian law and human rights law cannot be underestimated.³⁵⁰

XVI. National Implementing Measures

21.34

The relative weakness of international measures to secure the performance of obligations under humanitarian law calls for national implementing efforts, among which (p. 749) legislative measures, education programmes, and military manuals are of particular importance.

International humanitarian law must be made an integral part of any national law system,³⁵¹ binding upon individuals as a set of norms which is in most cases directly applicable. In any national legal system, a number of legislative and administrative activities must be taken to implement international legal obligations effectively. First of all, states need to make sure, by military manuals³⁵² and educational measures, that every member of the armed forces of a state knows the relevant norms and principles of humanitarian law and human rights law applicable in armed conflicts. Besides, states shall consult the Advisory Service of the ICRC that provides relevant information on the implementation of international humanitarian law.³⁵³ In addition to legislative, administrative, and political measures, military regulations and the criminalization of war crimes are of particular significance in this context, as the former translate humanitarian rules into the military sphere and may support their application in daily practice,³⁵⁴ and the latter show the red line nobody, especially no combatant is allowed to cross.

XVII. Dissemination of Humanitarian Law

21.35

Effective implementation is dependent upon the dissemination of humanitarian law. Providing information about it is the necessary basis from which to educate and to further the attitude of people towards a greater acceptance of these principles as an achievement of social and cultural development.

The observance of international humanitarian law can only be expected if all authorities, armed forces, and peoples are made familiar with its contents. Military manuals and regular education programmes for all members of armed forces are useful tools and necessary first

steps. The last resort is criminal proceedings against the head of states and/or combatants that have or might have breached international humanitarian law.

XVIII. Personal Responsibility of the Individual

21.36

Each individual shall be responsible for realizing the ideals of international humanitarian law and observing its provisions. Military leaders shall highlight this by their own behaviour. They shall make clear that everyone is required by his or her conscience to stand up for the preservation of the law.

Customary international humanitarian law is binding on every state and each individual; treaty obligations of international humanitarian law are binding on the states parties and the individuals of those parties, especially the combatants of states parties. In addition to these legal obligations, a moral obligation flows from the realization that the objective of international law is to reduce, as far as possible, the human (p. 750) suffering caused by military conflicts. This was stressed since the origins of the rules of armed conflict, the Lieber Code,³⁵⁵ and is enshrined in the Martens Clause³⁵⁶ as a principle of the laws of war. There is an individual responsibility for each person realizing the ideals of international humanitarian law and observing its provisions. This is true, even if weapons become more automated, and or if autonomous weapons will be deployed. Persons (combatants and heads of states that order the use of such weapons) have to be held accountable if these weapons do not act in compliance with humanitarian law to avoid a responsibility gap. In any case, military leaders, with their outstanding position, must stress that every combatant is required to stand up for the preservation of the law. However, the consequences of a command, given by a superior, that violates international humanitarian law or other norms of international law have not been fully settled.³⁵⁷ Generally, a soldier is obliged to obey his or her superior. This is an important general rule because only with a clear hierarchy and a clear command structure, the implementation of humanitarian law can be reached.³⁵⁸ However, to reach this implementation, it has to be forbidden that a soldier is obliged to obey a command if that command requires him or her to commit a war crime or another violation of humanitarian law. From the object and purpose of international humanitarian law, it can be derived that the soldier is obliged not to obey a command that requires him or her to commit a punishable offence.³⁵⁹ This is obvious in regard to orders that constitute an international crime; they must not be obeyed. According to Article 33 ICC Statute, the criminal responsibility of a person obeying an order is not relieved if this order is manifestly unlawful, namely an order to commit genocide or crimes against humanity (Article 33, para. 2 ICC Statute). When the order is not manifestly unlawful, as concerning war crimes, there is no criminal responsibility if the soldier was under a legal obligation to obey the order *and* did not know that the order was unlawful (Article 33, para. 1 ICC Statute).³⁶⁰ Orders which are obviously a violation of international law without constituting an international crime, are non-binding. This includes, for instance, violations of international law that are intentional violations of the main principles of humanitarian law but do not constitute war crimes, and intentional violations of main principles of human rights laws that do not constitute genocide or crimes against humanity. Apart from this, it is questionable whether it is sound to argue that a combatant is not obliged to obey illegal orders at all.³⁶¹ The drawback of such a rule would be that the command structure could be undermined. The positive side effect could be that illegal actions might be stopped (p. 751) without the personal risk of disciplinary sanctions. However, there does not seem to be enough state practice to support this view as a rule of customary law.³⁶² More convincing is the view, which is laid down in some national laws as well,³⁶³ that such orders, which are not given

for an official purpose, are non-binding and that every combatant has a duty to disobey a manifestly unlawful order.³⁶⁴(p. 752)

Footnotes:

¹ D. Thüerer, *International Humanitarian Law: Theory, Practice, Context* (Hague Academy of International Law, 2011), 32.

² In general to the ‘reaffirmation of the commitment to the rule of law and its fundamental importance for political dialogue and co-operation among all States and for the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development’, cf. UNGA Res. A/67/L.1, *Declaration of the High-level Meeting of the 67th Session of the General Assembly on the rule of law at the national and international levels* (24 September 2012), No. 20, <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>.

³ Cf. T. Stein, ‘Decentralized International Law Enforcement’, in J. Delbrück (ed.), *Allocation of Law Enforcement Authority in the International System* (Duncker & Humblot, 1995), 107–26.

⁴ Cf. D. J. Elazar, *Constitutionalizing Globalization, The Postmodern Revival of Confederal Arrangements* (Rowman & Littlefield, 1998); T. Kleinlein, *Konstitutionalisierung im Völkerrecht, Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Springer, 2012).

⁵ Cf. F. Pocar, ‘The International Proliferation of Criminal Jurisdictions Revisited: Uniting or Fragmenting International Law?’ in H. P. Hestermeyer, D. König, N. Matz-Lück, V. Röben, A. Seibert-Fohr, P-T. Stoll, and S. Vöneky (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Nijhoff, 2012), 1705 *et seq.*; T. Treves, ‘Cross-Fertilization between Different International Courts and Tribunals: The Mangouras Case’, in above, 1787 *et seq.*

⁶ See below, Sections 21.27–21.31.

⁷ Th. Giegerich, ‘Retorsion’, in *MPEPIL*.

⁸ See below, Section 21.08.

⁹ See, for instance, for a breach of Art. 1 GC, ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, Merits (27 June 1986), *ICJ Reports 1986*, para. 220.

¹⁰ See below, Section 21.32.

¹¹ See below, Section 21.26.

¹² J. A. Appleman, *Military Tribunals and International Crimes* (Bobbs-Merrill Company, 1954; Greenwood Press, 1971), 53; A. Cassese, ‘On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’ (1998) 9 *EJIL* 2–17; see below, Section 21.11–21.18.

¹³ See below, Section 21.27–21.31.

¹⁴ See below, Section 21.20–21.21.

¹⁵ See below, Section 21.22.

¹⁶ For a national legal order, see on these conditions H. L. A. Hart, *The Concept of Law*, 1st edn (OUP, 1961), 113 *et seq.*

- ¹⁷ R. Faucher, 'Social Media and Change in International Humanitarian Law Dynamics' (2019) 2 *Inter Gentes* 48–74. However, current armed conflicts—like the one in Syria—show that without a free press the possibilities to document breaches of international humanitarian law are diminished to a great extent, and mass media and social media can be misused—as part of an information war—for propaganda purposes, *see below*, Section 21.04. *See also* A. Lustgarten and F. Debrix, 'The Role of the Media in Monitoring International Humanitarian Law during Military Interventions: The Case of Kosovo' (2005) 3 *Peace & Change* 359–97, 359.
- ¹⁸ ICC, *The Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli*, ICC-01/11-01/17, First and Second Warrant of Arrest 2017 and 2018, <https://www.icc-cpi.int/libya/al-werfalli>.
- ¹⁹ M. Cherif Bassiouni, 'Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal' (1994) 4 *Fordham International Law Journal* 1191–211, 1202 *et seq.*; B. G. Ramcharan, *Human Rights and U.N. Peace Operations: Yugoslavia* (Brill, 2011).
- ²⁰ For duties in relation to war crimes and violations of human rights, *see below*, Sections 21.10–21.18.
- ²¹ In contrast to Art. 2 HC IV (1907), which states: 'The provisions contained in the Regulations referred to in Art. 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention.'
- ²² ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, Merits, 27 June 1986, *ICJ Reports 1986*, para. 220 *et seq.*
- ²³ Duties spelt out in AP II are indirectly covered by Art. 1 GC insofar as AP II is an elaboration of Art. 3 GC, cf. Art. 1, para. 1, AP II, *see* L. Boisson de Chazournes and L. Condorelli, 'Common Art. 1 of the Geneva Conventions Revisited: Protecting Collective Interests' (2000) 82 *IRRC* 67–87.
- ²⁴ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, Merits, 27 June 1986, *ICJ Reports 1986*, para. 220.
- ²⁵ It can be discussed whether this duty extends to autonomous weapons that lack meaningful human control and hence could be regarded as agents; for the discussion whether the use of autonomous weapons shall be prohibited or limited, *see above* Section 6.30.
- ²⁶ ICTY Appeals Chamber, *The Prosecutor v Dusko Tadić*, Judgment, The Hague, 15 July 1999, Case No. IT-94-1. Cf. G. D. Solis, *The Law of Armed Conflict* (CUP, 2010), 142.
- ²⁷ Cf. with regard to the *travaux préparatoires* J. S. Pictet (ed.), *Commentary, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (ICRC, 1958), 21.
- ²⁸ Lat.: I give so that you will give.
- ²⁹ ICTY Trial Chamber, *The Prosecutor v Zoran Kupreskić et al.*, Judgment, 14 January 2000, Case No IT-95-16-T, para. 517.
- ³⁰ With regard to UN forces conducting operations under UN command and control, the practice of the UN Secretary-General is decisive, cf. UN SG, *Observance by United Nations forces of international humanitarian law*, 6 August 1999, UN Doc. ST/SGB/1999/13.
- ³¹ Art. 89 AP I states: 'In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.'

- ³² Boisson de Chazournes/Condorelli, above (n. 23).
- ³³ Some argue in favour of this, *ibid*.
- ³⁴ Many states are not parties of the AP I and/or AP II, for instance, India, Indonesia, Iran, Israel, Pakistan, Somalia, Turkey, and the US.
- ³⁵ S. Vöneky, 'Armed Conflict, Effect on Treaties', in *MPEPIL*; ILC, *Draft Articles on Effects of Armed Conflicts on Treaties*, UN Doc. A/CN.4/L.727/Rev.1 (6 June 2008).
- ³⁶ For a 'support relationship' between different states in order to ensure respect for international humanitarian law, cf. ICRC Report, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions*, 2019, 75 *et seq*.
- ³⁷ Such obligations are not in conflict with Art. 34 *et seq*. Vienna Convention of the Law of Treaties (23 May 1969), 1155 UNTS 331, limiting treaty obligations and treaty rights with regard to non-treaty parties without their consent.
- ³⁸ For an overview, see as well ICRC, IHL Database, CIHL, *Practice Relating to Rule 144, Ensuring Respect for International Humanitarian Law Erga Omnes*, http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule144.
- ³⁹ See below, Section 21.04.
- ⁴⁰ Cf. *White House Briefings*, Statement by President Trump on Syria, issued 13 April 2018, <https://www.whitehouse.gov/briefings-statements/statement-president-trump-syria/>.
- ⁴¹ It was falsely asserted by a witness that after the Iraqi invasion of Kuwait, Iraqi soldiers caused the death of babies by taking them out of incubators in a Kuwaiti hospital, cf. J. R. MacArthur, 'Remember Nayirah, Witness for Kuwait?', *The New York Times*, 6 January 1992, Section A, 17.
- ⁴² See U. Ghia, 'International Humanitarian Law in a Post Truth World', *CILJ Post*, 17 December 2018, <http://cilj.co.uk/2018/12/17/international-humanitarian-law-in-a-post-truth-world>; see as well P. Winther, 'Military Influence Operations & IHL: Implications of New Technologies', *ICRC Blog*, 27 October 2017, <https://blogs.icrc.org/law-and-policy/2017/10/27/military-influence-operations-ihl-implications-new-technologies/>.
- ⁴³ Ghia, above (n. 42).
- ⁴⁴ With regard to the armed conflict in Syria, see, for instance, Save the Children (ed.), *Untold atrocities, the story of Syria's children*, 2012, http://www.savethechildren.org.uk/sites/default/files/images/untold_atrocities.pdf.
- ⁴⁵ The ICRC stresses as well the need that 'humanitarian organizations need to strengthen their digital literacy and data-protection measures, in accordance with the "do no harm" principle', ICRC Report, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions*, 2019, 29.
- ⁴⁶ See B. Simma, 'Reciprocity', in *MPEPIL* for further supporting evidence. For an interdisciplinary general theory on reciprocity, see E. Ostrom and J. Walker (eds), *Trust and Reciprocity, Interdisciplinary Lessons from Experimental Research* (Russell Sage, 2003).
- ⁴⁷ A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd edn (Duncker & Humblot, 1984, re-print 2010), 49.
- ⁴⁸ See below, Section 21.06.

⁴⁹ See above, Sections 7.42–7.45, and below, Section 21.08. Cf. A. R. Albrecht, ‘War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949’, in M. N. Schmitt and W. Heintschel von Heinegg (eds), *The Implementation and Enforcement of International Humanitarian Law* (Ashgate, 2012), 1 *et seq.*; F. Kalshoven, ‘Belligerent Reprisals Revisited’ (December 1990) 21 *Netherlands Yearbook of International Law* 43–80, 69 *et seq.*

⁵⁰ See below, Sections 21.08–21.16.

⁵¹ Cf. e.g. the military manuals of the United Kingdom, *The Manual of the Law of Armed Conflict*, Ministry of Defence, 1 July 2010; France, *Manuel de droit des conflits armés*, Ministère de la Défense, Direction des Affaires Juridiques, Sous-Direction du droit international humanitaire et du droit européen, Bureau du droit des conflits armés, 2001; Germany, *Law of Armed Conflict—Manual*, Joint Service Regulation (ZDv) 15/2, DSK AV230100262, Federal Ministry of Defence, Berlin, 2013; Italy, *Manuale di diritto umanitario, Introduzione e Volume I, Usi e convenzioni di Guerra*, SMD-G-014, Stato Maggiore della Difesa, I Reparto, Ufficio Addestramento e Regolamenti, Rome, 1991.

⁵² See below, Section 21.19. For the broader concept of accountability, see P. Rowe, *Legal Accountability and Britain’s Wars 2000–2015* (Routledge, 2016).

⁵³ Cf. G. Dahm, J. Delbrück, and R. Wolfrum, *Völkerrecht*, Vol. I/3 (de Gruyter, 2002), 956–90.

⁵⁴ The UN Compensation Commission was established in 1991 as a subsidiary organ of the Security Council in order to process claims and pay compensation for losses resulting from Iraq’s invasion and occupation of Kuwait: ‘Iraq [...] is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.’ SC Res. 687 (1991); cf. as well SC Res. 692 (1991).

⁵⁵ Art. 3: ‘A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.’

⁵⁶ The payments of Iraq because of the illegal invasion of Kuwait included, up to October 2019, ca. US \$49 billion leaving ca. US \$3.5 billion to be paid, see ‘United Nations Compensation Commission pays out US\$250 million’, Press Release PR/2019/6, 22 October 2019, <https://uncc.ch/sites/default/files/attachments/documents/Press%20release%20-%20Payment%20of%2022%20October%202019.pdf>.

⁵⁷ ILC, *Articles on Responsibility of States for Internationally Wrongful Acts*, Report on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001), GA, Official Records, Fifty-sixth Session, Supplement No. 10 (A/56/10), https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf.

⁵⁸ J. R. Crawford, ‘State Responsibility’, in *MPEPIL*; D. Bodansky and J. R. Crook, ‘Symposium: The ILC’s State Responsibility Articles. Introduction and Overview’ (2002) 93 *AJIL* 773–91, 790.

⁵⁹ For example: crimes against humanity, ICJ, *East Timor (Portugal v Australia)*, Judgment, 30 June 1995, *ICJ Reports 1995*, 90 *et seq.*, 102, para. 29; the prohibition of torture contained in common Art. 3, para. 1, lit. a, common to the Geneva Conventions; ‘basic rules of international humanitarian law applicable in armed conflict’ (ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, 226 *et seq.*, 257, para. 79); rights and obligations enshrined by the Genocide Convention (ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*

(*Bosnia and Herzegovina v Yugoslavia*), Preliminary Objections, 11 July 1996, *ICJ Reports* 1996, 595 *et seq.*, 616, para. 31).

⁶⁰ ICJ, *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)*, Judgment, 5 February 1970, *ICJ Reports* 1970, 1 *et seq.*, para. 33. Art. 26 '(Compliance with peremptory norms): Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.'

⁶¹ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, General List No. 131, *ICJ Reports* 2004, paras 155–7; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports* 1996, 226, para. 79; ICJ, *Questions Relating to the Obligation to Prosecute and Extradite (Belgium v Senegal)*, Judgment, 20 July 2012, *ICJ Reports* 2012, 422, para. 68

⁶² D. Fleck, 'International Accountability for Violations of the *Ius in Bello*: The Impact of the ICRC Study on Customary International Humanitarian Law' (2006) 11 *Journal of Conflict and Security Law* 179–99, at 181.

⁶³ See L. Hill-Cawthorne, 'Rights under International Humanitarian Law' (2017) 28 *EJIL* 1187–215.

⁶⁴ D. Fleck, 'Individual and State Responsibility for Violations of the *Ius in Bello*: An Imperfect Balance', in W. Heintschel von Heinegg and V. Epping (eds), *International Humanitarian Law Facing New Challenges* (Springer, 2007), 171–93.

⁶⁵ A first decision of the German Federal Court of Justice (civil division) in the case of *Varvarin* of 2 November 2006 was based upon the bombing of a bridge in Serbia during the NATO operation Allied Force. The Court repudiated claims for compensation but did not negate the possibility that the German national law of state liability gives individuals the legal ground to claim compensation if a German combatant is violating the *ius in bello* and causing damages, cf. Bundesgerichtshof (BGH) BGHZ 169, 349; H. P. Aust, 'Bridge of Varvarin Case' (DE 2006) *Oxford Reports on International Law/International Law in Domestic Courts* 887. The German Constitutional Court confirmed that Germany has no obligation to pay compensation in the *Varvarin* Case, cf. Bundesverfassungsgericht (BVerfG), Order of 13 August 2013, 2 BvR 2660/06, 2 BvR 487/07, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/08/rk20130813_2bvr266006en.html. In a second decision of the German Federal Court of Justice (civil division) with regard to the Kunduz airstrike (*Hanan Case*) and the bombing of two NATO tanker trucks in Afghanistan 2009 on the basis of an order of a German Colonel that caused the death of more than 100 persons, mainly civilians, the German court finally ruled out the possibility that individuals can claim compensation for violations of the *jus in bello* by German troops during an armed conflict on the basis of the German law of state liability, BGHZ, Decision of 6 October 2016 (III ZR 140/15), juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Sort=3&anz=178&pos=2&nr=76401&linked=urt&Bla. There will be a decision of the Great Chamber of the European Court of Human Rights in the *Hanan Case* with regard to the violation of human rights by Germany as the colonel was not prosecuted, cf. ECHR, Abdul HANAN v Germany, Application no. 4871/16, 13 January 2016.

⁶⁶ See below, Section 21.20.

⁶⁷ See below, Section 21.21.

⁶⁸ The notion ‘war on terror’ was coined by the Bush administration after 9/11; *see as well*, T. McCrisken, ‘Ten years on: Obama’s war on terrorism in rhetoric and practice’ (2001) 4 *International Affairs* 781–801. For a critical view *see* ICRC Report, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions, 2019, 57 *et seq.*

⁶⁹ *See* for instance the ICRC report on its visits to detainees being held in US facilities in Afghanistan, Guantanamo, and Iraq during the ‘war on terror’; ICRC, ‘Persons detained by the US in relation to armed conflict and the fight against terrorism—the role of the ICRC’, 9 January 2012; for a general overview of the ICRC position *see* ‘International humanitarian law and terrorism: questions and answers’, <https://www.icrc.org/en/doc/resources/documents/faq/terrorism-faq-050504.htm>; cf. ‘Red Cross in Afghanistan gives Taliban first aid help’, *BBC News South Asia*, 26 May 2010, <http://www.bbc.co.uk/news/10161136>.

⁷⁰ ICRC Report, above (n. 68), 29.

⁷¹ *See* below, Sections 21.25–21.21 and R. Klostermann, ‘The UN Security Council’s Special Compliance Systems, the regime of children and armed conflict’, in H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law* (CUP, 2015), 313–50. With regard to the civil war in Libya 2011, *see* SC Res. 1970 (2011); SC Res. 1973 (2011). On the conflict in Syria, *see*, for instance, SG/SM/14490, GA/11271, 5 September 2012; Report of the Secretary-General, *Implementation of General Assembly resolution 66/253 B on the situation in the Syrian Arab Republic*, UN Doc. A/66/889, 21 August 2012.

⁷² For the duty of co-operation between states and the UN, cf. Art. 89 AP I.

⁷³ M. Roscini, ‘The UN Security Council and the enforcement of international humanitarian law’ (2010) 43 *Israel Law Review* 330–59; L. Boisson de Chazournes, ‘The collective responsibility of States to ensure respect for humanitarian principles’, in A. Bloed et al. (eds), *Monitoring Human Rights in Europe* (Kluwer, 1993), 247–60.

⁷⁴ The following draft resolutions of the Security Council concerning Syria have been vetoed by one or more permanent members: S/2011/612, S/2012/77, S/2014/348, S/2016/846, S/2016/847, S/2016/1026, S/2017/172, S/2017/315, S/2018/321.

⁷⁵ With regard to Syria SC Res. 2170 (2014), SC Res. 2178 (2014), SC Res. 2199 (2015). Other Security Council Resolutions that have been adopted because of the situation in Syria in recent years are the following: SC Res. 2042 (2012), SC Res. 2043 (2012), SC Res. 2118 (2013), SC Res. 2139 (2014), SC Res. 2209 (2015), SC Res. 2235 (2015), SC Res. 2254 (2015), SC Res. 2268 (2016), SC Res. 2328 (2016), SC Res. 2401 (2018).

⁷⁶ Cf. SC Res. 2209 (2015), SC Res. 2235 (2015).

⁷⁷ SC Res. 2165 (2014).

⁷⁸ SC Res. 2328 (2016).

⁷⁹ SC Res. 1368 (2001).

⁸⁰ *See*, for instance, SC Res. 1707 (2006); SC Res. 1776 (2007); SC Res. 1943 (2010).

⁸¹ SC Res. 1973 (2011).

⁸² SC Res. 816 (1993) on Yugoslavia; SC Res. 1973 (2011) on Libya. M. N. Schmitt, ‘Clipped Wings—Effective and Legal No-fly Zone Rules of Engagement’ (1997–98) 20 *Loyola of Los Angeles International & Comparative Law Review* 727.

⁸³ SC Res. 780 (1992), UN Doc. S/25274 of 10 February 1993 (Report of the Commission).

⁸⁴ *See e.g.* SC Res. 1674 (2006), SC Res. 1820 (2008), SC Res. 1970 (2011).

- ⁸⁵ SC Res. 1593 (2005); Res. 1970 (2011); cf. Art. 13, lit. b, ICC Statute.
- ⁸⁶ Cf. draft SC Resolution S/2014/348 vetoed by Russia and China.
- ⁸⁷ For other similar Security Council Resolutions after 1989 see e.g. SC Res. 770 (1992), SC Res. 781 (1992), SC Res. 794 (1992), SC Res. 816 (1993), SC Res. 819 (1993), SC Res. 859 (1993), SC Res. 1003 (1995), SC Res. 1264 (1999), SC Res. 1272 (1999), SC Res. 1291 (2000).
- ⁸⁸ Cf. UNGA Res. A/67/1 (30 November 2012), *Declaration of the High-level Meeting of the 67th Session of the General Assembly on the rule of law at the national and international levels*, 24 September 2012, No. 20, <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>.
- ⁸⁹ UNGA Res. 66/176 (19 December 2011); UNGA Res. 67/183 (20 December 2012); UNGA Res. 69/189 (18 December 2014); UNGA Res. 70/234 (23 December 2015); UNGA Res. 71/203 (19 December 2016); UNGA Res. 71/248 (21 December 2016); UNGA Res. 72/191 (19 December 2017); UNGA Res. 73/182 (17 December 2018).
- ⁹⁰ UNGA Res. 68/182 (18 December 2013).
- ⁹¹ *The fall of Srebrenica*, Report of the Secretary-General pursuant to General Assembly Resolution 53/35, UN Doc. A/54/549, 15 November 1999.
- ⁹² *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide on Rwanda*, 15 December 1999. The UN Secretary-General has dealt with problems of compliance with international humanitarian law in different contexts and for many years, see e.g. *Children and Armed Conflict in Colombia*. Report of the Secretary-General to the Security Council, UN Doc. S/2019/1017 (31 December 2019); *Children and armed conflict in Iraq*. Report of the Secretary-General to the Security Council, UN Doc. S/2019/984 (23 December 2019); *Women and Peace and Security*. Report of the Secretary-General to the Security Council, UN Doc. S/2019/800 (9 October 2019) including Preventing and countering violent extremism conducive to terrorism and countering terrorism, 21 *et seq.* See as well earlier reports: *Uniting against terrorism: recommendations for a global counter-terrorism strategy*. Report of the Secretary-General, UN Doc. A/60/825 (27 April 2006); Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, UN Doc. S/2005/740 (28 November 2005); Secretary-General's keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security—*A Global Strategy for Fighting Terrorism* (10 March 2005); Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, *A more secure world: Our shared Responsibility*, UN Doc A/59/565 (2 December 2004).
- ⁹³ Cf. Y. Sandoz, 'The History of the Grave Breaches Regime', in M. N. Schmitt and W. Heintschel von Heinegg (eds), *The Implementation and Enforcement of International Humanitarian Law* (Ashgate, 2012), 209 *et seq.*; G. D. Solis, above (n. 26), 93 *et seq.*, 121 *et seq.*, 301 *et seq.*
- ⁹⁴ Cf. L. Henkin, 'Kosovo and the Law of Humanitarian Intervention' (1999) 93 *AJIL* 842 *et seq.*
- ⁹⁵ Report of the International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa, 2001); Th. G. Weiss, 'RtoP Alive and Well after Libya' (2011) 3 *Ethics & International Affairs* 1-6; A. J. Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm' (2011) 3 *Ethics & International Affairs* 263-9; L. Brozus, 'Improving Mass Atrocities Prevention - Guidelines for Effective and Legitimate Implementation of the Responsibility to Protect' (2012) 38 *SWP Comments* http://www.swp-berlin.org/fileadmin/contents/products/comments/2012C38_bzs.pdf. Stressing the primary responsibility of each state to protect its population cf. SC Res. 1970

(2010) and SC Res. 1973 (2011) with regard to Libya; SC Res. 1975 (2011) with regard to Côte d'Ivoire; SC Res. 2085 (2012) with regard to Mali. *See below*, Section 21.30.

⁹⁶ *See above* (n. 75), and SC Res. 1674 (2006), para. 26: 'Notes that the deliberate targeting of civilians and other protected persons, and the commission of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict, may constitute a threat to international peace and security, and, reaffirms in this regard its readiness to consider such situations and, where necessary, to adopt appropriate steps'. For peacekeeping missions based on Chapter VII cf., for instance, UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) SC Res. 2149 (2014).

⁹⁷ Cf. Art. 4, lit. h, Constitutive Act African Union (AU), 11 July 2000: 'The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. It is disputed whether an intervention of the AU is legal without a Security Council authorization.

⁹⁸ *See above*, Section 21.04, para. 1.

⁹⁹ *See below*, Section 21.31; C. Hofmann, 'Reasoning with Rebels. International NGOs' Approaches to Engaging Armed Groups', *SWP research paper*, September 2012, 10 *et seq.*, http://www.swp-berlin.org/fileadmin/contents/products/research_papers/2012_RP11_hof.pdf; P. Ryfmann, 'Non-governmental organizations: an indispensable player of humanitarian aid' (2007) 89 *IRRC* 21 *et seq.*

¹⁰⁰ *See* UN GA Res. A/67/L.1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, 30 November 2012, para. 20 *et seq.*, <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>.

¹⁰¹ For the first military manual by Francis Lieber (the so-called Lieber Code) see Instructions for the Government of Armies of the United States in the Field (1898), originally issued as General Orders No. 100 (1863); *see below* n. 166–7; cf. S. Vöneky, 'Der Lieber's Code und die Wurzeln des modernen Kriegsvölkerrechts' (2002) 62 *ZaöRV* 423–60. The military manual for German soldiers is issued by the Bundesministerium der Verteidigung, cf. Zentrale Dienstvorschrift Humanitäres Völkerrecht in bewaffneten Konflikten, A-2141/1 (2016), <https://www.bmvg.de/resource/blob/93612/f16edcd7b796ff3b43b239039cfcc8d1/b-02-02-10-download-handbuch-humanitaeres-voelkerrecht-in-bewaffneten-konflikten-data.pdf>.

¹⁰² *See below*, Section 21.34.

¹⁰³ *See above*, Section 21.04, para. 1.

¹⁰⁴ M. N. Schmitt and S. Watts, 'Beyond State-Centrism: International Law and Non-state Actors in Cyberspace' (2016) 21 *Journal of Conflict & Security Law* 595–611, 596; J. Reynolds, 'The view from inside Syria's propaganda machine', *BBC News Middle East*, 5 July 2012, <http://www.bbc.co.uk/news/world-middle-east-18717647>.

¹⁰⁵ *See for a general overview of propaganda in the light of international law* E. de Brabandere, 'Propaganda', in *MPEPIL*.

¹⁰⁶ Cf. P. Mozur, 'A Genocide Incited on Facebook, With Posts From Myanmar's Military', *The New York Times*, 15 October 2018, <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html>; A. Soshnikov, 'Inside a pro-Russia propaganda machine in Ukraine', *BBC Trending*, 13 November 2017, <https://www.bbc.com/news/blogs-trending-41915295>; Y. J. Dreazen, 'The Taliban Is Winning the Propaganda War', *The*

Atlantic, 2 November 2011, <http://www.theatlantic.com/international/archive/2011/11/the-taliban-is-winning-the-propaganda-war/247747>.

107 ICRC, IHL Database, Rule 140 *CIHL*: 'The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity', https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule140; see above, Sections 21.02 and 21.04, para. 2.

108 See above, Section 21.04, para. 8.

109 M. Ruffert, 'Reprisals', in *MPEPIL*.

110 Whether such attacks can be justified as a lawful reprisal was discussed after the destruction of chemical weapon sites in Syria by the US 2017 and by the US, UK, and France in 2018, see above (n. 40). Another question is whether they can be justified by the rules of humanitarian intervention or by a new emerging rule of customary international law, to prevent the use of cruel weapons of mass destruction that have been used before: the US President argued that the purpose of the actions was 'to establish a strong deterrent against the production, spread, and use of chemical weapons', and the German Chancellor supported the strikes as 'necessary and appropriate'; others, like Russia and Syria, called it an aggression against Syria; cf. 'Syria air strikes: US and allies attack 'chemical weapons sites', cf. *BBC News*, 14 April 2018, <https://www.bbc.com/news/world-middle-east-43762251>.

111 Self-contained regimes are those parts of international law which limit the possible reactions to violations, cf. E. Klein, 'Self-Contained Regime', in *MPEPIL*.

112 G. Dahm, J. Delbrück, and R. Wolfrum, *Völkerrecht*, Vol. 1/1, 2nd edn (de Gruyter, 1989), 92; B. Simma, in J. Delbrück (ed.), *The Future of International Law Enforcement. New Scenarios—New Law?* (Duncker & Humblot, 1993), 125, 136 *et seq.*

113 However, the UK has entered a reservation to that rule; it is questionable whether such reservation is compatible with the object and purpose of AP I. Cf. J. Gaudreau, 'Les réserves aux Protocoles additionnels aux Conventions de Genève pour la protection des victimes de la guerre' (2003) 85 *IRRC* 170.

114 See above, Section 21.06.

115 N. Petersen, 'Human Dignity, International Protection', in *MPEPIL*.

116 See above, Section 21.04, para. 4.

117 See below, Sections 21.10–21.18.

118 See below, Section 21.12.

119 For an overview, cf. G. D. Solis, above (n. 26), 301.

120 Regarding prosecution of war crimes in the Middle Ages, cf. M. Keen, *The Laws of War in the Late Middle Ages* (Routledge, 1965); L. S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Nijhoff, 1992), 18.

Punishment was already discussed for Napoleon following his return from Elba. In a statement made on 13 March 1815 in Vienna by the powers which had defeated Napoleon, the countries alleged that Napoleon had placed himself above the law, exposing himself to public retribution as an enemy of world peace. After his defeat, however, no criminal proceedings were initiated against him. Instead, by agreement of the great powers, he was treated as both a prisoner of war and a security risk and accordingly interned on St Helena.

121 R. Lesaffer and M. van der Linden, 'Peace Treaties after World War I', in *MPEPIL*; M. Lachs, *War Crimes: An Attempt to Define the Issues* (London: Stevens, 1945) emphasizes the Martens Clause in the Preamble (para. 8) HC IV. See above, Section 2.31.

122 Art. 11, para. 3: 'Offences to the contrary shall be severely punished, and especially so if committed by officers.' Cf. Arts. 12, 13, 33, 37, 44, 47 Lieber Code (1863), see above (n. 101).

123 '(1) Murders and massacres; systematic terrorism. (2) Putting hostages to death. (3) Torture of civilians. (4) Deliberate starvation of civilians. (5) Rape. (6) Kidnapping of girls and women for the purpose of enforced prostitution. (7) Deportation of civilians. (8) Internment of civilians. (9) Forced labour of civilians in connection with the military operations of the enemy. (10) Usurpation of sovereignty during military occupation. (11) Compulsory enlistment of soldiers among the inhabitants of occupied territory. (12) Attempts to denationalize the inhabitants of occupied territory. (13) Pillage. (14) Confiscation of property. (15) Exactions of illegitimate contributions and requisitions. (16) Debasement of currency and issue of spurious currency. (17) Imposition of collective penalties. (18) Wanton devastation and destruction of property. (19) Deliberate bombardment of undefended places. (20) Wanton destruction of religious, charitable, educational, and historic buildings and monuments. (21) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew. (22) Destruction of fishing boats and of relief ships. (23) Deliberate bombing of hospitals. (24) Attack on and destruction of hospital ships. (25) Breach of other rules relating to the Red Cross. (26) Use of deleterious and asphyxiating gases. (27) Use of explosive or expanding bullets, and other inhumane appliances. (28) Directions to give no quarter. (29) Ill-treatment of the wounded and prisoners of war. (30) Employment of prisoners of war on unauthorized works. (31) Misuse of flags of truce. (32) Poisoning of wells.' Cf. 14 *AJIL* (1920), 114-115; also reprinted in UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, 1948), 34 *et seq.*

124 Treaty of Versailles (Treaty of Peace with Germany) (1919), RGBI 1919, 687 *et seq.*

125 Art. 227 of the Treaty of Versailles considered the establishment of an international tribunal against Kaiser Wilhelm II. Charges were to be brought against him for violation of 'international morality and of sanctity of the treaties'. The provision stipulated that the tribunal 'will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality'. However, the execution of the trial foundered on the Netherlands' refusal to extradite. Art. 230 of the Treaty of Sèvres (1920) provided for the sentencing of those responsible for the crimes against the Armenians. However, this treaty was not ratified and stipulations of this sort were absent from the later Treaty of Lausanne (1923).

126 Of the 901 persons against whom proceedings were initiated, only thirteen were convicted. The penalties were deemed to be too light, and they were not fully executed, cf. UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, 1948), 48. The fact that the punishment of war criminals following WWI was considered unsatisfactory led to the establishment of the International Military Tribunal after WWII.

127 ILC, Historical Survey of the Question of International Criminal Jurisdiction—Memorandum submitted by the Secretary-General, UN Doc. A/CN.4/7/Rev. 1, 10 *et seq.*, https://legal.un.org/ilc/documentation/english/a_cn4_7_rev1.pdf.

128 Art. 30: 'On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible.' See J. S. Pictet, *Humanitarian Law and the Protection of War Victims* (Institut Henry Dunant, 1975), 68.

129 Cf. ILC, Historical Survey of the Question of International Criminal Jurisdiction, above (n. 127), 18 *et seq.*

130 Cf. UN War Crimes Commission, above (n. 123), 109 *et seq.*, 127; ILC, Historical Survey of the Question of International Criminal Jurisdiction, above (n. 127), 20-1; E. Schwelb, 'Crimes against Humanity' (1946) 23 *BYIL* 363-76.

131 The Moscow Declaration on Atrocities by President Roosevelt, Mr. Winston Churchill and Marshal Stalin, issued on 1 November 1943 reads: '[...] those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the Free Governments which will be erected therein. [...] The above declaration is without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint decision of the Governments of the Allies.' Cf. *A Decade of American Foreign Policy: Basic Documents, 1941-49 prepared at the request of the Senate Committee on Foreign Relations by the Staff of the Committee and the Department of State* (Government Printing Office, 1950).

132 *UNTS* (1951), 279 *et seq.*, printed at 39 *AJIL* (1945), Suppl. 258.

133 At least two different offences had already been provided for in the proposals of the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties appointed by the Preliminary Peace Conference of 1919; 14 *AJIL* (1920), 95 *et seq.*, 121 (violations of the laws and customs of war and the laws of humanity). Some scholars argue, as M. Greenspan, *The Modern Law of Land Warfare* (Columbia University Press, 1959), 419, that the term war crimes is to be understood generically as including conventional war crimes, crimes against humanity, and crimes against peace, as well as genocide. See C. Kreß, 'International Criminal Law', in *MPEPIL*.

134 For the trials before the Nuremberg Military Tribunal, see J. Fuchs/F. Lattanzi, 'International Military Tribunals', in *MPEPIL*. See also the thorough study by K. J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP, 2011) and for original documents cf. Harvard Law School Library, Nuremberg Trials Project, <https://nuremberg.law.harvard.edu/>.

135 Treaty of Peace with Japan, 8 September 1951, *UNTS* (1952), 48 *et seq.*; Art. 11: 'Japan accepts the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan, and will carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan. (...)'. For analyses cf. Y. Tanaka, T. L. H. McCormack, and G. Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Nijhoff, 2011); D. Cohen and Y. Totani, *The Tokyo War Crimes Tribunal* (CUP, 2018), 188 *et seq.*, 339 *et seq.*

136 20 December 1945, cf. Official Gazette of the Control Council for Germany, 31 January 1946, 50 *et seq.*

137 E. J. Drea, 'Introduction', in E. J. Drea et al. (eds), *Researching Japanese War Crimes Records: Introductory Essays* (National Archives and Records Administration for the Nazi

War Crimes and Japanese Imperial Government Records Interagency Working Group, 2006), 7.

138 Cf. J. Pictet, *Humanitarian Law and the Protection of War Victims* (Sijthoff, 1975), 69.

139 Art. 22 *et seq.* GC II (Hospital Ships).

140 H.-H. Jescheck, 'War Crimes', IV *Encyclopedia of Public International Law* (Elsevier, 2002), 1349–54, 1351; M. P. Scharf, 'Aut dedere aut iudicare', in *MPEPIL*.

141 Art. 4 and Art. 5 GC III have been in the centre of the discussions during the so-called war against terror, as the US administration argued that terrorists as unlawful combatants are neither protected by GC III, as they are no lawful combatants nor protected by GC IV, as they are no civilians. These views have been rejected as unconvincing by many scholars and the ICRC, cf. S. Vöneky, 'The Fight against Terrorism and the Rules of the Law of Warfare', in Ch. Walter, S. Vöneky, V. Röben, and F. Schorkopf (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer, 2004), 925, 938–41; K. Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85 *IRRC* 45–74.

142 Cf. Section 21.12, para. 10.

143 UN Doc. S/25704 (3 May 1993). Cf. S.-D. Bachmann, in N. Quéniwet and S. Sha-Davis (eds), *International Law and Armed Conflict: Challenges in the 21st Century* (Asser Press, 2010), 289–301; SC Res. 955 (1994) Art. 4; published in (1994) 33 *ILM* 1598–604. This, however, is not true with regard to every *ad hoc* international criminal court; the Special Tribunal for Lebanon, for instance, applies the national laws of Lebanon. Cf. A. Alamuddin, N.N. Jurdi, and D. Tolbert (eds), *The Special Tribunal for Lebanon* (OUP, 2014).

144 See below, Section 21.10, para. 9.

145 Proposals of some kind of immunity on the grounds of coercion or error about the law were submitted during the drafting process of the Geneva Conventions, but the negotiating states could not reach any consensus (*Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II, Section B, 115, 6 Official Records, 307, https://www.loc.gov/rr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-2-B.pdf).

146 Negotiations during the formulation of the 1977 Protocols to the 1949 Geneva Conventions illustrated that the former communist states and many developing countries offered their soldiers full immunity when they obeyed unlawful orders, even if they could not demonstrate that they mistakenly believed that the orders were lawful. 'Despite lengthy negotiations to draft a provision limiting the defense of superior orders, the effort was unsuccessful due to objections by some African and Asian states.' Cf. G. D. Solis, 'Obedience of Orders and the Law of War: Judicial Application in American Forums' (1999) 15 *American University International Law Review* 481–526, at 523. For an analysis of historical and recent developments, see H. Sato, 'The Defense of Superior Orders in International Law: Some Implications for the Codification of International Criminal Law' (2009) 9 *International Criminal Law Review* 117–37; Ch. Garraway, 'Superior Orders and the International Criminal Court' (1999) 81 *IRRC* 785.

147 UN Doc. A/CN.4/457, 15 February 1994, 6 *et seq.*

148 R. Rayfuse, 'The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission' (1997) 8 *Criminal Law Forum* 43, 47 *et seq.*; G. Acquaviva and F. Pocar, 'Crimes against Humanity', in *MPEPIL*.

149 UN Doc. A/CN.4/L.935, 15 May 2019, https://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/7_7_2019.pdf&lang=EF.

- 150** J. Crawford, *Brownlie's Principles of Public International Law*, 9th edn (OUP, 2019), 648 *et seq.*; Y. Dinstein, 'International Criminal Law' (1985) 20 *Israel Law Review* 206-42; Dahm/Delbrück/Wolfrum, above (n. 53), 993-1002.
- 151** Acquaviva/Pocar, above (n. 148). See also Bachmann, above (n. 143).
- 152** Rome Statute of the International Criminal Court (ICC Statute), 17 July 1998, *UNTS* vol. 2187, 3; 49 *ILM* (2010), 1331, 1334.
- 153** The crime of aggression was adopted at the Kampala Review Conference in June 2010 (so-called Kampala Amendment); 2017 the 16th Assembly of state parties to the Rome Statute decided 'to activate the Court's jurisdiction over the crime of aggression as of 17 July 2018'; cf. Resolution ICC-ASP/16/Res. 5, para. 1, 14 December 2017. According to this resolution in 'the case of a State referral or *proprio motu* investigation, the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments', para. 2.
- 154** Art. 28 ICC Statute.
- 155** Preamble, para. 4, ICC Statute.
- 156** Art. 17 ICC Statute.
- 157** Art. 16 ICC Statute.
- 158** A. Bogdan, 'The United States and the International Criminal Court: Avoiding Jurisdiction through Bilateral Agreements in Reliance on Article 98' (2008) 8 *International Criminal Law Review* 1-54; M. Benzing, 'U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties' (2004) 8 *Max Planck Yearbook of United Nations Law* 181-236; D. Fleck, 'Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?' (2003) 1 (3) *Journal of International Criminal Justice* 651-70.
- 159** ICC-02/17, Appeals Chamber Decision, 5 March 2020, Situation in the Islamic Republic of Afghanistan, <https://www.icc-cpi.int/afghanistan>.
- 160** Inter alia the US, that is not a state party, does not accept the decision by the ICC, mentioned above, to authorize an investigation into alleged war crimes in Afghanistan by US armed forces, and the CIA, cf. J. Hansler, 'Pompeo slams International Criminal Court decision to authorize Afghanistan war crimes investigation', *CNN*, 5 March 2020, <https://edition.cnn.com/2020/03/05/politics/icc-afghanistan-pompeo/index.html>.
- 161** In 2020, twenty-seven cases and thirteen so-called situations under investigations have been brought before the ICC. The majority of African states under investigation have arisen from self-referrals from parties to the Rome Statute (Uganda, the Democratic Republic of the Congo, Central African Republic, and the Republic of Mali); in two of the African cases the ICC did start investigations on its own (Burundi and Kenya). Cf. ICC, <https://www.icc-cpi.int/Pages/cases.aspx>. 123 states are parties to the ICC statute, including thirty-three African states; however, China, Russia, and the US are not states parties.
- 162** Cf. ICC, Judgment of 14 March 2012, Trial Chamber I, ICC-01/04-01/06, Case *The Prosecutor v Thomas Lubanga Dyilo*, Situation in the Democratic Republic of the Congo. Lubanga was sentenced, on 10 July 2012, to fourteen years of imprisonment.
- 163** Germain Katanga was sentenced on 7 March 2014 to twelve years of imprisonment because of a crime against humanity (murder) and four war crimes (murder, attacking a civilian population, destruction of property and pillaging); cf. ICC, Judgment of 7 March 2014, Trial Chamber II, *The Prosecutor v Germain Katanga*, ICC-01/04-01/07-3436-tENG; Ahmad Al Faqi Al Mahdi was found guilty as committing war crimes and sentenced to nine

years' imprisonment; cf. ICC, Judgment of 27 September 2016, Trial Chamber VIII, *The Prosecutor v Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15.

164 Cf. Bachmann, above (n. 143); C. P. R. Romano, A. Nollkaemper, and J. K. Kleffner (eds), *Internationalized Criminal Courts* (OUP, 2004).

165 Cf. Vöneky, above (n. 101).

166 The Lieber Code consists of 157 articles and was adopted by the US to inform the military personnel of the armed forces of the Union during the American Civil War (1861–1865) about the rules of the law of wars. Hence, the code was an internal, non-binding code of conduct and the first national manual on the laws of armed conflict. However, the Code, which became the military manual of the US until 1914 and was the model for many military manuals in Europe, had a major influence on the further development of the laws of war in general: the Code was the model for the Geneva Convention of 1864, followed by the Declaration of St Petersburg of 1868, and the 1874 Brussels International Declaration on the Laws of War, which was never adopted but influenced the 1899 Hague Rules of Land Warfare, see above (n. 101); cf. S. Vöneky, 'Francis Lieber', in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (OUP, 2012), 1137 *et seq.*

167 Art. 4 Lieber Code: 'Martial Law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not Martial Law. It is the abuse of the power which that law confers. As Martial Law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honour and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.'

168 Cf. Vöneky, above (n. 101), at 445 *et seq.*

169 See above (n. 166).

170 *Italics added by author.* Art. 11, paras 1 and 2 read as follows: 'The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers. It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts.'

171 For an interpretation, cf. Vöneky, above (n. 101), at 445 *et seq.*

172 See Art. 3: 'The Signatory Powers [...] further declare that any person in the service of any Power who shall violate any of those rules, whether or not such a person is under orders of a government superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found', cf. 16 *AJIL* (1922), Suppl. 58.

173 Art. 8: 'The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.'

174 Cf. *ICRC Commentary*, Art. 86, para. 3543; Art. 86, para. 2, AP I is based largely on the decision in the war crime proceedings against General Yamashita. He was sentenced by the US Military Commission in Manila for war crimes his troops had committed in the Philippines. A petition was submitted to the US Supreme Court. *Trial of General Tomoyuki Yamashita*, US Military Commission, Manila (8 October–7 December 1945) and the US Supreme Court (Judgments Delivered on 4 February 1946), in *IV Law Reports of Trials of War Criminals* (1948), 1–96, 43, https://www.loc.gov/rr/frd/Military_Law/pdf/Law-

Reports_Vol-4.pdf, reprinted in L. Friedman (ed.), *The Law of War: A Documentary History*, Vol. 2 (Greenwood, 1972) 1596–623, 1605.

175 Also Art. 4, A, 2, GC III; and Art. 43, para. 1, AP I.

176 See above, Section 21.10.

177 For an overview, see Bachmann, above (n. 143).

178 Court martials have to be differentiated from military tribunals, that have been established by the US after 9/11 during the so-called war on terror, for instance in Guantanamo. Military tribunals do not prosecute combatants from the state that enacts the tribunal; because of this, and because they might lack the necessary preconditions of a fair trial, it is disputed whether a military tribunal can be a competent court according to GC III, Art. 5.

179 For an analysis cf. S. Weill, *The Role of National Courts in Applying International Humanitarian Law* (OUP, 2014); with regard to the special case of Kongo, cf. J-M. Kumbu, 'National Courts: The situation in the Democratic Republic of the Congo', in H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law* (CUP, 2015), 217–46, at 221. Sometimes court martials prosecute even grave breaches with minor sentences and release sentenced soldiers earlier, cf. the case of soldiers prosecuted for three to ten years (or less) for maltreating prisoners in Abu Ghraib, an US Army detention centre, 2004 during the war in Iraq. To prosecute grave breaches by national courts is even more complicated if private companies, as military contractors, supply the army for instance with interrogators. In the case of Abu Ghraib in 2019 an US federal appeals court made it possible to proceed a trial against such a contractor, CACI Premier Technology. Cf. Iraq Prison Abuse, CNN, Editorial Research, 22 March 2020, <https://edition.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/index.html>

180 For the term 'grave breach' see below, Section 21.12.

181 See, e.g., ICTY, *Prosecutor v Kordić and Cerkez*, Case No. IT-95-14/2-T, Judgment of 26 February 2001; *Prosecutor v Krstić*, Case No. IT-98-33-T, Judgment of 2 August 2001; *Prosecutor v Delalić et al. (Celebici)*, Case No. IT-96-21-A, Judgment of 20 February 2001; *Prosecutor v Kunarac et al.*, Case Nos. IT-96-23-T and IT-96-23/1-T, Judgment of 22 February 2001; *Prosecutor v Furundžija*, Case No. IT-95-17/1, Judgment of 10 December 1998; *Prosecutor v Tadić*, Judgments of 2 October 1995 and 15 July 1999; *Prosecutor v Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment of 19 April 2004; *Prosecutor v Milan Martić*, Case No. IT-95-11-T, Judgment of 12 June 2007; *Prosecutor v Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgment of 3 April 2008; *Prosecutor v Gotovina et al.* Vols 1 and 2, Vol. 1, Case No. IT-06-90-T, Judgment of 15 April 2011; ICTR, *Prosecutor v Kambanda*, Case No. 97-23, Appeals Chamber Judgment of 19 October 2000; *Prosecutor v Bagilishema*, Case No. 95-IA-A, Appeals Chamber Judgment of 2 July 2002; *Prosecutor v Callixte Kalimanzira*, Case No. 05-88-T, Judgment of 22 June 2009; see for a comprehensive compilation of seminal judgments of the ICTR Human Rights Watch, *Genocide, War Crimes and Crimes Against Humanity. A Digest of the Case Law of the International Criminal Tribunal for Rwanda* (2010), <http://www.hrw.org/sites/default/files/reports/ictr0110webwcover.pdf>.

182 At the time of writing the ICC has opened fourteen investigations concerning ten situations in Africa (the Democratic Republic of the Congo, Uganda, Central African Republic (two), Darfur/Sudan, Republic of Kenya, Libya, Republic of Côte d'Ivoire, Mali, Burundi), see above (n. 161). In March 2012 the Court delivered its first decision ever by finding the accused Lubanga guilty; see above (n. 162). For a case analysis, see K. Ambos, 'The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A

Comprehensive Analysis of the Legal Issues' (2012) 2 *International Criminal Law Review* 115–53.

183 For elements of crimes, see K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (CUP, 2003), 17 *et seq.*

184 For an overview, cf. M. Cottier, 'Article 8, war crimes' in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court*, 3rd edn (Beck, 2016), 304 *et seq.*

185 Cf. Amendments to Art. 8 of the Rome Statute, RC/Res. 5, 10 June 2010; entered into force 26 September 2012, in accordance with Art. 121, para. 5, ICC Statute. The new Art. 8, para. 2, lit. e (xiii) and (xiv), ICC Statute were introduced including the following acts: (xiii) employing poison or poisoned weapons; (xiv) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices". Besides, it is a war crime in non-international conflicts, to employ "bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions" (new Art. 8, para. 2, lit. e (xv) ICC Statute). Cf. A.-M. La Rosa, 'The first amendment to the Rome Statute: bringing Article 8 of the Rome Statute in line with international humanitarian law', in G. Dive, B. Goes, and D. Vandermeersch (eds), *From Rome to Kampala: The First 2 Amendments to the Rome Statute* (Bruylant, 2012), 67–146.

186 Until now, thirty-eight states ratified the amendment. For instance, Germany is bound by the new paragraphs of Art. 8 since 2014.

187 Also belonging to this category are persons accompanying the armed forces without being members, such as civilian crew members of military aircraft, war correspondents, supply contractors, members of work units, or services responsible for the welfare of military personnel, cf. Art. 13, para. 4, GC I; Art. 13, para. 4, GC II; cf. H. S. Levie, *The Code of International Armed Conflict*, Vol. II (Oceana, 1989), 6 *et seq.*

188 Admiral Dönitz was accused before the Nuremberg Military Tribunal of having given the command that shipwrecked persons of hostile nations were not to be rescued, see *Trial of Dönitz*, in *Judgment of the International Military Tribunal for the Trial of German Major War Criminals (1 October 1946)*, 509; the Tribunal hold: 'If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass unharmed before his periscope.' However, although Dönitz had violated the 1936 London Protocol the Tribunal recognized that the US and UK had also carried out unrestricted submarine warfare, and had armed their merchant vessels, hence it was not prepared to hold Dönitz guilty on the basis of such violations; cf. A. Roberts and R. Guelff, *Documents on the Laws of War*, 3rd edn (OUP, 2000), 170. However, a British military court convicted the crew members of a German submarine that had opened fire on the crew of a sinking Greek ship after they had climbed into lifeboats (*The Peleus Trial*, British Military Court for the Trial of War Criminals held at the War Crimes Court, Hamburg, October 1945, cf. United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. I (1947), 1–21, https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-1.pdf). Pursuant to the 1936 London Protocol, the commanding officer of a submarine is not allowed to sink a civilian merchant vessel if he or she is not in a position to save the crew (Rule 2 London Protocol).

189 This term is broader than the notion of prisoners of war in GC III; see above, Chapter 5.

190 This is more far-reaching than GC I; see above, Chapter 12, as well as Levie, above (n. 187), 7 *et seq.*

191 See above, Chapter 15.

- 192** Cf. Cottier, above (n. 184), 344 *et seq.*
- 193** Cottier, above (n. 184), 305, para. 17.
- 194** Dörmann, in Triffterer/Ambos (eds), above (n. 183), 39.
- 195** G. Werle, *Völkerstrafrecht*, 2nd edn (Mohr Siebeck, 2007), 1021.
- 196** See above, Section 12.01.
- 197** Dörmann, above (n. 183), 47; N. Rodley, 'The Definition(s) of Torture in International Law' (2002) 55 *Current Legal Problems* 467–93.
- 198** Art. 1 '[...] severe pain or suffering, whether physical or mental, is intentionally inflicted on a person [...]'; cf. G. D. Solis, above (n. 26), 436.
- 199** Cf. K. Dörmann, 'Article 8 War Crimes: Analysis and Interpretation of Elements', in Triffterer/Ambos (eds), above (n. 184), para. 96.
- 200** For the notion of medical war crimes and medical grave breaches, cf. S. Mehring, *First Do No Harm: Medical Ethics in International Law* (Brill Nijhoff, 2015), 133 *et seq.* In this respect, the rules of the Geneva Conventions refer to earlier decisions in the trials of war criminals following WWII, e.g. *Trial of Erhard Milch*, US Military Tribunal at Nuremberg (October 1946–April 1947), in *Trials of War Criminals before the Nuernberg Military Tribunals*, Vol. II, 355–888, and *Law Reports of Trials of War Criminals*, Vol. VII, 27–66. Milch was found guilty and sentenced to life imprisonment.
- 201** See above, Sections 12.06–12.08.
- 202** Cf. K. Dörmann, 'Article 8 War Crimes: Analysis and Interpretation of Elements', in Triffterer/Ambos (eds), above (n. 184), para. 106.
- 203** Cf. H. S. Levie, *The Code of International Armed Conflict*, Vol. I (Oceana, 1986), 67 *et seq.*
- 204** Cf. ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 2009. For another interpretation cf. M. N. Schmitt, Direct Participation in Hostilities and 21st Century Armed Conflict, in H. Fischer et al. (eds), *Krisensicherung und Humanitärer Schutz. Festschrift für Dieter Fleck* (BWV, 2004), 505, 508.
- 205** Cf. K. J. Partsch, in M. Bothe, K. J. Partsch, and W. A. Solf (eds), *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Nijhoff, 1982), 516.
- 206** With regard to the lacuna, even according to the Rome Statute, in non-international armed conflicts, cf. above, Section 21.12.
- 207** See K. Dörmann, *Elements of War Crimes*, above (n. 183), 97–9.
- 208** M. Greenspan, *The Modern Law of Land Warfare* (University of California Press, 1959), 177.
- 209** Cf. *Trial of Erhard Milch*, US Military Tribunal, Nuremberg (20 December 1946–17 April 1947), above (n. 200), Vol. VII, 27–66, at 39.
- 210** For reference to the term 'civilians', see above, Section 8.01.
- 211** See K. Dörmann, *Elements of War Crimes*, above (n. 183), 106–23.
- 212** The Hague Law does not contain a particular prohibition of this sort, but in the aftermath of WWI, the deportation of sections of the Belgian civilian population to Germany for compulsory work during the war was already seen as unlawful, even by parties of the German *Reichstag*, cf. the quotation in *Trial of Erhard Milch*, US Military Tribunal, Nuremberg (20 December 1946–17 April 1947), above (n. 200), Vol. VII, 27–66, at 39; and J. Thiel and Ch. Westerhoff, 'Forced Labour', in U. Daniel, P. Gatrell, and O. Janz et al. (eds),

1914–1918 *International Encyclopedia of the First World War* (Berlin, October 2014), https://encyclopedia.1914-1918-online.net/article/forced_labour.

213 Cf. *The I. G. Farben Trial*, US Military Tribunal, Nuremberg (14 August 1947–29 July 1948), in *Law Reports of Trials of War Criminals*, Vol. X, 1–68, at 53; *The Krupp Trial*, US Military Tribunal, Nuremberg (17 November 1947–30 June 1948), above Vol. X, 69–177, at 141–2; *Trial of Erhard Milch*, US Military Tribunal, Nuremberg (20 December 1946–17 April 1947), above, Vol. VII, 27–66, at 39.

214 Dörmann, above (n. 183), 321.

215 Cf. Art. 43 HagueReg: the occupying power ‘shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, *unless absolutely prevented, the laws in force in the country*’. Accentuation by author. It is absolutely prevented to apply national laws, if they violate human rights that bind the occupying power, or the occupied state, or are part of *jus cogens*.

216 See K. Dörmann, *Elements of War Crimes*, above (n. 183), 363–74.

217 Art. 14 AP II acquires greater significance since the rules of AP II lack a clause regarding general protection of objects such as that found in Art. 52 AP I.

218 See K. Dörmann, *Elements of War Crimes*, above (n. 183), 249–62.

219 See K. Dörmann, *Elements of War Crimes*, above (n. 183), 130–47.

220 See above, Sections 7.01 *et seq*, 9.06.

221 Ibid.

222 Partsch, above (n. 206), at 516; *ICRC Commentary*, Art. 85, para. 3479.

223 Cf. as well Art. 33 GC IV.

224 See Section 7.12.

225 See Sections 7.19–7.21.

226 See Sections 7.22–7.24.

227 See K. Dörmann, *Elements of War Crimes*, above (n. 183), 185–92.

228 K. J. Partsch, above (n. 206), at 517; *ICRC Commentary on the Additional Protocols*, Art. 85, para. 3492.

229 *ICRC Commentary on the Additional Protocols*, Art. 85, para. 3509.

230 See K. Dörmann, *Elements of War Crimes*, above (n. 183), 314–24.

231 UNGA Res. 3068 (XXVIII) of 30 November 1973.

232 Art. 1 of this Convention reads: ‘[...] the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.’

233 See K. Dörmann, *Elements of War Crimes*, above (n. 183), 215–28.

234 See above, Chapter 16.

235 See above, Section 16-01.

236 See Section 16.03.

237 See K. Dörmann, *Elements of War Crimes*, above (n. 183), 100–5.

- 238** See above, Chapters 7, 13, and 14.
- 239** See K. Dörmann, *Elements of War Crimes*, above (n. 183), 193–207.
- 240** Counted among these are the individual indications and identifying features in accordance with Art. 38 GC I; GC IV, Annex I, Art. 6; Art. 66 AP I and Annex I.
- 241** See K. Dörmann, *Elements of War Crimes*, above (n. 183), 281–313.
- 242** For this Kampala Amendment, cf. above (n. 153).
- 243** Art. 35, para. 2, AP I; cf. also the Biological Weapons Convention, the Chemical Weapons Convention as well as the St Petersburg Declaration of 1868 and the 1899 Hague Declaration concerning Expanding Bullets; see above, Chapter 6.
- 244** See above (nn. 153 and 185).
- 245** For a discussion of autonomous weapons, see above, Section 6.30.
- 246** It can be argued that if autonomous weapons are not reliable in practice because they cause deaths or damage contrary to the laws of armed conflict—for whatever reasons—they cause superfluous injury and unnecessary suffering. If a state official knows about this and nevertheless orders to use these weapons, it might be possible to prove that these war crimes are committed as part of a plan or policy or as part of a large-scale commission of such crimes, as required by Art. 8, para. 1, ICC Statute.
- 247** Also, M. Greenspan, *The Modern Law of Land Warfare* (University of California Press, 1959), 317.
- 248** See Regulations adopted at the 20th International Conference (1965), Text in 32 *IRRC* (1992), 339–62, to be revised at the 30th International Conference (Geneva, 2007). See also ICRC Advisory service, Model Law concerning the use and the protection of the emblem of the red cross, the red crescent and the red crystal, <http://www.icrc.org/eng/assets/files/other/model-law-emblem-0107-eng.pdf>.
- 249** At the High-Level Meeting of the General Assembly on the Rule of Law in 2012, world leaders called on all states to recommit to the rule of law as a fundamental factor in preventing war and stressed the universality of humanitarian law and the importance of the ICC, see UNGA Res. 67/1 (30 November 2012), *Declaration of the High-Level Meeting of the 67th Session of the General Assembly on the Rule of Law at the National and International Levels*, para. 23, <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>: ‘We recognize the role of the International Criminal Court in a multilateral system that aims to end impunity and establish the rule of law, and in this respect we welcome the States that have become parties to the Rome Statute of the International Criminal Court, and call upon all States that are not yet parties to the Statute to consider ratifying or acceding to it, and emphasize the importance of cooperation with the Court.’
- 250** Cf. Romano/Nollkaemper/Kleffner (eds), above (n. 164).
- 251** Cf. F. Kalshoven, ‘State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of AP I of 1977 and Beyond’, in Schmitt/Heintschel von Heinegg (eds), above (n. 49), 177 *et seq.*
- 252** O. Dörr, ‘Völkerrechtliche Verantwortlichkeit’, in K. Ipsen (ed.), *Völkerrecht*, 7th edn (C. H. Beck, 2018), 690, for further evidence.
- 253** This tendency is countered by the Geneva Conventions. Under Art. 51 GC I, Art. 52 GC II, Art. 131 GC III, and Art. 148 GC IV, all states are obliged to ensure effective penal sanction for grave breaches. This obligation includes the prosecution of perpetrators

belonging to victorious armed forces. States cannot free themselves or another state from this responsibility.

254 When the Chinese Embassy in Belgrade was erroneously bombed by US forces during the Kosovo campaign on 8 May 1999, a US senior official offered 'sincere apologies' in Beijing and stated that the attack was 'completely unintended'. Compensation to the victims and their families were settled in a Memorandum of Understanding of 30 July 1999, cf. Memorandum of Understanding between the Delegation of the United States of America and the Delegation of the People's Republic of China, as of 30 July 1999, *Digest of United States Practice in International Law 2000*, at para. 40, <https://2009-2017.state.gov/s/l/c8185.htm>.

255 The US made *ex gratia* payments on the basis of the National Defense Authorization Act (NDAA). The NDAA of 2020 authorizes up to \$5,000,000 for ex gratia payments for damage, personal injury, or death that is incident to combat operations of the United States Armed Forces especially in Afghanistan, cf. Sec. 1215: Authority for certain payments to redress injury and loss in Afghanistan, Iraq, Syria, Somalia, Libya, and Yemen, <https://www.congress.gov/bill/116th-congress/house-bill/2500/text/rh>.

256 See, e.g., the UN Compensation Commission on claims against Iraq 'as a result of Iraq's unlawful invasion and occupation of Kuwait', established under SC Res. 687 (1991) of 8 April 1991, see above (n. 54); but also practice (*inter alia* by Bosnia and Herzegovina, Canada, Germany, Iran, the US) and other states, documented by D. Fleck, 'Individual and State Responsibility for Violations of the Ius in Bello: An Imperfect Balance', in W. Heintschel von Heinegg and V. Epping (eds), *International Humanitarian Law Facing New Challenges* (Springer, 2007), 171, 193-7.

257 See above (n. 57).

258 See Crawford, above (n. 58).

259 Annex to UN GA Res. 60/147 (21 March 2006) and Annex to Human Rights Resolution 2005/35, adopted by the Commission on Human Rights on 19 April 2005.

260 Ibid., especially para. 11 *et seq.*

261 The forthcoming decision of the Grand Chamber of the European Court of Human Rights in the case *Hanan v Germany* will give the opportunity to spell out state duties on the basis of human rights many years after the deadly use of force in Kunduz in 2009 during the armed conflict in Afghanistan. The decisive question to be answered by the court is whether Germany fulfilled its obligation to effectively investigate the attack and was in line with its obligations under the procedural aspect of the human right to life as enshrined in the ECHR, Art. 2, cf. above (n. 65), L. Steinle, 'Germany before the European Court of Human Rights', *Opinio Iuris*, 29 February 2020. <http://opiniojuris.org/2020/02/29/germany-before-the-european-court-of-human-rights-finally-accountability-for-the-airstrike-at-kunduz-and-beyond/>.

262 See <https://de.scribd.com/document/314521087/I-L-a-REPORT-Compensation-for-Victims-of-War> Cf. <http://www.ila-hq.org/en/committees/index.cfm/cid/1018>.

263 ILA, Resolution No. 2/2010, The Hague, 15-20 August 2010, http://www.nuhanovicfoundation.org/user/file/2010_ila_draft_principles_on_reparation_victims_armed_conflict.pdf.

264 ILA, Resolution No. 1/2014, The Hague, 7-11 April 2014, <https://reparations.qub.ac.uk/assets/uploads/Conference-Resolution-English-Washington-2014..pdf>

- 265** Cf. ILA, Commentary on the 2010 Declaration, Art. 6, para. 2, lit. b, http://www.nuhanovicfoundation.org/user/file/2010_commentary_ila_draft_principles_on_reparation_victims_armed_conflict.pdf; see as well R. Hofmann, 'The 2010 International Law Association Declaration of International Law Principles on Reparation for Victims of Armed Conflicts' (2018) 78 *ZaöRV* 551–4.
- 266** See above (n. 254).
- 267** For instance, as of 2004, a victim's family in Iraq can apply for a condolence payment of up to \$2,500 if an Iraqi non-combatant civilian is inadvertently killed by a combatant of the US. Cf. J. Joseph, 'Mediation in War: Winning Hearts and Minds Using Mediated Condolence Payments' (July 2007) 23 *Negotiation Journal* 219–48. In regard to *ex gratia* payments of \$5,000 by Germany for a family of one or more victims caused by the attack in Kunduz, cf. BT Drs. 17/3723 and BT Drs. 17/8120, 12 December 2011. For the human rights implications of the Kunduz Case (*Hanan v Germany*), cf. European Court of Human Rights (ECtHR), above (n. 65) and 261.
- 268** On questions of 'Muslim conflict resolution', cf. Joseph, above (n. 267).
- 269** Cf. for an overview H.-J. Heintze, 'Protecting Power', in *MPEPIL*.
- 270** Entered into force 19 June 1931, 118 *LNTS* 343.
- 271** Art. 45 *et seq.* 1961 Vienna Convention on Diplomatic Relations; the two kinds of protecting powers (Vienna mandate and Geneva mandate) can exist simultaneously, cf. Heintze, above (n. 270).
- 272** Entered into force 9 March 2004, 38 *ILM* (1999), 769; Arts. 2–4 Annex Regulations for the Execution of the Convention.
- 273** Entered into force 7 August 1956, 249 *UNTS* 240.
- 274** See below, Section 21.21.
- 275** See above, Sections 13.17–13.29.
- 276** For the reasons, see Heintze, above (n. 270).
- 277** After the 9/11 terrorist attacks, the ICRC visited in 2003 more than 200 detention facilities, where *circa* 450.000 persons have been detained in *circa* eighty states. The most prominent example is the Guantanamo Bay Detention Facilities by the US. For the work of the ICRC visiting these facilities since 2002, cf. <https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/678fk8.htm>. In February 2014 the ICRC made its 100th visit to the facilities, <https://www.icrc.org/en/document/icrcs-100th-visit-guantanamo>.
- 278** *Ibid.*; the ICRC wrote in 2004: "The ICRC remains concerned that significant problems regarding conditions and treatment at Guantanamo Bay have not yet been adequately addressed" by the US, *ibid.* Cf. as well N.A. Lewis, Red Cross Finds Detainee Abuse in Guantanamo, *New York Times*, 30 November 2004, <https://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html>. Much later, in 2014, an US commission (the Senate Select Committee) issued its report about the CIA's detention program, cf. 9 December 2014, <https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf>. And in 2020, it was discussed by judges of the military commission during the Guantanamo Trial over the 11 September 2001 attacks whether brutal interrogation techniques performed or authorized by the CIA since 2002, as waterboarding, are torture or cruel, inhuman, and degrading punishment.
- 279** For further discussion see R. Kolb, 'Protecting Powers', in A. Clapham, P. Gaeta, M. Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (OUP, 2015), 549–60.

- 280** See Art. 33 *et seq.* UN Charter; cf. A. Jachec-Neale, 'Fact-Finding', in *MPEPIL*.
- 281** Cf. H. Spieker, 'International (Humanitarian) Fact-Finding Commission', in *MPEPIL*; M. Bothe, 'Fact-finding as a means of ensuring respect for international humanitarian law', in W. Heintschel von Heinegg and V. Epping (eds), *International Humanitarian Law Facing New Challenges* (Springer, 2007), 249–67.
- 282** J. S. Pictet (ed.), *Commentary to the III Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC, 1960), 631 *et seq.*
- 283** See IHFFC website, https://www.ihffc.org/Files/en/pdf/ihffc_englisch.pdf.
- 284** See for a list of current states parties, https://www.ihffc.org/index.asp?page=statesparties_list. For a history of negotiations, see K. J. Partsch, International Fact-Finding Commission, in Bothe/Partsch/Solf, above (n. 205), at 537 *et seq.*
- 285** The wording of Art. 90 AP I is no limitation, as the object and purpose of international humanitarian law calls for an effective implementation of that law in all situations where the law of armed conflict is applicable; see as well Spieker, above (n. 281).
- 286** A JIT with 350 members did the criminal investigation with regard to the attack of the flight MH17 over Ukraine in July 2014 that killed nearly 300 civilians. As an outcome in March 2020 criminal proceedings began in the Netherlands against four men, three Russians, one Ukrainian.
- 287** E. Mikos-Skuza, 'The International Humanitarian Fact-Finding Commission: An Awakening Beauty?' in A. Fischer-Lescano, H.-P. Gasser, T. Marauhn, and N. Ronzitti (eds), *Frieden in Freiheit. Peace in Liberty. Paix en liberté. Festschrift für Michael Bothe zum 70. Geburtstag* (Nomos, 2008), 481 *et seq.*
- 288** The summary of the report was published 7 September 2017, <https://www.ihffc.org/index.asp?Language=EN&mode=shownews&ID=831>, <https://www.osce.org/home/338361>; cf. Ch. Azzarello/M. Niederhauser, 'The Independent Humanitarian Fact-Finding Commission: Has the Sleeping Beauty Awoken?', *Humanitarian Law & Policy*, 9 January 2018, <https://blogs.icrc.org/law-and-policy/2018/01/09/the-independent-humanitarian-fact-finding-commission-has-the-sleeping-beauty-awoken/>.
- 289** See Section 21.08.
- 290** See [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf).
- 291** For an overview of the activities of the Security Council, see M. Wood, 'United Nations, Security Council', in *MPEPIL*.
- 292** For further discussion, see below, Sections 21.27–21.33.
- 293** For the SC Resolutions during the recent armed conflict in Syria, see above (n. 75).
- 294** Until that time the Security Council had addressed serious human rights violations in South Rhodesia in Resolutions 217 of 20 November 1965 and 221 of 19 April 1966, but its measures were justified by the danger of military conflict between South Rhodesia and neighbouring states.
- 295** Even if the action taken pursuant to Chapter VII relied mainly on the violation of Bosnia-Herzegovina's territorial integrity, the serious violations of international humanitarian law also legitimized the enforcement measures.
- 296** See for instance, H.-P. Gasser, 'International Committee of the Red Cross (ICRC)', in *MPEPIL*.

- 297** The Statutes of the International Red Cross and Red Crescent Movement were adopted in 1986, and amended 1995 and 2006, <https://www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf>; they form the legal basis of the ICRC, cf. Art. 5, *ibid*.
- 298** Art. 5 Statutes of the International Red Cross and Red Crescent Movement.
- 299** See above, Section 21.21.
- 300** See for instance, Gasser, above (n. 296). For activities of the ICRC during the so-called war on terror, see above (nn. 68 and 69).
- 301** P. Boissier, *Histoire du Comité international de la Croix-Rouge. De Solférino à Tsoushima* (Librairie Plon, 1963, reprinted by Institute Henry Dunant, 1985); H. Haug, *Rotes Kreuz. Werden, Gestalt, Wirken* (Verlag Hans Huber, 1966), 13–32; A. Schlögel, ‘IRC – International Red Cross’, in R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, Vol. 2 (Springer, 1995), 814 *et seq*.
- 302** Gasser, above (n. 296). Cf. the report: 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, (2005) 87 *IRRC* 393–400; H.-P. Gasser and N. Melzer, *Humanitäres Völkerrecht. Eine Einführung*, 2nd edn (Nomos, 2012), 238–47. Therefore, the ICRC declined to comment on newspaper reports about torture and maltreatment in Guantanamo detention facilities by the US, see above (n. 278).
- 303** C. Tomuschat, *Human Rights: Between Idealism and Realism*, 3rd edn (OUP, 2014), 172–82; G. Neuman, ‘Human Rights, Treaties, and International Legitimacy’, in S. Vöneky and G.L. Neuman (eds), *Human Rights, Democracy, and Legitimacy in a World of Disorder* (CUP, 2018), 51–72.
- 304** International Covenant on Civil and Political Rights, 999 *UNTS* 171 and 1057 *UNTS* 407; International Covenant on Economic, Social and Cultural Rights, 993 *UNTS* 2; European Convention on Human Rights, 213 *UNTS* 222; African Charter on Human and Peoples’ Rights, 1001 *UNTS* 45; American Convention on Human Rights, 1144 *UNTS* 123.
- 305** J. A. Frowein, ‘Ius cogens’, in *MPEPIL*; G. Neuman, ‘Human Rights, Treaties and International Legitimacy’, above (n. 303), at 59–61; A. Bianchi, ‘Human Rights and the Magic of Jus Cogens’ (2008) 19 *EJIL* 491–508; M. S. McDougal, H. D. Lasswell, and L.-Ch. Cheng, *Human Rights and World Public Order: the Basic Policies of an International Law of Human Dignity* (Yale University Press, 1980), at 332 *et seq.*, https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1056&context=fac_books.
- 306** ICJ, Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Reports* 1996, 226, at para. 25; for state opinions during the drafting process cf. S. Vöneky, *Die Fortgeltung des Umweltvölkerrechts in internationalen bewaffneten Konflikten* (Springer, 2001), 146–63; ICJ, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, *ICJ Reports* 2004, 177, para. 102 *et seq*.
- 307** Resolution 1992/S-1/1 of 14 August 1992, at para. 9; for the report by E. Rehn, cf. E/CN.4/1996/63, 14 March 1996 based on the Commission Resolution 1995/89.
- 308** See above, Chapter 14.
- 309** Cf. above (nn. 65 and 261). See also the (forthcoming) Grand Chamber decision of the ECtHR in the Kunduz case (*Hanan v Germany*).
- 310** For further evidence, see S. Vöneky, ‘Armed Conflict, Effect on Treaties’, in *MPEPIL*; S. Vöneky, *Die Fortgeltung des Umweltvölkerrechts in internationalen bewaffneten Konflikten*

(Springer, 2001), 273 *et seq.* With regard to the right to life and reference to the UK practice cf. I. Park, *The Right to Life in Armed Conflict* (OUP, 2018), at part II. 4.

311 Cf. for instance Art. 1 ECHR; one has to differentiate between the state's acts occurring within the treaty space but outside the state's own territory and the state's acts occurring outside the treaty space (state forces acting abroad); for the former, see *Loizidou v Turkey* (23 March 1995, No. 15318/89); *Cyprus v Turkey* (10 May 2001, application no. 25781/94); for the latter, see *Al-Saadoon and Mufdhi v UK* (2 March 2010, No. 61498/08); *Al-Skeini et al. v UK* (7 July 2011); *Al-Jedda v UK* (7 July 2011); *Mansur PAD et al. v Turkey* (28 June 2007, no. 60167/00); *Marković et al. v Italy* (14 December 2006, application no. 1398/03); *Banković et al. v Belgium* (19 December 2001, application no. 52207/99); *Issa et al. v Turkey* (16 November 2004, no. 31821/96); *Saddam Hussein v Coalition Forces* (14 March 2006, No. 23276/04); *Behrami and Behrami v France* (31 May 2007, no. 71412/01); *Hanan v Germany* (Grand Chamber Judgment forthcoming), see above (nn. 65 and 261); cf. as well Park, above (n. 310), part II.3.

312 Ibid.

313 IACtHR, *Las Palmeras v Colombia*, Judgment of 6 December 2001, Series C No. 67, paras 17 n. 1, 24 n. 2.

314 IACtHR, *Bámaca-Velásquez v Guatemala*, Series C No. 70 (2000), Judgment of 16 November 2000, paras 205–9.

315 See, e.g., ECtHR, *Korbely v Hungary*, (application no. 9174/02), Judgment of 19 September 2008; *Al-Skeini et al. v UK*, (application no. 55721/07), Judgment of 7 July 2011; *Al-Jedda v UK*, (application no. 27021/08), Judgment of 7 July 2011; *Al-Saadoon and Mufdhi v UK*, (application no. 61498/08), Judgment of 2 March 2010. For a review of the caselaw of the ECtHR referring to situations of armed conflict, see M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP, 2010), 313–51; Park, above (n. 310), part I. 1. 7.

316 ECtHR, *Hanan v Germany*, above (nn. 65 and 261) (Grand Chamber Judgment forthcoming).

317 See, e.g., ECtHR, *McCann et al. v UK*, Judgment of 27 September 1995, Series A 324, 21 EHRR 97; *Ergi v Turkey*, (application no. 23818/94), Judgment of 28 July 1998; *Khashiyev and Akayeva v Russia* (applications nos. 57942/00 and 57945/00), Judgment of 24 February 2005; *Medka Isayeva, Yusupova and Bazayeva v Russia*, (applications nos. 57947/00, 57948/00, and 57949/00), Judgment of 24 February 2005; *Zara Isayeva v Russia*, (application nos. 57947/00, 57950/00), Judgment of 24 February 2005; *Saramati v France, Germany, and Norway* (application no. 78166/01), Admissibility Decision of 31 May 2007; W. Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 *EJIL* 741–67.

318 See M. Wood, 'United Nations, Security Council', in *MPEPIL*; R. Wolfrum, Rapporteur, 12th commission IDI, 'Judicial Control of Security Council Decisions', Final Report (2015) 76 *Yearbook of the Institute of International Law* 417–83, <https://www.idi-iil.org/app/uploads/2017/06/04-Wolfrum-JurisdictionONU.pdf>.

319 Ibid.

320 See above, Section 21.23.

321 See SC Res. 1755 (2007), in which sanctions have been taken against particular persons responsible for such violations. In SC Res. 1593 (2005), the Security Council

declared the situation in Sudan to constitute a threat to peace and has referred the case to the Prosecutor of the ICC.

322 Cf. as well, SC Res. 2513 (2020) with regard to Afghanistan.

323 Cf. as well, SC Res. 2510 (2020) with regard to Libya.

324 Cf. above (n. 74).

325 See SC Res. 1265 (1999) on the protection of civilians in armed conflict.

326 See above, Chapter 11; M. E. O'Connell, 'Humanitarian Assistance in Non-International Armed Conflict, The Fourth Wave of Rights, Duties and Remedies' (2001) 31 *IsrYHR* 183-217, at 217.

327 Publicly available data could be used to verify cases of humanitarian suffering and/or violations of humanitarian law, see above (n. 44). The Coronavirus (covid-19) crisis, by some head of states compared to a war, showed that artificial intelligence, data science, and big data tools can be necessary to monitor the implementation of certain measures to fight the spreading of the virus, globally, in democratic and undemocratic states.

328 SC Res. 827 (1993), and Report of the Secretary-General (UN Doc. S/25704 and Add. 1).

329 SC Res. 955 (1994), and request of the government of Rwanda (UN Doc. S/1994/1115).

330 SC Res. 1315 (2000).

331 SC Res. 1272 (1999), para. 16.

332 SC Res. 1244 (1999), and UNMIK Reg. 2000/64.

333 Romano/Nollkaemper/Kleffner (eds), above (n. 164).

334 P. B. Hayner, 'Truth commissions: a schematic overview' (2006) 88 *IRRC* 295-310, https://international-review.icrc.org/sites/default/files/irrc_862_4.pdf.

335 A. G. O'Shea, 'Truth and Reconciliation Commissions', in *MPEPIL*.

336 See SC Res. 693 (1991) and Mexico Peace Agreements, Art. 12. For the Clarification Commission in Guatemala, see C. Tomuschat, 'Clarification Commission in Guatemala' (2001) 23 *Human Rights Quarterly* 233-58.

337 For instance, the relationship between these Commissions and the pursuit of prosecution and the courts; see for further details O'Shea, above (n. 335).

338 See above, Section 21.23.

339 See above, Sections 21.25-21.31.

340 On 22 April 1980, the European Community Foreign Ministers resolved, in the framework of European political co-operation, to carry out measures necessary for the imposition of sanctions against Iran. *EC Bulletin* 1980, No. 4, 26 *et seq.*

341 *ICJ Reports* 1980, 3, 43 *et seq.*

342 See above, Section 21.02. Cf. F. Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances' (1999) 2 *YIHL* 3-61, at 54; B. Kessler, 'The Duty to "Ensure Respect" under Common Art. 1 of the Geneva Conventions: Its Implication in International and Non-International Armed Conflicts' (2001) 44 *GYIL* 498-516.

343 General Affairs and External Relations Council of the European Union, European Union Guidelines on promoting compliance with international humanitarian law, Official Journal of the European Union, 2005/C 327/04 (23 December 2005) and 2009/C303/06 (15 December 2009). For a current Report on the EU Guidelines and the updated 2009 Guidelines: European Union (ed.), Working Party on Public International Law July 2017-December 2018

(June 2019), <https://www.consilium.europa.eu/media/40345/ihl-2019-report-june-update-en.pdf>.

344 Cf. ICRC, June 2019, <https://www.icrc.org/en/document/improving-compliance-ihl>.

345 C. Stahn, 'NGOs and International Peacekeeping—Issues, Prospects and Lessons Learned' (2001) 61 *ZaöRV* 379–401.

346 See <http://www.amnesty.org/>.

347 See <http://www.hrw.org/>.

348 See <http://www.msf.ch/>.

349 See above, Section 21.31.

350 D. Fleck, 'The Role of Individuals in International Humanitarian Law and Challenges for States in Its Development', in M. N. Schmitt and L. C. Green (eds), *The Law of Armed Conflict: Into the Next Millennium*, 71 *International Law Studies* (Naval War College, 1998), 119–39.

351 For the complexity of this task, see D. Fleck, 'Implementing International Humanitarian Law: Problems and Priorities' (1991) 31 *IRRC* 140–53.

352 See above (n. 51).

353 See <https://www.icrc.org/en/what-we-do/building-respect-ihl>.

354 Cf. M. Bothe, P. Macalister-Smith, and T. Kurzidem (eds), *National Implementation of International Humanitarian Law* (Nijhoff, 1990).

355 See above (n. 101).

356 See above (n. 121).

357 Cf. for instance, Ch. Meloni, *Command Responsibility in International Criminal Law* (Asser Press, 2010); Solis, above (n. 26), 341 *et seq.*, 381 *et seq.*

358 See in regard to this hierarchical structure for armed groups in non-international armed conflicts, Art. 1(1) AP II.

359 Cf. G. Nolte and H. Krieger, 'European Military Law Systems—Summary and Recommendation', in G. Nolte (ed.), *European Military Law Systems* (de Gruyter, 2003), 10.

360 It is discussed whether Art. 33 ICC Statute departs from customary international law, cf. C. Staker, 'Defence of Superior Orders Revisited' (2005) 79 *Australian Law Journal* 431 *et seq.*, 446: '[A]lthough a defence of superior orders is now expressly recognised in Art. 33 of the ICC Statute, that defence does not yet form part of customary international law. Rather, in customary international law, the Nuremberg principle still prevails, according to which superior orders is no defence but may be taken into account in mitigation of sentence'. Y. Dinstein, 'International Criminal Courts and Tribunals, Defences', in *MPEPIL*, states, that '[u]nder customary international law, the fact that an accused acted in obedience to superior orders does not constitute a defence *per se*, but is a factual element that may be taken into account—in conjunction with other circumstances—within the scope of an admissible defence based on lack of mens rea, specifically, duress or mistake.'

361 See Nolte/Krieger, above (n. 369).

362 H. Sato, 'The Defense of Superior Orders in International Law: Some Implications for the Codification of International Criminal Law' (2009) 9 *International Criminal Law Review* 117–37, at 133. For the rules of the Lieber Code in this regard cf. Section 21.10, para. 12.

363 Cf. § 11 para. 1 Soldatengesetz der Bundesrepublik Deutschland [German Soldiers Law].

364 CIHL, Rule 154. See as well separate and dissenting Opinion of President Antonio Cassese, Judgment, *Erdemovic*, Case No. IT-96--22-A, Appeals Chamber, 7 October 1992, para. 15: '[...] duress is commonly raised in conjunction with superior orders. However, there is no necessary connection between the two. Superior orders may be issued without being accompanied by *any* threats to life or limb. In these circumstances, if the superior order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey the order. If allowing such a refusal, the order is reiterated under threat to life or limb, then the defence of duress may be raised, and superior orders lose any legal relevance. [...]' See above, Sections 21.04, para. 4 and 21.07.

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10 Accountability for Violations of the Laws of War

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(p. 444) 10 Accountability for Violations of the Laws of War

The first half of this book concentrated on explaining how resort to war came to be outlawed in international law. The UN Charter now only allows for the use of force by one state against another in situations where either there has been an armed attack and the state acts in self-defence, or the Security Council has authorized the use of force where this is necessary to maintain or restore international peace and security. Where this prohibition on the use of force is violated by states and their leaders, it may be possible to have some sort of accountability. With regard to leaders, there were of course trials and convictions for 'crimes against peace' in Nuremberg and Tokyo after the Second World War. The crime of aggression has now been inserted into the Statute of the International Criminal Court (although, as we shall see, the likelihood of prosecutions under the eventual agreed arrangements are very slim). But accountability can go beyond individual criminal conviction. We will examine other possibilities involving compensation and memorialization.

The second half of this book examined the laws of armed conflict. Here too there may be possibilities to demand various forms of accountability. Some breaches of these rules are considered war crimes and can be prosecuted as such. Command responsibility will attach to those who were in control and failed to prevent or punish such war crimes. All violations of these rules can, in theory, lead to various legal consequences beyond prosecution, and we will look below at several such forms of accountability.

But – and readers will have guessed there must be a 'but' coming – there are multiple obstacles to ensuring the rule of law in time of war. National courts are unlikely to challenge the government's decision to resort to force against another state.¹ International courts or Commissions have rarely been (p. 445) given jurisdiction over such matters (and even then enforcement of payment of compensation will be problematic). The UN Security Council and the General Assembly rarely find political agreement on whom to blame, or how to bring justice. Nation states hardly ever prosecute their own forces for war crimes,² or even under the ordinary criminal law. With regard to the rare criminal cases that were brought in recent years in the United States, related to killing of civilians in Afghanistan and Iraq, we have had the spectacle of members of the armed forces and private contractors being pardoned by President Trump.³ At the judicial level, courts are hesitant to decide cases against their own side that question decisions made in battle. Moreover, where a claim is brought in the domestic courts of one state against another state, it can be thwarted by the application of the international law of sovereign state immunity.⁴

In the end, even where the political and technical obstacles can be overcome, wars do not easily lend themselves to litigation. There is an assumption among many lawyers that war damage is too big to be dealt with in courts. For Tomuschat, the

harm resulting from armed conflict pertains to a specific class of damage originating from state conduct that by necessity causes mass injuries. Accordingly, the financial consequences of armed conflict cannot be dealt with as everyday problems that fit into the ordinary legal framework.⁵

Let us delve, however, into some ways in which a degree of accountability can in fact be achieved for violations of the laws of war. Before coming to the (p. 446) contemporary situation, let us consider what happened in the wake of the two World Wars, as these arrangements continue to shape how many think about the prospects of accountability.

10.1 The First World War

When we considered War as an institution for settling disputes between states against the background of the doctrine of Just War, we came across the idea that – in War – the loser pays. Accounts were settled in such a way that the winner was even compensated for the cost of fighting the War. These war ‘expenses’ or ‘indemnities’ were variously justified by the writers of the 16th and 17th centuries. While for some, the side fighting a just war could legitimately claim their costs, others considered that, as with a duel, the loser had consented to whatever might come. Alternatively, it was thought that the overarching principle was that the victor should be able simply to impose such conditions as were necessary to ensure their future security.⁶ By the 19th century, peace treaties would contain demands by the winner for huge sums in war reparations.⁷ By the beginning of the 20th century, a leading British law book, describing the ‘Laws of War in General’, would reflect these priorities for the winner, deeming it unnecessary to take into account whether or not the winner had been fighting a just war. Westlake explains:

[T]he object on the part of each belligerent is to break down the resistance of the other to the terms which he requires for peace. These are not necessarily limited to the concession of the demand or the satisfaction of the complaint out of which the war arose. They may include a demand for indemnity, for new arrangements promising greater security in future, or for new arrangements more pleasing to the stronger party for any other reason; and these may go so far as to include the cession of territory.⁸

This old orthodoxy helps us understand how people thought about war reparations as the First World War came to an end. But the Versailles Treaty nevertheless stopped short of punitive demands to prevent Germany’s ever (p. 447) again being a threat. Instead the idea was put forward that compensation should be based on fault and capacity to pay. This was in part self-serving, as the victors wanted to trade with a Germany actually able to pay, although, at the same time, the notion of ‘war reparations’ was talked up to satisfy domestic pressure. Squeeze the Germans till the ‘pips squeak’ was a celebrated refrain. The United States was, however, against the old idea of indemnities, or fines, whereby the loser pays the winner’s costs and some more. One option might have been to focus on violations of the laws of war, but this would have left Belgium a beneficiary for having been invaded and occupied, as that invasion had been under international law a violation of its Neutral Status. France and Britain, however, would have received relatively little under any scheme which concentrated on violations of international law.⁹ The focus therefore shifted to *damages*, as opposed to the costs of the whole War, and now the French and Belgians stood to gain more than the British.

In MacMillan’s expert telling of events, it emerges that the moral high ground staked out by President Wilson for the United States, whereby the winners would not be indemnified for the cost of fighting the war, was eventually subverted. Compensation came to include not only the estimates of damage done to the lands of France and Belgium, but also the costs of War pensions for ‘victims of war’, which meant those members of the Allied armed forces ‘whether mutilated, wounded, sick or invalided, and to the dependents of such victims’..¹⁰ This considerably bolstered the share of reparations owed to Great Britain, a sum that would otherwise have been essentially limited to the value of the merchant shipping damaged by German submarines.¹¹

In addition to monetary reparations (by 1932 Germany is said to have paid about \$4.5 billion¹²), the Versailles Treaty ‘called for Germany to give France and Belgium 120,000 sheep, 4,000 bulls, 140,000 dairy cows, and more than 40,000 horses’.¹³ German borders were redrawn, and Germany’s colonies in Africa and the Pacific were taken over by mandate holders under the League of Nations (including Belgium, France, the United

Kingdom, South Africa and Australia). German-leased territory in China was controversially ceded to Japan, and the 'Shandong problem' was resolved by treaty only in 1922. (p. 448) There were also restrictions on the size of the German Army and Navy. The Treaty further included the following curiosities: 'Germany had to return all French flags captured during the 1870-71 war, give to the king of Hejaz a historic Koran that the Ottoman sultan had once given to Kaiser Wilhelm, and deliver to the British the skull of the east African king Mkwawa.'¹⁴ The Peace Treaty is an amalgam of reparations for damage and indemnities for the cost of the war, symbolic fines and measures attempting to ensure security in Europe.

Mixed Arbitral Tribunals were set up to hear claims about war damage by nationals from the Allied or Associated Powers,¹⁵ while those same Powers enshrined in Article 297 of the Treaty that the private property of Germans in Allied lands would be simply seized and retained. By this time such seizure was considered outrageous by some. The records of the 1924 meeting of the International Law Association in Stockholm include this intervention by Wyndam Bewes:

[A]s internationalists, and as just men, we entirely repudiate the practice shown after this last war by every one of the warring States, by which they went back to forgotten practices of barbarism, which, I thought, had been eliminated for ever from the practices of civilised States – I mean the confiscation of the private property of the citizens of hostile States by the warring States in which they are found.

(Hear, hear.)

He then convinced the meeting to adopt unanimously the following text, whereby they 'Resolved that this Conference is firmly of opinion that the revived practice of warring States by which they confiscate the available private property of alien citizens is a relic of barbarism worthy of the most severe condemnation.'¹⁶

(p. 449) When considering accountability for going to War, two further provisions from the Treaty are constantly recalled. The first is known as the 'War Guilt Clause':

The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.¹⁷

The same language was used in the peace treaties with Germany's allies Austria, Bulgaria, Hungary and the Ottoman Empire. The second famous provision was supposed to lead to a trial of Kaiser Wilhelm:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.¹⁸

During the Peace Conference, there was some hesitation among the leaders of the victorious powers over the legality of prosecuting a Head of State before a tribunal. At one point the Prime Minister of Italy, Orlando (a Professor of law), pointed to the lack of precedent for the basis of such a right. The Prime Minister of France, Clemenceau, was not

looking for a precedent but rather seeking to set a precedent in the face of unprecedented atrocities:

We have today a glorious opportunity to bring about the transfer to international law of the principle of responsibility which is at the basis of national law.

Is there no precedent? There never is a precedent. What is a precedent? I shall tell you. A man comes along; he acts, for good or evil. Out of what is good we create a precedent. Out of what is evil, the criminals, whether individuals or heads of States, create the precedent of their crimes. We have no (p. 450) precedent? Why! This is our best argument. Was there in recent generations any precedent for the atrocities committed by the Germans in the present war, the systematic destruction of wealth to stifle competition, the torture of prisoners, the submarine piracy, the abominable treatment of women in the occupied countries? To these precedents, we will oppose a precedent of justice.¹⁹

This trial never took place, despite an amateur attempt to abduct the Kaiser from The Netherlands and bring him before a court, as engagingly told by Schabas in his book, *The Trial of the Kaiser*. Schabas highlights not only the hesitation of some leaders and Monarchs over the idea of prosecuting an Emperor for starting an unnecessary War, but also the unease in the legal community over prosecuting crimes that, at the time, had not been properly articulated as individual offences (as opposed to violations of the law of nations) and for which no penalties had been prescribed by law. Nevertheless, the discussion and preparation focused not only on punishing the violations of the guarantees to respect the Neutrality of Belgium and Luxembourg, but also on condemning what was seen by key players as a premeditated war of aggression,²⁰ as well as describing violations of the laws and customs of war as war crimes.²¹

The Treaty eventually included a provision whereby Germany recognized the right of the Allies to try 'acts in violation of the laws and customs of war', and an obligation for the German Government to hand over all persons accused of having committed such an act.²² Germany later explained that, under its law, it could not transfer any German citizens. In the end around a dozen people were tried for war crimes in German courts in Leipzig. The acquittals and minimal sentences provoked derision in France; and as Kreß has highlighted, this contributed to the breakthrough represented by the international trial in Nuremberg after the Second World War, and more generally explains the whole point of international criminal law. In his words, 'state will to investigate and prosecute a case of alleged state-based crime is inherently fragile'.²³

(p. 451) 10.2 The Second World War

The situation at the end of the Second World War was very different from that at the end of the First World War. Not only did the victors want to avoid a repeat of the Versailles experience,²⁴ but the tension between the West and the USSR meant that 'the Western powers were reluctant to establish a reparations regime that would have helped the Soviet Union to recover quickly from its losses'.²⁵ The result at the Potsdam Conference was a reparations regime that apportioned resources according to which occupation zone (Soviet or Western) they came under.²⁶ Again, the agreement highlights the collective responsibility for unleashing the War, stating that a guiding principle of the occupation would be

[t]o convince the German people that they have suffered a total military defeat and that they cannot escape responsibility for what they have brought upon themselves,

since their own ruthless warfare and the fanatical Nazi resistance have destroyed German economy and made chaos and suffering inevitable.²⁷

This time, as d'Argent explains,

dismantling of industrial plants was a way to exact reparations in the short term and at the same time to pursue a long term security goal by disarming the former enemies. ... The delivery of manufactured goods was a way to help local industry and to promote long term trade channels.²⁸

The bulk of the reparations for the USA and the United Kingdom were taken in terms of industrial goods, shipping and intellectual property rights. In addition, the victors benefitted from German forced labour for a few years after the Second World War. German prisoners of war subjected to forced labour in the Soviet Union were only finally released in 1953. The British were (p. 452) organizing hard labour for Japanese prisoners in Burma until 1947.²⁹ The last prisoners of war left Britain in 1948.³⁰

Similarly, for Japan there was concern that they were unable to pay full compensation, and that the priority should be reconstruction of the economy.³¹ Article 14 of the San Francisco Treaty stated:

It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless, it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations.

Therefore,

1. Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question. Such arrangements shall avoid the imposition of additional liabilities on other Allied Powers, and, where the manufacturing of raw materials is called for, they shall be supplied by the Allied Powers in question, so as not to throw any foreign exchange burden upon Japan.³²

And a specific class of violations of the laws of war was to be compensated:

As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers, or, at its option, the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund to appropriate national agencies, for the (p. 453) benefit of former prisoners of war and their families on such basis as it may determine to be equitable.³³

At the time, prisoners of war were paid around £75 each from the resulting fund. An attempt by former prisoners to sue the Japanese Government in 1998 failed in the Japanese courts, on the ground that such claims were already settled through the peace treaty.³⁴ Similarly, claims on behalf of Korean and Filipino women forced into sex (so-called 'comfort women'), and other claims by Korean, Filipino and Chinese nationals, have been dismissed

on the grounds that their claims are invalid due to legal agreements between Japan and Korea, the Philippines and China respectively.³⁵

The final settlement of reparations from Germany had to await a comprehensive peace agreement with a unified Germany. In the meantime Germany entered into various treaty agreements with different states, which again have been seen as extinguishing any private claims. Italy, Finland, Hungary, Romania and Bulgaria all paid reparations to other states under a series of Peace Treaties (1947).³⁶ In the end, it is estimated that, by 1965, 'Germany had paid more than DM18 billion (US\$4.5 billion), on January 1, 1986, that figure rose to more than DM59 billion (US\$27.5 billion) and in 2000 it was estimated to have reached more than DM82 billion (US\$38.6 billion)'.³⁷

After reunification, Germany set up funds, for example for the Conference on Jewish Material Claims, and reconciliation foundations with Poland, Russia, Belarus and Ukraine, and a special fund to compensate those subjected to forced labour.³⁸ This last foundation included contributions from German industry (the Foundation Initiative) and totalled around €5.1 billion; it was administered by the International Organization for Migration.³⁹

(p. 454) 10.3 Claiming Reparations in the Contemporary World before National Courts

The particularities of the German and Japanese settlements have left some uncertainty over the question as to whether individuals can claim, as a right, compensation from a state for violations of the laws of war. The German and Japanese Governments, and the courts in those countries, consider that claims relating to the Second World War, including against corporations in Japan, can no longer be litigated in their courts due, in part, to the War Reparations Treaties that have been adopted. The German and Japanese courts say that these treaties extinguish or dissolve any ability to litigate parallel claims, and that this is, in part, due to the absence in international law of *individual rights* to compensation for violations of the Hague Regulations 1907, the law on forced labour or the violation of the prohibitions on sexual slavery.⁴⁰

It is interesting to see how what I will call 'the logic of war' permeates some of the judgments. For example, in 2005, the Tokyo High Court, addressing allegations of rape of two Chinese women by Japanese soldiers, explained:

Since modern wars cause significant damage to a large number of people in each opponent State, if each national continues to pursue his or her claims for war damages against opponent States, it can hardly be said that the state of war has been terminated.⁴¹

As we have seen, traditional ideas about war meant the winner would impose conditions on the loser. The issue of a reckoning for violations of the laws of war was not central. In time, however, starting with the Hague Convention IV (1907), some treaties referenced a liability to pay compensation for violations of related provisions.⁴²

(p. 455) In the two World Wars, complex arrangements for reparations were developed. Several treaties, such as the San Francisco Peace Treaty with Japan (1951), were explicit that reparations claims by the nationals of Allied Powers were being waived with regard to 'any actions taken by Japan and its nationals in the course of the prosecution of the war'.⁴³ Not only does this mean that the courts of Japan have determined that claimants have lost the ability to bring claims before the relevant national courts, but it has also coloured how people think about the whole idea of claims based on violations of the laws of war. It is still

often assumed that states have only undertaken to be liable or accountable for violations of the laws of war *to other states* (and not individuals).

But an alternative vision is gaining ground, based on separate, mutually reinforcing ideas. First, consideration of the drafting history of certain original provisions of the 1907 Hague Convention IV and the 1949 Geneva Conventions shows that some proponents were concerned to indemnify particular classes of individuals, even at a time when international law was primarily about bilateral relationships between states.⁴⁴ Moreover, it has been highlighted that certain provisions, such as those on the rights of prisoners of war, should be perceived as generating individual entitlements, especially as the Geneva Conventions provide that the rights of prisoners of war, as well as rights belonging to other protected persons, cannot be subject to special agreements between states that would adversely affect the situation of such persons,⁴⁵ nor may such persons 'renounce the rights secured to them'.⁴⁶

Second, in 2005, an international instrument negotiated over a period of 15 years,⁴⁷ and adopted by all states without a vote, provided guidance and reaffirmed obligations to victims in this context. This text adopted by the UN (p. 456) General Assembly has the long title of the 'United Nations 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'. During its adoption, states were careful to make clear that the text contained no new obligations but rather identified ways of ensuring 'the effective implementation of existing obligations'.⁴⁸

The text extends way beyond what are now sometimes labelled 'atrocities crimes', or issues of 'responsibility to protect'. Indeed Theo van Boven, one of the authors of the expert work that led to the adoption of this instrument, highlighted that 'While the Principles and Guidelines focus on "gross" and "serious" violations, it is generally acknowledged that in principle all violations of human rights and international humanitarian law entail legal consequences'.⁴⁹ And the text is careful to state that 'it is understood that the present Basic Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law'.⁵⁰

We also might mention that, at the same time, states have recognized in this text that individuals and non-state actors (including armed groups and businesses) may also have to provide reparations in this context.⁵¹ Moreover, as pointed out by Mona Rishmawi, the Guidelines further extend the notion of 'victim' beyond individual human beings to 'collectivities' and 'indirect victims' such as family members, and on this point they have been influential in fora such as the International Criminal Court.⁵²

(p. 457) Nevertheless, in 2006, when a claim was made by 35 civilians in relation to the bombing of the Varvarin Bridge in Serbia by NATO, the German Federal Court of Justice held that 'With regard to violations of international law based on actions against foreign citizens, the person affected was not entitled to bring a claim, but rather his or her native country was'.⁵³ Moreover, the Court held that references in humanitarian law treaties to liability for payment of compensation 'only supported intergovernmental rather than direct individual restitution claims'.⁵⁴ It has been incisively pointed out that the German Court may have been overly focused on the rules developed by the International Law Commission for inter-state responsibility, and failed to take into account that these rules were developed without prejudice to other forms of responsibility and accountability towards actors other than states.⁵⁵ The case is now considered an exception to the modern trend to acknowledge reparations for victims of the law of armed conflict.⁵⁶

In the last 15 years, expert opinion has continued to gravitate towards emphasizing that states should provide a remedy and compensation for victims of violations of humanitarian law.⁵⁷ This comes in the most considered form in the International Law Association's Declaration of International Law Principles on Reparation for Victims of Armed Conflict (2010). Article 6 (p. 458) simply states 'Victims of armed conflict have a right to reparation from the responsible parties.' The Association's Committee on Reparation concluded:

Whilst claims of the individual were traditionally denied, the dominant view in literature has increasingly come to recognize an individual right to reparation – not only under international human rights law, but also under international humanitarian law. The same shift is discernible in State practice.⁵⁸

The Commentary also explains that 'The Committee can find no reason why the individual, who already enjoys strong protection under international human rights law, should have a weaker position under the rules of international law applicable in armed conflict.'⁵⁹ In this context it is being suggested that the compensation provisions in Hague Convention IV (1907) and Additional Protocol I (1977) 'should in the future be interpreted and applied in such a way as to accord an individual rights to compensation for violations of humanitarian law against the state responsible for the violations'.⁶⁰

Paola Gaeta, after a careful scholarly examination of developments in the law of state responsibility beyond the rights of an injured state, is clear about what she considers should be the direction of travel:

Under contemporary international law, individuals are no longer considered the 'objects' of rights accruing only to states, but are also considered to enjoy rights themselves vis-à-vis states under international law. It would therefore be preposterous to affirm that the position of the individual as a holder of rights dissolves when their need to be protected against abuses reaches its peak, ie in situations of armed conflict, when individuals are more vulnerable than ever. To state that the rules of IHL concerning the guarantees that belligerent parties must afford to civilians in combat operations and to persons in the hands of the enemy have a merely inter-state dimension amounts to asserting, that under this body of law, individuals are at the mercy of belligerents and entitled to protection only as mere objects of belligerents' rights. This construction would mean that the relevant rules of IHL, when they apply, dispossess individuals of their entitlements to be (p. 459) protected against illegal conduct by belligerents; that they suppress individuals to a position no different from that of 'endangered species' in situations where, on the contrary, belligerents must not forget they are dealing with human beings.⁶¹

But the German courts have, so far, failed to revise their position that individual claims cannot be brought on the basis of violations of international humanitarian law.⁶² A set of recent claims concern the 2009 German air strike on oil trucks in Afghanistan.⁶³ In the most recent decision on this incident, the highest Federal Court has pointed to the parallel regimes under human rights law and international criminal law to explain why national tort law should not be read as including a right to claim for violations of humanitarian law. The Court also rehearses the policy argument that, if German courts were to go out on a limb and allow the victims of violations of the laws of war to claim compensation, Germany would no longer be invited by NATO to participate in humanitarian operations:

In this connection, it should also not be overlooked that the risk of a hardly assessable liability could lead to a reduction in or even a complete end to humanitarian armed deployments by the German armed forces [. . .]. In the eyes, for example, of NATO partners whose national legal systems do not provide for individual claims to compensation for violations of international humanitarian law by their armed forces [. . .], the German armed forces would be limited in their ability to form alliances and take part in combat missions, because of the Damocles sword of – joint and several – public liability hanging over them [. . .].⁶⁴

(p. 460) In general, the judges and legislators of states currently involved in international armed conflicts seem unenthusiastic about developing remedies for claims for compensation in the context of armed conflict. Although a stream of academic commentary pleads for a recognition that the individual victims of violations of the laws of war should have a right to make claims as a matter of international rights before national courts, a number of counter-assumptions remain. First, that the law of armed conflict does not generate enforceable rights to compensation. Second, that national courts should not in general be considering the actions of the military abroad. And, third, even if there could be national public law reviews of administrative decisions related to targeting, judges cannot equate the decisions of an ‘administrative officer’ to those of a ‘soldier in combat’.⁶⁵

And not all academic commentary points to the desirability of ‘humanizing’ or ‘individualizing’ claims about violations of the laws of war. Commenting on the prospect of allowing tort law to be used to address breaches of the law of armed conflict in national courts, Gärditz opines:

National courtrooms are not necessarily adequate forums for assessing state conduct in international affairs, in particular armed conflicts. The perspective of the judge deciding on tort (or criminal) liability is unavoidably of a discrete case where the parties present arguments and evidence. Armed conflicts, on the other hand, are usually widespread, complex, and highly political. Applying tort liability against the state for military operations entails the risk that macroconflicts will be broken down into separate cases that can be fought as microwars at court, bereft of their political character.⁶⁶

The idea that war reparations are exclusively reserved to the state bringing a claim at the international level, is, however, likely to be rejected by a national court at some point. For the moment the German and Japanese courts continue to reject individual claims, many of which are said to be barred by waivers contained in peace treaties from the Second World War. The future success of claims by individuals beyond this context should be built on the growing recognition that states have to provide victims of certain violations a remedy,⁶⁷ that under the Geneva Conventions of 1949 states cannot override (p. 461) certain individual rights,⁶⁸ that states cannot absolve themselves from liability for grave breaches of the four Geneva Conventions,⁶⁹ and that, even if there might be national procedural bars to litigating these cases in national courts, the substantive international claims of victims and collectivities cannot be extinguished by treaties – as the international rights now belong to the individual victims and other entities and not exclusively to states.⁷⁰

On this last point, the Japanese Supreme Court explicitly stated:

Considering that the purpose of the waiver of claims under the Framework of the San Francisco Peace Treaty is to prevent issues concerning claims from being brought up in individual and ex-post civil litigation, the term “waiver of claims” in

this context should be understood to mean not to extinguish substantive claims but to extinguish the ability to litigate such substantive claims.⁷¹

In other words, what is extinguished is the right of the victim to claim reparation in court (including compensation, restitution and guarantees of non-repetition).⁷² Intriguingly, the same judgment ends with a reminder that nothing prevents the party being sued from satisfying the victims' claims; indeed the Supreme Court's judgment ends by stating that it expected this to happen:

[E]ven under the Framework of the San Francisco Peace Treaty, the obligors are not prevented from voluntarily and spontaneously taking measures to satisfy specific claims. Taking into consideration various circumstances, for example, the Victims' tremendous mental and physical suffering, the considerable benefits enjoyed by the appellant by having Chinese workers engaged in forced labor under the aforementioned harsh working conditions, and the aforementioned compensation received by the appellants, we (p. 462) expect the appellant and other parties concerned to make efforts to provide relief to the Victims.⁷³

In this stream of litigation, one of the defendants was the Nishimatsu Construction Company, and the reference is to the financial benefits accrued by such companies in the context of forced labour during the Second World War. The detailed study by Webster explains the eventual settlements reached by the Nishimatsu Company, and highlights the importance of apology, acknowledgement of legal liability and memorialialization (involving not only physical memorials, but also commemorative rituals for the dead).⁷⁴

The recent Mitsubishi Settlement Agreement (2016) is worth quoting to give a flavour:

Article 1 (Apology)

Party B [Mitsubishi Materials Corporation] apologi[z]es for this Case as follows, and Party A [YAN Yu Cheng [闫玉成]] accepts the sincere apology of Party B.

During World War II, about 39,000 Chinese laborers were kidnapped forcibly to Japan in accordance with the 'Resolution on the Importation of Chinese Labor to Japan' enacted by the Cabinet of the Government of Japan. Out of this group our company's predecessor Mitsubishi Mining Company and its contractors accepted 3,765 Chinese laborers at its facilities, and forced them to work under harsh conditions, resulting in the death of as many as 722 Chinese laborers. This issue remains unresolved to this day.

'A true mistake is having erred and not correct it.' Our company frankly and truthfully admit the historical fact that the human rights of these Chinese laborers were violated, for which we express deep remorse. These Chinese laborers were separated from their country and their families, and had to suffer great pain and suffering in a foreign land. For this, our company accepts the historical responsibility of those who used this labor, and (p. 463) sincerely apologizes to these Chinese laborers and their survivors. We also deeply mourn those Chinese laborers who died.

'Past experience must be our guide for the future.' Our company admits to the above-stated historical fact and historical responsibility, and from the perspective of contributing to improved Japanese-Sino relationship, will make payments towards a fund for these Chinese laborers and their survivors as part of the final overall

solution. To prevent a repeat of past mistake, our company will assist in the erection of a memorial, and promises to pass this fact down to future generations.

. . .

Article 3 (Payment to indicate sincere apology, establishment of a fund)

1. As an indication of a sincere apology in Article 1, Party B will pay each confirmed member of the 3,765 Chinese laborers (hereinafter called 'Original Laborers') RMB 100,000 through a fund established by the clause below (hereinafter referred to as "the Fund"). . . . For each deceased Original Laborer, the Fund will pay RMB 100,000 to his/her survivors with the right to inheritance as defined according [to] the law of the People's Republic of China (hereinafter referred to as "Survivors with right of inheritance").⁷⁵

Under Article 5, the Fund is to cover, *inter alia*, the memorial service to take place in Japan and the building of the memorial in Japan.

In parallel developments, the Supreme Court of Korea has held that it is not bound by the findings of Japanese courts that the Claims Agreement (1965) between the two states removed the possibility of claims by the victims of forced labour against Japanese companies. The Korean Supreme Court held that states could not, by treaty, waive without permission an individual's pre-existing rights.⁷⁶ In subsequent cases, the Supreme Court has upheld awards of compensation (circa \$90,000) for each victim against the New Nippon Steel Corporation and Mitsubishi.⁷⁷ The claims go beyond (p. 464) questions of unpaid wages, and in the *Nippon Case* were described by the Supreme Court as concerning

the forced mobilization victims' rights to claim solatium [compensation for emotional harm] against [the] Japanese corporation, premised upon the Japanese corporation's unlawful acts against humanity with direct links to the Japanese Government's unlawful colonial domination of the Korean Peninsula and waging of wars of aggression . . .⁷⁸

Let us now consider two modern innovative international arrangements that addressed the issue of reparations for the victims of war. In the first case, this was because the UN Security Council took decisive action with regard to the damage caused by the Iraqi invasion of Kuwait; and in the second case, it was because the states of Ethiopia and Eritrea agreed to set up an Arbitral Commission.

10.4 The UN Compensation Commission

In October 1990, two months after Iraq invaded Kuwait, the Security Council condemned

the actions by the Iraqi authorities and occupying forces to take third-State nationals hostage and to mistreat and oppress Kuwaiti and third-State nationals, and the other actions reported to the Council, such as the destruction of Kuwaiti demographic records, the forced departure of Kuwaitis, the relocation of population in Kuwait and the unlawful destruction and seizure of public and private property in Kuwait, including hospital supplies and equipment, in violation of the decisions of the Council, the Charter of the United Nations, the Geneva Convention relative to the Protection of Civilian Persons in Time of War.

The Council continued by

Reaffirming that the above-mentioned Geneva Convention applies to Kuwait and that, as a High Contracting Party to the Convention, Iraq is (p. 465) bound to comply fully with all its terms and in particular is liable under the Convention in respect of the grave breaches committed by it, as are individuals who commit or order the commission of grave breaches.⁷⁹

It then reminded Iraq

that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq; . . .⁸⁰

In March 1991 the UN Security Council went further, and demanded that Iraq '[a]ccept in principle its liability under international law' for the invasion and illegal occupation.⁸¹ One month later, in what is known as the 'cease-fire resolution',⁸² the Council reaffirmed that Iraq was liable, referencing this time 'any direct loss, damage - including environmental damage and the depletion of natural resources'.⁸³ The following month the Council established its Compensation Commission.

Again we see here limitations placed on the mechanism in the light of the target state's capacity to pay. At first the Security Council decided that compensation should not exceed 30% of the value of Iraq's exports of petroleum and petroleum products, later reduced to 25% in 2000 and then again reduced to 5% in 2003.⁸⁴ There is also a reflection of the old idea that payment can be demanded for the costs of the winning side in the war. By now, however, this can no longer be seen as the 'loser pays in war' principle, but rather as a requirement that the aggressor pay for the actual damage caused by both sides:

(p. 466)

[T]he starting point is the existence in contemporary international law of a norm which *post bellum* permits or even demands the liability of the aggressor state, charging it with an obligation to make good not only the entire amount of damage caused by itself, but also damage arising from the legitimate exercise of self-defence by the state that is the victim of the aggression.⁸⁵

Nevertheless, the Governing Council of the Commission (members of the Security Council) excluded from the compensation scheme 'the costs of the Allied Forces, including those of military operations against Iraq',⁸⁶ even though one distinguished commentator had argued that 'The element of calculated deliberate aggression by Iraq would necessarily seem to widen the responsibility for the consequences resulting from its act. Thus it seems difficult to exclude the Allies' costs of waging the war'.⁸⁷

Today it seems unlikely that a state will be able to recoup the costs of going to war as a matter of right (eg authorized by the Security Council or as a matter of self-defence) before an international court. Nevertheless, the reticence of the Security Council to impose such an obligation on Iraq will have been partly influenced by Iraq's ability to pay; but a state that started an aggressive war could indeed find that the Council might nevertheless seek to recoup the entire cost of restoring international peace and security. The obligation to pay imposed by the Security Council will flow from UN membership under the Charter. Recouping your costs can therefore no longer be seen as confined to the defunct prerogative of the winner in war.

This UN Commission marks an important step, because the compensation was awarded on the basis of *damage caused* rather than the *costs of a War*. Moreover, the sums awarded are substantial, around \$50 billion, and they have actually been paid. They were paid because a portion of Iraq's petroleum revenue was put aside by the Security Council in order to ensure sufficient funds. The situation remains rather exceptional, however, as Iraq accepted

its liability for its violation of international law related to the invasion along with the damages that should be paid as a consequence.

(p. 467) Lastly, the remedies remain one-sided. No violations of the laws of war by the Allied forces that succeeded in expelling Iraq from Kuwait could come within the scope of the work of the Commission.⁸⁸

10.5 Eritrea-Ethiopia Claims Commission

The peace treaty that ended the conflict between Ethiopia and Eritrea in 2000 made provision for a Boundary Commission and a Claims Commission. Each state could file complaints against the other for violations of international law on its own behalf and on behalf of its nationals and corporations, or even on behalf of non-nationals of Ethiopian or Eritrean 'origin'.⁸⁹ This time the parties were clear on the costs of war: 'The Commission shall not hear claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent that such claims involve violations of international humanitarian law.'⁹⁰ The two states nevertheless agreed that the Commission had jurisdiction over the legality of the use of force as a matter of *jus ad bellum* under the UN Charter.⁹¹

The Commission, having determined that the initial use of force by Eritrea constituted a violation of the UN Charter's prohibition on the use of force, had to determine how much of the damage from the resulting war could be billed to that state. Although the costs of self-defence were not in issue under the terms of the peace Agreement, Ethiopia sought damages, *inter alia*, for the displacement of civilians, civilian death at the war front, civilian property damage, the premature deaths of prisoners of war, loss of investment, loss of tourism and loss of profits for Ethiopian Airlines. Interestingly, the Commission, having found a *jus ad bellum* violation of the UN Charter, explained to the parties that the 'Commission does not regard its *jus ad bellum* (p. 468) finding as a finding that Eritrea initiated an aggressive war for which it bears the extensive financial responsibility claimed by Ethiopia'.⁹²

The Commission also highlighted that the reparations that followed the World Wars were not strictly speaking based on damages according to international law, but rather shaped by policies related to revenge against Germany for the First World War and economic reintegration in the context of the Second World War. And that, with regard that that War, the 'States deemed by the international community to be directly responsible for the war ultimately bore financial consequences that were modest in relation to the resulting damages.'⁹³ In any event, the Commission reminds us that 'Throughout history, indemnities frequently have been exacted from the losing parties in wars, but this has resulted from the exercise of power by the victor, not the application of the international law of State responsibility.'⁹⁴

The Commission was then faced with how far the law of state responsibility should extend to the damage caused in this Eritrea-Ethiopia war. The Commission decided that it went beyond the damage caused by the initial Eritrean attack on the town of Badme, but it limited the award of damages under this *jus ad bellum* head to damage where there was a 'proximate cause', a concept and requirement advocated by Eritrea. In Decision No 7, the Commission explained:

In assessing whether this test is met, and whether the chain of causation is sufficiently close in a particular situation, the Commission will give weight to whether particular damage reasonably should have been foreseeable to an actor committing the international delict in question.⁹⁵

A second intriguing dilemma concerned the issue of damages for events that were illegal under both the UN Charter prohibition on the use of force and the law of armed conflict. The targeted destruction of a civilian building, or the bombing of a military object resulting in an expected, disproportionate number of civilian casualties, would be illegal under both branches of international law if undertaken by the state resorting to the unlawful use of force. (p. 469) The Commission was probably the first body to really grapple with this as a practical rather than a philosophical matter. It delayed determining the question of damages for the violation of the UN Charter until after it had dealt with the violations of the law of armed conflict, and it sought to avoid 'double counting'. This then left the question of assessing damages for acts that flowed from the violation of the UN Charter, but which were not in themselves violations of the laws of armed conflict. So, for example, the use of landmines by Eritrea was found not to be illegal under the *jus in bello* as Eritrea was not bound by the relevant treaty. On the other hand, the damage to Ethiopians from those mines was a reasonably foreseeable and proximate consequence of the violation of the Charter (*jus ad bellum*). Similarly, the displacement of civilians was not found to be a violation of the laws of armed conflict, but it was nevertheless the foreseeable result of the initial illegal use of force.

To rationalize the award of damages for the violation of the UN Charter, the Commission places this war in the context of our wider discussion of reparations in war:

Eritrea's violation of the *jus ad bellum* in May 1998 as found by the Commission was serious, and had serious consequences. Nevertheless, that violation was different in magnitude and character from the aggressive uses of force marking the onset of the Second World War, the invasion of South Korea in 1950, or Iraq's 1990 invasion and occupation of Kuwait. The Commission believes that determination of compensation must take such factors into account. The Commission also considered whether an award of compensation should be limited as necessary to ensure that the financial burden imposed on Eritrea would not be so excessive, given Eritrea's economic condition and its capacity to pay, as seriously to damage Eritrea's ability to meet its people's basic needs.⁹⁶

The Commission went on to explain how a reparations programme should not itself undermine a successful peace, referencing the Treaty of Versailles.⁹⁷

Most interestingly, the Commission then explained its reasoning when it came to assessing damages for giving a violation of the UN Charter (*jus ad bellum*) less weight than the actual violations of the law of armed conflict (*jus in bello*). The damages were in the end to be rough approximations rather (p. 470) than an exact calculation of lost earnings, etc. But when dealing with death, destruction and displacement, why should it matter whether the damage comes from a violation of the UN Charter or the Geneva Conventions? Why not assess the harm done under each heading? The Commission explained its approach as follows:

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*.⁹⁸

In other words, there was a fear that if it became understood that an aggressor state was liable for all the damage done, whether or not there was a violation of the law of armed conflict including war crimes, then there would be no incentive for that state to abide by the rules on targeting. If the state has to pay for all the damage done anyway, there would,

according to this logic, be no incentive to distinguishing between civilian objectives and military objectives.

In the end the Commission was perhaps most influenced by the nature of the claims and the difficulty of assessing actual damage. A few examples will illustrate the challenge that will be faced by any body seeking to award reparations after a war. First, the Commission dealt with the claim concerning the internally displaced in Ethiopia, finding that 'Eritrea is liable for injury to Ethiopians who were internally displaced from those areas and during those times on account of the war.'⁹⁹ The claim for damages was that 349,837 Ethiopians had been displaced, and the award should be about \$600 per individual, totalling about \$209 million. In addition there was a claim for \$1.3 billion in moral (punitive) damages. Although the claim for moral damages was rejected, the Commission took 'into account the evidence of the nature of [internally displaced persons'] injuries and experiences in considering the level of compensation'.¹⁰⁰ Ethiopia was awarded \$45 million for the (p. 471) human suffering and lost income associated with these internally displaced persons.¹⁰¹

Claims for loss of profits, development assistance and investment were difficult for the Commission, bearing in mind the tests of proximate cause and foreseeability. But some passages reveal a more general attitude to the perceived inherent problem of assessing war reparations:

No system of legal liability can address all of the economic consequences of war. Costs and delays happen; business is injured; plans and expectations are disrupted. International law does not impose liability for such generalized economic and social consequences of war.¹⁰²

Many of the claims were dismissed or reduced. To understand this emerging topic, we might highlight one claim that nevertheless succeeded in part.

Ethiopia claimed loss of profits for Ethiopian Airlines. Precisely because this was a state-owned carrier, and the planes were at risk of seizure as enemy public property under the law of war should they land in Eritrea, as well as the obvious fall off in passengers and difficulty of obtaining insurance, the Commission found Eritrea liable for the associated loss of profits. It concluded

that documented lost profits from termination of the Addis Ababa-Asmara service were the proximate result of Eritrea's *jus ad bellum* breach. Clearly it was, or should have been, foreseeable to Eritrea's leaders that a likely result of Eritrea's action at Badme would be the interruption of commercial air service between the two capitals, with attendant economic injury to [Ethiopian Airlines].¹⁰³

Ultimately, the overall total awarded in 2007 to Ethiopia was around \$174 million, roughly half for Eritrea's violations of the law of armed conflict (*inter alia*, death, disappearance, destruction, damage and detention of civilians) and the slightly larger portion for the violations of *jus ad bellum* related to starting the war (*inter alia*, the suffering and economic losses of the internally displaced, the death and injury of civilians, damage from shelling, deaths from landmines, loss of profits for Ethiopian Airlines).¹⁰⁴ Eritrea was (p. 472) awarded compensation for violations by Ethiopia of the law of armed conflict (*jus in bello*) of around \$161 million, and an additional \$2 million awarded to Eritrean nationals as claimants.¹⁰⁵

Unfortunately the itemized claims and awards have so far not translated into actual compensation for the individuals, communities and organizations damaged by the war.¹⁰⁶ Nevertheless, the awards by the Commission have put paid to the idea of the impossibility

of determining what reparations should be paid for violations of the laws of war, including the damages owed by the state that starts a war.

10.6 International Criminal Law

In my experience, when reporting on the horrors of war, journalists and others quickly want to know 'But is it a war crime, are we dealing with genocide?' Similarly, reframing violations of human rights as crimes against humanity grabs attention and moves a story closer to the headlines. The prospect of war criminals' facing justice is also often accompanied, consciously or subconsciously, with the grainy black and white photos of famous war crimes trials. Such predispositions to see all violations of the laws of war as leading to war crimes trials have been reinforced by the adoption at the United Nations in the 21st century of the 'Responsibility to Protect' agenda, which essentially creates an expectation that states will act when faced with the commission of such international crimes in other states.¹⁰⁷ Before we launch into an examination of the framework that exists for the prosecution of international crimes, it is worth pausing to reflect on what gets overlooked, covered up or simply ignored when dealing with violence in war.

The expression 'rape as a weapon of war' has tragically become all too familiar as a way of describing the horrific rates of sexual violence in recent armed conflicts. It was not always thus. Christina Lamb's recent book is entitled *Our Bodies Their Battlefield: What War Does to Women*. She stresses how often rape in war has been considered normal. She reminds us: (p. 473)

The word rape comes from the Middle English *rapen*, *rappen* – to abduct, ravish, snatch. It originates from the Latin *rapere* which means to steal, seize or carry away, as if women were property, which is exactly what men thought for so many centuries.¹⁰⁸

Lamb interviews survivors and victims from across the globe, and shares their frustration at the absence of meaningful justice. This is a reference not only to the scarcity of criminal prosecutions, but also to the inadequacy of arrangements for reparations, counselling, health care and admissions of responsibility. She also interviews those who have struggled to bring about healing and accountability. What came through to me was that rape is not just something that happens in war but may be part of the purpose of warfare; and, furthermore, the inability to end such sexual violence is linked to war as a state of mind.

Lamb spent time with Dr Mukwege in the Democratic Republic of Congo at his clinic. Here he told her, 'It's not a sexual thing, it's a way to destroy another, to take from inside the victim the sense of being a human, and show you don't exist, you are nothing'. He also explained the thinking behind such violence (and this applies in other contemporary conflicts as well):

It's a deliberate strategy: raping a woman in front of her husband to humiliate him so he leaves and shame falls on the victim and it's impossible to live with the reality so the first reaction is to leave the area and there is total destruction of the community. . . . Rape as a weapon of war can displace a whole demographic and have the same effect as a conventional weapon but at much lesser cost.¹⁰⁹

The Guatemalan judge, Iris Yassmin Barrios Aguillar, also interviewed by Lamb, explained how women in Guatemala were 'seen as a military objective'.¹¹⁰ And Navi Pillay, a judge on two international criminal tribunals, explained how the conviction and judgment in the *Akayesu* case focused on what rape meant for the women: 'Until then rape had been

regarded as collateral damage'.¹¹¹ Pillay captures it brilliantly 'People think war authorises to kill, so raping women is nothing.'¹¹²

(p. 474) These insights help us see how rape and the inadequate responses to it are bound up with ingrained ways of thinking about war. At the same time, concentrating too much on rape as a weapon of war can skew attention away from the prevalent sexual violence carried out within society and especially in time of conflict.¹¹³ The focus on the idea that rape should be seen as a weapon, or even a strategy or tactic, means that we ignore the multiple aspects of sexual violence in armed conflict,¹¹⁴ much of it happening away from the fighting, in the home, on the edges of the village, in schools and workplaces, much of it exacerbated by the war but related to micro disputes not part of the overall war.¹¹⁵ This is not only an issue of how we choose to look at rape, it is a question of resources, criminal prosecution priorities, access to justice and long-term reconstruction that deals with the structural issues in society necessary for a sustainable peace.¹¹⁶ Attention is now turning to how to work on the factors that underlie gender power inequalities, which necessitates thinking beyond the binary of perpetrators and victims.¹¹⁷

The virtual absence of prosecution of sexual violence in wartime is due, in part, to a complete lack of political will and, in part, because such crimes may take place out of public sight or in ways that are considered too shameful for the survivors to recount. Gerry Simpson asks us not to focus on the precedents but rather on the 'unprecedents' – the times when war crimes were not (p. 475) prosecuted – as, just like monuments that 'un-remember' acts of history, so too 'trials sometimes erase those "crimes" not juridified'.¹¹⁸

Let us turn now to the prosecution of war crimes more generally. Crimes committed in wartime may not necessarily be prosecuted as war crimes. Even when states do discipline their troops, they rarely prosecute their *own* forces for war crimes (the same acts can usually be prosecuted under military justice codes or the ordinary criminal law).¹¹⁹ This may be changing. The creation of the International Criminal Court is starting to affect how states inquire into their own forces' crimes and how they conduct military justice. The recent Inquiry into the killings by Australian forces in Afghanistan may lead to some of the first modern war crimes prosecutions by a state of its own forces. The Inquiry's report explains at several points how action in Australia would have to meet the standards set by the International Criminal Court, or otherwise that Court could exercise jurisdiction over the alleged war crimes. On the substance the Inquiry found:

that there is *credible information* of 23 incidents in which one or more non-combatants or persons *hors-de-combat* were unlawfully killed by or at the direction of members of the Special Operations Task Group in circumstances which, if accepted by a jury, would be the war crime of murder, and a further two incidents in which a non-combatant or person *hors-de-combat* was mistreated in circumstances which, if so accepted, would be the war crime of cruel treatment. Some of these incidents involved a single victim, and some multiple victims.

These incidents involved:

- a. a total of 39 individuals killed, and a further two cruelly treated; and
- b. a total of 25 current or former Australian Defence Force personnel who were perpetrators, either as principals or accessories, some of them on a single occasion and a few on multiple occasions.

(p. 476)

None of these are incidents of disputable decisions made under pressure in the heat of battle. The cases in which it has been found that there is credible information of a war crime are ones in which it was or should have been plain that the person killed was a non-combatant, or *hors-de-combat*. While a few of these are cases of Afghan local nationals encountered during an operation who were on no reasonable view participating in hostilities, the vast majority are cases where the persons were killed when hors-de-combat because they had been captured and were persons under control, and as such were protected under international law, breach of which was a crime.¹²⁰

The international law on war crimes, in a great part thanks to the existence of the International Criminal Court, has moved to the forefront of how we react to allegations of violations of international humanitarian law. On hearing of a violation of the law of war, the automatic response is that there should be a trial of the suspected war criminal. Considering the prospect of prosecution of the perpetrator is an important aspect of accountability, but I want to outline the international criminal law as much for the other measures of liability that this branch of law can introduce.

For example, at the international level, in the context of UN peacekeeping, the United Nations has developed its own due diligence policy, which relies in part on international criminal law.¹²¹ The international regime that prohibits certain arms transfers relies in part on a prohibition on any transfer where a state party has knowledge that the arms would be used in the commission of certain international crimes.¹²² At the national level, individuals and companies that furnish arms, ammunition and fuel to parties in foreign conflicts could still find themselves held accountable for complicity in war crimes.¹²³

And framing a violation as an international crime can mean that national statutes of limitation, which would preclude prosecutions after a certain period, do not apply.¹²⁴ The defence of superior orders could also be precluded, (p. 477) while the possibility of prosecution for command responsibility is opened up.¹²⁵ Immunities that protect officials from prosecution abroad may not apply in the face of certain international crimes.¹²⁶ And the rule that prevents prosecution for an offence that was not criminal at the time it was committed, contains an exception where the individual is accused of international crimes.¹²⁷

Lastly, as we shall see, under rules related to universal jurisdiction, acts that constitute international crimes may be prosecuted outside the state where they were committed. In the case of grave breaches of the Geneva Conventions and Protocol I, there will be an *obligation* on states to search for those suspected of having committed or ordered to be committed such grave breaches, and to prosecute or extradite such persons.¹²⁸ And states such as Switzerland can exercise criminal jurisdiction over war crimes committed in non-international armed conflicts by anyone anywhere. Such trials are not regular occurrences, but they are starting. The trial of Alieu Kosiah, a commander from the rebel group ULIMO in Liberia in the 1990s, concluded at the Swiss Federal Criminal Court in Bellinzona in March 2021.

10.6.1 The Nuremberg and Tokyo International Military Tribunals

The International Military Tribunals (IMTs) were set up by the Allies to try the 'major war criminals of the European Axis' in Nuremberg, and the 'major war criminals in the Far East' in Tokyo.¹²⁹ The Charters (with slightly different wording) focused on:

(p. 478)

(a) *Crimes against Peace*: [Tokyo version]

Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) *Conventional War Crimes*: [Tokyo version] Namely violations of the laws and customs of war;

(c) *Crimes against Humanity*: [in the Nuremberg version]

Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹³⁰

These became known (after the numbering of the subparagraphs in the Charters) as Class A crimes (crimes against peace), Class B crimes (war crimes) and Class C crimes (crimes against humanity).

The Tokyo Charter demanded that all defendants had to be charged with 'offenses which include Crimes against Peace'.¹³¹ This led to the idea that those convicted were 'Class A War Criminals', and indeed the Tribunal was established for the 'just and prompt trial and punishment of the major war criminals in the Far East'.¹³² Confusingly, 'US Occupation authorities communicated to the Japanese authorities that the "B" would be applied to military officers who had formal responsibility for atrocities and that "C" would refer to soldiers who had actually carried out criminal acts.'¹³³ Eventually, around 5,700 Japanese defendants were tried in subsequent trials (known sometimes as the Class B and C trials) held by various Allied states in the Far East. There were over 900 executions and over 3,000 sentencings to terms of imprisonment, which in the end were often commuted; and the last prisoners were freed in 1958.¹³⁴

(p. 479) The Nuremberg IMT sentenced 12 defendants to death, seven received prison sentences and three were acquitted. In addition, three organizations were declared criminal, while another three organizations were acquitted.¹³⁵ In Tokyo, seven defendants were sentenced to death, 18 received prison sentences and there were no acquittals. There were further trials conducted by the military powers in occupation in Germany and in the Far East (sometimes referred to as trials of Class B/C criminals). These led to thousands of further convictions and hundreds of executions both in occupied Germany and the Far East. Later, in the 1960s and 1970s, West Germany took up the challenge of investigating and prosecuting thousands more cases before they could become time-barred under German law in 1980.¹³⁶ The atmosphere of these trials is captured in the famous book and film, *The Reader*.

The controversies pertinent to our present focus were as follows:

- conviction for crimes against peace or waging a war of aggression was seen by some as creating new law, rather than the result of a trial for breaching existing law;
- the category of 'crimes against humanity' had to be created for the Nuremberg Tribunal so that the German leadership might be prosecuted for the atrocities committed against other Germans and the extermination of the German Jews;

- no prosecutions of individuals from the winning side were included, and indeed evidence and argument related to crimes committed by the Allied side were mostly excluded.¹³⁷

Crimes related to aerial bombardment were not charged, thus defusing any discussion of the Allies' 'area bombing' of cities like Dresden. The Allied bombings ended not only in the firebombing of Tokyo, but also with the (p. 480) atomic bombs dropped on Hiroshima and Nagasaki, leaving up to another 200,000 dead.

Sitting in Japan, some of the judges of the IMT were acutely aware of this anomaly. As the Dutch Judge Röling recounts, when asked if he ever discussed the atomic bombings with the US Supreme Commander General McArthur:

I sometimes had contacts with Japanese students. The first thing they always asked was 'Are you morally entitled to sit in judgement over the leaders of Japan when the Allies have burned down all of its cities with sometimes, as in Tokyo, in one night 100,000 deaths and which culminated in the destruction of Hiroshima and Nagasaki? Those were war crimes.' I am strongly convinced these bombings were war crimes. It was terrorizing the civilian population with the purpose of making war painful beyond endurance so that the civilian population would urge the government to capitulate. It was terror warfare, 'coercive warfare'. And that is forbidden by the law of war, for sure. So why discuss it with the General? That would have been only embarrassing, I think.¹³⁸

The judges in both Tribunals were perhaps also a little uneasy about sentencing individuals for the newly-coined 'crimes against peace' and the related offence of the 'planning, preparation, initiation, and waging of wars of aggression'. It is well known that no one received the death sentence for this crime alone; death sentences were only attached to findings of guilt related to war crimes and crimes against humanity.¹³⁹

The Judgments are remembered beyond their historical significance for multiple legal advances. These include the rejection not only of the defence of *tu quoque* (in other words, 'the other side did it too'), but also of the Germans' defence that their acts were the acts of the state, and only the state could be held accountable. International law was said by the Tribunal to attach to the individuals themselves, and they could therefore be held accountable for violations of international law. The Tokyo Tribunal and the subsequent trial and execution of the Japanese General Yamashita following an American court-martial are often associated with the development of the thinking on 'command responsibility'. In other words, holding an individual accountable for (p. 481) failing to prevent or punish the war crimes committed by those under their control.¹⁴⁰

10.6.2 Contemporary Prosecutions for International Crimes Committed in Times of Armed Conflict

Even after the end of the occupation of both Germany and Japan, there were occasional trials of international crimes related to violations of the laws of war and crimes against humanity in the Second World War. Notable trials in Israel and France included those of Eichmann, Demjanjuk, Barbie and Touvier, and there have been multiple lesser-known trials in China, Canada and Australia.¹⁴¹ Prosecutions unrelated to the Second World War were more rare until the creation of the ad hoc International Tribunals for the former Yugoslavia and Rwanda in the 1990s, and the series of ad hoc hybrid tribunals that followed for Sierra Leone, Cambodia and Kosovo.¹⁴² Most recently, we are faced with the prospect of

prosecutions for war crimes related to the conflicts in the Central African Republic and South Sudan.¹⁴³

In 1998, the adoption of the Rome Statute of the International Criminal Court codified a long list of international crimes, created an international court and generated new momentum for prosecutions of international crimes in national courts. As will be well known, the Court has been criticized for the small number of successful prosecutions, as well as for failing to tackle crimes committed by the armed forces of major powers. It is true that the handful of convictions mostly relate to commanders from rebel groups, and all, so far, come from Africa. But this can be partly explained by the early African enthusiasm for the Court's jurisdiction, and the cooperation (p. 482) of African states in ensuring cases could go ahead against the rebel leaders they had been fighting. The Court's docket is also skewed by the fact that the Security Council is selective as to which situations it chooses to refer to the Prosecutor. The Council has referred the situations in Darfur and Libya, and has refused to do so for situations like that in Syria. In recent years, however, the Court has started investigations concerning Russian troops in Georgia and US personnel in Afghanistan. There have been preliminary investigations into UK personnel in Iraq, and for Israeli nationals with regard to war crimes committed in Palestine, both in Gaza and in the West Bank.¹⁴⁴

We have no room here to rehearse all the heated exchanges over whether the International Criminal Court should be dealing with these issues, or to explain the rules that determine which cases fall within the jurisdiction of the Court. The fact that states and others feel so strongly about the prospect of their nationals being prosecuted is testament to the idea that war crimes law has come of age. No one seeks now to brush off the allegations with assertions of military necessity, or claims that 'all's fair in love and war'. And no one can seriously claim today that the international crimes that the Court can prosecute were unknown or uncoded when the crimes were committed.

We have already dealt with the definition of the 'crime of aggression' in the Statute of the International Criminal Court (see Chapter 4). Suffice it to say that the crime is defined as 'an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations', and that, in the absence of a Security Council referral, jurisdiction is limited to the rare cases where the person in a position controlling or directing the action of a state has the nationality of a state that has accepted the amendment on aggression, and the state that is the victim of the aggression has also accepted the amendment.¹⁴⁵ So the individual aggressor and the victim state must both come from a short-list of around 40 states.¹⁴⁶ Let us now look in turn at the other crimes in the Statute: war crimes; crimes against humanity; and genocide.

(p. 483) 10.7 War Crimes

The idea that individuals should be prosecuted for violations of the laws of war goes back centuries. George Abi-Saab explains that while the 19th-century codifications of the laws of war foresaw individual punishment, and states could only prosecute individuals from other states by relying on international law in order to assert their jurisdiction, 'A quantum leap took place . . . when international law undertook to define "war crimes" directly, instead of leaving it to municipal law.'¹⁴⁷ The Charters and judgments of the International Military Tribunals marked this leap, and the law on international war crimes was developed so that individuals were seen as having obligations derived directly from international law. The advent of the UN Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) determined that the international law on war crimes also applies to non-international armed conflicts.

Not every violation of the laws of war constitutes a war crime; there needs to be a secondary rule that criminalizes the conduct. And not every crime committed in wartime is a war crime; there needs to be a nexus to the armed conflict and, in practice, the crime must be deemed to be serious. To make things more complicated, not all war crimes generate the same effects in international law. Space does not permit a detailed description of war crimes law and the complexities that relate to the modes of liability, such as planning, inciting, ordering, aiding, abetting, assisting, joint criminal enterprise and command responsibility.¹⁴⁸ What we can do is sketch some broad categories of war crimes in international law (national legal orders may go further¹⁴⁹). I have used these categories as they are associated with separate obligations for states with regard to prosecution, extradition, immunity and prohibitions on export in the context of arms transfers.

(p. 484) 10.7.1 Grave Breaches of the Geneva Conventions and Protocol I (International Armed Conflicts)

Grave breaches of the 1949 Geneva Conventions include certain violations against protected persons, for example wounded or shipwrecked members of the armed forces (Geneva Conventions I and II), or prisoners of war (Geneva Convention III), or civilians in the hands of the a party to the conflict or occupier (Geneva Convention IV). They apply only to situations of international armed conflict.

Those breaches that qualify as grave breaches are listed in the four 1949 Geneva Conventions in Articles 50, 51, 130 and 147, respectively. The grave breach has to be committed against persons or property protected under the provisions of the relevant Geneva Convention.¹⁵⁰

It is a grave breach when these protected persons are subjected to any of the following acts:

- wilful killing
- torture or inhuman treatment, including biological experiments
- wilfully causing great suffering or serious injury to body or health.

(p. 485) In addition, with regard to prisoners of war, a grave breach also is constituted by:

- compelling a prisoner of war to serve in the forces of the hostile Power
- wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the [Third] Convention.

Lastly, with regard to civilians under the control of a state in an international armed conflict or occupation, a grave breach is also constituted by:

- compelling a protected person to serve in the forces of the hostile Power
- wilfully depriving a protected person of the rights of fair and regular trial prescribed in the [Fourth] Convention
- unlawful deportation or transfer or unlawful confinement of a protected person
- taking of hostages.

Grave breaches against protected property cover, *inter alia*, medical establishments and vehicles used for medical transport, and hospital ships; and in occupied territory they also cover real and personal property, as well as property belonging to the state and other public authorities. The provisions reference 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'.¹⁵¹ The ICTY has

explained that 'A single act may, in exceptional circumstances, be interpreted as fulfilling the requirement of extensiveness, as for instance the bombing of a hospital.'¹⁵²

Chapter 9 explained in some detail the criteria for qualifying as a protected person or protected property under the grave breaches regime of the Geneva Conventions. This grave breach regime is supplemented by the additional grave breaches listed in the Additional Protocol I of 1977. For the avoidance of doubt, the Protocol explains that grave breaches of the Conventions and Protocol 'shall be regarded as war crimes'.¹⁵³

One key set of war crimes is defined in Article 85(3) of the Protocol. The crimes must be 'committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health':

- a) making the civilian population or individual civilians the object of attack;
- (p. 486) b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii);
- c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii);
- d) making non-defended localities and demilitarized zones the object of attack;
- e) making a person the object of attack in the knowledge that he is hors de combat;
- f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

The prohibitions on indiscriminate and disproportionate attacks are spelt out here, and in order to understand fully these crimes we need to reproduce Article 57(2)(a)(iii), on which the crimes listed in Article 85(3)(b) and(c) are dependent.

(2) With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

...

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

This is the rule we met when we considered the law on targeting and the questions of distinction and proportionality. It becomes a war crime and a grave breach when there is a wilful launch of the attack, with relevant knowledge, which causes death or serious injury.

Additional Protocol I also defines a further set of war crimes in Article 85(4) that, unlike the list from Article 85(3) quoted above, need not cause death or serious injury to body or health.

[T]he following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

(p. 487)

- a) the transfer 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, in violation of Article 49 of the Fourth Convention;
- b) unjustifiable delay in the repatriation of prisoners of war or civilians;
- c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
- e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

These crimes, together with the crimes in Article 11 of the Protocol related to the mistreatment of anyone deprived of their liberty, comprise a complete list of the war crimes in the grave breaches regimes of the Geneva Conventions and their Protocol.¹⁵⁴ The significance of separating them out in this way is in order to highlight that, because every state has become a party to the Geneva Conventions, the Conventions' grave breaches regime applies universally. This means that every state in the world has an obligation to search for those alleged to have ordered or committed the grave breaches of the Geneva Conventions, and either to prosecute or extradite the persons it detains. Furthermore, by becoming parties to these treaties, it may be presumed that states have waived claims to immunity over their officials should they be tried abroad.¹⁵⁵ Where Additional Protocol I applies as a matter of treaty law, the list of grave breaches is extended with the same effects.

(p. 488) 10.7.2 Other War Crimes in International Armed Conflicts

The adoption of the Statute of the International Criminal Court means that we now have a catalogue of war crimes that includes not only the adaption of the grave breaches regime from the Geneva Conventions, but also a long list of war crimes going beyond the protected persons and property of that regime and covering the conduct of hostilities more generally, as well as certain prohibited weapons.

Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; (iii) 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; (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural

environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion; (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; (viii) 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; (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or (p. 489) scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army; (xii) Declaring that no quarter will be given; (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war; (xvi) Pillaging a town or place, even when taken by assault; (xvii) Employing poison or poisoned weapons; (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123; (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; (xxiv) 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; (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions; (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities; (xxvii) Employing weapons, which use microbial or other biological agents, or toxins, whatever (p. 490) their origin or method of production [not yet in force for all states parties] (xxviii) Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays [not yet in force for all states parties]; (xxix) Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is

to the naked eye or to the eye with corrective eyesight devices [not yet in force for all states parties].¹⁵⁶

As explained by the ICRC customary law study, the war crimes in this list are mostly accepted as representing the customary international law of war crimes. The list is not complete, however, in the sense that a number of further customary crimes can arguably be said to constitute war crimes under customary international law.¹⁵⁷

The key crimes not already mentioned in our discussion of grave breaches include traditional war crimes such as the use of certain prohibited weapons; destroying or seizing the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war; attacks on hospitals or buildings dedicated to religion, education, etc.;¹⁵⁸ pillage; and other traditional war crimes related to acts that are prohibited methods of war, such as killing or wounding combatants who have surrendered or are *hors de combat*, ordering that there should be no survivors or prisoners taken, and perfidy (p. 491) (misuse of the flag of truce or feigning some protected status resulting in death or injury). On the other hand, we find crimes that were included in the 1998 Statute in order to reflect modern concerns, for example the war crime of conscripting or enlisting children under the age of 15 years into the armed forces, or using them to participate actively in hostilities.

Lastly, we should highlight the modern formulation covering war crimes related to sexual violations: committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or other forms of sexual violence. This last crime covers a situation where the 'perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion', and along with rape and enforced prostitution could be committed by 'taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent'.¹⁵⁹

10.7.3 Serious Violations of Common Article 3 (Non-International Armed Conflict)

Today it is widely accepted that serious violations of Common Article 3 to the 1949 Geneva Conventions applicable to non-international armed conflicts (including civil wars) are war crimes. Garraway further suggests that we should see these war crimes as also applicable in international armed conflict.¹⁶⁰

Such war crimes concern violations against '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'.¹⁶¹ As with grave breaches, once one has determined (p. 492) who is protected – in this case the answer is simply 'persons taking no active part in hostilities' – the next step is to look at the finite list of obligations. Common Article 3 prohibits:

- 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.

10.7.4 Other War Crimes in Non-International Armed Conflict

Again we can reference the catalogue of crimes in the Rome Statute for further war crimes that can be prosecuted in times of non-international armed conflict. The list is shorter, in part due to compromises made during the drafting of the Statute, and in part because some concepts do not apply in the same way in times of non-international armed conflict (eg the law of occupation, and certain rights related to foreign nationals). The crimes absent from the list are identified in the footnote for completeness,¹⁶² but we might highlight a couple of glaring omissions.

There is no explicit mention of the war crimes that cover attacks against civilian objects and attacks with knowledge that there will be disproportionate damage or injury to civilians. The absence of these two specific crimes from the Rome Statute for non-international armed conflicts should not lead us to the conclusion that such acts are not war crimes under international law. Indeed a new treaty, adopted by African states at the AU Summit in Maputo (p. 493) in 2014, foresees a criminal chamber for the future African Court of Justice and Human Rights, which would have jurisdiction over the war crimes in non-international conflict of '[l]aunching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage'.¹⁶³ We should stress that practice points to states and other International Tribunals treating such actions as war crimes.¹⁶⁴ The absence of a war crime from the Statute of the International Criminal Court should not be read as meaning that the war crime does not exist as a matter of international law.

On the other hand, the Judges at the Court have proved capable of expanding the understanding of war crimes law in new directions. Recently the International Criminal Court clarified in the *Ntaganda* case that war crimes related to sexual violence can be committed not only against enemy forces and civilians, but also with regard to those from one's own side. Non-international armed conflicts have been particularly plagued by the use of child soldiers and sexual violence.

In the *Ntaganda* case, these two issues came simultaneously before the Court. Ntaganda was a commander from a rebel group UPC/FPLC in the Democratic Republic of Congo. He was prosecuted, in addition to other crimes, for rape and sexual slavery with regard to two girls who were part of the armed group of which he was a commander. It had been argued extensively that war crimes and the laws of war applied to regulate behaviour towards the *enemy* and not with regard to one's own side. It is now clear, however, according to the Court, that

provided there is a nexus to the armed conflict, rape and *sexual* slavery against any person is prohibited, and that therefore members of the same armed force are not per se excluded as potential victims of the war crimes of rape and sexual slavery.¹⁶⁵

(p. 494) The Court found that:

Female members of the UPC/FPLC were regularly raped and subjected to sexual violence . . . by male UPC/FPLC soldiers and commanders . . . and, in relation to his female bodyguards, by Mr Ntaganda himself. This common practice was generally known and discussed within the UPC/FPLC. A number of these female members of the UPC/FPLC became pregnant during their time in the UPC/FPLC. As set out with more specificity in the cases discussed below, PMFs [*personnel militaire feminine*] who suffered acts of sexual violence as just described included girls under 15 years of age.¹⁶⁶

The rape and sexual slavery of the girls in the particular case attracted sentences of 17 years and 14 years respectively.

This precedent has widened considerably the concept of war crimes beyond the traditional understanding, which conceived of war crimes as perpetrated against the enemy. There is here a clear shift in logic away from war crimes being derived from a law of war that demands a certain respect for the enemy, towards the protection of human beings as such. The Appeals Chamber considered that 'international humanitarian law not only governs actions of parties to the conflict in relation to each other but also concerns itself with protecting vulnerable persons during armed conflict and assuring fundamental guarantees to persons not taking active part in the hostilities'.¹⁶⁷

10.8 Crimes Against Humanity

As already mentioned, the Nuremberg Charter included crimes against humanity in order to capture the atrocities committed by Germans against other Germans (and in particular German Jews) that would not be covered by the traditional law of war, which protected, at that time, only enemy nationals in wartime. Philippe Sands traces the history of this development in his book *East West Street*, and pinpoints the moment when Hersch Lauterpacht's idea (p. 495) regarding crimes against humanity was included in the Charter. He references Prosecutor Jackson's communication to the Allies when proposing revisions to the Charter: 'We should insert words to make clear that we are addressing persecution, etc of Jews and others in Germany, as well as outside it . . . before as well as after commencement of the war.'¹⁶⁸

At the time, in order for the Tribunal to prosecute these new crimes, they had to be in execution of, or in connection with, other crimes within the jurisdiction of the Nuremberg Tribunal, as so connected to the War. Some from the United States, including Prosecutor Jackson¹⁶⁹ and Secretary of War Stimson, were apparently fearful that a self-standing crime against humanity could be used to condemn racial discrimination in the United States.¹⁷⁰ The need for such a connection to the Second World War, or indeed to any armed conflict, was later dispensed with, and today there is no need for crimes against humanity to be connected to any war or armed conflict; they can be committed both during an armed conflict and in peacetime.¹⁷¹

While different international tribunals and national law have defined crimes against humanity with slight variations, for present purposes we can focus on the definition used in Article 7 of the Statute of the International Criminal Court. This definition states that crimes against humanity mean certain acts 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. The acts constituting crimes against humanity are listed as follows:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (p. 496) (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in

connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

These terms are further defined in the Statute. It is enough to explain here that ‘ “[a]ttack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack’.¹⁷² In fact the victim need not be a civilian; it is enough that the acts occur as part of a widespread or systematic attack against the civilian population. Given that such crimes can occur in peacetime, it has been suggested that the term ‘civilian population’ has a wide, non-technical meaning.¹⁷³ Similarly, the concept of an ‘organizational policy’ has been found to include ‘any organization or group with the capacity and resources to plan and carry out a widespread or systematic attack’.¹⁷⁴ While the policy should be linked to the state or group, it need not be formally adopted or motivated.¹⁷⁵

10.9 Genocide

Like the notion of crimes against humanity, genocide as a concept gained a foothold in the Nuremberg Tribunal. As Sands highlights, even if genocide was not (p. 497) included in the Charter, Rafael Lemkin’s campaign to prosecute genocide partly paid off, with its inclusion in the indictment. Sands references the indictment, which accused the defendants in the context of their occupations of

deliberate and systematic genocide, viz, the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others.¹⁷⁶

The concept of genocide did not figure further in the judgment, or in sentencing, but genocide was affirmed to be a crime under international law by the UN General Assembly in 1946,¹⁷⁷ and was included (albeit with a slightly more restrictive definition) in the 1948 Genocide Convention.¹⁷⁸ In part there was a perceived need to remedy the fact that Nuremberg had not dealt with genocidal crimes committed before the outbreak of the War.¹⁷⁹ The states parties to the Convention confirmed that the ‘that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish’.¹⁸⁰

The universal nature of the prohibition on genocide was quickly established when the International Court of Justice concluded in 1951 that ‘the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation’.¹⁸¹ The prohibition has also attained the status of a peremptory norm (*jus cogens*),¹⁸² meaning there can be no derogation from this prohibition, even in times of war. And the prohibition of genocide gives rise to rights and obligations *erga omnes* (meaning that even a non-injured state can seek accountability through international law, including binding provisional (p. 498) measures ordered by the International Court of Justice, as recently happened in the case brought by Gambia against Myanmar).¹⁸³

The 1948 Convention sets out a definition of ‘genocide’ for the purposes of the Convention, but which is referred to as reflecting the customary international law ‘both at the interstate level and at the level of individual liability’.¹⁸⁴ Article II reads:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Genocide is stated to be an international crime, which can be committed by individuals who are to be punished according to Article IV of the Convention, 'whether they are constitutionally responsible rulers, public officials or private individuals'.

Well-known trials have been carried out at the national level. Israel prosecuted and executed Eichmann in 1962 on genocide-related charges, and more recently, in 2010, the Iraq Special Tribunal prosecuted and executed Al Majid (also known as Chemical Ali) for genocide, including the use of chemical weapons against the Kurds. Less well-known cases have been prosecuted in states such as Ethiopia and Brazil, sometimes using a wider meaning of 'genocide' than the one found in the Convention.¹⁸⁵

At the international level, the UN Tribunals for the former Yugoslavia and Rwanda found a number of individuals guilty of genocide.¹⁸⁶ Prosecutions also took place in Rwanda and in states from the former Yugoslavia, such as Croatia and Bosnia and Herzegovina. Most recently, in 2010, the International Criminal Court issued a warrant of arrest including charges of (p. 499) genocide in connection with Darfur for Al Bashir (President of Sudan 1989–2019). Such international prosecutions are complicated by the uncertain nature of the terms 'national, ethnical, racial or religious group' and the need to find the specific intent to destroy such a group in whole or in part.¹⁸⁷ While genocide may attract the greatest opprobrium and the highest sentences, prosecutors may in the end choose to prioritize prosecutions for crimes against humanity or war crimes.

But the obligation not to commit genocide as defined in the Convention is also an international obligation on states, and so prosecution is not the only form of accountability that is available. This was confirmed by the International Court of Justice in the case brought by Bosnia and Herzegovina against Serbia and Montenegro:

Under Article I [of the Genocide Convention] the States parties are bound to prevent such an act, which it describes as 'a crime under international law', being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide.¹⁸⁸

In this case we learn some of the parameters of what it means to have an obligation to prevent genocide. Although the Court did not find that Serbia had committed genocide, it did find that the state had failed in its obligation to prevent genocide:

The Court has found that the authorities of the Respondent [Serbia and Montenegro] could not have been unaware of the grave risk of genocide once the VRS forces had decided to take possession of the Srebrenica enclave, and that in view of its influence over the events, the Respondent must be held to have had the

means of action by which it could seek to prevent genocide, and to have manifestly refrained from employing them . . . (p. 500)

The obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide.¹⁸⁹

10.10 Beyond Prosecution for International Crimes

We should turn now to look at some of the other ways in which states hold actors accountable for violations of international law in wartime. Today a wide range of options are advocated that bear little resemblance to the 'loser pays' principle we encountered up to the end of the Second World War. The logic of why states engage in armed conflict has changed. Ruti Teitel goes so far as to suggest that, precisely because some of today's inter-state wars are said to be fought for human rights, reparations will have to be paid by winners and losers. 'The justification for war, especially where humanitarian justice considerations are prominent, sets the stage for higher expectations of humanitarianism, both in relation to how war is waged and the responsibilities of the victors post-conflict.'¹⁹⁰

A first alternative to prosecution is civil or tort accountability before national courts.¹⁹¹ Rather than presenting claims based on international humanitarian law, which, as we have seen, may be considered non-justiciable at the national level, the victim of mistreatment in detention may be able to present the claim under human rights law.¹⁹² Civil litigation is slow and expensive, though, and many states will present multiple barriers to access to justice in this context. Worldwide, accountability for violations of international law in times of armed conflict is mostly dependent on investigations carried out by the armed forces themselves, notwithstanding the obvious (p. 501) obstacles to conducting such activity in wartime.¹⁹³ Recent interpretations of the right to life by the UN Human Rights Committee nevertheless set out how human rights law encompasses the prohibitive rules in the laws of war and adds a series of duties related to disclosure and investigation:

[P]ractices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields, would also violate article 6 of the Covenant [the right to life]. States parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered. They must also investigate alleged or suspected violations of article 6 in situations of armed conflict in accordance with the relevant international standards.¹⁹⁴

In addition to human rights claims before national courts, international courts may hear claims from individuals as well as from states. In the past there has sometimes been an assumption that matters concerning armed conflicts should be dealt with exclusively as a matter of international humanitarian law and not by human rights courts with a limited jurisdiction. Today, human rights courts and treaty bodies have affirmed that human rights

law continues to apply in times of armed conflict, and they have interpreted the (p. 502) human rights treaties with reference to the interrelated humanitarian law treaties.¹⁹⁵

With regard to the conflict in Nagorno-Karabakh, the European Court of Human Rights recently called for the parties to refrain from military action that might entail breaches of the human rights of the civilian population, and for compliance with their obligations concerning the human rights of those captured.¹⁹⁶ The bombardment of the population and the treatment of detainees (including prisoners of war) were seen by the Court as human rights issues, with accountability for states before this human rights court.

Claims for reparations before international courts will, however, be the exception rather than the rule. In many conflicts transitional justice mechanisms continue to evolve, including not only reparations at the end of internal conflicts, but also truth and reconciliation mechanisms.¹⁹⁷ Nevertheless, we have to be clear that reparations for the victims of today's civil wars have to be conceived of very differently from the claims related to the victims of the World Wars, or even for the transitions to democracy witnessed in the 20th century. Thinking about today's conflicts in the Democratic Republic of Congo, the Central African Republic, South Sudan or Syria requires creative forms of reparation beyond individualized packets of compensation. As De Greiff, a leading expert in this field, explains:

In these contexts, drawing familiar lines between contending forces, between civilians and armed agents, and even between victims and perpetrators, becomes increasingly difficult. Similarly, participation in violence may be more widespread in weak States, making the attribution of responsibility more complicated. The larger universe of potential beneficiaries coupled with economic scarcity make comprehensive reparations (p. 503) much less feasible. The absence of a well established institutional setting also makes talk of reform much less convincing than that of 'institution-building' in its most literal sense.¹⁹⁸

The expectation that victims (beyond states) are entitled to reparations from the parties to an armed conflict (including non-state actors) is evolving, and the trend, especially outside the Second World War-related claims brought in the German and Japanese courts, is towards recognizing individual claimants and a wider range of possible responses to these claims beyond the obvious routes that hold out the promise of compensation.

The complaints mechanism under the UN Convention against Torture, for example, has been successfully used by a victim of rape in the armed conflict in Bosnia and Herzegovina. Article 14 of the Convention states:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.

The UN Committee recently found there had been a violation of this provision and that in addition to compensation, a state party is required 'to ensure that the complainant receives medical and psychological care immediately and free of charge; [and] offer public official apologies to the complainant'.¹⁹⁹

Another overlooked international accountability activity is the monitoring and reporting work carried out by various bodies, including the special procedures and commissions of inquiry established by international organizations.²⁰⁰ In turn, such work may feed into national accountability (p. 504) mechanisms, including prosecution.²⁰¹ The public reporting by such Commissions before the UN Security Council or Human Rights Council is keenly followed, and not only introduces accountability through a form of truth-telling, but also

constitutes a form of leverage, as states and armed groups do adjust their behaviour (although not nearly enough) in order to avoid censure.

Alternatively, information about individual violations may be relevant for immigration decisions related to refugee status. The 1951 Convention Relating to the Status of Refugees does not apply to individuals where 'there are serious reasons for considering' a person 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'.²⁰²

Furthermore, decisions on leave to remain, family reunification and immigration rights more generally are now looking to reports that reference violations of the laws of war and international crimes. The most dramatic recent decision relating to immigration and asylum procedures concerns the trial for fraud and perjury of 'Jungle Jabbah', a commander fighting against Charles Taylor in the Liberian civil war. He was sentenced in the United States in 2017 to 30 years' imprisonment for lying in response to the question 'Have you ever engaged in genocide, or otherwise ordered, incited, assisted or otherwise participated in the killing of any person because of race, religion, nationality, ethnic origin or political opinion?'.²⁰³

Turning away from national law related to immigration and perjury, we can highlight the sanctions imposed by the Security Council, the European Union and individual states, such as the United States, Canada and the United Kingdom. Such sanctions aim to freeze assets and impose travel bans with regard to allegations of violations of international law, including those committed in times of armed conflict. These sanctions cover individuals, groups and business entities.²⁰⁴

(p. 505) For an example, consider the work of the Security Council's Panel of Experts for South Sudan, which is tasked in Resolution 2428 (2018), *inter alia*, with looking to place on a list those individuals and entities 'responsible for or complicit in, or having engaged in, directly or indirectly, actions or policies that threaten the peace, security or stability of South Sudan'. Such actions and policies may include:

- Planning, directing, or committing acts that violate applicable international human rights law or international humanitarian law, or acts that constitute human rights abuses, in South Sudan;
- The targeting of civilians, including women and children, through the planning, directing, or commission of acts of violence (including killing, maiming, or torture), abduction, enforced disappearance, forced displacement, or attacks on schools, hospitals, religious sites, or locations where civilians are seeking refuge, or through conduct that would constitute a serious abuse or violation of human rights or a violation of international humanitarian law;
- Planning, directing, or committing acts involving sexual and gender-based violence in South Sudan;
- The use or recruitment of children by armed groups or armed forces in the context of the armed conflict in South Sudan;
- The obstruction of the activities of international peacekeeping, diplomatic, or humanitarian missions in South Sudan, including the Ceasefire and Transitional Security Arrangements Monitoring Mechanism or of the delivery or distribution of, or access to, humanitarian assistance.²⁰⁵

Similar sanctions apply with regard to hundreds of individuals, groups and business entities in the situations related to the Democratic Republic of Congo, Central African Republic, Guinea Bissau, Iraq, North Korea, Libya, Mali, Al-Qaeda, Sudan, Somalia, the Taliban in Afghanistan, and Yemen.²⁰⁶ A panel of experts may determine that they have 'reasonable grounds to believe that an incident occurred', but when determining that the responsibility

(p. 506) for an incident lies with an individual perpetrator it could be that all five experts have to agree beyond reasonable doubt on the bases of corroborative evidence.²⁰⁷ These reports are not prosecutions, but when used by the Security Council or others to impose sanctions, the effects on an individual (with regard to travel bans or asset freezes) can be significant.

The United Kingdom has recently implemented its own sanctions criteria for action beyond what has been agreed in the United Nations.²⁰⁸ In July 2020, the Government announced asset freezes and travel bans on 25 individuals from Russia (in connection with the mistreatment and death of Sergei Magnitski), 20 individuals from Saudi Arabia (in connection with the unlawful killing of Jamal Khashoggi) and two Generals from Myanmar (in connection with serious human rights violations (including unlawful killings and systematic rape) against the Rohingya population by the army in Rakhine State), and asset freezes on two entities from North Korea (in connection with serious human rights in prison camps).

The relevant UK legislation allows for regulations based on all the norms discussed in the present book: compliance with UN obligations; promotion of the resolution of armed conflicts or the protection of civilians in conflict zones; accountability for torture or inhumane treatment; promotion of compliance with international human rights law and international humanitarian law; and contribution to multilateral efforts to prevent the spread and use of weapons and materials of mass destruction.²⁰⁹ Of course the efficacy of such measures depends on whether or not individuals or entities have assets in the United Kingdom, or want to travel to the UK, but the sanctions themselves are premised on the international law obligations we have been analyzing, and, however selective, represent a form of accountability.

(p. 507) 10.11 Belligerent Reprisals

Lastly, we have to consider reprisals as a way of enforcing the law in time of war. In a way this topic contains within it many of the aspects of the evolution of the law of war that we have been exploring. We have seen throughout this book how a theory of reprisals allowed for violence that would otherwise be unlawful. From the 13th century we have examples of the issuing of letters of reprisal by an English sovereign to right a wrong done to a subject. This was an act against a collectivity for a wrong done by a member of that society. So,

it was not at all necessary for the person who had suffered a loss to confine his reprisals to the goods of the particular person or persons who had inflicted the loss. If an Englishman's goods were taken unlawfully by a Spaniard, for example, he might seize in reprisal the goods of the Spanish King or of any subject of that king.²¹⁰

Such authorized reprisals are no longer possible in peacetime or in war. Nor can a state resort to armed reprisals of any kind to right a wrong.²¹¹ And yet, once an international armed conflict starts, the idea endures that a state can take *belligerent reprisals* against another state in response to violations of the laws of war. Belligerent reprisals are separate from the reprisal action that was said to justify the war. They relate to a violation of the laws of war (*jus in bello*) during the course of the war. The sinking of the passenger liner *Lusitania* in 1915, with over 1,000 killed, was sometimes argued to be a reprisal for the long-range starvation blockade of Germany by Britain (a close, effective blockade would have been considered legal) and sometimes to be a response to the alleged transport of war munitions. The unrestricted submarine warfare on merchant ships in both World Wars was said to be in reprisal for violations of the law of war, whether it be violations of neutrality, the arming of merchant ships, or the effects of blockade. At the same time, we also saw how the law on reprisal was invoked by the United States to justify its unneutral behaviour at the beginning of the Second World War (reprisal for Germany's aggression). And then

again, targeting merchant ships was a reprisal in response to the unneutral assistance being offered by the United (p. 508) States to the United Kingdom. The famous 'V' bombs rained on London were said to be Germany's reaction to area bombing in Germany – the 'V' standing for *Vergeltungswaffen*, variously translated as weapons of vengeance or retaliation or reprisal.

It is not hard to see how the notion of reprisal quickly becomes tangled up with counter-reprisal, and that allowing for reprisal in wartime means that unlawful acts of violence spiral out of any meaningful legal control.

The language used in the British Order in Council framing reprisals in 1939 is revealing in the way the action is explained as taken as a right of retaliation:

Whereas His Majesty has been compelled to take up arms against Germany in defence of the fundamental right of nations to a free and peaceful existence:

And whereas German forces have in numerous cases sunk merchant vessels, British, Allied and neutral, in violation of the rules contained in the Submarine Protocol, 1936, to which Germany is a party:

. . .

And whereas it is manifest that the German Government have deliberately embarked on a policy of endeavouring to destroy all seaborne trade between the Allied and other countries by a ruthless use of the forces at their disposal, contrary to the laws and customs of war, the rights of neutrals and the obligations of humanity:

And whereas this action on the part of the German Government gives His Majesty an unquestionable right of retaliation . . .²¹²

There are, today, however, limits to what action can be taken in the form of belligerent reprisals. International humanitarian law has taken an incremental approach, first outlawing reprisals against prisoners of war in the Geneva Convention of 1929, and then extending the prohibition to protected persons and property under the 1949 Geneva Conventions.²¹³ In addition, cultural property is now protected from reprisals under the 1954 Hague Convention, and there are restrictions on reprisals against civilians in the context of restrictions on the use of mines, booby traps and (p. 509) other devices.²¹⁴ Additional Protocol I of 1977 extended the lists of protected persons and property, and added a prohibition on reprisals constituting attacks against the natural environment.²¹⁵ Particular controversy, however, surrounds the inclusion of a prohibition on attacks on the civilian population or civilian objects by way of reprisal, and a number of states made statements or formulated reservations or declarations concerning this provision.²¹⁶

But away from the technical details of what is allowed, or not allowed, under the law of reprisals, one needs to get a sense of the bigger picture. It takes a historian like Best to put the lawyers' talk into perspective:

'Reprisals' has always been a particularly tricky and controversial topic throughout the history of the law of war, because in practice it is difficult to distinguish between the motives for pursuing 'reprisals', 'retaliation', 'retribution', and 'revenge' (and even 'retorsion'). But 'reprisals' has become the morally more elevated and juridically acceptable concept. ... 'Revenge' rings meanly in many civilized ears, and 'retaliation' lacks moral overtones. But 'reprisals' has acquired a character of active virtue: in contemporary international law parlance, it is an act,

perhaps unlawful in itself, justifiably undertaken with the specific object of pain[ing] a law-neglecting enemy back into conformity with the law.²¹⁷

Today it is difficult to conceive of a state's thinking it would be considered acceptable to claim that the law on reprisals entitled it to order disproportionate attacks harming the civilian population of another state; although the continuing argument that nuclear weapons may be permitted in self-defence seeks to leave open this possibility.²¹⁸

The UK *Manual of the Law of Armed Conflict*, having recalled its statement that seeks to reserve the right to take reprisals against a civilian population in the event of serious and deliberate attacks against its own civilian (p. 510) population,²¹⁹ carefully restricts the possible use of any such reprisal against the civilian population:

[C]ommanders and commanders in chief are not to take reprisal action on their own initiative. Requests for authority to take reprisal action must be submitted to the Ministry of Defence and require clearance at Cabinet level.²²⁰

Looking to the future, it is occasionally argued that there are few rules prohibiting reprisals in non-international armed conflict, leaving the door open to reprisals as a means to enforce international law in non-international armed conflict.²²¹ This makes no sense to me.

Whatever history there may be of reprisals being carried out in civil wars in previous centuries, there is no evidence that states consider that belligerent reprisal as a matter of international law can be invoked outside inter-state conflict. The idea that a terrorist armed group could point to a violation of the laws of war by a state to legalize its own violations of the laws of war would get short shrift. And to allow a state to point to a violation of international law by the armed group it is fighting and then, in turn, to claim that it is justified in violating the law of war in retaliation, would be to signal the end of the rule of law in war.²²²

(p. 511) 10.12 War in the Mind of a War Criminal

Many have puzzled over why brutal war crimes are committed. Each context is different, of course, and there will be thousands of explanations. But one reflection I came across bears out the thesis of this book: that war can be understood as a state of mind.

The Japanese prisoner of war camp commander, Katō Tetsutarō, was tried as a war criminal by the United States, and at one point was sentenced to death. He wrote a famous memoir, which was later televised and made into various films, with the English title *I Want to be a Shellfish*. This memorable plea comes from Katō's story entitled *I Want to Become a Shellfish - A Cry of a BC Class War Criminal*. This idea of wanting to come back as a shellfish provides us with a first insight into the mindlessness provoked by war. In his story he imagines a secret last testament of a fictional executed prisoner, Sergeant Akagi:

Who on earth did we fight the war for? I believed that it was for the Emperor, but it seems this was not the case. The Emperor did not save me. I had always faithfully obeyed every order as coming from you - whether I hated it or not. And I always tried hard to internalise the spirit of the *Imperial Rescript*.²²³ I had never shirked my military duties, and I became a sergeant.

Why did not you save me, your Majesty the Emperor? Perhaps you just had no idea of how much we suffered. I would like to believe this. But I can no longer believe in anything. When you say we are *enduring the unendurable and suffering the insufferable*, do you mean that I must die?

I will be executed. It has been decided. I have obeyed your orders up until my death, so I therefore owe you nothing.

In my view, what I did owe to you were only the 7–8 cigarettes provided on the front line in China and some snacks at a field hospital. Cigarettes were very expensive – I paid you back with my life and my long-suffering. So, I will no longer be deceived by your words. No matter how honey-tongued they are. We are even now, and so, I owe you nothing.

If I should be reborn as Japanese, I would never be obedient to you. I would never become a soldier. If I have to be reborn, I do not want to be Japanese. No, I would rather not be human. I would not want to be a cow or horse, for humans bully me. (p. 512)

If I have no choice but to be born again, I would rather be a shellfish. Stuck on the rock at the bottom of the ocean, a shellfish has nothing to worry about. There I would have nothing to know, no sorrow or pleasure, no pains and itches, no headache, no conscription, and no war.²²⁴

The films and the memoir are often seen as highlighting the sense of injustice that flowed from the war crimes prosecutions conducted by foreign powers, but the memoirs of such convicted war criminals in the end formed part of the Japanese peace movement. Katō's *Cry of a BC War Criminal* includes a second insight into the author's state of mind:

War makes people mad. In a desperate life-or-death situation, any system of values breaks down. In war, killing is considered the highest virtue. By killing people and seeing fellow soldiers killed by the enemy at war, people become deranged in the state of mind that they are forever in a situation where they either kill or are killed.²²⁵

Footnotes:

¹ As Simpson points out in looking at recent judgments, 'Matters of war and peace (even those encompassing possible breaches of fundamental human rights guarantees) were left to the realm of politics.' Simpson, *Law, War and Crime* (2008) at 23.

² See, however, the approach of the Colombian judiciary, which has insisted on applying the law of armed conflict even in the face of opposition from President Uribe, who refused to acknowledge the fact of an armed conflict, simply branding the armed opposition 'terrorist' and discouraging others from using the language of war, conflict or even guerrilla. See Lozano and Machado, 'The Objective Qualification of Non-International Armed Conflicts: A Colombian Case Study', 4 *Amsterdam Law Forum* (2012) 58–77; for the subsequent appropriation by the military of the framework of international humanitarian law for its 'exculpatory and permissive' character, see Kalmanovitz, 'Entre el deber de protección y la necesidad militar: oscilaciones del discurso humanitario en Colombia 1991–2016', *Latin American Law Review* (2018) 33–60.

³ See the Chair-Rapporteur of the UN Working Group on the use of mercenaries: Jelena Aparac, 'Pardoning the Blackwater contractors is an affront to justice and to the victims of the Nisour Square massacre and their families', UN Press Release, 30 December 2020; Goldenziel, 'War Has Rules: The United States Must Respect Them', *National Interest* (29 December 2020).

⁴ For a careful look at the multiple obstacles facing litigants before national courts, see Tomuschat, 'State Responsibility and the Individual Rights to Compensation Before National

Courts', in Clapham and Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2014) 811–39.

⁵ Ibid at 821.

⁶ See the analysis by Neff, *War and the Law of Nations* (2005) at 156–58; Sullo and Wyatt, 'War Reparations', *MPEPIL* (2015) at para 2.

⁷ d'Argent, *Les réparations de guerre en droit international public: la responsabilité internationale des Etats à l'épreuve de la guerre* (2002).

⁸ Westlake, *International Law: Part II War* (1907) at 53.

⁹ Neff (n 6) at 288.

¹⁰ See Treaty of Peace with Germany (Treaty of Versailles) (1919) Annex I para 5.

¹¹ MacMillan, *Paris 1919: Six Months That Changed the World* (2003) Ch 15.

¹² Ibid at 480; the final settlement of the First World War reparations only comes with the reunification of Germany – see Sullo and Wyatt (n 6) at para 16, where it is stated that the average amount suggested by experts is DM40 billion (circa €20 billion).

¹³ Neiberg, *The Treaty of Versailles: A Very Short Introduction* (2019) at 73; for the exact breakdown details, see Annex IV to the Treaty.

¹⁴ Neiberg (n 13) at 74.

¹⁵ Mixed Arbitral Tribunals were set up with Germany by Belgium, Czechoslovakia, France, Great Britain, Greece, Italy, Japan, Poland, Rumania, Serb-Croat-Slovene State and Siam; similar tribunals were set up with Austria, Hungary, Bulgaria and Turkey, while the United States, declining to ratify the Versailles Treaty, set up a Mixed Claims Commission with Germany. See further Dolzer, 'Mixed Claims Commissions', *MPEPIL* (2011); Bank and Foltz, 'Lump Sum Agreements', *MPEPIL* (2013).

¹⁶ *Report of the Thirty Third Conference* (1924) at 70 and 73. It is difficult to see how today such seizures could be considered as being in conformity with human rights law, or, as we shall see, that a state could extinguish the rights of its nationals though a peace treaty.

¹⁷ Versailles Treaty (1919) Art 231.

¹⁸ Versailles Treaty (1919) Art 227.

¹⁹ Mantoux (ed), *Paris Peace Conference 1919: Proceedings of the Council of Four (March 24–April 18)* (1964) at 149–50, discussed further in the entry on 'International Crimes' in Marks and Clapham, *International Human Rights Lexicon* (2005) at 223–25.

²⁰ Schabas, *The Trial of the Kaiser* (2018) esp at 45–46, 128–29 and Ch 9.

²¹ Ibid Ch 10.

²² Versailles Treaty (1919) Art 228.

²³ Kreß, 'Versailles – Nuremberg – The Hague Germany and International Criminal Law', 40 *International Lawyer* (2006) 15–39 at 19.

²⁴ Neiberg (n 13) at 114.

²⁵ d'Argent, 'Reparations after World War II', *MPEPIL* (2009) at para 2.

²⁶ Ibid at paras 4–17; for a full treatment of war reparations under international law, see d'Argent, *Les réparations de guerre* (n 7).

- ²⁷ The Berlin Conference of the Three Heads of Government of the USSR, USA, and UK (Potsdam Conference) 17 July to 2 August 1945, Conclusion, II The Principles to Govern the Treatment of Germany in the Initial Control Period A.3(ii).
- ²⁸ d'Argent (n 25) at para 37.
- ²⁹ For a rare first-hand account by a Japanese prisoner in English, see Aida, *Prisoner of the British* (1966).
- ³⁰ See further Reynolds, 'Life in Britain for German Prisoners of War', 17 February 2011, available at http://www.bbc.co.uk/history/british/britain_wwtwo/german_pows_01.shtml.
- ³¹ Ibid at paras 24–34.
- ³² Treaty of Peace with Japan (1951) Art 14.
- ³³ Ibid Art 16, this resulted in a payment of £4.5 million, for details see Rey-Schyr, *From Yalta to Dien Bien Phu: History of the International Committee of the Red Cross 1945 to 1955* (2017) at 146 ff.
- ³⁴ See at <http://news.bbc.co.uk/2/hi/asia-pacific/222253.stm>.
- ³⁵ For references, see Hofmann, 'Compensation for Personal Damages Suffered during World War II, *MPEPIL* (2013).
- ³⁶ For a summary of the terms, see von Puttkamer, 'Peace Treaties (1947)', *MPEPIL* (2001).
- ³⁷ Colonomos and Armstrong, 'German Reparations to the Jews after World War II: A Turning Point in the History of Reparations', in De Greiff (ed), *The Handbook of Reparations* (2008) 390–419 at 408.
- ³⁸ d'Argent, 'Reparations after World War II' (n 25) at para 19.
- ³⁹ Bank and Foltz, 'German Forced Labour Compensation Programme', *MPEPIL* (2013)
- ⁴⁰ The German case-law is discussed below; for the Japanese cases, see especially *X v Y*, Supreme Court, 27 April 2007, 61 *Minshu* (3) 1188 [2007], English translation in 51 *Japanese Yearbook of International Law* (2008) 518–32 (Chinese citizens claiming with regard to forced labour from 1944); *X v State of Japan and Y*, Nagoya High Court, 8 March 2010, English translation in 54 *Japanese Yearbook of International Law* (2011) 514–22 (recruitment of female forced labour); *X et al v the Government of Japan*, Tokyo High Court, 11 October 2001, HJ (1769) 61 [2002], English translation in 45 *Japanese Annual of International Law* (2002) 144–46 (Dutch prisoners of war).
- ⁴¹ *X et al v State of Japan*, Tokyo High Court, 18 March 2005, 51 *Shomu Geppo* (11) 2813 [2005], English translation in 49 *Japanese Annual of International Law* (2006) 149–54 at 152.
- ⁴² See Hague Convention IV (1907) Art 3 with regard to the provisions of the attached Regulations, and Additional Protocol I (1977) Art 91 with regard to provisions of the 1949 Geneva Conventions and the Protocol.
- ⁴³ Treaty of Peace with Japan (1951) Art 14(b).
- ⁴⁴ See Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces', 40 *ICLQ* (1991) 827–58; Greenwood, 'Expert Opinion: Rights to Compensation of Former Prisoners of War and Civilian Internees under Article 3 of Hague Convention No IV, 1907', in Hisakazu, Isomi and Kantaro (eds), *War and the Rights of Individuals: Renaissance of Individual Compensation* (1999) 59–71 at 63–65; Kalshoven and Zegveld, *Constraints on the Waging of War*, 4th edn (2011) at 75–77, 273–76; *contra* Tomuschat, 'Compensation Before National Courts' (n 4); see also Provost, *International Human Rights and Humanitarian Law* (2002).

- ⁴⁵ See Common Arts 6/6/6/7, 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.
- ⁴⁶ See Common Arts 7/7/7/8 of the Four Geneva Conventions 1949, explained by d'Argent, 'Non-Renunciation of the Rights Provided by the Conventions', in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) at 145-53; in more general terms, see Thürer, 'International Humanitarian Law: Theory, Practice, Context', 338 *RCADI* (2008) 9-370 at 51.
- ⁴⁷ Bassiouni, 'International Recognition of Victim's Rights', 6 *HRLR* (2006) 203-79.
- ⁴⁸ The Chilean Delegate (Muñoz) introducing the text on behalf of the sponsors in the Third Committee where it was adopted by consensus. UN Doc A/C.3/60/SR.39, Meeting 10 November 2005, at 2; the Basic Principles were adopted and proclaimed by General Assembly resolution A/RES/60/147 of 16 December 2005.
- ⁴⁹ Available at https://legal.un.org/avl/ha/ga_60-147/ga_60-147.html.
- ⁵⁰ Principle 26.
- ⁵¹ Principle 15: 'In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.' See also van Boven, 'Introductory Note' at https://legal.un.org/avl/ha/ga_60-147/ga_60-147.html 'While the Principles and Guidelines are drawn up on the basis of State responsibility, the issue of responsibility of non-State actors was also raised in the discussions and negotiations, notably insofar as movements or groups exercise effective control over a certain territory and people in that territory, but also with regard to business enterprises exercising economic power. It was generally felt that non-State actors are to be held responsible for their policies and practices, allowing victims to seek redress and reparation on the basis of legal liability and human solidarity, and not on the basis of State responsibility.'
- ⁵² Principle 8 states: 'For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.' The development of this principle and its subsequent application by the International Criminal Court is explained in Rishmawi, 'The Human Rights of Victims' in 'International and Transitional Criminal Justice & Human Rights: Essays in Memory of M Cherif Bassiouni (1937-2017)', 89 *Revue internationale de droit pénal* (2018) 77-87.
- ⁵³ *Varvarin Bridge Case, 35 citizens of the Former Federal Republic of Yugoslavia v Germany* (2006) BGHZ 166, 384 at para 6 (translation in IDLC 887 (DE 2006)).
- ⁵⁴ *Ibid* at para 13.
- ⁵⁵ As highlighted by Aust in ILDC (n 53) at A3. Art 33(2) of the ILC Articles on State Responsibility reads 'This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.' The ILC Commentary elaborates 'Individual rights under international law may also arise outside the framework of human rights. ... It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account.' Crawford, *The*

International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002) 209–10.

⁵⁶ Commentary to ILA Declaration of International Law Principles on Reparation for Victims of Armed Conflict, 74 *ILA Reports of Conferences* (2010) 291–345 at 316 fn112.

⁵⁷ Ibid at 312ff; Gaeta, 'Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?', in Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (2011) 305–27; Hill-Cawthorne, 'Rights under International Humanitarian Law', 28 *EJIL* (2017) 1187–215.

⁵⁸ Commentary (n 56) at 312.

⁵⁹ Ibid at 318.

⁶⁰ Hofmann, 'The 2010 International Law Association Declaration of International Law Principles on Reparation for Victims of Armed Conflict', 78 *ZaöRV* (2018) 551–54 at 553.

⁶¹ Gaeta, 'Victims of Serious Violations' (n 57) at 319; see also, from a philosophical perspective, Schulzke, *Just War Theory and Civilian Casualties: Protecting the Victims of War* (2017).

⁶² See *Vavarin Bridge Case*, 2 BvR 2660/06 German Constitutional Court ILDC 2238 (DE 2013).

⁶³ Karlsruhe, Federal Court of Justice, Judgement of the 3rd Civil Panel of 6 October 2016, III ZR 140/15, case note explained by Galina Wedel with unofficial translation available at <https://casebook.icrc.org/case-study/afghanistan-bombing-civilian-truck>.

⁶⁴ Ibid at para 38(b). The original reads: 'In diesem Zusammenhang darf auch nicht übersehen werden, dass das Risiko einer kaum abschätzbaren Haftung dazu führen könnte, dass humanitär motivierte bewaffnete Auslandseinsätze der Bundeswehr reduziert oder gar gänzlich eingestellt würden (Jutzi aaO S. 44). Aus Sicht zum Beispiel der NATO-Partner, deren nationale Rechtsordnungen individuelle Schadensersatzansprüche wegen Verstößen ihrer Streitkräfte gegen das humanitäre Völkerrecht nicht vorsehen (Raap, NVwZ 2013 aaO S. 554; BWV 2016 aaO S. 130), wären die deutschen Streitkräfte auf Grund des Damoklesschwertes der – auch gesamtschuldnerischen – Amtshaftung nur noch bedingt bündnis- und kampf einsatzfähig (vgl. von Woedtke aaO S. 324).'

⁶⁵ Ibid at para 33: 'Darüber hinaus kann die Entscheidungssituation eines verwal tungsmäßig handelnden Beamten nicht mit der Gefechtssituation eines im Kampfeinsatz befindlichen Soldaten gleichgesetzt werden.'

⁶⁶ Gärditz, 'Bridge of Varvarin', 108 *AJIL* (2014) 86–93 at 92.

⁶⁷ See the UN Basic Principles and Guidelines (2005) (n 48).

⁶⁸ See Common Arts 6/6/6/7 and 7/7/7/8 of the Four Geneva Conventions 1949.

⁶⁹ See Common Arts 51/52/131/148 of the Four Geneva Conventions 1949.

⁷⁰ See, in this direction, Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edn (2016) at 29; see also Greenwood, 'Rights at the Frontier – Protecting the Individual in Time of War', in Rider (ed), *Law at the Centre: The Institute of Advanced Legal Studies at Fifty* (1999) 277–93.

⁷¹ *X v Y*, 27 April 2007 (n 40) at 526.

⁷² See UN Basic Principles and Guidelines (n 48) principles 15–23; ILA Declaration of International Law Principles on Reparation for Victims of Armed Conflict, Arts 6–10; De

Greiff, 'Justice and Reparations', in De Greiff (ed), *The Handbook of Reparations* (2008) 451–77.

⁷³ *X v Y*, 27 April 2007 (n 40) at 532; a case note is also provided by Levin, '*Nishimatsu Construction Co v Song Jixiao et al; Kō Hanako et al v Japan*', 102 *AJIL* (2008) 148–54; the two cases (forced labour and sexual slavery) were dealt with together and the legal reasoning is the same.

⁷⁴ Webster, 'The Price of Settlement: World War II Reparations in China, Japan and Korea', 51 *New York University Journal of International Law and Politics* (2019) 301–84 at 356–65 and 318–29.

⁷⁵ English version available at <http://www.10000cfj.org/en/wp-content/uploads/2016/09/SETTLEMENT-AGREEMENT.pdf>, accessed 30 April 2020; for more detail and an explanation of the significance of the quotes in the Settlement, see Webster, 'The Price of Settlement' (n 74).

⁷⁶ 'Further, a country may not expire a citizen's individual right to claim without consent of an individual citizen by treaty where a diplomatic protection right is abandoned. It is against the principle of modern law.' See *Claims for damages and wage payment claims against Mitsubishi Heavy Industries brought by victims of Japan's forced mobilization, Park and ors v Mitsubishi Heavy Industries Limited*, 2009 Da 22549, ILDC 1909 (KR 2012), 24 May 2012, at para 60.

⁷⁷ *Yeo Woon Taek v New Nippon Steel Corporation*, Supreme Court of South Korea, 30 October 2018, 2013 Da 61381; discussed by Lee and Lee, case note, 113 *AJIL* (2019) 592–99; and see the report of the judgment concerning Mitsubishi, 'South Korea's top court orders Mitsubishi Heavy to pay compensation for wartime labor', *Japan Times* (29 November 2018).

⁷⁸ Section 4(B)(1), *Nippon Steel Corp* (n 77) English translation from the Court's website.

⁷⁹ Resolution 674 (1990) preamble.

⁸⁰ Ibid at para 8.

⁸¹ Resolution 686 (1991) para 2.

⁸² See Mensah, 'United Nations Compensation Commission (UNCC)', *MPEPIL* (2011), who explains (at para 2) that the Security Council had demanded that Iraq accept its liability under international law as a condition of the cease-fire.

⁸³ Resolution 687 (1991) para 16; for discussion of some of the aspects relating to the environmental damage, see Boisson De Chazournes and Campanelli, 'The United Nations Compensation Commission: Time for an Assessment?', in Fischer-Lescano et al (eds), *Frieden in Freiheit – Peace in Liberty – Paix en liberté: Festschrift für Michael Bothe zum 70. Geburtstag* (2008) 3–17.

⁸⁴ For details, see Higgins et al, *Oppenheim's International Law: United Nations* (2017) at 1279–80.

⁸⁵ Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations', 13 *EJIL* (2002) 161–81 at 173.

⁸⁶ S/AC.26/Dec.19 (1994).

⁸⁷ Fox, 'Reparations and State Responsibility' in Rowe (ed), *The Gulf War 1990–91 in International and English Law* (1993) 261–86 at 277.

- 88** Members of the armed forces of the Allied forces, however, were eligible for compensation related to mistreatment in violation of international humanitarian law as prisoners of war. UN Governing Council S/AC.26/1992/11, 26 June 1992.
- 89** Art 5(9) of the of the Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia, UN Doc A/55/686-S/2000/1183, 13 December 2000; see further Brilmayer, Giorgetti and Charlton, *International Claims Commissions: Righting Wrongs after Conflict* (2017) at 230, and Klein, 'Eritrea-Ethiopia Claims Commission', *MPEPIL* (2013) at para 11.
- 90** Art 5(1) of the Agreement (n 89).
- 91** Explained by Murphy, Kidane and Snider, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (2013) at 104ff.
- 92** See Decision No 7 (27 July 2007) 'Guidance Regarding *Jus Ad Bellum* Liability' at para 5. Eritrea-Ethiopia Claims Commission - Preliminary Decisions August 2001, December 2005 and July 2007 XXVI RIAA (2009) 1-22 at 10-20.
- 93** Ibid at para 24.
- 94** Ibid at para 21.
- 95** Ibid para 13.
- 96** Final Award Ethiopia's Damages Claims, 17 August 2009, XXVI RIAA (2009) at 728 at para 312-313.
- 97** Ibid at 729 para 315.
- 98** Ibid at 730 para 316.
- 99** Ibid at 731 para 321.
- 100** Ibid at 732 para 326.
- 101** The details of all the categories of award are to be found ibid at 768ff.
- 102** Ibid at 747 para 395.
- 103** Ibid at 761 para 450.
- 104** Ibid at 768-70.
- 105** Final Award Eritrea's Damages Claims, 17 August 2009, XXVI RIAA (2009) at 629-30.
- 106** Brilmayer et al, *International Claims Commissions* (n 89) 240-44.
- 107** See further Bellamy, *The Responsibility to Protect: A Defense* (2015); Orford, *International Authority and the Responsibility to Protect* (2011) Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (2008).
- 108** Lamb, *Our Bodies Their Battlefield* (2020) at 201.
- 109** Ibid at 304-05.
- 110** Ibid at 381.
- 111** Ibid at 148; the relevant judgment is *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998.
- 112** Ibid at 399.
- 113** Heaton, 'The Risks of Instrumentalizing the Narrative on Sexual Violence in the DRC: Neglected Needs and Unintended Consequences', 96 *IRRC* (2014) 625-39.

- 114** For an overview of many of the issues and some of the debates in the feminist literature see Chinkin, 'Gender and Armed Conflict', in Clapham and Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2014) 675–99 esp at 693ff. See also Wood, 'Conflict-related Sexual Violence and the Policy Implications of Recent Research', 96 *IRRC* (2014) 457–78; Henry, 'The Fixation on Wartime Rape: Feminist Critique and International Criminal Law', 23 *Social and Legal Studies* (2014) 93–111.
- 115** Eriksson Baaz and Stern, *Sexual Violence as a Weapon of War? Perceptions, Prescriptions, Problems in the Congo and Beyond* (2013).
- 116** Luedke and Logan, '“That Thing of Human Rights”: Discourse, Emergency Assistance, and Sexual Violence in South Sudan's Current Civil War', 42 *Disasters* (2018) 99–118; see also Engle, *The Grip of Sexual Violence in Conflict* (2020) at 151, who is concerned that the focus on sexual violence has 'distorted the lens through which feminists understand, represent, and address issues of gender, sex, ethnicity, and armed conflict'. The responses that support militarized or criminalized responses 'have displaced attention to imperialist, economic distribution, and – relatedly – causes of the very armed conflict in which they aim to intervene'.
- 117** Céspedes-Báez, 'A (Feminist) Farewell to Arms: The Impact of the Peace Process with the FARC-EP on Colombian Feminism', 52 *Cornell International Law Journal* (2019) 39–63; Korac, 'Feminists against Sexual Violence in War: The Question of Perpetrators and Victims Revisited', 7 *Social Sciences* (2018) 182.
- 118** Simpson, 'Unprecedents', in Tallgren and Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (2019) 12–29 at 24; see also Mégret, 'International Criminal Justice History Writing as Anachronism: The Past that Did Not Lead to the Present', *ibid* 72–89.
- 119** For a rare exception, see Rasiah, 'The Court-martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice', 7 *JICJ* (2009) 177–99; even here the author concludes (*ibid* at 195) 'the military court-martial is an inherently self-serving institution with a tendency to operate as a damage limitation mechanism, focussing responsibility on the lower ranks, characterizing criminality as the aberrant conduct of a few “bad apples”, and failing to call the political and military elite to account for their role in the implementation of the systems that lead to or facilitated the crimes in question.'; for an introduction to the shortcomings of the US system, see Fidell, *Military Justice: A Very Short Introduction* (2016).
- 120** 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 29, paras 15–17.
- 121** Human rights due diligence policy on United Nations support to non-United Nations security forces (2013) UN Doc A/67/775-S/2013/110, Annex paras 1 and 12.
- 122** Arms Trade Treaty (2013) Art 6(3), explained in Casey-Maslen, Clapham, Giacca and Parker, *The Arms Trade Treaty: A Commentary* (2016) 229–43.
- 123** Hathaway, Haviland, Kethireddy and Yamamoto, 'Yemen: Is the US Breaking the Law?', 10 *Harvard National Security Journal* (2019) 1–74.
- 124** Cassese et al, *Cassese's International Criminal Law*, 3rd edn (2013) at 313–15.
- 125** Gaeta, 'International Criminalization of Prohibited Conduct', in Cassese (ed), *Oxford Companion to International Criminal Justice* (2009) 63–74.

- 126** The proposal being discussed at the International Law Commission is that ‘Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance.’ See ‘Seventh Report on Immunity of State Officials from Foreign Criminal Jurisdiction’, by Concepción Escobar Hernández, UN Doc A/CN.4/729, 18 April 2019, Draft Art 7 and Annex. For an example of a national tribunal’s refusal to apply immunity for a former Minister of Defence when faced with war crimes in a non-international armed conflict (Algeria), see *A v Ministère public de la Confédération*, Swiss Federal Criminal Court, 25 July 2012.
- 127** Clapham, ‘Human Rights and International Criminal Law’, in Schabas (ed), *The Cambridge Companion to International Criminal Law* (2016) 11–33.
- 128** Gaeta, ‘Grave Breaches of the Geneva Conventions’, in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 615–46 at 628–40.
- 129** See Art 1 of the Charter of the International Military Tribunal (IMT) and Art 1 of the Charter of the International Military Tribunal for The Far East (IMTFE).
- 130** IMTFE Charter, Art 5; IMT Charter, Art 6.
- 131** IMTFE Charter Art 5; Totani, ‘The Case against the Accused’, Tanaka, McCormack and Simpson (eds), *Beyond Victor’s Justice The Tokyo War Crimes Trial Revisited* (2010) 147–61.
- 132** IMTFE Charter Art 1.
- 133** Wilson et al, *Japanese War Criminals* (2017) at 7; for some of the consequences in Japan surrounding these labels, see *ibid* at 191.
- 134** See *ibid* at 270 and Ch 3 for the trials; in addition, there were trials by the USSR and the People’s Republic of China; see also Wilson, ‘War Criminals in the Post-war World: The Case of Katō Tetsutarō’, 22 *War in History* (2015) 87–110.
- 135** The Tribunal found the following were criminal organizations: the Leadership Corps of the Nazi Party, Die Geheime Staatspolizei (Gestapo) and Der Sicherheitsdienst des Reichsführer SS (SD) (considered together), and the Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (SS). The Tribunal declined to issue a declaration of criminality for the Die Sturmabteilungen der Nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the SA), the Reich Cabinet (Die Reichsregierung) and the General Staff and High Command of the German Armed Forces.
- 136** Weinschenk, ‘Nazis Before German Courts: The West German War Crimes Trials’, 10 *International Lawyer* (1976) 515–29.
- 137** See Röling and Cassese, *The Tokyo Trial and Beyond* (1993) at 59–60; although, as we saw in section 7.4.1, Admiral Dönitz was not sentenced for unrestricted submarine warfare due to similar behaviour by the US Admiral Nimitz in the Pacific – see *Prosecutor v Goering et al*, Judgment of the IMT, 1 October 1946, Official Text, at 313.
- 138** Röling and Cassese (n 137) at 84.
- 139** *Ibid* at 67 and 99; Totani, ‘The Case against the Accused’ (n 131) at 152.
- 140** Röling and Cassese (n 137) at 70–74; see further Cryer, Robinson and Vasiliev, *An Introduction to International Criminal Law and Procedure*, 4th edn (2019) 368ff; Jackson, ‘Command Responsibility’, in de Hemptinne, Roth and van Sliedregt (eds), *Modes of Liability in International Criminal Law* (2019) 409–31.
- 141** Lafontaine, ‘National jurisdictions’, in Schabas (ed), *The Cambridge Companion to International Criminal Law* (2016) 155–77; Lafontaine, *Prosecuting Genocide, Crimes*

Against Humanity and War Crimes in Canadian Courts (2012); Heller and Simpson (eds), *The Hidden Histories of War Crimes Trials* (2013).

142 Romano, Nollkaemper and Kleffner (eds), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (2004); Schabas, *The UN International Criminal Tribunals: the former Yugoslavia, Rwanda and Sierra Leone* (2006);

143 Labuda, 'Open for Business': The Special Criminal Court Launches Investigations in the Central African Republic', *EJIL Talk*, 8 February 2019; Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (2018) Ch V section 5.3, 'Hybrid Court for South Sudan'.

144 The Court's jurisdiction is limited, apart from referrals by the Security Council; for the current details, refer to the information provided by the Office of the Prosecutor, available at <https://www.icc-cpi.int/pages/situation.aspx> and <https://www.icc-cpi.int/pages/pe.aspx>.

145 See section 4.4.

146 As of 29 April 2021: Andorra, Argentina, Austria, Belgium, Bolivia, Botswana, Chile, Costa Rica, Croatia, Cyprus, Czech Republic (now Czechia), Ecuador, El Salvador, Estonia, Finland, Georgia, Germany, Guyana, Iceland, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, North Macedonia, Panama, Paraguay, Poland, Portugal, Samoa, San Marino, Slovakia, Slovenia, Spain, State of Palestine, Switzerland, Trinidad and Tobago, and Uruguay.

147 Abi-Saab, 'The Concept of "War Crimes"', in Yee and Tieya (eds), *International Law in the Post-Cold War World: Essays in memory of Li Haopei* (2001) 99–118 at 104.

148 de Hemptinne, Roth and van Sliedregt (eds), *Modes of Liability in International Criminal Law* (2019).

149 Garraway warns against overly concentrating on international law, as some breaches of the law of armed conflict should be prosecuted at the national level even if they are not defined as war crimes at the international level or would not be considered serious enough violations. He gives the examples of misuse of the flag of truce and using prohibited weapons. Garraway, 'War Crimes', in Wilmschurst and Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) 377–98 at 386. In Switzerland, the courts have prosecuted war crimes based on international conventions – see Swiss judgment in the *Niyonteze case* (2001) at para 3, available at <https://casebook.icrc.org/case-study/switzerland-niyonteze-case>: 'In principle, the provisions of Articles 108 to 114 MPC apply where war has been declared and to other conflicts between two or more States (Art 108 (1) MPC). However, Art 108 (2) MPC stipulates that breaches of international agreements are punishable if those agreements specify a broader field of application. It therefore follows that the "international conventions governing the conduct of hostilities and the protection of persons and property" that apply to non-international conflicts, and which hence have a wider field of application than those of the conventions applicable exclusively to international conflicts, also fall under the provisions of Art 109 (1) MPC.' There is, however, a danger that national jurisdictions will claim to be prosecuting war crimes when the behaviour is not related to a violation of the law of armed conflict: in response to the US Supreme Court's claim to prosecute the German saboteurs for violations of the laws of war (discussed in section 5.4), Dinstein points out that 'a soldier removing his uniform in a military operation does not thereby violate the laws of war – and is not a war criminal': Dinstein, 'The Distinction Between Unlawful Combatants and War Criminals', in Dinstein and Tabor (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 103–16 at 109. The issue of what constitutes a war crime under international law is now particularly significant in the context of the Military Commissions set up in Guantánamo Bay, where the concept of war crimes under international law is important to avoid retroactive penal application of the law, and where some charges related

to terrorism have been held not to constitute war crimes under international law – see Brenner-Beck, ‘Trial and Punishment for Battlefield Misconduct’, in Corn et al, *The War on Terror and the Laws of War: A Military Perspective*, 2nd edn (2015) 193–236 esp at 195.

150 See section 9.1 for details.

151 Common Arts 50 GC I; 51 GC II; 147 GC IV.

152 ICTY, *Prosecutor v Naletilic*, Judgment (Case No IT-98-34-T), 31 March 2003, §576.

153 AP I Art 85(5).

154 Most of these grave breaches, but not all, are included (with some slight modifications) in the ICC Statute.

155 Gaeta, ‘Grave Breaches of the Geneva Conventions’, in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 615–46 at 628–38.

156 Art 8(2)(b).

157 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol 1: *Rules* (2005) at 568–603, adding slavery and deportation to slave labour; collective punishments; despoilation of the wounded, sick, shipwrecked or dead; attacking or ill-treating a *parlementaire* or bearer of a flag of truce; unjustifiable delay in the repatriation of prisoners of war or civilians; the practice of apartheid or other inhuman or degrading practices involving outrages on personal dignity based on racial discrimination; launching an indiscriminate attack resulting in loss of life or injury to civilians or damage to civilian objects; launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive incidental loss of civilian life, injury to civilians or damage to civilian objects. For a critical look at the ICRC approach to war crimes in this study, see Garraway, ‘War Crimes’ (n 149).

158 In addition there are specific war crimes under the Hague Convention for the Protection of Cultural Property in Times of Armed Conflict of 1954 and its Second Protocol (1999) – see O’Keefe, ‘Protection of Cultural Property’, in Clapham and Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2014) 492–520 at 511–16; see also O’Keefe, Péron, Musayev and Ferrari, *Protection of Cultural Property: Military Manual* (2016) at 5, para 16, which highlights the obligations under Art 28 of the Hague Convention (1954) and Art 21 of its Second Protocol (1999) to prosecute or punish certain serious violations related to cultural property. In 2016, the ICC sentenced Al Mahdi (allegedly a member of Ansar Eddine, a movement associated with Al Qaeda in the Islamic Maghreb) to nine years’ imprisonment for the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali. *Prosecutor v Al Mahdi*, ICC-01/12-01/15, 27 September 2016. The guilty plea perhaps meant that the appropriateness of this crime was not fully tested; see Schabas, ‘Al Mahdi Has Been Convicted of a Crime He Did Not Commit’, 49 *Case Western Reserve Journal of International Law* (2017) 75–102.

159 Elements of Crimes under the Rome Statute (2002) Art 8(2)(b)(xxii)-6 War crime of sexual violence, para 1; with regard to rape, it has been argued that the coercive environment should be seen as evidence of lack of consent in contrast to the idea that rape can be defined without the element of lack of consent – see Dowds, *Feminist Engagement with International Criminal Law: Norm Transfer, Complementarity, Rape and Consent* (2019).

160 Garraway, ‘War Crimes’ (n 149) at 388.

161 With regard to the category of persons taking no active part in hostilities, the ICTY Appeals Chamber in *Stuger* stated ‘As the temporal scope of an individual’s participation in hostilities can be intermittent and discontinuous, whether a victim was actively participating in the hostilities at the time of the offence depends on the nexus between the victim’s activities at the time of the offence and any acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the adverse party.’ Judgment (Case No IT-01-42-A), 17 July 2008, §178.

162 The omissions concern mainly the war crimes in ICC Statute Art 8(2)(b)(ii), (iv), (v), (vii), (viii), (xiv), (xv), (xx), (xxi), (xxiii) (see section 10.7.2) some crimes are adapted to fit the context of non-international armed conflict, see for example Art 8(2)(e)(viii). For details of the scope of each crime see Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003); the Statute was amended in 2019 to include the war crime of starvation of civilians in non-international armed conflict Art 8(2)(e)(ix) (it will first come into force for New Zealand on 14 October 2021).

163 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Art 28D(e)xviii; the Protocol also includes most of the customary war crimes referenced in the ICRC study on *Customary International Humanitarian Law* (n 157) that were omitted from the Rome Statute both for international and non-international armed conflict.

164 La Haye, *War Crimes in Internal Armed Conflicts* (2008) at 144; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (n 157) at 599–601; Cryer et al, *An Introduction to International Criminal Law and Procedure*, 3rd edn (2014) at 293.

165 *Prosecutor v Ntaganda*, ICC-01/04-02/06, 8 July 2019, para 965 (original emphasis); see also the judgment in the Appeal Chamber ICC-01/04-02/06 A A2, 30 March 2021

166 *Prosecutor v Ntaganda*, ICC-01/04-02/06 at paras 407–408 (footnotes omitted).

167 *Prosecutor v Ntaganda*, ICC-01/04-02/06 OA5, 15 June 2017, 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’ at para 57.

168 Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity* (2016) at 111 and 413 fn 111.

169 See Schabas, *Genocide in International Law: The Crime of Crimes* (2000) at 35.

170 Röling and Cassese (n 137) at 55.

171 Clark, ‘History of Efforts to Codify Crimes Against Humanity: From the Charter of Nuremberg to the Statute of Rome’, in Sadat (ed), *Forging a Convention for Crimes Against Humanity* (2011) 8–27; ILC Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, UN Doc A/74/10 (2019) 53.

172 ICC Statute Art 7.

173 See further Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) at 154: ‘Generally, the concept of “civilian population” should be construed liberally, in order to promote the principles underlying the prohibition of crimes against humanity, which is to safeguard human values and protect human dignity.’ See also Cassese et al, (n 124) at 102–04.

174 ILC Draft Articles on Crimes Against Humanity (n 171) at 40.

175 *Ibid* esp at 39.

176 IMT Judgment (n 137) at 43–44; see Sands, *East West Street* (n 168) Ch IV at 188.

- 177** Resolution 96(I).
- 178** 1948 Convention on the Prevention and Punishment of the Crime of Genocide. See, eg, Gaeta (ed), *The UN Genocide Convention: A Commentary* (2009).
- 179** See Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edn (2009) at 52, referencing the presentation of a text in the UN General Assembly by the Cuban delegate.
- 180** Genocide Convention Art 1.
- 181** ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, p 12.
- 182** *Case Concerning Armed Activities on the Territory of the Congo* (New Application: 2002) (*Democratic Republic of the Congo v Rwanda*), Jurisdiction of the Court and Admissibility of the Application, Judgment, 3 February 2006, para 64.
- 183** *Ibid*; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, *Provisional Measures*, Order of 23 January 2020 esp at paras 41–42.
- 184** Cassese, ‘Taking Stock of the Genocide Convention and Looking Ahead’, in Gaeta (ed), *The UN Genocide Convention* (2009) 531–44 at 537 (original emphasis).
- 185** For the detail, see Schabas, *Genocide* (n 179) Ch 8.
- 186** For the detail, see *ibid*.
- 187** For a detailed look, see Cryer et al, *Introduction* (n 164) Ch 10.
- 188** *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 166; for discussion of the differences between state and individual genocide, see further Gaeta, ‘Génocide d’État et responsabilité pénale individuelle’, *Revue générale de droit international public*, 111 (2007) 631–48.
- 189** *Bosnia and Herzegovina v Serbia and Montenegro* (n 188) at para 461.
- 190** Teitel, ‘Rethinking *Jus Post Bellum* in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May’, 24 *EJIL* (2013) 335–42 at 342.
- 191** For example, see the Torture Victim Protection Act 1991, 28 USC §1350, Section 2:
- (a) Liability – An individual who, under actual or apparent authority, or color of law, of any foreign nation–
- (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
- (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.
- 192** For cases in the United Kingdom known as the ‘Iraqi civilian litigation’, see *Alseran et al v Ministry of Defence* [2017] EWHC 3289 (QB).
- 193** See Schmitt, ‘Investigating Violations of International Law in Armed Conflict’, 31 *Harvard National Security Journal*, 2 (2011) 31–84.

194 General Comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc CCPR/C/GC/36, 30 October 2018, at para 64 (footnotes omitted); see further Rishmawi, 'Protecting the Right to Life in Protracted Conflicts: The Existence and Dignity Dimensions of General Comment 36', 101 *IRRC* (2019) 1149-69; see also the finding by the European Court of Human Rights that in the context of a complaint about a violation of the right to life there is an obligation 'under customary international humanitarian law to investigate the airstrike at issue, as it concerned the individual criminal responsibility of members of the German armed forces for a potential war crime'. *Hanan v Germany*, 16 February 2021, at para 137. The procedural duties on the state have nevertheless to be applied 'realistically', see paras 198-236.

195 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; for the recent limits developed by the European Court of Human Rights, to the understanding of jurisdiction over extraterritorial acts resulting in loss of life, see *Georgia v Russia (II)*, 21 January 2021, esp paras 125-144; the procedural human rights obligations to investigate violations of the right to life nevertheless continue even when the substantive jurisdiction is limited. See paras 328-337. For human rights cases in the United Kingdom related to detention see section 9.2.2.

196 See press releases ECHR 265, 276, 310, 314 (2020).

197 De Greiff, 'Justice and Reparations', in De Greiff (ed), *The Handbook of Reparations* (2008) 451-77; OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Reparations Programmes' (2008) Sooka, 'Dealing with the Past and Transitional Justice: Building Peace through Accountability', 88 *IRRC* (2006) 311-25; and for some of the theoretical issues, see Stahn, Easterday and Iversom (eds), *Jus Post Bellum: Mapping the Normative Foundations* (2014).

198 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence', UN Doc A/HRC/36/50, 21 August 2017, at para 45.

199 *A v Bosnia and Herzegovina*, UN Doc CAT/C/67/D/854/2017, 11 September 2019.

200 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). See also Zhu, 'International Humanitarian Law in the Universal Periodic Review of the UN Human Rights Council: An Empirical Survey', 5 *JIHLS* (2014) 186-212; and Heinsch, 'The Future of the International Humanitarian Fact-Finding Commission: A Possibility to Overcome the Weakness of IHL Compliance Mechanisms', in Djukić and Pons (eds), *The Companion to International Humanitarian Law* (2018) 79-97. A new Oxford Forum for International Humanitarian Law Compliance is set to be developed in 2021. On the history of the failed attempt to develop a 'Meeting of States on IHL' as well as other possibilities for compliance review, see Pouloupoulou, 'Strengthening Compliance with IHL: Back to Square One', 14 February 2019, blog ejiltalk.org.

201 See in particular the work of the UN Investigative Mechanisms for Syria and Myanmar, and the UN Commission on Human Rights in South Sudan.

202 Convention Relating to the Status of Refugees (1951) Art 1F(a). On the burden of proof, see *JS v Home Department* [2010] UKSC 15.

203 See the indictment and explanations on the website of Civitas Maxima at <https://www.civitas-maxima.org/en/trials/legal-monitoring-of-the-jungle-jabbah-case>; see also the conviction of Thomas Woewiyu on similar charges, 'Delco Man Convicted of Hiding Past as

Liberian War Criminal', *Philadelphia Inquirer* (3 July 2018) – in 2020 he died from COVID 19 and was never sentenced.

204 On the question of criminal obligations of corporations under international law, see Nerlich, 'Core Crimes and Transnational Business Corporations', 8 *JICJ* (2010) 895–908; on the application of international humanitarian law to entities, see 'Ten questions to Philip Spoerri, ICRC Director for International Law and Cooperation', 94 *IRRC* (2012) 1124–34; for some recent developments, see Clapham, 'Human Rights Obligations for Non-State Actors: Where Are We Now?', in Lafontaine and Larocque (eds), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (2019) 11–35.

205 Resolution 2428 (2018) at para 14.

206 The full list with the explanations is available at <https://www.un.org/securitycouncil/sanctions/narrative-summaries>.

207 See 'Final Report of the Panel of Experts on Yemen', UN Doc S/2019/83, 25 January 2019, Annex 1, para 4 and Appendix B para 2(e).

208 For the full list of sanctions applicable in the UK (including UN and EU sanctions) <https://ofsistorage.blob.core.windows.net/publishlive/ConList.pdf>.

209 Sanctions and Anti-Money Laundering Act 2018, s 1(2); Global Human Rights Sanctions Regulations 2020 (SI 2020/680) – in this instance, under reg 4, the purpose of the Regulations is to deter and provide accountability for activity that, 'if carried out by or on behalf of a State within the territory of that State, would amount to a serious violation by that State of an individual's— (a) right to life, (b) right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, or (c) right to be free from slavery, not to be held in servitude or required to perform forced or compulsory labour, whether or not the activity is carried out by or on behalf of a State.' In other words, according to the Explanatory Note to the Regulations, 'The activities could be carried out by a State or non-State actor.'

210 Clark, 'The English Practice with Regard to Reprisals by Private Persons', 27 *AJIL* (1933) 694–723 at 697.

211 See Ch 4.

212 *Statutory Rules and Orders* (1939) vol II, 3606–07; the reprisals related to goods leaving enemy ports and enemy goods on neutral ships, all such goods to be placed in the custody of the Marshal of the Prize Court.

213 See de Hemptinne, 'Prohibition of Reprisals', in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 575–96.

214 See Protocol II, and (Amended Protocol II) to the Convention on Certain Conventional Weapons (1980) Art 3(2).

215 See AP I Arts 20, 51–56.

216 Greenwood, 'Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', in Fischer, Kress and Luder (eds), *International and National Prosecution of Crimes under International Law: Current Developments* (2001) 241–66; for a look at some of the statements by states, see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (n 157) at 520–23.

217 Best, *Humanity in Warfare* (1980) at 166–67.

218 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, at para 46; Casey-Maslen and Haines, *Hague Law Interpreted* (2018) 337–44;

219 The relevant statement made on ratification of Additional Protocol I (1977), and extended to Overseas Territories in 2002, reads in part: 'If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government.'

220 UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) at para 16.19.2.

221 See the discussion of this topic in Casey-Maslen and Haines, *Hague Law Interpreted* (n 218) 343–44; ICRC, *Commentary on the First Geneva Convention*, 2nd edn (2016) paras 904–907 (Art 3); Bílková, 'Belligerent Reprisals in Non-International Armed Conflicts', 63 *ICLQ* (2014) 31–65; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (n 157) at 526–29; Turns, 'Implementation and Compliance', in Wilmshurst and Breua (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) 354–76 at 370–72; Darcy, *Collective Responsibility and Accountability Under International Law* (2007) 166–85; Zegveld, *Accountability of Armed Opposition Groups in International Law* (2002) esp at 89ff; Romani, *Belligerent Reprisals from Enforcement to Reciprocity: A New Theory of Retaliation in Conflict* (forthcoming CUP).

222 See also de Hemptinne, 'Prohibition of Reprisals' (n 213) at 587–91.

223 The Emperor's speech is available at <https://www.pearlharborhistoricsites.org/blog/gyokuon-hoso-the-jewel-voice-broadcast>.

224 I am extremely grateful to Hibiki Urano for her translations of Katō Tetsutarō, *Watashi wa kai ni naritai – Aru BC kyu senpan no sakebi* (*I Want to Become a Shellfish – A Cry of a BC Class War Criminal*), ed Fujiko Kato (Tokyo: Shunjusha, 2007) at 26–27.

225 Ibid at 47. The original reads: 戦争は、人間を発狂させる。死ぬか生きるかという、せっぱつまったとき、あらゆる価値が転倒する。殺人がもっとも大きな美徳とされるのが戦争である。自分が人を殺す、また仲間の兵隊が敵に殺されるのを見る、そして自分もまた、いつなんどき殺されるかわからないという心理が支配的となったとき、人間は発狂するのである。 This passage and the memoir were highlighted by Tachikawa Kyoichi in 'The Treatment of Prisoners of War by the Imperial Japanese Army and Navy Focusing on the Pacific War' 9 *National Institute for Defense Studies Security Reports* (2008) 45–90 at 71. For the connection between these writings and the peace movement, see Takeshi, 'A Foreign Country in Japan: Sugamo Prison: Review of Utsumi Aiko, Sugamo Prison: The Peace Movement of the War Criminals (Sugamo purizun – senpantachi no heiwa undo). Tokyo: Yoshikawa Kobunkan, 2004', 2(7) *The Asia-Pacific Journal* (2004), online at <https://apjif.org/-Ishida-Takeshi/2050/article.html>.

16 Implementation of International Humanitarian Law

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1. Introduction

It is something of a truism to say that legal rules are not worth the paper they are written on if they are not enforced. In the second decade of the twenty-first century there is a striking contrast between the apparent inability—or unwillingness—of the world's nations to properly implement and enforce the rules of international humanitarian law ('IHL') and the manifold methods by which such implementation and enforcement may be achieved. On one level this might be viewed as resulting in part from, on the one hand, the accelerated development of the law itself since 1945, and on the other, from the very high levels of media and public interest in the conduct of the various actors in situations of armed conflict. This interest is spurred on by the omnipresence of social media and ever-increasing round-the-clock media scrutiny of military operations, particularly where (as is almost invariably the case, to a greater or lesser extent) these involve civilian casualties; but it is also the case that the law itself provides for its own implementation and enforcement in a multiplicity of ways. These arise under IHL itself and also under various other specific legal regimes within the broad framework of public international law; they address the duties and liabilities of States and also of individuals; they are judicial and quasi-judicial in nature, and also political; and they require action at the national, as well as at the regional and universal, levels. Usually, the action that is required to give effect to these various legal mechanisms is comparatively clear and straightforward. In theory, therefore, one might be forgiven for assuming that the implementation of IHL should be a matter of no great controversy.

And yet, four brief vignettes of recent topical situations suffice to illustrate the difficulties that are encountered in practice when states, international organizations, and non-governmental organizations (NGOs) seek to do nothing more than secure greater observance of this body of law to which, after all, every sovereign state in the world is at least formally and voluntarily committed to.

- Following the United Nations High Commissioner for Human Rights' recommendation for the establishment of 'prompt, thorough, effective, independent and impartial investigations into ... alleged violations of international humanitarian law' committed by both sides in the Yemeni Civil War,¹ the Netherlands sponsored a draft resolution in the Human Rights Council (HRC) which would have mandated a UN mission to (p. 360) Yemen in order to establish facts and document violations by both the Houthi forces currently in control in Sana'a and the Saudi-led regional coalition that has been intervening in support of the internationally recognized government in Aden since March 2015.² However, in the face of intense Saudi pressure and open hostility on the part of other Arab members of the coalition, as well as conspicuous lack of support from various other countries in the HRC, including the US and the UK, the Dutch draft—negotiations on which had also been boycotted by the Yemeni Government in the HRC—was withdrawn³ and a much weaker Arab-drafted resolution, calling merely for 'technical assistance' to support a domestic investigative committee in Yemen and the reporting already taking place, was adopted by consensus.⁴ A Group of International and Regional Eminent Experts on Yemen appointed by the HRC has reported on 'patterns of continued violations by all

parties to the conflict', but to date no action has been taken to end the impunity noted in the Experts' report.⁵

- On 3 October 2015, a US Special Forces airstrike provided by way of close air support in response to a request from Afghan National Army personnel on the ground in Kunduz in northern Afghanistan, which had recently been retaken by Taliban fighters, hit a hospital operated by the humanitarian organization *Médecins Sans Frontières* (MSF), killing thirty civilians (MSF staff and patients) and wounding thirty-seven more.⁶ An internal US military investigation's findings were summarized in the following terms: 'the approximate cause of this tragedy was a direct result of avoidable human error compounded by process and equipment failures ... some of the US individuals involved did not follow the rules of engagement. With regard to ... proportionality ... the actions of the aircrew and the Special Operations Forces were not appropriate to the threats that they faced.'⁷ Although sixteen US military personnel were suspended and other investigations were undertaken by the North Atlantic Treaty Organization (NATO) Command in Afghanistan and the Afghan national authorities, nobody has been charged with any offences in relation to the incident and the lack of any reference to possible criminal investigations was criticized by the NGO Human Rights Watch (HRW)⁸ as well as by MSF itself.⁹

- Although the Agreement on the Victims of the Conflict¹⁰ reached between the Colombian Government and the rebel *Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo* (usually referred to as 'FARC') makes provision for a new 'Special Jurisdiction for Peace' to consist of a Peace Tribunal and Judicial Panels to determine which cases of grave violations of human rights and IHL committed in the Colombian Civil War can go to trial, the sanctions provided for have likewise been criticized for 'not reflect[ing] accepted standards of appropriate punishment for grave violations and mak[ing] it virtually impossible that Colombia will meet its binding obligations under international law to ensure accountability for crimes against humanity and war crimes'.¹¹

- As a mandated outcome of the 31st International Conference of the Red Cross and Red Crescent in 2012, the International Committee of the Red Cross (ICRC) and the Swiss Government initiated a consultation process with states in order to identify and propose possible ways of strengthening legal protection for victims of armed conflicts by 'exploring ways of enhancing and ensuring the effectiveness of mechanisms of compliance' with IHL.¹² In particular, it was proposed to institute a regular Meeting of States, which would serve primarily as a non-politicized forum for states 'to examine IHL issues of common concern based on dialogue and cooperation' and to carry out activities (such as the sharing of best practices and technical expertise, to be agreed by participating states) related to the implementation of IHL, in order to strengthen respect for the law.¹³ The proposed mechanism, therefore, was conceived as something entirely non-partisan and unthreatening to states' sovereignty. Nevertheless, after four consultative meetings convened by Switzerland and the ICRC with the participation of a total of ninety-one states, it proved impossible to reach a multilateral agreement on even this relatively harmless proposal;¹⁴ instead, all that could be agreed upon was to launch a four-year inter-governmental process to discuss further the methods of enhancing the implementation of IHL, with a view to reporting back to the next Conference.¹⁵

This chapter takes a holistic view of the implementation of IHL as including all the various tools which may be used to render IHL effective in practice, whether they are used primarily before a situation of armed conflict arises, or during or after such a situation, whether they invoke the civil responsibility of the state or the criminal responsibility of individuals, and whether they fall to be implemented in a national or international (p. 362)

context. Enforcement of IHL, though arguably susceptible of treatment as a separate topic discrete from implementation as such, is here subsumed within the same framework as it is a logical and necessary consequence of IHL implementation. Starting with a brief review of the evolution and development of national and international implementation mechanisms for the laws of war during the era of modern warfare from the early seventeenth century to the aftermath of the Second World War, the chapter sets out the contemporary legal framework provided by treaty instruments and recognized as customary international law before examining specific state obligations relating to pre-conflict preventive measures, the supervision of conduct and repression of violations during conflict, and the subsequent enforcement of IHL by judicial, quasi-judicial, and non-judicial means. Finally, the chapter considers the increasingly important role played by non-state actors (NSAs), such as NGOs, civil society, and the media, in monitoring and advocacy on IHL issues.

2. The Historical Context

Early attempts at the enforcement of the laws of war appeared through the prism of punishing those who were judged guilty of violating that body of rules. Although the notion of having rules of law in war (*jus in bello*) is probably about as old as organized warfare itself, and concepts of honour and chivalry in ancient and mediaeval warfare were historically adjudicated in various forums,¹⁶ it was not until the advent of mass citizen-armies organized by nation-states as a public activity in the course of the seventeenth century that something resembling systematic national implementation of the laws of war began to take place. Even then, these were couched in terms of domestic military law and the extension of national criminal offences to cover military discipline, rather than international law as such; among the earliest known examples are the Articles of War promulgated for the Swedish army in the Thirty Years' War (1618-1648).¹⁷ In England the source of disciplinary enforcement for the Army was the royal prerogative, under which King Charles I promulgated '*Lawes and Articles of Warre*' (building on ad hoc mediaeval precedents dating back to Plantagenet times) in 1625—these were reissued in 1629 and 1639;¹⁸ their substantive essence, along with the constitutional authority to issue them, began to be transferred to a statutory footing with the adoption of the first Mutiny Act in 1689. Discipline in the Royal Navy was covered by statute for the first time shortly after the Restoration of King Charles II.¹⁹ These early articles of national military law provided, naturally, for the trial and punishment of soldiers and sailors accused of breaches of service discipline; but they also enacted a variety of offences amounting to crimes under the civil law, which under modern (p. 363) IHL could be characterized as war crimes or crimes against humanity. Nevertheless, the actual effectiveness of such purely national and disciplinary codes for the protection of the civilian population—in later times to become one of the main aspects of IHL—in the early modern period of warfare has been questioned.²⁰

While the jurisdiction of a State to conduct trials of *its own* soldiers for violations of national service law has never been disputed, as it is an obvious aspect of criminal jurisdiction over a states' own nationals, it is not clear exactly when it became definitively accepted that a state could legitimately assert such enforcement jurisdiction in respect of *enemy soldiers* (ie foreign nationals) who, after capture, were accused of violating the laws and customs of war. Early modern writers on international law suggested that persons who violated the laws of war, by analogy with pirates, were to be considered mere *banditti* or brigands, and could be subjected to punishment by whichever authority's hands they fell into.²¹ The main examples in early modern practice derive largely from the US—the first systematic institutional mechanism for punishing what would today be called war crimes appeared in the Mexican-American War (1846-1848), when Major General Winfield Scott's *General Orders No 20* instituted military commissions for the trial and punishment of 'atrocious crimes' whether committed by civilians or military persons, Mexicans or Americans, namely: '[m]urder, premeditated murder, injuries or mutilation, rape, assaults and malicious beatings; robbery, larceny, desecration of Churches, cemeteries or houses, and religious

buildings; and the destruction of public or private property that was not ordered by a superior officer'.²² The first clear enunciation of the notion of prosecuting enemy soldiers for 'violation of the laws of war' appears in the orders issued at the behest of the US Army's department commander in Missouri, Major General Henry Halleck, in respect of guerrilla warfare against irregular Confederate forces during the American Civil War (1861–1865):

... a soldier duly enrolled and authorized to act in a military capacity in the enemy's service is not according to the code military individually responsible for the taking of human life in battle, siege, &c., while at the same time he is held individually responsible for any act which he may commit in violation of the laws of war. Thus he cannot be punished by a military tribunal for committing acts of hostility which are authorized by the laws of war but if he has committed murder, robbery, theft, arson, &c., the fact of his being a prisoner of war does not exempt him from trial by a military tribunal.²³

This power to enforce the laws of war by prosecuting one's own or the enemy's soldiers for violations was clearly generally acknowledged by the late nineteenth century,²⁴ and was to (p. 364) be reasserted as a result of the wholesale atrocities committed during both World Wars.²⁵ As noted by authorities at the time, however, it was not always possible for a belligerent to secure custody of an accused in order to bring him to trial; and if the state of his nationality refused or otherwise failed to investigate and prosecute him,²⁶ a standard recourse for the injured state was to have resort to the right of belligerent reprisal, whereby a belligerent would engage temporarily in proportionate illegal conduct with a view to inducing the enemy to desist from his own unlawful behaviour.²⁷

Aside from enforcement by means of criminal sanctions, the concept of specifically implementing parts of the laws of war by the enactment of regulations and legislation appears to have entered the lexicon of international conventions only with the adoption of the first Geneva Convention in 1864; initially this was conceived of as being a matter which was delegated to military commanders in the field, who would act in accordance with the instructions promulgated by their governments.²⁸ Subsequent iterations of the Geneva Convention in the early twentieth century repeated that injunction and also required signatories to 'take the necessary steps to acquaint their troops ... with the provisions of this convention and to make them known to the people at large'²⁹ and also to introduce 'such measures as may be necessary' to prevent the unauthorized use of the protected emblem of the Red Cross and to repress 'individual acts of robbery and ill treatment of the sick and wounded of the armies, as well as to punish ... the wrongful use of the flag and brassard of the Red Cross'.³⁰ These requirements pointed the way forward to the post-1945 emphasis on enactment of penal sanctions in domestic legislation and on dissemination of the Geneva Conventions, as discussed further in section 4 'The Geneva Conventions and Their Additional Protocols' below.

On a more general level, in the pre-1945 era, the only other specific provision for giving effect to the laws of war was to be found in the Hague Convention's adoption of the general rule of state responsibility for unlawful acts by state organs: 'A belligerent party which violates the provisions of the [annexed] Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.'³¹ This, however, was and is a general doctrine of public international (p. 365) law and is in no way peculiar to the laws of war; neither can it be said to constitute a rule of enforcement per se, perhaps even less so a rule for specific implementation of the law. Although it was used against Germany by the victorious Allied Powers in the infamous reparations clauses of the peace settlement after the First World War,³² in historical terms and notwithstanding the settled rules of international law this represented something of an aberration: in the aftermath of the Second World War the emphasis returned very firmly to criminal sanctions and the prosecution of accused war criminals.³³ Both Germany and

Japan as occupied territories after 1945 saw the creation of military tribunals—the Nuremberg and Tokyo Trials, respectively, for the trial of major war criminals, and a myriad of national tribunals, in both the occupied states and their erstwhile enemies, for the trial of so-called minor war criminals. But these were ad hoc expedients adopted by the victors exclusively against their defeated enemies in a situation of *debellatio*; systemic reliance upon mechanisms of national implementation of IHL would not come until the adoption of the updated Geneva Conventions in 1949.

3. The Contemporary Framework

A. Generalities

Broadly speaking, the contemporary implementation of IHL in the holistic sense alluded to in the introduction to this chapter may be achieved in some seven different ways.³⁴ It is difficult to gauge the relative impact and effectiveness of these methods, as they are quite different from each other: some consist of implementation *stricto sensu*, others are more in the nature of prevention and/or punishment, while yet others are not strictly speaking legal in nature. Nevertheless, for the purposes of summarizing them here, they may be enumerated in approximately the following generalized order of impact and effect:

- (1) belligerent reprisals;
- (2) state responsibility;
- (3) dissemination and instruction;
- (4) command responsibility;
- (5) national implementation;
- (6) criminal prosecution;
- (7) external scrutiny/pressure.

For the purposes of this chapter, these aspects of implementation are considered by reference to a temporal framework: those that exist under general public international law are (p. 366) dealt with first, followed by obligations of prevention that arise before armed conflicts, then securing compliance during armed conflict, then enforcement—which usually, though not invariably, occurs in the aftermath of armed conflict. This is followed by some discussion of non-judicial methods that are nevertheless established by law; methods of scrutiny that are primarily political or diplomatic, or that arise as a result of media or social pressure, are considered last. It should be borne in mind that there is some inevitable overlap between some of the methods to be considered, such that neither the categorization nor the methodology of their analysis is perfect.

The implementation of IHL treaties since the end of the Second World War has become relatively systematized and has tended to follow a set pattern, depending on the type of treaty in question, all under the *chapeau* of the general doctrine of state responsibility in public international law, as noted in section 2 ‘The Historical Context’ above. The 1949 Geneva Conventions and their 1977/2005 Additional Protocols have specific inbuilt mechanisms for their own dissemination, implementation, and enforcement. The majority of the other IHL treaties adopted post-1945 are concerned with the prohibition or restriction of various types of weaponry, which generally fall to be implemented by means of the creation of specific criminal offences in the national laws of states parties to those treaties.

B. Belligerent Reprisals

Historically, in the absence of international institutions and a rule-of-law-based system of international governance, belligerent reprisals, as a means of self-help, were one of the main ways in which a state could attempt to secure greater compliance with the law by its enemies. Although the theoretical possibility of belligerent reprisals remains in the law today, the likelihood of their being used in contemporary armed conflicts has been increasingly attenuated by the progressive interdiction of whole categories of persons as legitimate targets for reprisal action in successive treaties of modern IHL. Thus, for example, reprisals against the civilian population and the natural environment are both now flatly prohibited.³⁵ The idea of belligerent reprisals is to compel cessation of violations by the adverse party in an armed conflict by resort to a proportionate action that is itself illegal. Unfortunately, they often achieve precisely the opposite effect, producing a downward spiral of retaliation and counter-retaliation which undermines the law rather than enhances it, as seen in incidents of reciprocal shackling of prisoners of war (POWs) by the UK, Canada, and Germany during the Second World War, ostensibly in reaction to attempts by POWs to escape from captivity and subsequent 'mutinies' in POW camps.³⁶ Generally, the use of belligerent reprisals in the twenty-first century—if it is even seriously contemplated—will in many countries be circumscribed by stringent conditions and subject to political approval at the highest level of government.³⁷

(p. 367) C. State Responsibility

In the modern era states have continued to present civil claims for monetary or other satisfaction against each other, based on allegations that IHL was violated by members of the regular state armed forces; that is, by individuals or units belonging to an organ of the state.³⁸ Such claims generally involve an element of international arbitration in order to be adjudicated. Following the conclusion of the Gulf War, a United Nations Claims Commission (UNCC) was established as a subsidiary organ of the Security Council in order to process claims for compensation in respect of losses and damage resulting directly from the Iraqi occupation of Kuwait in 1990–1991,³⁹ To date the UNCC has paid out some \$47.8 billion in compensation awards, with about \$4.6 billion (awarded for production and sales losses resulting from the destruction of Kuwaiti oil fields) still outstanding.⁴⁰ The Algiers Peace Agreement, which terminated the 1998–2000 armed conflict between Ethiopia and Eritrea, created a Claims Commission under the auspices of the Permanent Court of Arbitration to adjudicate:

all claims for loss, damage or injury by one Government against the other, and by nationals ... of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict ... and (b) result from violations of international humanitarian law ...⁴¹

Sitting between 2004 and 2009, the Eritrea-Ethiopia Claims Commission delivered a total of seventeen Awards, of which all but three relate to alleged violations of IHL, in response to eight claims submitted by Ethiopia and thirty-two submitted by Eritrea.⁴²

Similarly, the United Nations (and other international or regional organizations, if appropriate) may consider the attribution of responsibility for damage and loss suffered by the organization itself and its employees in the course of military operations, as was done for instance in respect of incidents of such damage and loss suffered by various UN specialized agencies during the 2008–2009 conflict between Israel and Hamas in the Gaza Strip.⁴³ On that occasion damage worth in excess of \$11 million was attributed to actions by the Israel (p. 368) Defence Forces, with a provisional estimate of some \$29,000 worth of

damage being laid at the door of a Palestinian armed faction, most likely to have been Hamas.⁴⁴

4. The Geneva Conventions and Their Additional Protocols

It is appropriate to deal with the generalities of the 1949 Geneva Conventions and the 1977 Additional Protocols thereto separately within the framework of the contemporary law, as they have their own particular implementation scheme. The Conventions' starting point is that, 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention[s] *in all circumstances*', an injunction which is repeated *verbatim* in the first Protocol (but not the second).⁴⁵ It is therefore immediately apparent that there are certain provisions which fall to be implemented during peacetime as well as in situations of armed conflict—these will be discussed in section D 'Non-Judicial Mechanisms of Implementation' below.

Insofar as implementation during situations of armed conflict is concerned, the practice prior to 1949 had generally been to make a state's application of its treaty obligations dependent on reciprocity and to include them among the final provisions of each treaty, as expressed in the following typical formulation: 'The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.'⁴⁶ Although this approach persisted in the interwar period's sole adopted treaty regulating the conduct of hostilities,⁴⁷ the updated Geneva Conventions adopted in 1929 introduced the 'in all circumstances' rule and modified for the first time the 'all-participation clause' by stipulating that, 'if one of the belligerents is not a party to the Convention, its provisions shall, nevertheless, remain binding as between the belligerents who are parties thereto'.⁴⁸ This new wording did not alter the technical possibility that the Conventions would remain legally inapplicable in cases where one belligerent was, but its opponent was not, a party to the Conventions; nevertheless, the introduction of the 'in all circumstances' language created a potentially inconsistent obligation. The effect could be seen in Germany's refusal to apply the Geneva Conventions on the Eastern Front during the (p. 369) Second World War on the basis that the Soviet Union was not a party to those instruments, although those deemed responsible for the resulting ill-treatment of Soviet prisoners of war were subsequently condemned as war criminals.⁴⁹

There has been a shift in emphasis since the Second World War away from all-participation clauses to a more universalist approach, as well as placing these provisions at the very start of the substantive contents of the modern instruments, rather than burying them among procedural provisions at the end of the documents. These can be attributed to a desire to strengthen the imperative encapsulated by the maxim *pacta sunt servanda*: the inclusion of the phrase 'in all circumstances' stresses that the treaties are to be applied even outside the parameters of the situations to which they pertain—namely, armed conflicts—by taking in peacetime the preventive actions, to be discussed in 4.A 'Pre-Conflict: Obligations of Prevention' below. Notwithstanding the importance attached to the treaty texts, it is worth recalling that the International Court of Justice (ICJ) has stated that, '[the obligation in Common Article 1] does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression'.⁵⁰

Given the vagueness of the wording in Common Article 1, the question may well be asked: vis-à-vis from whom a state is to 'ensure respect'. Obviously it must ensure respect by its own regular armed forces, and also by irregular forces whose conduct is attributable to it.⁵¹ Ensuring respect by *other states*, in the sense of influencing them in the context of general friendly relations, or pursuant to a specific alliance, or at the 'hard end' of joint military operations in a multinational coalition, wherein different nations may not necessarily all be parties to the same IHL treaties, can be surprisingly problematic.⁵² Differences between

allied nations in respect of legal obligations, or even of bona fide interpretation of legal provisions—as in, for example, detailed aspects of the definition of military objectives under article 52(2) of API—do not give rise to any doctrinal controversy in this respect. More difficult, however, are situations where individual states may reasonably be expected to use their influence on friends and allies to induce the latter to comply with IHL in the conduct of their military operations. Diplomatic and economic policies may eclipse humanitarian concerns, as attested by the British Government’s 2016 response to criticism in respect of its arms sales to Saudi Arabia in light of the latter’s extremely destructive campaign in Yemen.⁵³ Occasionally a multilateral attempt is made pursuant to a treaty,⁵⁴ (p. 370) or within the forum of an international organization to exert pressure upon a perceived delinquent state in order to induce it to comply with its obligations under IHL.⁵⁵ However, this often seems to achieve little other than to push the target state into a defensive and uncooperative position of reflexive denial.⁵⁶ Arguably the most credible attempts to ‘ensure respect’ for IHL on the part of other states are evinced by international court decisions,⁵⁷ and diplomatic responses thereto,⁵⁸ but such cases are rare indeed. As for the notion that a state should ensure respect for IHL on the part of NSAs, this will plainly be a dead letter insofar as opposition NSAs on the state’s own territory are concerned, but it would be a reasonable expectation that a state should prevail upon NSAs over which it has effective control, whether within its own borders or elsewhere, to conduct their operations in accordance with IHL.⁵⁹

A. Pre-Conflict: Obligations of Prevention

Although the most publicly visible form of IHL implementation is post-conflict enforcement by means of criminal proceedings for the punishment of violations, and it is through that prism that the consciousness of IHL has largely become embedded in the general population in many countries, actually modern IHL mandates various measures to be taken by states in advance of any armed conflict breaking out with a view to avoiding or minimizing the risk of future violations. Broadly, these may be broken down into those measures that are of a general, ongoing nature and those that entail specific one-off actions. While compliance with these obligations of prevention is not, in and of itself, a panacea for IHL violations, and they are only addressed to states as opposed to NSAs, it is arguably the case that effective implementation of these measures assists in the development of a culture of compliance with the law, as well as mitigating the opportunities for future violations.

(p. 371) 1. General measures

Each of the 1949 Geneva Conventions contains a whole chapter or part headed ‘Execution of the Convention’.⁶⁰ This is equally the case for API,⁶¹ though not for APII, whose sole provision for implementation is the requirement that, ‘This Protocol shall be disseminated as widely as possible.’⁶² The central requirement is a dual one, of *dissemination* and *instruction*: states undertake to propagate the text of the Conventions ‘as widely as possible in their respective countries’ so that ‘the entire population’ may become aware of their principles.⁶³ This is to be achieved by educating the civilian population at large, as well as the members of armed forces, in the principles and rules of IHL. As to the civilian population, the subject may be included in the curriculum of universities and even (in some countries) schools, and there is a myriad of programmes such as moot court competitions, simulations, subject-specific projects, and voluntary youth instruction, all designed to foster an interest in and awareness of IHL.⁶⁴ Inevitably, however, this method of implementation is somewhat uneven, depending as it does on the availability of staff expertise and educational resources: even in a country like the UK, for example, IHL as a discrete subject is comprehensively taught at little more than a handful out of approximately 100 university-level law schools, and there is no evidence of any government initiatives to promote the

dissemination of IHL among the general population in the UK, although the British Red Cross does encourage the teaching of aspects of IHL in schools.⁶⁵

A crucial part of the dissemination of IHL is the education and training of armed forces, which is expressly mandated by the provisions discussed above. This is primarily the responsibility of the military legal advisory services, which now exist in virtually all states around the world: for example, in the British Army, such instruction is delivered via the medium of the Mandatory Annual Training Tests (MATTs), which must be taken by all active and reserve soldiers; currently MATT 7 is designated as covering Operational Law, including the Law of Armed Conflict. Specific pre-operational deployment training in IHL is provided by officers of the Army Legal Services (ALS) Operational Law Branch, based in the Land Warfare Centre at Warminster. For officers, pre-commission instruction in IHL is provided by the Department of Defence and International Affairs at the Royal Military Academy Sandhurst, and opportunities exist for subsequent academic study to Masters (p. 372) and Doctoral level at various higher education institutions. IHL is expressly included on the staff courses of many states' staff colleges, such as the Joint Services Combined Staff College at the UK Defence Academy, the Italian Centre for Defence Higher Studies, and the Sri Lankan Defence Services Command and Staff College. Similar programmes of legal instruction, which may or may not include university-level programmes of study, exist in armed forces as diverse as those of Uruguay, Algeria, and Indonesia: the pattern is now genuinely quite universal.

A further layer of education in IHL for armed forces is provided by API, which requires states to maintain an establishment of legal officers, 'to advise military commanders at the appropriate level ... on the appropriate instruction to be given to the armed forces on this subject'.⁶⁶ In some states, such as Canada or the Republic of Ireland, military legal advisers are tri-service; in others, such as the US and the UK, the various services that make up the armed forces maintain their own completely separate legal advisory services.⁶⁷ While these military legal services provide education and training in IHL for the rest of the armed forces, they also themselves often receive such training from academic providers; for example, in the UK, ALS officers currently attend academic courses in international law (including IHL) at the University of Nottingham, while Royal Navy lawyers attend the University of Oxford; Royal Air Force Legal Officers have in recent years attended academic courses provided by the University of Bristol and by Cranfield University at the UK Defence Academy. On an international level, remarkable work in IHL education for military officers (both lawyers and operators) has for many years been done by the International Institute of Humanitarian Law at San Remo (Italy),⁶⁸ as well as on a more geo-politically restricted basis by such institutions as the NATO School at Oberammergau (Germany),⁶⁹ and the Asia Pacific Centre for Military Law (Australia).⁷⁰ Operationally, military legal advisers fulfil a critical role by advising the commanders to whose staff they are attached about a wide range of legal issues, including the application of IHL in—for instance—the selection of targets for attack and the precautions to be observed in planning and executing such attacks, and the classification and treatment of battlefield detainees.⁷¹

Although the mandating of legal advisers for armed forces in international treaty law since 1977 has given added impetus to the production and status of modern military law manuals, the precedents for such documents, as outlined in section 2 'The Historical Context' above, go back several centuries.⁷² Such manuals fulfil a number of functions, all of them equally important in the legal regulatory framework of state armed forces.⁷³ They may (p. 373) provide evidence of states' views as to the scope, ambit, and interpretation of rules of IHL, and the normative status thereof in customary international law.⁷⁴ Ultimately their most practical purpose in terms of the implementation of IHL is that they tell soldiers what the law is and according to what legal standard their actions in armed conflict will be judged.⁷⁵ Such manuals may be published exclusively in official format,⁷⁶ or they may be made separately available as an academic publication.⁷⁷ One innovative approach is to publish

them with extensive academic commentary.⁷⁸ However precisely they are publicized, these military manuals—and the Rules of Engagement that are based on them—are a crucial aspect of the dissemination of IHL to armed forces.

2. Specific measures

Various treaties that make up the corpus of codified IHL impose requirements for state parties to undertake specific measures of implementation: principally, these are the requirements in the Geneva Conventions and API (along with many of the weaponry treaties) to enact certain criminal offences into states' national legal systems with a view to securing compulsory enforcement jurisdiction, and the promulgation of protective measures in respect of particular objects, areas or persons. While these measures may be taken at any time, it is obviously best, with an eye to the prevention of violations, for them to be taken at an early stage before any armed conflict breaks out.

The mandatory repression of grave breaches of the Geneva Conventions and of API requires states 'to enact any legislation necessary to provide effective penal sanctions' for their commission,⁷⁹ a jurisdiction which is then enforced according to the principle of *aut dedere aut judicare*—whereby states are under a legal obligation to search for alleged perpetrators and either place them on trial in their own courts or extradite them to any other state that wishes to do so.⁸⁰ In the large majority of states the implementation of this obligation has necessarily entailed the passage of special legislation creating new criminal offences and providing for extradition arrangements, as exemplified by the UK's Geneva Conventions (p. 374) Act 1957 and Geneva Conventions (Amendment) Act 1995.⁸¹ This process was given added impetus for many states in the years following the entry into force of the 1998 Rome Statute of the International Criminal Court, because of the need to implement the principle of complementarity of jurisdiction contained therein.⁸² In addition to the punishment of grave breaches as war crimes, there is also specific provision for the penal repression by special legislation of any abuse of the various distinctive emblems of the Red Cross.⁸³ Various other IHL treaties, notably those that prohibit the use of specified types of weaponry, similarly contain obligations to criminalize in national law the conduct that is prohibited by treaty.⁸⁴

Perhaps less obvious than the measures relating to penal repression by the creation of criminal offences in national law are various treaty provisions requiring specific practical actions by state authorities. These are generally of an unspectacular, often technical, nature: for example, there is an obligation 'to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as [the High Contracting Parties] consider appropriate'.⁸⁵ States may conclude agreements as to the designation of demilitarized zones, with the aim of protecting an area and its civilian population against military operations,⁸⁶ although the ICRC has conceded somewhat enigmatically that, 'it is unlikely that two or more States will agree in advance to keep one or more zones clear of military operations in the event of a conflict breaking out between them: this seems, at least, a rather theoretical point'.⁸⁷ Although the rationale for the existence of the possibility in peacetime is thus not very clear, nevertheless it exists on the face of the law.

As military history has amply demonstrated, particularly since the Industrial Revolution, one of the most significant peacetime activities by states to have a direct bearing on armed conflict is the development of new weaponry. In light of the rules of IHL prohibiting the employment of weapons that are indiscriminate or that cause superfluous injury and unnecessary suffering, a precautionary requirement was introduced into the law in 1977:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its (p. 375) employment would, in some or all circumstances, be prohibited by [API] or by any other rule of international law applicable ...⁸⁸

While the precise methodologies, as well as the detailed substance, of these weapons reviews are classified by the states concerned for inevitable reasons of national security—and only a handful of High Contracting Parties to the Protocol are known to conduct them at all—an important recent move to greater openness in this context is the institution in 2015 of an annual Weapons Review Forum, convened on behalf of the UK MoD by the Development, Concepts and Doctrine Centre (DCDC) in the UK Defence Academy at Shrivenham. This initiative brought together state representatives, defence industry and procurement teams, academics, the ICRC and other NGOs to compare their practices and learn from each other's experiences.⁸⁹

B. Compliance during Armed Conflict

It is hardly necessary to state that the ideal position to attain is one of full compliance with the rules of IHL during actual situations of armed conflict, since those are the situations in which IHL applies. It is a tragedy for the law and perceptions thereof that in contemporary armed conflicts such compliance is usually conspicuous by its absence. All too often, insurgent NSAs that display scant respect for the law, and indeed have little incentive to comply with it, are pitted against state armed forces that persist in regarding the former as 'terrorists' and show correspondingly little inclination to give them the benefit of the law. Arguably there has not been a generally 'clean' armed conflict, in which both sides were scrupulous in their adherence as far as circumstances permitted to the letter and spirit of the law and where there were very few (if any) accusations of war crimes, since the Falklands War between Argentina and the UK in 1982. However, the picture is not irredeemably gloomy: for a variety of reasons, NSAs can and do engage with IHL, and accept and apply its principles.⁹⁰ Although it has never been used successfully, a mechanism exists in API whereby, as a consequence of the extended definition of international armed conflicts to include those 'in which peoples are fighting against colonial domination and against racist régimes in the exercise of their right of self-determination',⁹¹ an authority representing such a people may make a unilateral declaration undertaking to apply the Geneva Conventions and the Protocol.⁹² In reality, such putative declarations have been stymied by the relevant states' obfuscations due precisely to their unwillingness to accept the extended scope of application of API.⁹³ (p. 376) This notwithstanding, it is possible for NSAs to signal their willingness to comply with IHL by both unilateral actions—such as accepting engagement with the ICRC, issuing internal codes of conduct and enforcing discipline,⁹⁴ making Deeds of Commitment,⁹⁵ and entering into special bilateral or multilateral agreements such as Memoranda of Understanding.⁹⁶

Within regular organized armed forces, the principal mechanisms for securing compliance with IHL are the enforcement of military discipline and the doctrine of command responsibility. Armed forces are required to be subject to 'an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict'.⁹⁷ This in turn relies on the commander's discharge of his responsibility to supervise his subordinates. Although command responsibility as a modern legal doctrine was created in less than ideal circumstances, and applied in a way that would surely be thrown out of court instantly today,⁹⁸ it is now mandated by IHL in the form of the requirement that commanders take all feasible measures to prevent or repress violations of the law committed by troops under their command, provided that they know or have information which should enable them to conclude in the circumstances at the time that such violations are being committed or going to be committed.⁹⁹ This is a form of liability based on omission, rather than commission; it is self-evident that a commander who

actually orders his troops to commit a violation will be guilty as a principal of that crime. The Protocol places commanders under a positive duty to ensure that troops under their command are aware of their obligations under IHL, to prevent and suppress violations of the law by those troops, and to report such violations to the authorities and initiate disciplinary or penal action as required.¹⁰⁰ Although the language of the Protocol is couched exclusively in terms of military commanders, the latest form of the doctrine as enshrined in the 1998 Rome Statute of the International Criminal Court extends the concept to 'a person effectively acting as a military commander' and to persons not in traditional military-type superior-subordinate relationships, but where the superior has 'effective authority and control' over the subordinate.¹⁰¹

(p. 377) C. Post-Conflict Enforcement: Criminal Justice Mechanisms

The modern consciousness of IHL and its effective implementation has been developed through the prism of criminal justice: essentially this has meant the prosecution of persons alleged to have committed violations of the law in armed conflicts, as an outgrowth of the disciplinary powers of the commander discussed above. Until the advent of truly international criminal tribunals in the twentieth century, this justice was always dispensed by national criminal courts, which retained a nationality-based jurisdiction to prosecute soldiers of their own side who were accused of violating the laws of war,¹⁰² and simultaneously asserted what came to be recognized as a universal jurisdiction likewise to prosecute soldiers of the adverse party after capture.¹⁰³ The nationality-based jurisdiction over own soldiers—the notion that military troops in effect carry the criminal law of their own country with them, wherever in the world they are deployed—remains an integral part of military law in all states to this day,¹⁰⁴ and has given rise to some of the most famous war crimes prosecutions of modern times, like those of Lieutenant William Calley for the massacre of civilians at My Lai during the Vietnam War,¹⁰⁵ and Sergeant Alexander Blackman for the murder of a wounded Taliban insurgent in Afghanistan.¹⁰⁶

Putting aside the International Military Tribunals convened by the Allied Powers' occupation authorities in Germany and Japan after the Second World War, the first genuinely international tribunals for the prosecution of serious violations of IHL were established by the UN Security Council pursuant to its Chapter VII powers in the early 1990s.¹⁰⁷ They have since been followed by other ad hoc international or 'internationalized' tribunals,¹⁰⁸ generally established by special treaty agreements between the UN and the individual states concerned, but the most important progress was made by the adoption of the Rome Statute of the International Criminal Court ('ICC') in 1998. The ICC has been in existence since 2002 and has heard such pioneering cases in the enforcement of IHL as those involving the recruitment and use of child soldiers¹⁰⁹ and directing attacks against cultural property during armed conflict.¹¹⁰ In addition, the Statute's articles providing for ICC jurisdiction over war crimes and crimes against humanity may to a considerable extent be viewed as a de facto codification of those crimes for the modern era. Although the primary jurisdiction to punish war crimes remains that of individual states according to their national legislation, (p. 378) the importance of having a permanent international court to punish the most serious violations of IHL can hardly be overstated in terms of the law's enforcement.

D. Non-Judicial Mechanisms of Implementation

Finally, a variety of mechanisms that do not involve judicial investigations, prosecutions, or other legal sanctions fall to be considered under this generic heading. Although they are mostly quite different from one another, they have in common that they generally seek to obtain compliance with IHL by the exertion of external pressure and public scrutiny, as well as unofficial monitoring and advocacy of issues related to violations of the law in armed

conflicts. For the purposes of discussion in this context, it is expedient broadly to divide them into two types: those that are mandated by IHL itself, and those that are not.

1. Mechanisms mandated by IHL

The four Geneva Conventions and API all contain provisions for the designation of Protecting Powers to represent belligerent states' interests vis-à-vis their adverse parties in situations of international armed conflict.¹¹¹ By this system, neutral states voluntarily undertake to safeguard the supervision and implementation of IHL as between belligerents, who have no direct formal mutual diplomatic relations due to the existence of a state of armed conflict between them. This is not to be confused with the more generic diplomatic protection of interests, whose protagonists are also often referred to as Protecting (or Protective) Powers, but whose operation is not confined to situations of armed conflict.¹¹² The system under IHL had its genesis in the late nineteenth century—it has been traced in its modern form specifically to the Franco-Prussian War (1870–1871), when the US Minister in Paris arranged the evacuation of citizens of the North German Confederation from French territory—and was entirely a creature of customary law until its incorporation into the codified framework of the Geneva Conventions.¹¹³ Protecting Powers can fulfil a valuable role in securing the protection of POWs by visiting camps and monitoring trials of POWs and civilians of the adverse party and in making representations to the relevant belligerent concerning general compliance with IHL. Unfortunately, the system of Protecting Powers has largely fallen into disuse in modern armed conflicts, principally because the designation of a Protecting Power must be agreed by the adverse party. In most recent armed conflicts such mutual agreement has not often been forthcoming, since it has been difficult to find a neutral state maintaining equally good diplomatic relations with both parties to the conflict. The Falklands War (1982) was the last in which neither side objected to the other's nominee.¹¹⁴

Although one practical response to the decreasing use of Protecting Powers has been to have recourse to the good offices of the ICRC, actually the role of the ICRC in securing (p. 379) compliance with IHL is clearly mandated in the law that has evolved since the first Geneva Convention in 1864. The ICRC has the right under treaty law to offer its impartial services in place of a Protecting Power, if none is designated,¹¹⁵ and to visit and interview POWs,¹¹⁶ and other protected persons,¹¹⁷ as well as assisting in the institution and recognition of hospital and safety zones,¹¹⁸ and various other specific humanitarian tasks on the battlefield. The organization also communicates regularly with the parties to armed conflicts with its observations and concerns as to their compliance—or lack thereof—with IHL; normally these communications are not published, in order to preserve the confidence of the belligerents as to the ICRC's neutrality and impartiality and discreetly to encourage compliance with IHL rather than pointing an accusatory finger, but on some rare occasions the organization has famously been moved to go public with its criticisms.¹¹⁹ The ICRC Advisory Service on IHL, made up of expert legal advisers, assists states with the national implementation of IHL; through its network of Regional and National Delegations and delegates to armed forces and non-state armed groups (NSAGs), the organization maintains a strong global presence and is indefatigable in its advocacy of respect for IHL.

A further mechanism for monitoring compliance is available in the form of the International Humanitarian Fact-Finding Commission ('IHFFC'). This body was created in 1977,¹²⁰ and became operational in 1992, with a mandate impartially to investigate alleged violations of IHL and confidentially establish facts in cases of mutual allegations and denials of responsibility.¹²¹ With seventy-six states having accepted its competence in accordance with the Protocol—although the Russian Federation notably withdrew its acceptance in 2019—in theory the IHFFC should be a prime tool for the enforcement of the law, except for the fact that the consent of both belligerent states or other parties to the conflict is required; it also has no powers of enforcement, but can simply issue confidential reports. To date the Commission has been used only once, to lead an independent forensic investigation in

Luhansk province in Eastern Ukraine in 2017—a remarkable testimony to the reluctance of states, commented upon in the Introduction to this chapter, to submit their military actions to any kind of impartial authoritative scrutiny.

5. Conclusion: Other Mechanisms

In a world of twenty-four-hour rolling international news coverage, it is inevitable that situations of armed conflict should attract a great deal of attention from the media. The phenomenon often referred to as ‘the CNN effect’, while decidedly modern in terminology, arguably dates back in its earliest form to the horrified public fascination stimulated by photographs taken in the aftermath of the fighting on the great battlefields of the American (p. 380) Civil War (1861–1865).¹²² Today, images of the atrocities of war are beamed into the living rooms and onto the smartphones of millions around the world on an almost daily basis. Users of social media are quick to vent their fury in apparently spontaneous reaction to missile strikes that have the effect, whether desired by the attacker or not, of harming the civilian population. In this kind of febrile environment it is not surprising that a multiplicity of non-governmental and civil society organizations thrive on bringing external scrutiny and pressure to bear on governments to account for the conduct of their armed forces in conflict: Amnesty International, Human Rights Watch, B’Tselem, MSF, and a myriad of other similar organizations serve to monitor violations and demand accountability in accordance with the law. While this advocacy has had the beneficial effect of helping to raise the profile of IHL and its application in armed conflicts, it has perhaps inevitably led to a backlash in some governmental and military quarters, where the term ‘lawfare’ has acquired increasing (and pejorative) currency.¹²³ In a British context especially, it has come to be used to decry the increasing involvement of European human rights organs as a tool for hampering military operations.¹²⁴ The growing tendency to apply the standards of civilian life to military operations in human rights complaints has also been condemned as the ‘judicialisation of war’.¹²⁵

The growing significance of interpretations of IHL by human rights bodies is also evidenced by the increasing tendency of such organs as the UN Human Rights Council to mandate commissions of inquiry, fact-finding missions, and other such bodies to report on situations where violations are alleged to have occurred.¹²⁶ Although these reports again have the effect of bringing discussions of IHL more into the public domain, the atmosphere is often openly inquisitorial, with the investigated state tending to withhold or restrict co-operation, resulting in an often blatantly one-sided report. Sometimes the mandate, too, is criticized for being one-sided in its focus on violations by state armed forces as opposed to NSAs. Discussion of such reports is all too often excessively politicized, with no discernible achievement other than to foreclose rational and balanced discussion of the substantive issues of IHL.

Footnotes:

1 United Nations Human Rights Council (UNHRC), ‘Situation of Human Rights in Yemen: Report of the United Nations High Commissioner for Human Rights’ UN Doc A/HRC/30/31 (7 September 2015) para 91.

2 UNHRC, ‘Draft Resolution: Situation of Human Rights in Yemen’ UN Doc A/HRC/30/L.4/Rev.1 (30 September 2015) para 13.

3 Human Rights Watch (HRW), ‘UN: Rights Council Fails Yemeni Civilians’, *Human Rights Watch* (2 October 2015) www.hrw.org/news/2015/10/02/un-rights-council-fails-yemeni-civilians.

- 4** HRC Resolution 30/18 UN Doc A/HRC/RES/30/18 (12 October 2015).
- 5** Report of the Group of Eminent International and Regional Experts as submitted to the United Nations High Commissioner for Human Rights, UN Doc A/HRC/42/17 (9 August 2019).
- 6** US Senate Committee on Armed Services, 'Hearing to Receive Testimony on the Situation in Afghanistan', Statement of General John F Campbell, Stenographic Transcript (6 October 2015) 14 www.armed-services.senate.gov/imo/media/doc/15-76%20-%2010-6-15.pdf.
- 7** Brigadier General Wilson Shoffner, quote in 'Department of Defense Press Briefing by General Campbell via Teleconference from Afghanistan', News Transcript, US Department of Defense (25 November 2015) <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/631359/departement-of-defense-press-briefing-by-general-campbell-via-teleconference-fro/fro>.
- 8** 'Letter from HRW to Secretary of Defense Ashton Carter' (17 December 2015) www.hrw.org/sites/default/files/supporting_resources/hrw_letter_to_sec_def_carter_on_msf_strike.pdf.
- 9** See Françoise Bouchet-Saulnier and Jonathan Whittall, 'An Environment Conducive to Mistakes? Lessons Learnt from the Attack on the Médecins Sans Frontières Hospital in Kunduz, Afghanistan' (2018) 100 *IRRC* 337.
- 10** Acuerdo sobre las Víctimas del Conflicto: 'Sistema Integral de Verdad, Justicia, Reparación y No Repetición', incluyendo la Jurisdicción Especial para la Paz; y Compromiso sobre Derechos Humanos (5 December 2015) http://legal.legis.com.co/document/Index?obra=legcol&document=legcol_ee52f558022d4ec8bc714555c034519e (only in Spanish).
- 11** HRW, 'Human Rights Watch Analysis of Colombia-FARC Agreement' (21 December 2015) www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement#_edn1.
- 12** International Committee of the Red Cross (ICRC), 'Strengthening Compliance with International Humanitarian Law: Draft Resolution and Concluding Report', 32nd International Conference of the Red Cross and Red Crescent, 32IC/15/19.2 (Geneva, 8–10 December 2015, 32IC/15/19.2) 7 http://rcrcconference.org/wp-content/uploads/sites/3/2015/10/32IC-DR-and-concluding-report-on-Strengthening-Compliance-with-IHL_EN.pdf.
- 13** *ibid* 19.
- 14** ICRC, 'No Agreement by States on Mechanism to Strengthen Compliance with Rules of War' (10 December 2015) www.icrc.org/en/document/no-agreement-states-mechanism-strengthen-compliance-rules-war.
- 15** ICRC, 'Resolution 2: Strengthening Compliance with International Humanitarian Law', 32nd International Conference of the Red Cross and Red Crescent, 32IC/15/R2 (Geneva 8–10 December 2015) http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-AR-Compliance_EN.pdf. See also Jelena Pejic, 'Strengthening Compliance with IHL: The ICRC-Swiss Initiative' (2016) 98 *IRRC* 315.
- 16** For a general overview, see Leslie C Green, *The Contemporary Law of Armed Conflict* (3rd edn, Manchester UP 2008) 26–32; also Robert C Stacey, 'The Age of Chivalry', in Michael Howard, George J Andreopoulos, and Mark R Shulman (eds), *The Laws of War: Constraints on Warfare in the Western World* (Yale UP 1994) 27, 31.
- 17** See Kenneth Ögren, 'Humanitarian Law in the Articles of War decreed in 1621 by King Gustavus II Adolphus of Sweden' (1996) 36 *IRRC* 438.

- 18** See Charles M Clode, *The Military Forces of the Crown: Their Administration and Government, Vol 1* (John Murray 1869) 18, 429 (annexed Illustration (VI)).
- 19** Charles II, 1661, 'An Act for the Establishing [of] Articles and Orders for the Regulating and Better Government of His Majesties Navies Ships of Warr and Forces by Sea', in John Raithby (ed), *Statutes of the Realm: Vol 5, 1628-1680* (first published 1819) 311.
- 20** See eg Markus Meumann, 'Civilians, the French Army and Military Justice during the Reign of Louis XIV, circa 1640-1715', in Erica Charters, Eve Rosenhaft, and Hannah Smith (eds), *Civilians and War in Europe, 1618-1815* (Liverpool UP 2014) 100.
- 21** See eg Emmerich de Vattel, *Le Droit des Gens* (1758) Liv III, Chap XV para 226.
- 22** Cuartel General del Ejercito, 'Ordenes Generales—No 20' (Tampico, 19 February 1847) English translation <https://scholarship.rice.edu/jsp/xml/1911/27562/3/aa00208tr.tei.html>. For discussion, see John F Witt, *Lincoln's Code: The Laws of War in American History* (Free Press 2012) 118-32; Louis Fisher, 'Military Tribunals: Historical Patterns and Lessons', US Congressional Research Service Report RL32458 (9 July 2004) 11-14.
- 23** Department of Missouri, 'General Orders No 1' (Saint Louis, 1 January 1862) in US War Department, *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies, Series II, Vol 1* (Government Printing Office 1894) 249.
- 24** Institute of International Law, *Manual of the Laws of War on Land* (Oxford 1880) Part III.
- 25** See James W Garner, 'Punishment of Offenders against the Laws and Customs of War' (1920) 14 *AJIL* 70; Hersch Lauterpacht, 'The Law of Nations and the Punishment of War Crimes' (1944) 21 *BYBIL* 58; Willard B Cowles, 'Universality of Jurisdiction over War Crimes' (1945) 33 *CLR* 177.
- 26** For centuries it was the custom for commanders on the battlefield to communicate directly with each other under a flag of truce, usually via *parlementaires*, for a variety of purposes, including bringing each other's attention to alleged violations of the laws of war: see Green (above n 16) 113-16. As direct governmental control of armed forces increased and technology developed, such communications could be addressed by a commander directly to the enemy government or indirectly between the belligerent governments, via the good offices of a neutral state: see eg correspondence between the British Commander-in-Chief in South Africa and the Afrikaner State Presidents concerning reported abuse of the white flag on the battlefield during the Second Boer War, *Telegrams from Field-Marshal Lord Roberts to the Secretary of State for War* (Cd 122, 1900).
- 27** See William Winthrop, *Military Law and Precedents* (2nd edn, Government Printing Office 1920) 796-9; Shane Darcy, 'The Evolution of the Law of Belligerent Reprisals' (2003) 175 *Mil L Rev* 184.
- 28** Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (signed 22 August 1864, entered into force 22 June 1865) 129 CTS 361 article 8.
- 29** 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) 202 CTS 144 articles 25-26.
- 30** *ibid* articles 27-28.
- 31** Hague Convention (IV) Respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 (Hague Convention IV) article 3.

32 Treaty of Peace between the Allied and Associated Powers and Germany (adopted 28 June 1919, entered into force 10 January 1920) 225 CTS 188 (Versailles Treaty) part VIII: Reparation.

33 After World War I the Treaty of Versailles had deferred such matters to German national jurisdiction: see Mahmoud Cherif Bassiouni, 'World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System' (2002) 30 *Denv J Intl L & Pol'y* 244, 281–85.

34 For an outline, see David Turns, 'The Law of Armed Conflict (International Humanitarian Law)', in Malcolm D Evans (ed), *International Law* (5th edn, OUP 2018) 840.

35 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 51(6) and 55(2), respectively.

36 See Jonathan F Vance, 'Men in Manacles: The Shackling of Prisoners of War, 1942–1943' (1995) 59 *J Mil Hist* 483.

37 Eg UK Ministry of Defence (MoD), *The Manual of the Law of Armed Conflict* (OUP 2004) paras 16.16–16.19.

38 Draft Articles on Responsibility of States for Internationally Wrongful Acts article 4 in *Yearbook of the International Law Commission 2001, Vol II* UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) (UN 2001) 30. The generic modern restatement of state responsibility for violations of IHL is contained in API article 91.

39 UN Security Council (UNSC) Resolution 687 UN Doc S/RES/687 (8 April 1991) para 18. Resolution 687 declared, inter alia, that Iraq was 'liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait': *ibid* para 16. Note the broad similarity of language and intent between this provision and articles 231–233 of the Versailles Treaty, which affirmed Germany's liability based on its aggression in 1914 and established a Reparation Commission to consider claims made against Germany in respect of the First World War.

40 For details of the UNCC's work since 1991, see www.uncc.ch.

41 UNSC, 'Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia: Identical letters dated 12 December 2000 from the Permanent Representative of Algeria to the United Nations addressed to the Secretary-General and the President of the Security Council' UN Doc A/55/686-S/2000/1183 (13 December 2000) annex, article 5(1).

42 For details, see <https://pca-cpa.org/en/cases/71/>.

43 UNSC, 'Summary by the Secretary-General of the report of the United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 January 2009' UN Doc A/63/855-S/2009/250 (15 May 2009).

44 *ibid* paras 94–95.

45 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); 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); 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); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October

1953) 75 UNTS 287 (GCIV); Geneva Conventions Common Article 1 (emphasis added); API article 1.

46 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 299 (Hague Convention V) article 20. An identical provision was inserted in each of the other conventions adopted at the 2nd Hague Peace Conference, except for Conventions (I)–(III), which are not properly speaking part of the *jus in bello*.

47 Namely, the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (signed 17 June 1925, entered into force 8 February 1928) 94 LNTS 65, the High Contracting Parties to which agreed ‘to be bound as between themselves’.

48 Convention Relative to the Treatment of Prisoners of War (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 343, article 82. The equivalent provision in article 25 of the contemporaneous Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (above n 29) contained minor variations in wording but was substantively identical.

49 International Military Tribunal (IMT), *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg, 14 November 1945–1 October 1946*, Vol XXII (IMT 1948) 472, 474–5.

50 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, (Merits) [1986] ICJ Rep 14 para 220.

51 *ibid* paras 115–116.

52 This may be the case, especially in relation to API and some of the treaties prohibiting or restricting the use of specific weapons.

53 Despite extensive evidence gathered by the UN and various NGOs of IHL violations committed in Yemen in the course of Saudi operations, and sharp criticism within Parliament, the British Government’s response has been to either contest that such violations are occurring, or insist that they are best investigated by the Saudis’ own internal procedures rather than by impartial international mechanisms. For details of alleged IHL violations in Yemen, see UNSC, ‘Final Report of the Panel of Experts on Yemen established pursuant to Security Council Resolution 2140 (2014)’ UN Doc S/2016/73 (26 January 2016) paras 123–142; for domestic British criticism and Government responses, see House of Commons International Development Committee, *Crisis in Yemen: Fourth Report of Session 2015–16*, HC532 (House of Commons, 4 May 2016) paras 39–73, annex 2 and appendices 1–4.

54 See eg the Swiss-convened Conference of High Contracting Parties to the Fourth Geneva Convention, which resulted in a Declaration (dated 5 December 2001) calling inter alia upon ‘all parties, [whether] directly involved in the conflict or not, to respect and to ensure respect for the Geneva Conventions in all circumstances ...’. For the full text of the Declaration, see <https://unispal.un.org/DPA/DPR/unispal.nsf/0/8FC4F064B9BE5BAD85256C1400722951>. For an overview of the process, which reconvened in 2014 and resulted in another Declaration, see Pierre-Yves Fux and Mirko Zambelli, ‘Mise en œuvre de la Quatrième Convention de Genève dans les Territoires Palestiniens Occupés: Historique d’un Processus Multilatéral (1997–2001)’ (2002) 84 *IRRC* 661; also Matthias Lanz, Emilie Max, and Oliver Hoehne, ‘The Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014 and the Duty to

Ensure Respect for International Humanitarian Law' (2014) 96 *IRRC* 1115 (including the text of the 2014 Declaration at 1128–30).

55 See eg the Tenth Emergency Special Session of the UN General Assembly (UNGA) (first convened in 1997 and periodically resumed on several occasions since, most recently in 2009), which is concerned specifically with 'Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory'. A typical early resolution:

[r]ecommends to the States that are High Contracting Parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War to take measures, on a national or regional level, in fulfilment of their obligations under article 1 of the Convention, to ensure respect by Israel, the occupying Power, of the Convention (UNGA Resolution ES-10/2 UN Doc A/RES/ES-10/2 (25 April 1997) para 8).

56 See eg UNGA, 'Statement by Ambassador Gabriela Shalev, Permanent Representative of Israel, Tenth Emergency Special Session (resumed)' (15 January 2009) <https://www.un.org/press/en/2009/ga10807.doc.htm>.

57 See eg *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (*Palestinian Wall* case), in which the Court found that certain obligations arising under IHL were obligations *erga omnes* (at para 155), and emphasized the corresponding obligation arising under article 1 of GCIV (at para 158).

58 See eg UNGA Resolution ES-10/15 UN Doc A/RES/ES-10/15 (2 August 2004) paras 1, 7.

59 See David Turns, 'Implementation and Compliance', in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 354, 359–60, 372–3.

60 GCI ch VIII; GCII ch VII; GCIII pt VI; GCIV pt IV.

61 API pt V.

62 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) article 19.

63 GCI article 47; GCII article 48; GCIII article 127; GCIV article 144; API article 83(1). The GCIII and GCIV articles include particular requirements for personnel with responsibilities for, respectively, prisoners of war and protected persons (ie civilians in occupied territory) to be 'specially instructed' as to those Conventions' provisions; these requirements are amalgamated in API article 83(2). Other modern IHL treaties also include the requirement of dissemination, while limiting it to armed forces: eg 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 October 1980, entered into force 2 December 1983) (1980) 19 ILM 1523 (CCW) article 6.

64 Among many such initiatives worldwide, prominent examples include the Jean-Pictet Competition <http://concourspictet.org/indexen.html>, the Martens Moot Court Competition on IHL, and the Israeli Alma National IHL Competition for Students www.alma-ihl.org/ihl-competition. Most such projects are organized by, or at least with the support of, the ICRC at national, regional, and/or international level; for an example of the organization's approach to IHL civil education, see Luisa Vierucci, 'Promoting the Teaching of International Humanitarian Law in Universities: The ICRC's Experience in Central Asia' (2001) 83 *IRRC* 155 (and other articles in the same thematic issue).

- 65** See British Red Cross, 'Teaching Resources' www.redcross.org.uk/What-we-do/Teaching-resources.
- 66** API article 82.
- 67** For example each of the US services—Army, Navy, Air Force, Marine Corps, and Coast Guard—has its own separate Judge Advocate General's Corps.
- 68** See International Institute of Humanitarian Law www.iihl.org.
- 69** See NATO School Oberammergau www.natoschool.nato.int.
- 70** See Asia Pacific Centre for Military Law <http://apcml.org>.
- 71** See US Department of Defense, 'Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O—The Role of the Law of War' (1992) 31 *ILM* 615, 617.
- 72** Indeed, although ALS (to take the UK, and more specifically England, as an example) dates in its modern form only from 1948, it traces its genesis back to the authority of the mediaeval offices of Earl Marshal and Advocate of the Army—the origin of the modern term 'court-martial', signifying a military court, derives from the Court of the Marshal (or 'Marshal's Court'), which was instituted by King Henry VIII in 1521 and was itself based on a much older institution.
- 73** See Hans-Peter Gasser, 'Military Manuals, Legal Advisers and the First Additional Protocol of 1977', in Nobuo Hayashi (ed), *National Military Manuals on the Law of Armed Conflict* (2nd edn, Forum for International Criminal and Humanitarian Law 2010) 55.
- 74** See David Turns, 'Military Manuals and the Customary Law of Armed Conflict', in Hayashi (above n 73) 65. In this context they are cited by courts in both international and national jurisdictions: see eg the Israeli High Court of Justice's references to the UK's military manual in *Public Committee against Torture in Israel v Government of Israel* (2006) 46 *ILM* 375.
- 75** Charles Garraway, 'Military Manuals, Operational Law and the Regulatory Framework of the Armed Forces', in Hayashi (above n 73) 45.
- 76** See eg France Ministry of Defence, *Manuel de Droit des Conflits Armés* (2012 edn) <https://www.defense.gouv.fr/sga/le-sga-en-action/droit-et-defense/droit-des-conflits-armes/droit-des-conflits-armes> ; US Department of Defense (DoD), *Department of Defense Law of War Manual* (June 2015) (Updated December 2016) <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190> .
- 77** See eg UK Ministry of Defence (MoD), *The Joint Service Manual of the Law of Armed Conflict* (JSP 383) www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf, and its book format (MoD (above n 35)).
- 78** The German *Bundeswehr's* ZDv 15/2—*Humanitäres Völkerrecht in bewaffneten Konflikten* (1992) has been published in English with extensive academic commentary as Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013).
- 79** GCI article 49; GCII article 50; GCIII article 129; GCIV article 146. These provisions are then referred back to in a consolidating clause in API article 85(1). The Protocol also provides for mutual assistance between states parties in criminal matters connected with grave breaches: API article 88.
- 80** As to the generalities of *aut dedere aut judicare*, see *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422, Separate Opinion of Judge Yusuf at paras 18–22; ILC, 'The Obligation to Extradite or Prosecute (*aut dedere aut judicare*): Final Report of the International Law Commission',

submitted to the UNGA by the ILC in 'Report of the International Law Commission on the Work of its 66th Session' UN Doc A/69/10 (1 May–6 June and 7 July–8 August 2014) para 65.

81 See David Turns, 'Prosecuting Violations of International Humanitarian Law: The Legal Position in the United Kingdom' (1999) 4 *JACL* 1.

82 See David Turns, 'Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States', in Dominic McGoldrick, Peter Rowe, and Eric Donnelly (eds), *The Permanent International Criminal Court—Legal and Policy Issues* (Hart Publishing 2004) 337.

83 GCI article 54; GCII article 45; 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) article 6(1).

84 Eg CCW Amended Protocol II (1996) 35 ILM 1206 article 14.

85 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) article 3. This Convention also entails dissemination in terms virtually identical to those of the Geneva Conventions (*ibid* article 25); the production of quarterly reports to the Director General of the UN Educational, Scientific and Cultural Organisation 'concerning any measures being taken, prepared or contemplated' in fulfilment of the Convention (*ibid* article 26(2)); and the enactment of penal or disciplinary sanctions in domestic criminal law for violations of the Convention (*ibid* article 28). See further the 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 articles 5, 11, 15–21.

86 API article 60(2).

87 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* (ICRC/Martinus Nijhoff 1987) (AP Commentary) para 2308.

88 API article 36. For discussion, see Justin McClelland, 'The Review of Weapons in Accordance with Article 36 of Additional Protocol I' (2003) 85 *IRRC* 397; Kathleen Lawand, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977* (ICRC 2006).

89 See MoD, 'UK Weapons Reviews' (Development, Concepts and Doctrine Centre) www.gov.uk/government/uploads/system/uploads/attachment_data/file/507319/20160308-UK_weapon_reviews.pdf.

90 For general discussion, see Olivier Bangerter, 'Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not' (2011) 93 *IRRC* 353.

91 API article 1(4).

92 *ibid* article 96(3).

93 For discussion of the UK's reservation to API in respect of articles 1(4) and 96(3) prompted by the situation in Northern Ireland, and the failure of the Palestine Liberation Organization to have its 1989 declaration accepted in relation to its struggle against Israel, see Turns, 'The Law of Armed Conflict' (above n 32).

94 See eg ICRC, 'A Collection of Codes of Conduct Issued by Armed Groups' (2011) 93 *IRRC* 483 (examples from China, the Philippines, Colombia, Uganda, Sierra Leone, and Libya).

- 95** See Pascal Bongard and Jonathan Somer, 'Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call *Deed of Commitment*' (2011) 93 *IRRC* 673.
- 96** For a useful overview of the typology of such commitments, see Sandesh Sivakumaran, 'Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War' (2011) 93 *IRRC* 463 at 465–9.
- 97** API article 43(1). The internal disciplinary system of armed forces will typically be enforced by military police or provost-m Marshals, with investigations of cases where crimes appear to have been committed and subsequent prosecution in courts-martial or civilian courts, as appropriate. The military legal and disciplinary system in the UK is provided for in the regulations promulgated for each service (eg *The Queen's Regulations for the Army* 1975 www.gov.uk/government/uploads/system/uploads/attachment_data/file/433769/QR_Army.pdf, with similar but separate regulations existing for the Royal Navy and the Royal Air Force) and the tri-service Armed Forces Act 2006.
- 98** For an overview of the doctrine, see Guénaél Mettraux, *The Law of Command Responsibility* (OUP 2009).
- 99** API article 86(2).
- 100** *ibid* article 87.
- 101** Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) article 28.
- 102** For an early modern Anglo-Australian example, see the case of Lieutenants Harry Morant, Peter Handcock, and George Witton of the Bushveldt Carbineers, court-martialled and executed for the murder of prisoners of war during the Second Boer War: *The Brisbane Courier* (24 May 1902).
- 103** For an early American example, see *Trial of Henry Wirz* (1865), US House of Representatives, 40th Congress, 2nd Session, Ex Doc No 23.
- 104** This jurisdiction is based exclusively on national legislation. For instance, in the UK it is currently provided for by the International Criminal Court Act 2001, pt 5 (Offences under domestic law) and the Armed Forces Act 2006; in the US, by the Uniform Code of Military Justice (1950) 10 USC paras 802, 805, 877–934.
- 105** *United States v William L Calley, Jr* (US Court of Military Appeals, 21 December 1973) 22 USCMA 534.
- 106** *Reg v Blackman* (UK Courts Martial Appeal Court) [2014] EWCA Crim 1029 (22 May 2014).
- 107** The International Criminal Tribunal for the Former Yugoslavia, established by UNSC Resolution 827 UN Doc S/RES/827 (25 May 1993); the International Criminal Tribunal for Rwanda, established by UNSC Resolution 955 UN Doc S/RES/955 (8 November 1994).
- 108** For instance, the Special Court for Sierra Leone (established in 2000) and the Special Court for Kosovo.
- 109** *The Prosecutor v Thomas Lubanga Dyilo* (Judgment) ICC-01/04-01/06, T Ch I (14 March 2012).
- 110** *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Decision on the Confirmation of Charges) ICC-01/12-01/15, Pre-Trial Ch I (24 March 2016).
- 111** GCI, GCII, and GCIII article 8; GCIV article 9; API article 5.

112 Current examples are the Swiss diplomatic representation of American and Saudi interests in Iran and of Russian interests in Georgia, and the Swedish representation of American, Australian, and Canadian interests in North Korea.

113 See Howard S Levie, 'Prisoners of War and the Protecting Power' (1961) 55 *AJIL* 374.

114 Switzerland acted for the UK, while Brazil acted for Argentina. See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd edn, ICRC 2016) paras 1115–1119.

115 GCI article 10. This has been the case, for instance, in respect of Russia and Georgia since their brief conflict over South Ossetia and Abkhazia in 2008.

116 GCIII article 126.

117 GCIV article 143.

118 *ibid* article 14.

119 See eg ICRC, 'Iran/Iraq Memoranda of 7 May 1983 and 10 February 1984' (Case Study, 12 January 2012) <https://casebook.icrc.org/case-study/icrc-iraniraq-memoranda>.

120 API article 90.

121 For further details of the IHFFC's mandate and work, see IHFFC, www.ihffc.org/index.asp?Language=EN&page=home.

122 One of the best-known examples is TH O'Sullivan's 'The Harvest of Death', depicting the bloated and contorted bodies of Federal soldiers killed at the Battle of Gettysburg in 1863.

123 'Lawfare' has been defined as, 'the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective': Charles J Dunlap, 'Lawfare Today: A Perspective' (Winter 2008) *Yale J Int'l Affairs* 146, 146.

124 See Richard Ekins, Jonathan Morgan, and Tom Tugendhat, *Clearing the Fog of Law—Saving Our Armed Forces from Defeat by Judicial Diktat* (Policy Exchange 2015).

125 The phrase was coined by Lord Hope in *Smith and Others v Ministry of Defence* [2013] UKSC 41, [2013] 2 WLR 27; see also Richard Scorer, 'The Judicialisation of War?' (2013) 163(7571) *NLJ*.

126 See eg UN Human Rights Council (HRC), 'Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1' UN Doc A/HRC/3/2 (23 November 2006); UNHRC 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict' UN Doc A/HRC/12/48 (15 September 2009); UN, 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/POC%20Rep%20on%20Account%20in%20Sri%20Lanka.pdf>.

15 War Crimes

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1. Introduction

Rather like in the way that the law of theft and fraud is a set of crimes that intersect, but are narrower than the civil law of property, the law of war crimes is a criminalized subset of violations of International Humanitarian Law (IHL).¹ Hence the law here is parasitic on a violation of IHL.² Although this chapter will return to the precise relationship between the two areas of law, it suffices for this moment to say that whilst every war crime is a violation of IHL, the converse is not the case.

There have been prosecutions for war crimes throughout history,³ however the bases have evolved across the years. In the Chivalric era, it was often on the basis of Chivalric codes which were enforceable across what were, at the time, functionally states.⁴ By the eighteenth century though, war crime charges were brought on the basis of domestic military codes. Although states could bring charges against enemy nationals, it was perhaps not clear at the time whether this was on the basis of individual liability under international law, or an exceptional additional domestic jurisdictional ground largely based on passive personality (ie nationality of the victim) if the crimes were not committed on the territory of the prosecuting state.⁵

By the end of the First World War, the majority view was probably that liability was based directly on international law,⁶ although the matter was not beyond contention.⁷ There were still doubts in some quarters even in the Second World War,⁸ but the Nuremberg International Military Tribunal had no truck with such arguments. It famously pronounced that:

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crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced ... individuals have international duties which transcend the national obligations of obedience imposed by the individual state.⁹

It said, with reference to war crimes:

the crimes defined by Article 6, section (b) [i.e the provision that covered such offences] were already recognized as war crimes under international law. They were covered by Articles 46, 50, 52 and 56 of the Hague Convention of 1907 and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit argument.¹⁰

The position was usefully summed up by the Special Tribunal for Lebanon, which said that:

[War crimes were] originally born at the domestic level: States began to prosecute and punish members of the enemy military (then gradually also of their own military) who had performed acts that were termed either as criminal offences perpetrated in time of war (killing of innocent civilians, wanton destruction of private property, serious ill-treatment of prisoners of war, and so on), or as breaches of the laws and customs of war. Gradually this domestic practice received international sanction, first through the Versailles Treaty (1919) and the following trials before the German Supreme Court at Leipzig (1921), then through the London Agreement of 1945 and the trials at Nuremberg. Thus, the domestic criminalisation of breaches of international humanitarian law led to the international

criminalisation of those breaches and the formation of rules of customary international law authorising or even imposing their punishment.

The nature of the law of war crimes thus necessitates an investigation into its sources.

2. The Sources of War Crimes Law

The sources of war crimes law are the same as those of IHL, which further are those of public international law more generally; in other words treaty law, customary law, general principles of law, and as subsidiary means of identifying the law, judicial decisions, and the writings of the most highly qualified publicists.¹¹ It is also important to note the role of national law in this regard, which may be both over and under-inclusive. Nonetheless, for many domestic courts that will be the predominant law (although it may be subject to (p. 341) oversight by, inter alia, human rights bodies or, in relevant circumstances, the International Criminal Court).¹²

As is the case in other areas of international law, in spite of their notionally subsidiary role, large developments in the law of war crimes have come through the decisions of courts and tribunals,¹³ but there have been times when states have rejected some cases outright.¹⁴ This is not always for nefarious reasons. There are times when the reasoning of international tribunals is unconvincing, and the dissents are more persuasive,¹⁵ which can undermine their authority. That said, national courts often seem unwilling or unable to understand or apply IHL either, perhaps to a greater degree.¹⁶

Still, the law of war crimes has contributed greatly to IHL.¹⁷ Even so, there are some notes of caution that ought to be made. The first is that war crimes are not just part of IHL, they are part of international criminal law, and the two have different principles of interpretation. Perhaps most important is the *nullum crimen sine lege* (no crime without pre-existing law) principle.¹⁸ This mandates a very careful approach to interpreting war crimes. For example, article 22 of the Rome Statute of the International Criminal Court reads, 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In cases of ambiguity the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.'¹⁹ This does not apply to state responsibility for violations of IHL, where the more general principles of treaty interpretation are favoured instead (although they are also relevant for war crimes too).

In spite of this, there have been some criticisms of the international criminal tribunals (the International Criminal Tribunal for the former Yugoslavia (ICTY) in particular), for taking the humanitarian side of humanitarian law and elevating it over the other side of IHL, namely military necessity.²⁰ Others celebrate what they call the 'humanization' of humanitarian law, in particular by the ad hoc Tribunals.²¹ This may be more a conflict of different cultures in the face of interpretation between military practitioners and others,²² one which is sometimes rather antagonistic, and is, more generally, an issue in IHL.²³

(p. 342) A. The Types of War Crime

The law on war crimes is complicated by the knot that forms the term war crimes itself and is far from easy to unpick.²⁴ As noted above it seems that not every violation of IHL can a priori be considered a war crime.²⁵ The issue is also tangled up with the question of the jurisdiction of states, international criminal courts and tribunals, as well as the sources of IHL itself.

As a starting point though, the classic (although not uncontroversial) statement of the conditions for a violation of IHL to be considered a war crime was given by the ICTY in its

foundational *Tadić* decision. The Appeals Chamber argued that there were four such (cumulative) conditions:

- i. the violation must constitute an infringement of a rule of international humanitarian law;
- ii. the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- iii. the violation must be 'serious,' that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and
- iv. the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.²⁶

The authority for these propositions becomes more controversial as they move from (i) to (iv), and all have certain issues of interpretation that are complex.²⁷ Probably the clearest example of violations of IHL that fulfil all of these criteria are grave breaches of the Geneva Conventions, defined (in a parsing of the Conventions themselves) in the Rome Statute of the International Criminal Court, as being:

... any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Willful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Willfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (p. 343) (vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.²⁸

For these offences, states are required to criminalize them on the basis of universal jurisdiction (ie irrespective of where they have occurred), and seek out, extradite, or prosecute anyone (at least in their territories, or territories over which they have authority) who is suspected of such offences.²⁹

It ought to be said, though, that if a violation of IHL does not fulfil the criteria that international law requires, it is still within the rights of a state to criminalize it domestically, subject to the usual principles of criminal jurisdiction that international law provides for.³⁰ It will not, however, be a war crime for the purposes of individual liability under international law. Things are rendered further complicated by the fact that there may be things, owing to the operation of treaty law, that may be war crimes for the purposes of states parties to certain treaties, but where they are not reflective of custom for non-parties. Certain aspects of Additional Protocol I may be at issue here,³¹ and also some weapons conventions, such as the Ottawa Convention on Anti-Personnel Landmines and the Cluster Munitions Convention, neither of which can be taken as customary per se.³² It

might be thought that these are more akin to arms control treaties than IHL regimes, but the line between the two is porous, to say the least.

3. Defining War Crimes: Substance and Jurisdiction

A further issue is that the existence of a war crime in treaty-based or customary international law is not the same as an international criminal tribunal having jurisdiction to prosecute it. Whilst the Nuremberg and Tokyo International Military Tribunals had the authority to prosecute an open-ended list of war crimes pursuant to articles 6(b) and 5(b) of their respective Statutes, owing to the nature of the conduct of the defendants, there was little that was prosecuted pursuant to those provisions that would not have traditionally been thought of as war crimes, a point that was not seriously contested by the defence in those proceedings.³³ The ICTY, in addition to the right to prosecute grave breaches of the (p. 344) Geneva Conventions pursuant to article 2 of its Statute, also had an open-ended provision on war crimes (article 3) which that Tribunal interpreted as granting it the right to prosecute violations of any applicable IHL in the relevant conflict, so long as it was customary, or brought into force by agreement between the parties.³⁴ This led the ICTY to engage in detailed, and at times transformative discussions of what, in particular, customary law provided for.³⁵

With respect to the International Criminal Tribunal for Rwanda (ICTR), it was given a closed list of violations of IHL, perhaps as at the time (1994) it was doubted by many whether the law of war crimes applied to non-international armed conflicts (NIACs).³⁶ The position is now settled though: whilst the substantive law is not identical (tracing the distinction between the two types of conflict), there is criminal liability for certain violations of IHL in NIACs.³⁷

One of the most modern (and broadly ratified) sets of war crimes can be found in the Rome Statute of the International Criminal Court, and owing to this, it deserves to be quoted in full in spite of its length. Despite its detailed nature, it ought not to be taken as a comprehensive codification of the law of war crimes: it is not.³⁸ Nonetheless, it is the definition that has been incorporated into many domestic criminal laws,³⁹ and is a baseline for the law on this point.⁴⁰ War crimes are covered by article 8 of the Rome Statute. This reads, in a slightly redacted form:⁴¹

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2.
 - a. [grave breaches of the Geneva Conventions, as set out above]
 - b. Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (p. 345) ii. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - iii. 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;

- iv. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- v. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- vi. Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- vii. Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- viii. 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;
- ix. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- x. Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- xi. Killing or wounding treacherously individuals belonging to the hostile nation or army;
- xii. Declaring that no quarter will be given;
- xiii. Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- xiv. Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- xv. Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- xvi. Pillaging a town or place, even when taken by assault;

- xvii. Employing poison or poisoned weapons;
- (p. 346) xviii. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- xix. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- xx. Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- xxi. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- xxii. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- xxiii. Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- xxiv. 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;
- xxv. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;
- xxvi. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

Article 8(2)(c) of the Rome Statute separately lists war crimes in NIACs:

- c. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against 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:
 - i. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

- ii. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- iii. Taking of hostages;
- iv. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

d. Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(p. 347) e. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.
- ii. 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;
- iii. 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;
- iv. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- v. Pillaging a town or place, even when taken by assault;
- vi. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
- vii. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- viii. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- ix. Killing or wounding treacherously a combatant adversary;

- x. Declaring that no quarter will be given;
- xi. Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- xii. Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

f. Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. 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.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the state or to defend the unity and territorial integrity of the state, by all legitimate means.

(p. 348) A. The Rome Definition

There is no space here to discuss the details of this definition,⁴² and it is better to refer to the chapters on the relevant IHL norms herein than recapitulate discussion. However, certain things can be highlighted. The first of these is that article 8(1) was a compromise provision between states that only wanted the International Criminal Court (ICC) to get involved with very high-level offences, so suggested that there be a jurisdictional limit on the ICC such that it could not deal with ‘small fry’ or isolated offences (irrespective of the possible duties on states to do so), and those that were utterly opposed to such a limit. As such, article 8(1) is a careful compromise that is framed as guidance to the Prosecutor, rather than a jurisdictional limit.⁴³

Looking first to international armed conflicts (IACs), as mentioned above, in addition to violations of the Grave Breaches provisions of the 1949 Geneva Conventions (but not Additional Protocol I—Protocol II having no analogous provision anyway), the ICC has jurisdiction over various other violations of the law applicable to IACs ‘within the established framework of international law’. This provides for a *renvoi* to the relevant IHL norms, reaffirming the parasitic nature of the law of war crimes on IHL.⁴⁴ Hence the interpretation of IHL is at the least what the law of war crimes cannot go beyond. This said, certain provisions of the Rome Statute may be narrower than the relevant IHL norms—article 8(2)(b)(iv) may be amongst these.⁴⁵ And indeed some clear prohibitions, such as those of biological weapons, are simply missing.⁴⁶ This is owing (again), to the fact that the Rome Statute is a negotiated document, and some uncomfortable compromises were reached.⁴⁷ Hence it is important to reiterate that the Rome Statute definition is not the alpha and omega of the law of war crimes, as states may have further obligations in relation to conduct, criminalization, and prosecution that do not find their basis there. This is part of the reason that article 10 of the Rome Statute provides that ‘Nothing in this Part shall be

interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.⁴⁸

The law relating to NIAC is, in many ways, a pared down version of the provisions relating to international armed conflict. There are some notable omissions, such as any provision on collateral damage, but also, as the Statute was originally drafted, any weapons offences. This was an omission at least partially rectified by the 2010 amendments adopted (although not directly brought into force) that same year, which made the same weapons (p. 349) offences applicable in IACs applicable to NIACs.⁴⁹ For its parties, this is now in force. But there is also customary law applicable that is not referable to the Rome Statute. The extent to which it is applicable in a domestic legal order would depend on the constitutional arrangements of the relevant state, but for such customary war crimes it would not violate the principle of non-retrospectivity to introduce *ex post facto* legislation to deal with them, as they were already criminal under international law.⁵⁰

4. Individual Criminal Responsibility

When it comes to war crimes, the substantive law is only part of the story. Although domestically we may see the primary perpetrator as the most responsible (depending on our legal traditions), in international criminal law the position tends to be reversed (although not always). In international criminal law, the further away from the direct perpetrator someone gets, the greater the responsibility often becomes.⁵¹ The principles of liability are largely (although not comprehensively) set out in the Rome Statute, article 25 of which states:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - a. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - b. Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - c. For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - d. In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

e. In respect of the crime of genocide, directly and publicly incites others to commit genocide;

f. Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of (p. 350) circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of states under international law.

Many of these principles of liability will be familiar to domestic criminal lawyers. There are lengthier treatments of the details of them elsewhere.⁵² Perhaps what is notable is that the ICC has used article 25(2)(a) to develop a theory of co-perpetration, including what is known as indirect co-perpetration, which, drawing on theories of criminal law from Germany, provides for liability of those who are part of a group or system that violates international criminal law.⁵³ It is questionable whether such a principle is part of customary international law (although for the ICC, as a matter of treaty law, article 25 as interpreted by the Court is the controlling law).⁵⁴

The ICTY, on the other hand, has asserted that customary international law recognizes a concept of perpetration through being a part of joint criminal enterprise, which includes where someone is part of such an enterprise and foresees the possibility of offences occurring. Suffice to say that it is controversial, both as to the extent to which it is firmly established in customary law, and also as to whether it is consistent with the principles of criminal law, as intentional offences can be committed by what in the common law world would be considered recklessness.⁵⁵ Article 25(3)(d) reflects an analogous concept, but requires that the person knows that the relevant crime will be committed.⁵⁶

Furthermore, when it comes to assistance to a crime, probably narrower than customary international law⁵⁷ the Rome Statute requires that an accomplice engages in their conduct with the purpose of assisting or encouraging a crime. The customary law on this point though is controversial too, especially with respect to those who are physically distant, and the jurisprudence with respect to whether any assistance being required to be 'specifically directed' to helping or encouraging the primary offence is a little mixed.⁵⁸ The balance of authorities are against such a requirement.⁵⁹

(p. 351) A. Command Responsibility

For war crimes, as with other international crimes, international criminal law has a principle of liability that is relatively unknown in domestic law. This is the principle of command responsibility, which is the liability of superiors for crimes committed by their subordinates. The customary law on point is the subject of considerable disagreement, both as to the ambit of the principle and the nature of the responsibility, the two aspects of which are interlinked.⁶⁰ It finds its modern basis in post-war jurisprudence,⁶¹ but its most recent treaty formulation is article 28 of the Rome Statute.⁶² This reads:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

a. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- i. That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- ii. That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

b. With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- i. The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- ii. The crimes concerned activities that were within the effective responsibility and control of the superior; and
- iii. The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

The requirements for this form of liability have been usefully parsed by the ICTY, who asserted that there are, as a matter of customary law, three requirements: first, there is a superior/subordinate relationship; second, there is a 'mental element'; and third, a failure to take reasonable measures to prevent or punish violations of international criminal law.⁶³ The Rome Statute adds the requirement that the violations must occur as a result of a failure to exercise (p. 352) control over those subordinates. This, in other words, requires an element of causation, which is controversial as a matter of custom, and has been a matter of considerable debate, both judicially and academically, especially with respect to a failure to punish offences.⁶⁴

In terms of the requirements, the condition that there be effective control is not always simple, in particular when non-state actors are at issue, as there may not be a formal structure involved.⁶⁵ In practice, this has proved difficult, although not impossible, to prove.⁶⁶ When it comes to the mental element, the ICTY has said that what is required is that, as a matter of customary law:

[A superior] ... may possess the *mens rea* for command responsibility where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes ... or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation

in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.⁶⁷

This is not beyond controversy,⁶⁸ and is different to the standards set out in the Rome Statute. Notably, the Rome Statute adopts different mental elements for military and civilian superiors, a distinction not known to customary law.⁶⁹ With respect to superior responsibility, the ICC has determined that, for military superiors, the standard is essentially one of negligence.⁷⁰ The standard for civilian superiors has yet to be pronounced upon, but the ICC has expressed its separation from the ad hoc Tribunals' jurisprudence on this point.⁷¹ It is likely that with regard to civilian superiors, the standard applicable before the ICC is practically the same as constructive knowledge.⁷²

Looking to the action that needs to be taken to fulfil the duties that are imposed by the international law of command responsibility, the ICTY has said that what is required is what:

can be taken within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates ... What constitutes such measures is not a matter of substantive law but of evidence.⁷³

Hence the level of activity required is linked to the level of control the superior has.

In relation to the duty to prevent and punish (which are separate), the ICC has said that it:

'depend[s] on the degree of effective control over the conduct of subordinates at the time a superior is expected to act'; (2) measures must be taken to prevent planning (p. 353) of preparation of crimes, not simply their execution; (3) 'the more grievous and/or imminent the potential crimes of subordinates appear to be, the more attentive and quicker the superior is expected to react'; and (4) a superior is not 'obliged to do the impossible'.⁷⁴

The duty is thus to do what is possible. It is a duty of conduct rather than result. Not least, it ought to be noted that the duty to punish can be fulfilled by submitting the matter to the relevant prosecutorial authorities, as article 28 makes clear.

B. Grounds for Excluding Criminal Responsibility

Although less discussed, perhaps as a result of some discomfort with dealing with the issue,⁷⁵ there are defences to war crimes. The clearest of the definitions of such general defences is provided in the Rome Statute. Articles 31–32 provide that:

Article 31 ... 1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

- (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
- (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a

result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person (p. 354) does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32 Mistake of fact or mistake of law 1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Most of these will also be recognizable to domestic criminal lawyers, although the definitions are, as with all aspects of the Rome Statute, the outcome of compromises that do not reflect any one domestic approach. They include both justifications (such as self-defence), excuses (such as duress), and what may be called failure of proof defences (such as mental incapacity).⁷⁶ The extent to which some of them reflect customary law is not necessarily clear.⁷⁷

Rather like principles of liability, especially command responsibility, when it comes to defences, international criminal law has some specific provisions.⁷⁸ The most important of these is superior orders.⁷⁹ Such a defence was excluded in the Statutes of the Nuremberg and Tokyo International Military Tribunals, as well as of those of the ICTY and ICTR.⁸⁰ The

Rome Statute, however, reinstates a limited form of the defence, in article 33, which provides:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (p. 355)
 - a. The person was under a legal obligation to obey orders of the Government or the superior in question;
 - b. The person did not know that the order was unlawful; and
 - c. The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

The customary status of this provision is controversial,⁸¹ and its ambit is not entirely clear.⁸² In particular, what is 'manifestly' unlawful, and to whom, is a matter of considerable difficulty.⁸³ It is also the case that that subparagraph 2 is not easy to interpret, as, although the intention was to limit the defence to war crimes, rather than other offences, orders tend to engage in conduct, rather than being easily reduced to the categories of international crimes *in abstracto*.⁸⁴ The ICC has yet to pronounce on the provision.

5. State Responsibility for War Crimes

Responsibility for war crimes is not limited to individual liability (although, as will be seen, there are obligations in this regard).⁸⁵ States have responsibility to prevent and punish war crimes.⁸⁶ Looking to the duties of parties to an armed conflict, it is important to note that liability for war crimes between individuals and states is parallel.⁸⁷ Neither excludes the other. There is liability for violations of IHL (which all war crimes are), but of course, there is the necessity of attributability to the state. For the actions of the armed forces, as state actors, they naturally entail state responsibility.⁸⁸ For non-state actors the issue is more complex, as their actions are not always referable to a state.⁸⁹

The positive duties of states with respect to preventing and punishing war crimes are surprisingly similar. With respect to IACs, all states are obliged, pursuant to the Grave Breaches provisions of the Geneva Conventions, to domestically criminalize such violations, and seek out and either extradite or prosecute those violations.⁹⁰ (p. 356) The situation is different for NIACs, although human rights obligations are relevant here.⁹¹

The fundamental obligation that lies upon states, whether parties to a conflict or not, is contained in Common Article 1 of the 1949 Geneva Conventions, which provides that, 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.'⁹² This requires both prophylactic, and *ex post facto* measures. The former are to be preferred.

The duty in Common Article 1 was, in its initial conception, related to the duties in peacetime, such as dissemination rather than anything else, but gradually as time went on, it became used by states as an entry into issuing diplomatic protests about violations of IHL in conflicts to which they were not parties. However, these were by no means always forthcoming, not least as states were concerned that saying anything could be interpreted as taking sides in the conflict, and therefore often keep silent.

The ICJ, has taken a very broad approach to Common Article 1 in the *Palestinian Wall* Advisory Opinion, and 'piggy-backed' this to their discussion of the *erga omnes* nature of many, if not most, rules of IHL.⁹³ In this opinion it noted that:

It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with ... [and] ... In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.⁹⁴

Perhaps unsurprisingly, this was not beyond controversy within the Court. Hence, for example, Judge Koojimans questioned the extent to which Common Article 1 imposed obligations on parties that were not part of the relevant armed conflict.⁹⁵ Judge Higgins, on the other hand, thought that the obligation not to recognize the situation did not rely on the concept of *erga omnes* obligations but the Common Article 1 requirement that states should attempt to ensure compliance. She also noted that 'the Court has, in subparagraph (3)(D) of the *dispositif*, carefully indicated that any such action should be in conformity with the Charter and international law'.⁹⁶ This is probably the best interpretation of the nature of the obligation as it is currently seen by states.⁹⁷ Reprisals that violate the *jus ad bellum*, are certainly not permitted.

(p. 357) In terms of state obligations relating to creating (domestic) individual liability, criminalization is required by the Geneva Conventions for grave breaches of their provisions. Hence, article 49 of Geneva Convention I of 1949 provides that:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention ...

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article ...⁹⁸

Added to this, article 52 of the same convention provides that:

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention. If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

That said, this latter provision (and, to a large extent the former) has not been implemented in practice, in large part because states are often unwilling to prosecute their own nationals for war crimes.⁹⁹

Criminal law is not the only, nor even the best, measure for suppressing violations of IHL. Hence the Geneva Conventions, in Common Article 47/48/127/144, create an obligation on States to disseminate IHL, and train people in its use:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.

Additional Protocol I, Article 83, says, essentially the same thing.¹⁰⁰

(p. 358) There is sense in this, not least in that it is something of a stretch to say that people ought to be held to standards of which they were entirely, and reasonably, unaware. However, there are limits to this too, not least the fact that during armed conflicts, nationalistic considerations tend to dominate. Further, states have not always been assiduous in implementing this obligation. And where they have, this has not necessarily led to compliance with the law.¹⁰¹

One of the most important mechanisms of implementation is the integration of legal advisors into the military decision-making system. This is required by article 82 of Additional Protocol I of 1977, which reads:

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.¹⁰²

This is extremely important, as although there may be differences of opinion on the interpretation of IHL,¹⁰³ well-trained military lawyers can provide important advice on IHL, and can prevent possible violations at the outset.

6. Conclusion

The law of war crimes is a controversial one, not least as states cannot be certain that their nationals will not commit them. Young soldiers in stressful situations, and who are highly armed, may well end up violating IHL (as well as their superiors), and thus be responsible for war crimes. This is not inappropriate, but leads to worry in states about their possible liability, both political and legal. This, in addition to nationalist sentiment that often accompanies armed conflicts, often makes the circumstances surrounding prosecution difficult. Whilst the deterrent effect of prosecutions is not clear,¹⁰⁴ there are important retributive reasons for prosecuting war crimes, and, in addition, criminal law is only one means of enforcing IHL.

Footnotes:

1 Michael Bothe, 'War Crimes', in Antonio Cassese, John RWD Jones, and Paolo Gaeta (eds), *The Rome Statute of the International Criminal Court* (OUP 2002) 381.

2 As such, the law of war crimes, in spite of considerable convergence between the two types of law, retains the distinction between international armed conflicts (IACs) and non-international armed conflicts (NIACs). See eg Sonja Boelaert-Suominen, 'The Yugoslavia Tribunal and the Common Core of Humanitarian Law Applicable to All Armed Conflicts' (2000) 13 *Leiden JIL* 19.

3 See generally, Timothy LH McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime', in Timothy LH McCormack and Gerry J

Simpson (eds), *The Law of War Crimes: National and International Approaches* (Martinus Nijhoff 1997) 31.

4 Maurice H Keen, *The Laws of War in the Late Middle Ages* (Keegan Paul 1965).

5 On the bases of jurisdiction here, see Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (4th edn, CUP 2019) ch 3.

6 'Report of the Commission on the Responsibility of the Authors of the War and Enforcement' (1920) 14 *AJIL* 95, 122.

7 The American and Japanese members dissented from this position: *ibid* 146 (US), 152 (Japan).

8 Manfred Lachs, *War Crimes: An Attempt to Define the Issues* (Stevens and Sons 1944); George Manner, 'The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War' (1943) 37 *AJIL* 407.

9 Nuremberg International Military Tribunal, 'Judgment and Sentence' (1947) 41 *AJIL* 171, 221.

10 *ibid*.

11 See generally Dapo Akande, 'The Sources of International Criminal Law', in Antonio Cassese et al (eds), *The Oxford Companion to International Criminal Justice* (OUP 2009) 41.

12 For useful discussion, see Alexandra Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *AJIL* 1.

13 Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (CUP 2014) 25-38 is quite rightly, sanguine, to a point.

14 UK Ministry of Defence (MoD), *Manual of the Law of Armed Conflict* (OUP 2004) 421.

15 *Prosecutor v Gotovina and Markač* (Judgment) ICTY-06-90-A (16 November 2012). See Janine N Clarke 'Courting Controversy: The ICTY's Acquittal of Croatian Generals Gotovina and Markač' (2013) 11 *JICJ* 399.

16 Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (OUP 2014).

17 Christopher J Greenwood, 'The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia' (1998) 2 *Max Planck YB UN L* 97; Darcy (above n 13); Robert Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Impact of the International Criminal Tribunals on the ICRC Customary Law Study' (2006) 11 *JCSL* 239.

18 See eg Kenneth Gallant, *The Principle of Legality in International and Comparative Law* (CUP 2009).

19 On which see Bruce Broomhall, 'Article 22', in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Court* (3rd edn, Hart 2015) 949.

20 Michael Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 *Vir J Int'l L* 795.

21 See eg Theodor Meron, 'The Humanization of International Humanitarian Law' (2000) 94 *AJIL* 239.

22 David Luban, 'Military Necessity and the Cultures of Military Law' (2013) 26 *Leiden JIL* 315.

- 23** Robert Cryer, 'The ICRC and Direct Participation in Hostilities: See a Little Light', in Robin Geiß (ed), *The International Red Cross and Red Crescent Movement at 150: Developing and Clarifying International Humanitarian Law* (CUP 2017) 113.
- 24** Charles Garraway, 'War Crimes', in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary Humanitarian Law* (CUP 2007) 377.
- 25** Fausto Pocar, 'The Criminalization of the Violations of International Humanitarian Law from Nuremberg to the Rome Statute', in Fausto Pocar, Marco Pedrazzi, and Micaela Frulli (eds), *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and Investigation* (Edward Elgar 2013) 3.
- 26** *Prosecutor v Tadić* (Decision on Interlocutory Appeal on Jurisdiction) ICTY-94-1-AR72 (2 October 1995) para 94. For more detailed discussion see Robert Cryer, 'Individual Liability for Violations of the Law of Armed Conflict', in Rain Liivjoa and Timothy LH McCormack (eds), *The Routledge Handbook on the Law of Armed Conflict* (Routledge 2016) 538, 540–6.
- 27** See Cryer, *ibid.*
- 28** On which, see Paolo Gaeta, 'Grave Breaches of the Geneva Conventions', in Andrew Clapham, Paolo Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 615; Markus D Öberg, 'The Absorption of Grave Breaches into War Crimes Law' (2009) 91 *IRRC* 163, 163; Horst Fischer, 'Grave Breaches of the 1949 Geneva Conventions', in Gabrielle Kirk-McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law* (Kluwer 2000) 65, 70, 71.
- 29** Fischer (above n 28).
- 30** Pocar (above n 25).
- 31** Where there are obligations to domestically criminalize such violations (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) article 85). On the customary status of Additional Protocol I, see eg Christopher Greenwood, 'Customary Status of the 1977 Geneva Protocols', in Astrid JM Delissen and Gerard J Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead* (Nijhoff 1991) 93, albeit things may have moved on since then, see eg Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (CUP 2005) (CIHL).
- 32** William A Boothby, *Weapons and the Law of Armed Conflict* (OUP 2009) chs 11, 15.
- 33** Nuremburg International Military Tribunal (above n 9).
- 34** *Tadić* (above n 26) paras 87–93. See Christopher Greenwood, 'International Humanitarian Law and the *Tadić* Case' (1996) 7 *EJIL* 265.
- 35** UK MoD (above n 14).
- 36** Peter Rowe, 'Liability for War Crimes in a Non-International Armed Conflict' (1995) 34 *Revue de Droit Militaire et de Droit de la Guerre* 149.
- 37** *ibid.*
- 38** See generally, William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 213–319.
- 39** This is often so they may take advantage of the complementarity provisions of the Rome Statute, which provides that the International Criminal Court is not capable of intervening if a State is willing or able to prosecute such offences itself, on which see Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002)

2187 UNTS 3 (Rome Statute) articles 17–19 and Carsten Stahn and Mohammed el Zeidy (eds), *The International Criminal Court and Complementarity* (CUP 2012).

40 Although other states have gone beyond this to update their criminal codes to include all of the war crimes which they feel ought to be criminalized domestically; see eg David A Blumenthal, 'Australian Implementation of the Rome Statute of the International Criminal Court', in David A Blumenthal and Timothy LH McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance* (Martinus Nijhoff 2008) 283; William A Schabas, 'Canadian Legislation for Implementing the Rome Statute' (2000) 3 *YBIHL* 337.

41 And needs to be read alongside the ICC, *Elements of Crimes* (PrintPartners Ipskamp 2011) (*Elements of Crimes*) adopted by the Assembly of States party to the Statute, which, but by virtue of article 9 of the Rome Statute, are to guide the Court in its interpretation of the crimes (see Erkin Gadriov and Roger Clark, 'Article 9', in Triffterer and Ambos (eds) (above n 19) 619).

42 The discussion of war crimes in the Rome Statute (not even more generally), takes up just shy of 300 pages in the standard commentary on the Rome Statute, see 'Article 8' in Triffterer and Ambos, above note 19 295–580.

43 Schabas, *The International Criminal Court* (above n 38) 225–8.

44 See above n 2.

45 Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005) 272–3.

46 Aspects of this may be remedied if the amendments that were adopted by the Assembly of States Parties in 2017, to include such weapons, as well as some of those covered by the 1980 Conventional Weapons Convention, such as those that injure by non-detectable fragments, blinding laser weapons, and see, [C.N.116.2018](#), [C.N.125.2018](#), and [C.N.126.2018](#). However they are not in force. Some other provisions proved controversial, for political reasons, so eg the provision on the transfer of population into occupied territory was considered by some to be directed at Israel, see *ibid* 273–4.

47 *ibid* chs 5–6.

48 On which, see Otto Triffterer and Alexander Heinze, 'Article 10', in Triffterer and Ambos (eds) (above n 19) 644.

49 Amendments to Article 8 of the Rome Statute (adopted 10 June 2010) RC/Res.5; Amal Amaluddin and Phillippa Webb, 'Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute' (2010) 8 *JICJ* 1219.

50 *Vasiliaukas v Lithuania* (Application No 35343/05) (ECtHR Judgment of 20 October 2015) paras 165–69.

51 See William Schabas, 'Enforcing Individual Criminal Responsibility in International Criminal Law: Prosecuting the Accomplices' (2001) 843 *IRRC* 439.

52 See eg Elies van Sliedregt, *Individual Criminal Responsibility in International Criminal Law* (OUP 2012); Cryer et al (above n 5) ch 15.

53 See 'Symposium' (2011) 9 *JICJ* 85–226, especially Thomas Weigend, 'Perpetration through an Organization: The Unexpected Career of a German Legal Concept' (2011) 9 *JICJ* 91.

54 *Prosecutor v Stakić* (Judgment), IT-97-25-A (2006) para 62, and Schabas, *The International Criminal Court* (above n 38) 579–82.

55 For a useful overview, see Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (Martinus Nijhoff 2003) 94–110. See also ‘Symposium and Anthology’ (2007) 5 *JICJ* 67–244. On the overlaps, see Stefano Manacorda and Chantel Meloni, ‘Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law’ (2011) 9 *JICJ* 159.

56 See eg *Prosecutor v Mbarushimana* (Decision on the Confirmation of Charges) ICC-01/04.01/10 (16 December 2011) paras 288–289.

57 See *Prosecutor v Tadić* (Judgment), ICTY-94-1-A (15 July 1999) para 229.

58 Leila N Sadat, ‘Can the ICTY Šainović and Perišić Cases be Reconciled?’ (2014) 108 *AJIL* 475.

59 *ibid.*

60 See generally, Guénaél Mettraux, *The Law of Command Responsibility* (OUP 2009); and van Sliedregt (above n 55) ch 8; see specifically Christopher Greenwood, ‘Command Responsibility and the *Hadžihasanović* Decision’ (2004) 2 *JICJ* 598.

61 William Hays Parks, ‘Command Responsibility for War Crimes’ (1973) 62 *Military L Rev* 1, 1–20.

62 It is also contained in API articles 86 and 87.

63 *Prosecutor v Delalić* (Judgment) IT-96-21 (16 November 1998) para 344.

64 Cryer et al (above n 5) 390–2.

65 See Sandesh Sivakumaran, ‘Command Responsibility in Irregular Groups’ (2012) 10 *JICJ* 1129.

66 *ibid* 386–8; *Prosecutor v Bemba Gombo* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/05-01/08 (15 June 2009) paras 414–416.

67 *Bemba Gombo* (above n 66) paras 223–241.

68 Mettraux (above n 60) ch 10.

69 van Sliedregt (above n 55) 191–2.

70 *Bemba Gombo* (above n 66) 429.

71 *ibid* 434

72 Mettraux (above n 60) 194–6.

73 *Prosecutor v Blaškić* (Judgment) IT-95-14 (29 July 2004) 72. See eg Kai Ambos, *Treatise on International Criminal Law Volume I: Foundations and General Part* (OUP 2013) 217–20.

74 *Prosecutor v Orić* (Judgment) IT-03-68 (30 June 2006) para 329.

75 Albin Eser, ‘Defences in War Crimes Trials’, in Yoram Dinstein and Mala Tabory (eds), *War Crimes in International Law* (Martinus Nijhoff 1996) 251. On the issues mentioned here see generally Cryer et al (above n 5) ch 16.

76 Ambos (above n 73) 304–7.

77 See eg *Prosecutor v Erdemović* (Judgment) IT-96-22-A (7 October 1997). Belgium considers the provision on self-defence of property to be contrary to *jus cogens*.

78 Pursuant to article 31(3) of the Rome Statute, other, customary defences, perhaps including (in limited circumstances, reprisals, insofar as they are not banned under the law of armed conflict, may also be applicable.

79 The classic study remains Yoram Dinstein, *The Defence of Superior Orders in International Criminal Law* (OUP 2012).

80 Charter of the International Military Tribunal, annex to the London Agreement on the Prosecution and Punishment of the Major War Criminals of the European Axis Powers 82 UNTS 279, article 8. Article 6 of the Tokyo IMT Charter is largely the same: see Special Proclamation: Establishment of an International Military Tribunal for the Far East (19 January 1946) TIAS No1589. See also Updated Statute of the International Criminal tribunal for the Former Yugoslavia (adopted 25 May 1993, as amended 7 July 2009 by resolution 1877) article 7(4); Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994, as amended 13 October 2006 by resolution 1717) article 6(4).

81 Paolo Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law' (1999) 10 *EJIL* 172; cf Charles Garraway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied?' (1999) 836 *IRRC* 785.

82 See further Robert Cryer, 'Superior Orders in the International Criminal Court', in Richard Burchill, Nigel White, and Justin Morris (eds), *International Conflict and Security Law* (CUP 2005) 49.

83 *ibid* 61–3.

84 Cryer (above n 5).

85 See generally Hans-Peter Gasser, 'Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations', in Hazel Fox and Michael A Meyer, *Armed Conflict and the New Law: Vol II: Effecting Compliance* (BIICL 1993) 15.

86 See Silja Voleki, 'Implementation and Enforcement of International Humanitarian Law', in Dieter Fleck, (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 647.

87 André Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 *ICLQ* 615.

88 International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' (ILC 2001) ch II.

89 The conditions upon which the actions of rebels may be attributable to third states is a matter of some controversy; see eg *ibid* articles 8 and 47–49.

90 Articles 50, 51, 130, and 147 of the four Geneva Conventions 1949. See Symposium, 'The Grave Breaches Regime in the Geneva Conventions: A Reassessment Sixty Years On' (2007) 7 *JICJ* 4 653–877; and Paolo Gaeta, 'The Interplay between the Geneva Conventions and International Criminal Law', in Clapham et al (above n 28) 737.

91 *Velasquez-Rodriguez v Honduras*, IACtHR Series C No 4 (29 July 1988); *McCann v UK* (1995) 21 EHRR 67, para 161.

92 On which see Robin Geiß, 'The Obligation to Respect and Ensure Respect for the Geneva Conventions', in Clapham et al (above n 28) 111 ; Frits Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' (1999) 2 *YBIHL* 3; Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 *EJIL* 125.

93 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) [2004] ICJ Rep 36 para 157.

94 *ibid* paras 158–159.

95 *ibid* Separate Opinion of Judge Koojimans paras 46–50.

96 *ibid* Separate Opinion of Judge Higgins para 39.

97 *ibid*.

98 On which, see Elizabeth Miles Sturza ‘Dissemination of the Geneva Conventions’, in Clapham et al (above n 28) 597.

99 Timothy McCormack, ‘Their Atrocities and Our Misdemeanours: the Reticence of States to Try their “Own Nationals” for International Crimes’, in Phillippe Sands and Matthew Lattimer (eds), *Justice for Crimes against Humanity* (Hart 2003) 107.

100 See Michael Bothe, Karl Josef Partsch, and Waldemar A Solf, *New Rules for Victims of Armed Conflict* (Martinus Nijhoff 182) 501–4.

101 Yugoslavia was frequently feted for its work in this area prior to its dissolution, in a series of conflicts notable for the violations of IHL, which led to the creation of the ICTY.

102 Bothe et al (above n 100) 498–50.

103 Meron (above n 21).

104 For a modern discussion, see Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court’s Intervention on Ending Wars and Building Peace* (OUP 2016).

**Part VII Accountability/Liability for Violations of
the Law in Armed Conflict, Ch.29 War Crimes and
Other International 'Core' Crimes**

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(p. 737) Chapter 29 War Crimes and Other International 'Core' Crimes

1 Introduction

IN a book published in 1945, Manfred Lachs, writing 'under the strain of active military service' during World War II, noticed that '[w]ar crimes may appear a minor issue in this deadly conflict'. He pointed out, however, that 'the manner in which the problem is resolved might become a great precedent' for, he explained, raising international law 'to the height it deserves', '[t]he principle that crime does not pay must become law, not only in the everyday life of an individual, but also in inter-State relations'.¹

This he wrote before the adoption of the London Charter which established the Nuremberg Tribunal² and the trials of war criminals from World War II started, (p. 738) both at the international and the national level. It was a time when the 'principle that individuals are not subjects of the law of nations' was still an orthodoxy in international law, and even perceived by some commentators as 'axiomatic' in the law of war.³ Its natural corollary was that penal offences could have only a *municipal* character, including those offences committed in violation of the laws of war. An orthodox approach therefore required war crimes not to be considered as crimes under international law, but simply a means to enforce international rules of warfare at the national level.

The trials against World War II German 'major war criminals' before the Nuremberg Tribunal, and against the 'major war criminals in the Far East' before the Tokyo Tribunal,⁴ shook this basic principle of international law. The trials were grounded on the assumption that the individuals in the dock were to be tried for crimes *against international law*, and that the rules proscribing these crimes were *international rules*. The fact that some defendants had committed such crimes in obedience of superior orders lawfully issued under their domestic law was therefore no defence before those Tribunals.⁵ Nor could the defendants plead that they had acted on behalf of the state, a plea based on the traditional notion that only states, and not individuals, are responsible for conduct contrary to international law.⁶ Manfred Lachs' wish, to see the problem of war crimes committed during World War II solved in a way which would raise international law to 'the height it deserved', was thus fulfilled.

It was, however, not until after the end of the Cold War, and following the establishment of the ICTY and the ICTR by the UN Security Council,⁷ that the (p. 739) revolutionary precedent set by the international criminal trials in Nuremberg and Tokyo could grow into a fully-fledged body of international criminal rules, now known as 'international criminal law'. At the legal level, resistance came mainly from those who supported the 'orthodox' approach to international law. Firmly believing that crimes were a matter exclusively confined to national jurisdictions, they went on to influence the drafting of treaties dealing with individual criminal responsibility for violations of international law. The preeminent example is found in the 1949 GCs. The attempt to declare that certain violations of the GCs amounted to war crimes, thus entailing criminal responsibility for the individual perpetrators under the Conventions, was strenuously resisted by many delegations. Some insisted that the use of the word 'crime' had to be avoided, since violations of the Conventions 'will not be crimes until they are so made by domestic penal legislation'.⁸ This approach prevailed. The GCs, far from directly establishing the criminal responsibility of the individuals who violate the Conventions, merely oblige the High Contracting Parties to 'enact any legislation necessary to provide effective penal sanctions' against them and to

bring them before their national courts.⁹ The term 'war crimes' to describe those violations was carefully avoided, and that of 'grave breaches' was finally chosen.¹⁰

The 'orthodox' approach to international law in the matter of individual criminal responsibility for war crimes, however, is no longer tenable today. The principle that individuals may be held directly responsible under the law of nations is firmly embedded in customary international law. In addition, the list of acts directly criminalized under international law also includes at least two other classes of crimes: crimes against humanity and genocide.¹¹

This Chapter aims to trace the development of the criminalization of war crimes under international law and to compare it with the parallel criminalization of crimes (p. 740) against humanity and genocide. It will also examine the legal ingredients of these three classes of international crimes. It will be shown that, while war crimes are intimately connected to international humanitarian law, the same does not hold true for crimes against humanity and genocide. Although they are usually committed in times of armed conflict, crimes against humanity and genocide are internationally criminalized because they constitute a serious and gross infringement of the human rights accruing to all human beings, regardless of their nationality or allegiance.

2 The Criminalization of War Crimes versus the Criminalization of Crimes Against Humanity and Genocide

A. The paths followed

The rationale behind the assertion of individual criminal responsibility under international law for war crimes can be traced back to the eighteenth century, when national criminal codes and military manuals started providing for the right of a belligerent to prosecute and punish its own soldiers for violations of the laws of war.¹² As for war crimes committed by enemy personnel or civilians, it would seem that the power of a belligerent to exercise its criminal jurisdiction was initially limited to the time of the armed conflict and, in any case, only within occupied territories. However, armistice or peace treaties could contain a clause whereby the victorious belligerent imposed upon the defeated states the obligation to surrender alleged war criminals for trial.¹³

World War I abruptly launched the discourse on war crimes in the international arena. Articles 228–9 of the Peace Treaty of Versailles constitute the first clear international recognition of the right of a belligerent party to bring to justice persons belonging to the other belligerents for violations of the laws and customs of war *after* the end of hostilities.¹⁴ Article 227 of the Treaty went so far as to provide for (p. 741) the accountability of the former German Emperor for 'a supreme offence against international morality and the sanctity of treaties'. It is well known that this was an abortive attempt: Wilhelm II was never brought to trial on account of the refusal of the Netherlands to extradite him (on grounds of national law: Dutch legislation allowed extradition only on the basis of a treaty, and the Netherlands was not party to the Versailles treaty; in addition, the offences provided for in Article 227 did not constitute crimes under Dutch law).¹⁵ Furthermore, the high ranking German military officers indicted under Article 228 were never tried by the Allies.¹⁶

The path towards criminalization of war crimes however continued through the establishment of the Nuremberg and Tokyo Tribunals,¹⁷ and the adoption of specific provisions on grave breaches in the 1949 GCs,¹⁸ subsequently supplemented by the relevant provisions in Additional Protocol I.¹⁹ This process culminated, as mentioned above,

with the establishment of the ICTY and the ICTR²⁰ and the subsequent creation of the ICC²¹ and other international or mixed criminal tribunals.²²

The rationale behind the international criminalization of war crimes is clear. It lies in the need to guarantee—also by way of a threat of criminal sanction—that some elementary principles and considerations of humanity are respected in warlike situations, so as to reduce as much as possible the suffering and misery caused by war.

The case of crimes against humanity is slightly different. The path towards their international criminalization is not rooted in national criminal legal systems, as it is (p. 742) the case with war crimes. It started at the international level with the adoption of the Statute of the Nuremberg Tribunal and the ensuing criminal trials. The story is well known: the Allies had to find a way to come to grips with odious crimes committed by the Nazis against Germans, or against the civilian population of the Allies of the Third Reich. These crimes did not fall under the notion of war crimes as understood at that time (war crimes could only be committed against an enemy population, or enemy combatants). Moreover, under traditional international law the treatment by a state of its own citizens or those of Allied countries was a matter pertaining to the ‘internal and external affairs’ of states, and no interference from other states was envisaged or allowed. Crimes against humanity were therefore conceived of as a sort of ‘umbrella’ notion, to be applied if necessary to fill the lacunae left by the notion of war crimes, subject however to an important limitation: these crimes had to be linked to the perpetration of war crimes or crimes against peace, ie they had to be connected with war.²³ However, after these truly international first steps, the notion of crimes against humanity remained ‘dormant’ for a long time, and the process of its international criminalization was never subject to the establishment of traditional mechanisms for criminal repression, as was the case for war crimes through the institution of the notion of grave breaches of the Geneva Conventions. In other words, states never felt it necessary to conclude an international treaty by which they obliged themselves, both to criminalize within their legal systems these crimes, and to coordinate their efforts in the field of criminal repression. On the contrary: some national courts conceived the notion of crimes against humanity as strictly connected to World War II and the punishment of German and Japanese criminals, as if there were no international rule prohibiting crimes against humanity except for the one that had evolved from the Nuremberg Charter.²⁴

Unlike crimes against humanity, genocide was not included in the list of crimes falling within the jurisdiction of the Nuremberg Tribunal (the Holocaust was punished at Nuremberg as part of the wider notion of crimes against humanity in the form of persecution or ‘extermination’). However, the process towards its international criminalization was faster than the process accompanying crimes against humanity, and the adoption in 1948 of the Genocide Convention accelerated this trajectory. True, this Convention, while solemnly proclaiming the international prohibition of genocide, did not directly criminalize genocide. It applied the traditional scheme of repression, by requesting contracting states to criminalize genocide and obliging the territorial state to punish genocide within its legal order. However, Article VI of the Convention went so far as to envisage the future establishment of an international criminal court endowed with jurisdiction over acts of genocide. In addition, the Genocide Convention was rapidly ratified by a large number of states, (p. 743) and the general revulsion against this crime quickly gave rise to a customary rule contemplating genocide, not only as a crime committed by individuals, but also as a very serious international wrongful act of state. This explains why, when the Security Council established the ICTY and ICTR, the definition of genocide was taken verbatim from the Genocide Convention without much discussion, and again inserted in all subsequent instruments instituting international or mixed tribunals for the repression of international crimes. By contrast, at the time of the adoption of the ICTY and ICTR

Statutes the notion of crimes against humanity was still highly controversial, as the subsequent Rome negotiations for the ICC made abundantly clear.²⁵

B. The reasons for the different paths to international criminalization

One can speculate on the reasons why the process of international criminalization of crimes against humanity and genocide was different from that relating to war crimes.

Arguably, for war crimes the 'national' origin of their international criminalization can be explained by taking into account that states had a sort of 'selfish' interest in their criminal repression within their national legal systems. Whatever the humanitarian reasons behind the birth and development of the laws of war, it is a fact that these laws for a long time applied solely within the context of an inter-state relationship (ie they were conceived to regulate international armed conflicts between states). For a long time, no humanitarian reason appeared strong enough to force or convince states to regulate civil strife as well. The notion of war crimes served various purposes: when it applied to national military servicemen, repression of violations of the laws of war served to impose military discipline and to protect the honour of armed forces; with regard to enemy combatants, such repression constituted an effective tool to discourage breaches of the rules of warfare by the enemy belligerent.

The notions of crimes against humanity and genocide emerged from a totally different seed: the concept that states are not the absolute owners of the life, limbs and dignity of their citizens, rather individuals and groups *as such* must be respected in their fundamental rights. At Nuremberg, for the first time in history, they proclaimed the right of the international community to lift the veil of state sovereignty when a state systematically tramples on basic human rights. This was an unexpected revolution. True, the drafters of the Nuremberg Charter carefully tried to confine the (p. 744) notion of crimes against humanity to the historical events of World War II, in order to avoid future interference in their internal affairs by the international community with regard to the treatment of their citizens.²⁶ Two US Military Tribunals sitting at Nuremberg even asserted that the notion of crimes against humanity could apply to extermination through euthanasia only if the victims were *foreigners*!²⁷ A similar cautious development can be seen in the UN Charter. For example, the powers of the new United Nations Organization in matters of human rights were originally limited to the adoption of resolutions of a general nature, while the passing of resolutions condemning a given state for violating human rights was argued to fall within the remit of domestic jurisdiction under Article 2(7) of the UN Charter. Notwithstanding these and other sophisticated attempts to avoid perceived undesirable developments, the seeds of the human rights doctrine had been sown. In the 1990s, this doctrine was embedded enough in the 'conscience' of the international community to allow the notion of individual criminal responsibility for large-scale violations of human rights to flourish. The Rome negotiations on the ICC Statute and the adoption of Articles 6 and 7 of this Statute (on genocide and crimes against humanity) are the latest stage of a process that originated and developed almost entirely at the international level.

3 War Crimes and the Rules of IHL

War crimes are traditionally defined as *serious violations* of rules of international humanitarian law (IHL), involving the individual criminal responsibility of the perpetrator under international law. This definition might appear tautological, since it explains what a crime is by referring to its consequence for the perpetrator, ie the fact that he or she may be criminally accountable. However, the key element in the definition is the reference to the criminal responsibility of *an individual under international law*. This is to underline the 'revolutionary' element of war crimes as violations of IHL as a body of rules belonging to international law. Rules of international law traditionally only address states, and their

violations traditionally involve only the international responsibility of the state on behalf of which an individual has acted, and not the responsibility of the individual himself or herself. In the case of (p. 745) war crimes, the illegal conduct will instead also make the individual who carried it out accountable at the international level.

There is no authoritative list of what violations of IHL constitute war crimes. Rules of IHL usually fail to provide whether their violation is or must be criminalized. Exceptions are the relevant provisions enshrined in the four 1949 Geneva Conventions (GCs) and Additional Protocol (AP) I concerning so-called 'grave breaches'. These provisions expressly indicate the violations of the rules that, in addition to the international responsibility of the party to the conflict, shall entail the criminal responsibility of the individual. In addition, Article 85(5) of AP I expressly clarifies that grave breaches of the GCs and of AP I 'shall be regarded as war crimes'.

Setting aside grave breaches, in order to identify which conduct amounts to a war crime one has therefore to peruse international practice and *opinio juris* to determine whether a customary international law rule provides for the criminalization of a given violation of IHL. The point of departure is whether a violation has been consistently considered a war crime in national legislation and by national courts. There needs to be widespread evidence that states customarily prosecute the violation as a war crime and that they do so because they believe themselves to be acting under a rule of international law. The violation can also be termed a war crime by the Statute of an international criminal court or tribunal. In this case, there exists a strong presumption that the violation of IHL is a war crime under customary international law (in any case, such violation will fall under the jurisdiction of that international criminal court or tribunal). Article 8 of the Rome Statute of the ICC contains a fairly long list of the war crimes which fall within the jurisdiction of the Court. This provision, however, does not codify or crystallize customary international law.²⁸

It is undisputed that not every violation of a rule of IHL constitutes a war crime, but only those that are 'serious'. Violations that do not reach the threshold of seriousness may give rise to international responsibility of the party to the conflict to which the violation can be attributed, but do not constitute war crimes under international law.

A. Classes of war crimes

Since a war crime is a serious violation of a rule of IHL, there cannot be a war crime if there is no armed conflict, since IHL rules apply only in this context. (p. 746)

Traditionally, war crimes proper were held to embrace only violations of international rules regulating international armed conflicts (IACs), ie between states, and not civil wars. After the landmark ICTY Appeals Chamber decision in *Tadić (Interlocutory Appeal)*, it is now widely accepted that serious infringements of the international humanitarian law of non-international armed conflicts (NIACs) may also be regarded as amounting to war crimes proper, if the relevant conduct is criminalized by international law.²⁹

Given the continuing discrepancy between the rules of IHL applicable in IAC and those applicable in NIAC, a particular conduct may be a war crime if committed during an IAC but not if it takes place in the context of a NIAC. For instance, conduct contrary to the IHL rules applicable in occupied territories, or the rules protecting prisoners of war and other 'protected persons' as expressly defined by the GCs, can constitute war crimes only in an IAC (since the relevant rules are not applicable in NIAC). Setting aside these clear-cut examples, however, one can safely assume that in the matter of war crimes the traditional distinction between IAC and NIAC has become obsolete, since illegal conduct that can amount to war crimes is almost the same in both kind of armed conflict.³⁰

In this respect, therefore, Article 8 of the Rome Statute of the International Criminal Court (ICC) must be considered as more restrictive than the applicable rules of customary international law. In listing war crimes submitted to the jurisdiction of the ICC, it maintains the distinction between IAC and NIAC and, within it, it further distinguishes between conduct contrary to the Geneva Conventions and 'other serious violations of the laws and customs' applicable either in IAC or in NIAC. In other words, Article 8 refers to four classes of war crimes, on the basis the character of the armed conflict, and the origin of the norm of IHL which was violated. The list of war crimes in IAC comprises: (i) grave breaches of the GCs; and (ii) 'other serious violations of the laws and customs applicable in international armed conflict' (mainly the rules on the means and methods of warfare, principally codified in the Hague Conventions and AP I). The list of war crimes in NIACs consists of: (i) serious violations of Common Article 3 of the Geneva Conventions; (ii) 'other serious violations of the laws and customs applicable in armed conflicts not of an international character'.

The Rome Statute's list of war crimes in IAC is considerably longer than the one applicable to NIAC. For instance, with regard to the IHL rules on prohibited methods of warfare, Article 8 fails to include in the list of war crimes committed in NIAC (p. 747) illegal practices such as attacks directed against illegal objects, attacks causing excessive incidental death or injury of civilians, attacks against undefended localities, and so on, that are practices commonly considered as war crimes under customary international law in a NIAC. In addition, since the wording used to describe the illegal acts constituting certain war crimes is taken verbatim from the relevant provisions of the Geneva Conventions, there is a clear discrepancy between the crimes committed as grave breaches in an IAC against protected persons and the crimes committed as serious violations of Common Article 3 in a NIAC against persons not taking part in the hostilities. For instance, while Article 8(2)(a)(iii) refers to the war crime of '[w]ilfully causing great suffering, or serious injury to body or health' to a protected person in IAC, the corresponding war crime in NIAC is that of '[v]iolence to life and person, in particular [...] cruel treatment'. These discrepancies therefore oblige the ICC to classify the nature of the armed conflict, before formulating a specific charge against a suspect. This task can prove extremely difficult in some circumstances, as evidenced by the debate on the classification of armed conflicts involving a non-state armed group operating autonomously from both within a state and a third state.

B. The seriousness of the violation and the distinction between war crimes of conduct and war crimes of result

As noticed above, not every violation of a rule of IHL necessarily constitutes a war crime, but only those involving a degree of 'seriousness'. In the words of the ICTY Appeals Chamber in *Tadić*, a war crime 'must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim'.³¹ Under this definition, war crimes are therefore *crimes of result*. War crimes consisting in *crimes of conduct*, ie those punishable simply on account of the illegality of the behaviour, irrespective of any prejudicial consequence, seem therefore to be excluded from the notion of war crimes propounded by the ICTY.

In modern criminal law, a crime does not consist only of an illegal act (*actus reus*). The law also requires that the individual carries out the illegal conduct with a 'criminal mind', which constitutes the so-called mental element or *mens rea* of a crime. The ICTY Appeals Chamber decision mentioned above does not clarify the (p. 748) mental element necessary for a serious violation of a rule of IHL to be a war crime. The mental element, however, is sometimes specified by the international rule prohibiting a certain conduct: for instance, Article 130 of GC III on prisoners of war enumerates, among the 'grave breaches' of the Convention, the 'wilful' killing of prisoners of war. When this is not the case, ie when the relevant international rules of IHL do not provide, not even implicitly, for a subjective element, it would seem appropriate to hold that what is required is intent or, depending

upon the circumstances, recklessness, as prescribed in most legal systems of the world, for the illegal conduct to be a crime under municipal law (murder, rape, torture, destruction of private property, pillage, etc).

It would therefore be incorrect to believe that the individual who breaches a rule of IHL commits *ipso facto* a war crime. Further elements must be added, namely: (i) the conduct must be contrary to a rule protecting fundamental values; (ii) the breach must have caused grave consequences to the victims; (iii) the illegal conduct must have been carried out with the requisite criminal mind, that can be expressly or implicitly provided by the rule of IHL that was breached, or be identified through other means.

In the light of the above, it is worth emphasizing, contrary to what may appear at first sight, that some of the war crimes listed in the Rome Statute are not mere reformulations of 'grave breaches' as included in AP I. An obvious example is the war crime of attacking civilians in IACs. Under Article 85(3) of AP I this crime must be committed 'wilfully' and must cause 'death or serious injury to body or health'.³² In other words under AP I the war crime of attacking civilians is a crime of result (because it requires that a harmful event is caused by the illegal conduct), that must be committed with a given degree of intent (wilfulness). According to the ICTY case law, that adheres to the relevant ICRC Commentary on Article 85(3) of AP I,³³ wilfulness describes a mental element that comprises not only of knowledge and intention (the so called *dolus directus*), but also recklessness or the conscious awareness that one's behaviour will probably result in a violation of a criminal rule.³⁴ However, this (p. 749) relatively low *mens rea* required by Article 85(3) of API is counter-balanced by a more stringent *actus reus*, in that an attack against civilians amounts to a war crime only if it causes death or serious injury to body and health.

Article 8(2)(b)(i) (relating to IAC) of the Rome Statute takes a different approach. It provides that there is a war crime under the jurisdiction of the ICC of 'intentionally launching attacks against civilians', without providing for the need of any harmful result.³⁵ Clearly, under the Rome Statute, the crime of attacking civilians is a crime of conduct (ie a crime that is completed by the mere launching of an attack against a civilian population or individual civilians): no resulting death, injury, or damage is required. Additionally, this differing objective element is accompanied by the adoption of a required *mens rea*, namely 'intentionality', which excludes recklessness.³⁶ Indeed, whether or not the *mens rea* required for the war crime of attacking civilians under the Rome Statute corresponds to the general subjective element set out by Article 30 of the Rome Statute,³⁷ it could certainly not be maintained that attacks directed at specific military targets that nonetheless hit civilians due to a conscious disregard of the necessary measures of precaution can be considered an attack intentionally directed against civilians. Once a military attack is directed against military objectives, any subsequent casualty caused to civilians must be assessed according to the proportionality rule,³⁸ and the separate crime of attacking civilians is no longer at issue.³⁹

The differing *actus reus* and *mens rea* elements within the Rome Statute that correspond to grave breaches in AP I (at least as interpreted by the ICTY for the (p. 750) requisite *mens rea*) are therefore not without consequences. In practice they might allow for a greater application of the potential defence of mistake of fact.⁴⁰ Attacks carried out against military targets that instead, due to a reasonable error, hit civilians will not be considered criminal. Similarly, attacks where the mistake concerns whether or not the target is a military objective will not be punishable under the Rome Statute.⁴¹ Considering that many instances of attacks against civilians are justified by the responsible party invoking a fatal error on the facts, one cannot fail to observe that the relevant provisions of the Rome Statute appear

to be too restrictive from the point of view of the enhanced protection of victims of armed conflict.

C. The nexus with the armed conflict

Not all crimes committed during an armed conflict constitute war crimes. It is widely held in the case law and legal literature,⁴² that in order to qualify as a war crime, the criminal conduct must be closely related to the hostilities, ie it must have a 'nexus' with the armed conflict. The nexus between the criminal conduct and the armed conflict is also demanded by the Elements of Crimes of the ICC, for each war crime listed in Article 8 of the Rome Statute.

The requirement of such a nexus clearly serves to distinguish between war crimes and 'ordinary' criminal conduct that falls under the law applicable in the relevant territory. It applies in particular to offences committed by civilians against other civilians or against combatants, although courts have also required the link, or nexus, with an armed conflict in the case of crimes perpetrated by members of the armed forces. In addition, it should be noted that identifying a nexus between a criminal offence and an armed conflict is relatively easy in the case of an *international* armed conflict: there, normally two or more states face each other, and offences committed by combatants or civilians from one party to the conflict against combatants and civilians from the opposing party will usually be considered as 'linked' to the armed conflict. In contrast, things are less clear in a *non-international* armed conflict, in particular with respect to crimes committed by civilians not taking part in hostilities against other civilians not taking part in hostilities. Here the question of identifying whether the criminal conduct was related to the armed conflict might prove to be particularly challenging, as the case law of the ICTR evinced in a string of cases.⁴³(p. 751)

The ICTY and ICTR considered the following criteria to be of assistance when assessing whether an offence qualifies as a war crime: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of, or in the context of, the perpetrator's 'official duties'.⁴⁴

The 'nexus' standard is objective in linking the armed conflict *with the crime*, not the criminal. The fact that the offender is a soldier and the victim a civilian not taking part in the hostilities does not, in and of itself, provide the necessary link. Rather, it is the inference regarding the conduct of the soldier that might assist in establishing the link. In other words, the conduct is objectively a war crime—even if in the nexus can only be inferred by looking at the personal (subjective) qualification of the perpetrator and the victim. The application of this standard avoids two unwanted outcomes. First, opportunistic crimes that are unrelated to the conflict will not be characterized as war crimes merely because of the existence of an armed conflict (eg where a civilian who holds a personal vendetta against his neighbour takes advantage of lawlessness created by the conflict to murder his neighbour). Secondly, it is not necessary to inquire into the state of mind of the offender in order to establish a nexus.

4 Crimes Against Humanity

Crimes against humanity were defined for the first time by the Charter of the Nuremberg Tribunal as follows:

murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the [Tribunal], whether or not in violation of the domestic law of the country where perpetrated.⁴⁵

(p. 752)

The inclusion of this category of crimes within the jurisdiction of the Tribunal had the main purpose of allowing prosecution of acts of barbarity committed by the Nazis against their own population (Jews, trade union members, social democrats, communists, members of the church) or those of their allies or of the annexed countries. As such, those crimes could not come under the notion of war crimes, for the latter, in the context of a war such as World War II, only embraced crimes committed against the enemy civilian population or enemy combatants. In addition, some of those acts of barbarity had been committed even before the war started, under the dictatorship established by Hitler since he came to power.

The inclusion of crimes against humanity in the Charter of the Nuremberg Tribunal marked a great advance. After the failed attempt in the first decades of the nineteenth century to assert the international criminal nature of mass crimes committed by governments against their own population,⁴⁶ the international community widened the category of acts considered of 'meta-national' concern. This category came to include all action running contrary to the inherent dignity and value that ought to attach to any human being. The Nuremberg Charter showed that in some special circumstances there were limits to the omnipotence of the state in the way it treated its own citizens. The seeds of the international protection of human rights were thus planted.

The definition of crimes against humanity provided in the Charter of the Nuremberg Tribunal was repeated almost verbatim in the Charter of the Tokyo Tribunal⁴⁷ and, with some important modifications, in the law passed by the four Occupying Powers in Germany for the prosecution of German war criminals in the respective occupying zones (ie Control Council Law No 10).⁴⁸ In addition, on 11 December 1946 the UN General Assembly unanimously adopted a Resolution 'affirming' the principles of the Charter of the Nuremberg International Tribunal and its judgment. On 13 February 1946 it further passed Resolution 3(1) recommending the extradition and punishment of persons accused of the crimes provided for in the Nuremberg Charter. These Resolutions illustrate that the category of crimes against humanity was in the process of becoming part of customary international law.

Despite this momentum, no international treaty was adopted to provide for the express criminalization under international law of this class of crimes. Arguably, this was because the international community preferred to focus on what was perceived at that time as the paradigmatic example of crimes of against humanity, ie genocide. As aptly noted, the 'early international focus on genocide' through the (p. 753) adoption of the 1948 Genocide Convention, 'resulted in the fragmentation of the law of atrocity crimes and delayed the process of shaping the norm of crimes against humanity'.⁴⁹

As a result of the absence of a convention that could have crystallized the definition of crimes against humanity under customary international law, or at least influenced its development, the clarification of the legal ingredients of this class of crimes was achieved through the establishment of the ICTY, the ICTR, and especially the ICC. The definition now enshrined in Article 7 of the Rome Statute was the object of intense negotiations, in particular as regards the so-called *chapeau* of the provision setting forth the contextual element of the crime. Being included in a treaty to which a large number of states are now

parties, it constitutes an indispensable point of reference for any discussion on crimes against humanity.

A. The prohibited conduct and the mental element

Crimes against humanity consist of two distinct categories of conduct, also described as ‘underlying offences’, that are usually referred to as ‘murder-type’ offences and ‘persecution-type’ offences. This distinction serves to underline the fact that the acts that can amount to crimes against humanity are either criminal offences in national legal systems, such as murder; or they can be acts that may not be criminal or may not even be prohibited in national legal systems, but are committed on discriminatory grounds to persecute a specific group of people.

The list of the ‘murder-type’ offences that can amount to a crime against humanity contained in the Rome Statute is longer than the ones contained in the Statutes of other international criminal courts and tribunals. In the Charter of the Nuremberg and Tokyo Tribunals the list comprised murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population. Control Council Law No 10 added imprisonment, torture, and rape, while the ICTY and ICTR Statutes simply cumulatively list all the preceding acts. The Rome Statute, by contrast, adds crimes such as ‘forcible transfer of population’, ‘forced pregnancy’, ‘severe deprivation of physical liberty in violation of fundamental rules of international law’, ‘sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity’, ‘enforced disappearance of persons’, and ‘the crime of apartheid’. In addition, the notion of ‘any other inhumane act’, which harks back to Article 6(c) of the Statute of the Nuremberg Tribunal, is given looser contours in the Rome Statute. By following the interpretation already given by the ICTY,⁵⁰ Article 7(1)(k) provides that (p. 754) crimes against humanity include ‘other inhumane acts [of a character similar to the offences mentioned in Article 7] and causing great suffering or serious injury to body or to mental or physical health’. In spite of its relatively loose character, the offence is important for it may function as a ‘residual clause’ covering and criminalizing instances of inhuman behaviour that do not neatly fall under any of the other existing categories of crimes against humanity.

There is no comprehensive enumeration of the persecution-type offences constituting a crime against humanity. The ICTY Appeals Chamber clarified that persecution consists of ‘an act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law’.⁵¹ A similar definition is contained in Article 7(2)(g) the Rome Statute, according to which persecution means ‘the deprivation of fundamental rights contrary to international law’. The persecutory conduct must be carried out on discriminatory grounds. Here again the Rome Statute is more expansive compared to the constitutive instruments of preceding international courts and tribunals: to the political, racial, and religious grounds already mentioned in the latter, it adds national, ethnic, cultural, and gender grounds, or ‘other grounds that are universally recognized as impermissible under international law’.⁵² The Rome Statute, however, requires that persecutory conduct is committed in connection with a murder-type offence of crimes against humanity listed in Article 7 or any crime within the jurisdiction of the Court (ie war crimes, genocide, and aggression). It thus narrows considerably the reach of the ICC jurisdiction over discriminatory conduct with respect to the ICTY and ICTR. The two ad hoc Tribunals did not consider the connection with murder-type offences or with other international crimes to be a legal ingredient of the crime of persecution under customary international law.

The conduct constituting crimes against humanity must be carried out with the awareness by the perpetrator of the broader context into which his or her crime fits.⁵³ In addition, the perpetrator shall possess the criminal mental element appropriate for the underlying offence under domestic or international law (usually intent, but sometimes recklessness). When crimes against humanity take the form of persecution, another mental element is also required: a persecutory or discriminatory animus, ie the intent to subject a person to discrimination, so as to bring about great suffering or injury to that person.(p. 755)

B. The severance of the link with armed conflict and the contextual element

Article 6(c) of the Charter of the Nuremberg Tribunal provided that the Tribunal had jurisdiction over crimes against humanity committed before or during the War, but at the same time it linked the definition of crimes against humanity to the other two categories of offences under the jurisdiction of the Tribunal. Article 6(c) actually required crimes against humanity to be perpetrated 'in execution of or in connection with' war crimes or crimes against peace. Since it was only within the context of a war, or of the unleashing of aggression, that these crimes could be prosecuted and punished, the Tribunal decided that such a link certainly existed after 1 September 1939, which was when the War had started. It therefore decided not to take into consideration crimes committed before that date.⁵⁴

After 1945 the link between crimes against humanity and war was gradually dropped. For instance, the definition of crimes against humanity contained in Article II(1)(c) of Control Council Law no 10 did not require crimes against humanity to be committed in connection with war crimes or crimes against peace. Similarly, when passing criminal legislation on crimes against humanity, some countries did not link crimes against humanity to war.⁵⁵ By contrast, the definition of crimes against humanity contained in the Statute of the ICTY refers to crimes against humanity committed in armed conflict. This limitation prompted the ICTY Appeals Chamber to clarify in its early case law that this requirement was not needed under customary international law.⁵⁶ The question of whether crimes against humanity had to be connected to an armed conflict was discussed at the Rome Conference. Some delegations considered it necessary to include such a link in the definition of crimes against humanity in the Rome Statute, but the majority of the delegations were of a different opinion in light of the post-Nuremberg developments.⁵⁷ Article 7 of the Rome Statute therefore drops any reference to armed conflict in the definition of crimes against humanity, and codifies the customary international rule that these crimes against humanity can be committed in time of peace.(p. 756)

It is a fact, however, that the underlying offences comprising crimes against humanity are a frequent occurrence in war. Since they consist of offences that can also amount to war crimes, the need to distinguish crimes against humanity from war crimes and to clarify their mutual relationship therefore arises. To identify whether an offence perpetrated during an armed conflict is a crime against humanity, the key element is whether it belongs to a pattern of widespread or systematic violence against a civilian population. Crimes against humanity were included in the Charter of the Nuremberg Tribunal because the offences perpetrated during the Nazi era were not isolated or sporadic events, but they were part of a widespread or systematic practice carried out in furtherance of the Nazi policy. The offences punishable under the Charter as crimes against humanity were therefore clearly of a *large-scale* or *massive nature*. Subsequent case law, both at the national and international level, has consistently borne out that this is a major feature of the crimes.⁵⁸ Article 7(1) of the Rome Statute confirms this feature, and demands that for acts to amount to crimes

against humanity they must be 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.⁵⁹

The need for this contextual element clarifies when an offence committed in the course of an armed conflict that amounts to a war crime also constitutes a crime against humanity, and *vice versa*. Therefore, when a soldier kills a group of innocent civilians in the course of a NIAC, this crime can constitute a war crime if it is committed wilfully and is linked to the armed conflict. It can, however, also amount to a crime against humanity if the killing forms part of a widespread or systematic practice carried out against the civilian population in the course of the armed conflict, and the perpetrator acts in the knowledge of such practice. In such a case, he will be accountable for *both* the war crime of attacking civilians and the crime against humanity of murder. This on the basis of the doctrine of *concoirs ideal d'infractions* (cumulative convictions), according to which: should an act breach two different criminal rules protecting two different set of values and interests, the perpetrator is (p. 757) accountable for both breaches.⁶⁰ By contrast, the isolated and intentional killing of a civilian in an occupied territory by a soldier of the Occupying Power can amount to a war crime, but the same act will not amount to a crime against humanity absent the contextual element described above. Similarly, when a given offence cannot constitute a war crime as the conduct is not a breach of a rule of IHL, the commission of a crime against humanity cannot be excluded. What matters is that the act is an underlying offence within crimes against humanity, and that the act forms part of a widespread or systematic pattern of violence against a civilian population, with knowledge of such practice. One example could be that of the killings of civilians during an armed attack against a military objective that does not contravene the precautionary and proportionality rules under IHL. The killings cannot amount to war crimes, for they do not violate a rule of IHL, but they might still constitute a crime against humanity if they belong to a pattern or practice of violence against a civilian population. For instance, if the 'proportionate collateral damage' inflicted on the civilians are part of a pattern of violence against the civilian population living in a given geographical area.

Finally, in time of peace, the contextual element of crimes against humanity serves to establish whether an offence is a crime against humanity or eventually 'only' amounts to a municipal offence. This legal criterion is indeed crucial to confine the 'intrusion' of international law into criminal matters to serious situations of gross violations of human rights, so as 'to reserve' the criminalization of other violations to domestic criminal legislation.

5 Genocide

The destruction of, or the attempt to destroy, entire groups, whether national, racial, religious, cultural, and so on, is by all evidence an ancient phenomenon in the history of mankind. The word 'genocide', which etymologically describes it, however, was only coined in 1944, by the Polish lawyer R. Lemkin.⁶¹ In just a few short years the term 'genocide' has spread and asserted itself at the authoritative description of an age-old behaviour.⁶² The relatively modern construct of the term explains (p. 758) why the word 'genocide' itself, which is now commonly used as well to describe the Holocaust of the Jews before and during World War II, cannot be located within the Statute of the International Military Tribunal in Nuremberg (IMT), nor in its final judgment.⁶³ As we have seen, in fact the Holocaust perpetrators were punished by the IMT using charges of extermination and persecution, which constituted two of the underlying offences of crimes against humanity.

On 9 December 1948, in the wake of the Nuremberg trial, the UN General Assembly adopted the Genocide Convention,⁶⁴ whose substantive rules may largely be considered as declaratory of customary international law.⁶⁵ Among these rules, one can certainly mention Article II, which provides the legal definition for what was until that time a crime without a name.⁶⁶ Nonetheless, the existence of a conventional definition of the crime of genocide has

rendered the evolution of a parallel, and potentially wider, definition through customary international law more (p. 759) difficult. The 'rigidity' of the definition of genocide, however, has been softened by way of judicial interpretation. In particular, the International Criminal Tribunal for Rwanda (ICTR) has adopted specific criteria to widen the categories of groups protected by the definition, and has considered that some acts, such as rape, can fall within the purview of the enumerated genocidal acts.

A. The genocidal acts

The conduct that may amount to genocide, as pointed out above, is contained in Article II of the Convention which exhaustively lists the following acts: (a) killing members of the group; (b) causing seriously bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

The ICTR and the ICTY have both contributed to clarifying the scope of each of these notions. The case law of the two Ad Hoc Tribunals clarifies that the killing under paragraph (a) is equivalent to 'murder', which requires *intentional* killing.⁶⁷ Various arguments have been put forward to ground this interpretation, including the fact that the French text refers to *meurtre* and therefore clearly excludes unintentional homicide.

As for the act of causing harm under (b), it does not require that the harm caused be permanent and irremediable,⁶⁸ but '[i]t must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life'.⁶⁹ The harm caused can be bodily *or* mental, and must be 'serious'. The seriousness of the harm 'must be assessed on a case-by-case basis and with due regard for the particular circumstances'.⁷⁰ In the ICTR case law, serious bodily harm has been interpreted as 'harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses'.⁷¹ With respect to serious mental harm, it has considered that 'minor or temporary impairment of mental faculties' would not meet the seriousness threshold.⁷² Serious bodily or mental harm can also be caused by rape and other acts of sexual violence.⁷³(p. 760)

'Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', provided under (c), includes 'slow death measures', such as 'lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion'.⁷⁴ It is not required that those conditions of life actually result in the physical destruction of the group, in whole or in part; it is only requested that they are 'calculated to bring about its physical destruction', namely that they intended to achieve this result.⁷⁵

The fourth prohibited act that can amount to genocide, namely 'imposing measures intended to prevent births within the group', is intended to cover conduct whose aim is to prevent the biological reproduction of the group. This result can usually be achieved through the sterilization of women (when the transmission of the distinguishing features of the group is matriarchal, as it was in the case of the sterilization of Jewish women). It can also be accomplished through the rape of women of the group by members of another group, when rape aims at changing the ethnic composition of the group whose characteristics are transmitted following the patriarchal line. Other measures intended to achieve the same objective can include segregation of sexes, prohibition of marriage, or forced birth control.⁷⁶ As in the preceding hypothesis, it is not required that the measures achieve the desired goal, it is only necessary that they are carried out for that particular purpose.⁷⁷

B. The mental element

As in the case of crimes against humanity, there is a need to distinguish between first, the mental element required for each of the acts that may amount to genocide, and then, secondly, the specific mental element which is necessary to consider that the conduct amounts to genocide.(p. 761)

All the prohibited acts must be carried out *intentionally*, ie they require *intent* on the part of the perpetrator. In addition to requiring intent with regard to the prohibited act, an additional specific mental element is required, namely 'the intent to destroy, in whole or in part' one of the enumerated group 'as such'. In other words, although the victims of the prohibited conducts are individuals, it is against the group as such to which the victims belong that the perpetrator must ultimately direct his or her genocidal activity.⁷⁸ This is the specific intent of genocide, also known as genocidal intent. It is an aggravated form of intent that does not demand realization through the material conduct, but that the realization is nonetheless pursued by the perpetrator. In other words, it is not required that the perpetrator actually manages to destroy a member of a protected group by carrying out one of the five acts prohibited under the Convention. It is only necessary that the perpetrator harbours the specific intent to destroy the group while carrying out one of the prohibited acts, regardless of whether by accomplishing the act the intended ultimate objective is achieved. The requirement of this specific intent, therefore, has a preventative function, since it allows the criminalization of genocide before the perpetrator achieves the actual destruction of the group.

The question, however, arises whether the specific intent harboured by the perpetrator has to be 'realistic'; must the perpetrator believe that the intended goal can really be achieved through the commission of one of the prohibited acts? The case law of the ICTR and ICTY has not expressly tackled this issue. In *Mpambara*, however, an ICTR Trial Chamber has stressed that 'even a single instance of one of the prohibited acts' can amount to genocide, 'provided that the accused genuinely intends by that act to destroy at least a substantial part of the group'.⁷⁹ The reference to the *genuine* intent to destroy the group is explained by the Trial Chamber in a note to the judgment: 'The perpetrator of a single, isolated act of violence could not possess the requisite intent based on a delusion that, by his action, the destruction of the group, in whole or in part, could be effected'.⁸⁰ It seems therefore that for the Trial Chamber the genocidal intent can be 'genuine' only to the extent that the perpetrator realistically considers it possible that the destruction of the group can eventually be achieved.(p. 762)

The genocidal intent of the perpetrator must be directed towards a group. Under Article II of the Genocide Convention, the list of the protected groups is exhaustive and it comprises national, ethnical, racial, or religious groups. During the preparatory work on the Genocide Convention, an attempt was made also to include in the list cultural and political groups, but to no avail. The exclusion was justified by the volatile membership of these two categories of groups and the desire to afford protection to groups characterized by a certain degree of stability.⁸¹ The ICTR has tried to identify the distinguishing features of each protected group, and has affirmed that: (i) a national group is a group of people 'who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties';⁸² (ii) a racial group is made up by members who possess 'hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors';⁸³ (iii) an ethnic group is 'a group whose members share a common language or culture',⁸⁴ and (iv) a religious group is made by members who share 'the same religion, denomination or mode of worship'.⁸⁵ It is important to stress, however, that the reference to the four enumerated groups is made to the groups as social entities. It would therefore be useless to try to describe the protected groups by applying

rigorous scientific or objective notions, also because by so doing one could find that some groups do not scientifically and objectively exist.⁸⁶

It is perhaps because a particular group can be deemed to exist as a national, racial, ethnic, or religious group on account of the perception by the community, that the question of the identification of a given group, as a group protected by the prohibition of genocide, has eventually been solved by applying a subjective test, accompanied by the existence of objective elements. Thus, in the case of the attacks against the Tutsis in Rwanda, the ICTR considered they constituted an *ethnic group*, since the official classifications referred to them as an ethnic group and the Rwandans themselves, without hesitation, answered questions regarding their ethnicity.⁸⁷ Similarly, the International Commission of Inquiry on Darfur, found that the members of the tribes attacked in Darfur constituted an ethnic group distinct from that of the attackers on account of the self-perception of the victims as well (p. 763) as the attackers that they were two different ethnic groups, namely the 'Africans' as opposed to the 'Arabs'.⁸⁸

The genocidal intent must be directed at one of the listed groups 'in whole or in part'. This means that it is not required that the perpetrator seeks to destroy the group in its entirety, since an intent to attain only a 'partial' destruction would suffice. It is, however, not clear what 'in part' means exactly. If one applies a quantitative approach 'in part' can describe the numeric size of the group with respect to its totality. By contrast, if one uses a qualitative approach, the intrinsic characteristic of the selected part of the group would count, ie the leadership of the targeted group. In any case, it has been contended that 'in part' seems to mean 'a substantial part'⁸⁹ of the group, and that both a quantitative and a qualitative approach can be used to establish whether or not part of the targeted group constitutes a substantial part.⁹⁰

Finally, the genocidal intent must aim at the destruction of the group 'as such'. This requirement makes it clear that the ultimate intended victim of genocide is the group, whose destruction is sought by the perpetrator through carrying out the prohibited acts against its individual members or the group itself.⁹¹

C. Is the existence of a genocidal policy a legal ingredient of the crime of genocide?

The word genocide reminds us of the extermination of thousands, if not millions of people, on account of their membership in a particular group and in the pursuance of a state policy. The definition of genocide enshrined in the Genocide Convention, however, does not expressly require the existence of such a policy, and as a matter of fact does not even consider the number of the victims of the prohibited acts as relevant. The fact that historically genocide coincides with the actual destruction of a protected group, carried out in furtherance of a genocidal policy, has not been mirrored in the legal definition of genocide, which is aimed at punishing some enumerated acts as genocide on account of the specific intent harboured by the perpetrator. The ICTR and the ICTY have clearly confirmed this view,⁹² although (p. 764) they have admitted that the existence of a genocidal plan may be useful to establish whether the perpetrator of one of the prohibited acts of genocide possesses the required genocidal intent.⁹³

Some distinguished commentators consider this stand to be incorrect and argue that a contextual element, in the form of genocidal campaign, or at least of a pattern of collective violence against the group, is necessary.⁹⁴ To bolster this proposition, it is maintained that it would be unrealistic for a single individual to aim at the destruction of a group; therefore the genocidal intent must perforce be directed to the result of a collective endeavour to which the single individual contributes.⁹⁵ This view has also been echoed in the case law.⁹⁶ It also finds some support in the Elements of Crimes of the International Criminal Court (ICC), according to which the conduct must take place 'in the context of a manifest pattern

of similar conduct directed against the group or was conduct that could itself effect [the] destruction [of the group]’.

As is clear, the question of the need for the existence of a genocidal policy is in fact closely intertwined with whether the specific intent to destroy one of the protected group, in whole or in part, must be ‘genuine’ (to use the expression of the ICTR Trial Chamber in *Mpambara*). The existence of a genocidal policy or campaign against the targeted group will make it possible for the perpetrator to form a ‘realistic’ intent to attain the destruction of the group; the conduct of the perpetrator will in fact aim at the same result pursued by others, thus creating a genuine threat to the existence of the group.

Nonetheless, it would be incorrect to conclude that a genocidal policy or campaign is one of the legal ingredients of genocide. Even admitting that historically genocide has been perpetrated within a genocidal context, still it is theoretically possible that (p. 765) a lone perpetrator may realistically aim at the destruction of a targeted group in the absence of such a context. An example is that of the individual who possesses a weapon of mass destruction. Another example is the attack, by a single individual, against the leadership of the group that may realistically endanger its existence at least in part.

It is on account of these considerations that one may perhaps understand why the ICC Elements of Crimes provides, with respect to genocide, that the conduct either must take place in the context of a manifest pattern of similar conduct directed against the group, *or* must be of a kind that *could itself effect* the destruction of the targeted group. If a *single* act may pose a concrete risk to the existence of the group, regardless of the existence of a genocidal policy, then the act carried out by the perpetrator could amount to genocide.

6 Concluding Remarks

Writing ‘under the strain of military service’ during World War II, Manfred Lachs could not perhaps have foreseen the tremendous development of international law in the matter of criminal responsibility of individuals for war crimes and other serious offences against international law. This development, which started with the trials at the Nuremberg and Tokyo Tribunals, culminated with the establishment of the ICTY and the ICTR by the UN Security Council and the adoption of the Rome Statute of the ICC, and is still under way. The international community has now begun to enforce its criminal prohibitions through international or mixed international courts and tribunals, that directly apply international criminal rules. The *jus puniendi* has now ceased to be an exclusive state prerogative; furthermore, it is exercised at the international level on behalf of the international community as a whole. Plainly, states can still prosecute and punish individuals who engage in these criminal acts. However, the current exercise of national criminal jurisdiction in the field of war crimes, crimes against humanity, and genocide can better be described as a judicial activity performed for the international community as such, rather than as a way of exercising sovereign power.⁹⁷

The principle that ‘crime does not pay’ is now firmly embedded in international law. And, as Manfred Lachs envisaged, ‘[i]t is, therefore, our task, the task of those who are the guardian of law, to make it work’.⁹⁸

Footnotes:

¹ M. Lachs, *War Crimes. An Attempt to Define the Issues* (London: Stevens & Sons, 1945), 102.

² The Charter of the International Military Tribunal at Nuremberg was signed on 8 August 1945 by France, the United Kingdom, the United States, and the USSR after very difficult negotiations relating to the list and definition of the crimes to be subject to the jurisdiction of the Tribunal, as well as with regard to the rules of procedure and evidence it had to follow. The London Charter conferred on the Nuremberg Tribunal jurisdiction over three classes of crimes: crimes against peace, war crimes, and crimes against humanity.

³ See for instance G. Manner, 'The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War', 37 *AJIL* (1943) 407.

⁴ The Tokyo Tribunal was established in January 1946, by virtue of a Decree issued by the US General D. MacArthur to implement amongst others Art 10 of the Potsdam Declaration, which provided that 'stern justice' was to be 'meted out' to all war criminals. Its Statute was very similar to that of the Nuremberg Tribunal and conferred on the Tokyo Tribunal jurisdiction over crimes against peace, war crimes, and crimes against humanity.

⁵ Article 8 of the Charter of the Nuremberg Tribunal provided: 'The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires'. In the same vein, see Art 6 of the Charter of the Tokyo Tribunal.

⁶ Article 7 of the Charter of the Nuremberg Tribunal provided: 'The official position of the defendants, whether as Heads of States or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment'. The same provision, slightly changed, can also be found in Art 6 of the Charter of the Tokyo Tribunal: '[N]either the official position, at any time, of an accused, [...] shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstance may be considered in mitigation of punishment if the Tribunal determines that justice so requires'.

⁷ The Security Council established the ICTY with Resolution 827 of 25 May 1993, following consideration of the Secretary-General's Report (S/25704, 3 May 1993). In this Resolution the Security Council determined that the situation in the former Yugoslavia, and in particular in Bosnia and Herzegovina—'where there were reports of mass killings, massive, organized and systematic detention and rape of women and [...] the practice of ethnic cleansing'—constituted a threat to international peace and security under Ch VII of the UN Charter. The ICTR was established in a similar fashion to the ICTY in response to the civil war and genocide in Rwanda. The Security Council adopted the Statute of the ICTR by Resolution 955 of 8 November 1994, after having determined that 'this situation continues to constitute a threat to international peace and security'.

⁸ This was the statement of the US Delegation. For the debate, see *Diplomatic Conference of Geneva, Verbatim Report of the Twenty-first Meeting*, 30 July 1949 (CDG/PLEN/CR.21), 10-11.

⁹ This is an essential feature of the grave breaches: under the GCs, any contracting state is obliged to search for and bring to trial (or alternatively to surrender to a requesting state showing a *prima facie* case) any person suspected or accused of a grave breach (see Arts 49/50/129/146, para 2, of the GCs). This is what is usually known as the 'mandatory system of universal criminal jurisdiction' over grave breaches.

¹⁰ Article 49/50/129/146, para 1, of the GCs, according to which: 'The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article'.

- ¹¹ The list of international crimes directly criminalized under customary international law is uncertain, but there is general agreement that it includes at least war crimes, crimes against humanity, and genocide.
- ¹² M. Bothe, 'War Crimes', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome of Statute of the International Criminal Court. A Commentary*, vol I (Oxford: Oxford University Press, 2002), 382.
- ¹³ See UN War Crimes Commission, *History of the UN War Crimes Commission and the Development of the Laws of War* (1948), 29–30.
- ¹⁴ Article 228 of the Treaty of Versailles provided as follows: 'The German Government recognizes the right of the allied and associated powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war [...]'. Under Art 229, persons charged with war crimes against the nationals of one of the Allied and Associated Powers, should have been brought before the military tribunals of the relevant Power, while persons accused of war crimes against nationals of more than one of these Powers should have been brought before military tribunals composed of members of the military tribunals of the Powers concerned. It should be noted that these articles only deal with violations of law and customs of war; the American view prevailed and no reference was made to the 'laws of humanity'.
- ¹⁵ See E. Decaux, 'Le statut du Chef d'État déchu', XXVI *AFDI* (1980), 109.
- ¹⁶ Germany refused to surrender the 896 persons requested by the Allies (among those persons there were many senior military and naval officers). As a compromise, it was decided that instead of handing the accused persons over to the Allies, the German Government would have to bring to trial those persons before the Supreme Court of Leipzig. Only 12 out of the 45 persons, against whom the most serious charges had been brought, were tried by the Leipzig Court (see UN War Crimes Commission (n 13), 46–52).
- ¹⁷ See Art 6(b) of the Charter of the Nuremberg Tribunal and Art 5 (b) of the Charter of the Tokyo Tribunal, conferring on both Tribunals jurisdiction over war crimes.
- ¹⁸ See Art 50/51/130/147 of GCs.
- ¹⁹ See Art 11 and Art 85 of AP I.
- ²⁰ Both Tribunals have jurisdiction over war crimes: see Arts 2 and 3 of the ICTY Statute and Art 4 of the ICTR Statute.
- ²¹ The ICC was established by virtue of the Rome Statute, adopted in Rome on 17 July 1998. Its jurisdiction includes war crimes, as defined in Art 8 of the Statute.
- ²² For instance, the Special Court for Sierra Leone, whose Statute was drafted by the UN Secretary-General at the request of Sierra Leone and became part of the Agreement of 16 January 2002 between the UN and Sierra Leone (UN Doc S/2000/915). The jurisdiction of the Court comprises serious violations of Common Art 3 and of AP II, as well as other serious violations of IHL.
- ²³ See Section 4.B.
- ²⁴ See the *Boudarel* case (*Sobanski Wladyslav*), decided on 1 April 1993 by the French Court of Cassation, in *RGDIP* (1994) 471.
- ²⁵ See, in this regard, D. Robinson, 'Defining "Crimes against Humanity" at the Rome Conference', 93 *AJIL* (1999) 43. See also Section 4.B.
- ²⁶ See Section 4.

- ²⁷ See, in this regard, the cases reported in A. Cassese and P. Gaeta, *Cassese's International Criminal Law* (3rd edn, Oxford: Oxford University Press, 2013), 105.
- ²⁸ See Art 10 of the Rome Statute, expressly declaring that the provisions contained in Part 2 (including the one on war crimes) do not purport to limit or prejudice 'in any way existing or developing rules of international law'.
- ²⁹ ICTY, Appeals Chamber, *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, §§ 94–137.
- ³⁰ See the Chapter by E. David in this volume. See also V. Nerlich, 'War Crimes (Non-International Armed Conflict)', in A. Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), 568.
- ³¹ ICTY, Appeals Chamber, *Tadić* (n 29), § 94 (emphasis added). See, however, the notion of seriousness propounded by the ICRC in *Explanatory Note*, 'What Are "Serious Violations of International Humanitarian Law"', available on the ICRC website. For the ICRC, 'violations are serious, and are war crimes, if they endanger protected persons[...] or objects [...] or if they breach important values'.
- ³² The *chapeau* of Art 85(3) of Additional Protocol I, preceding the list of grave breaches which includes 'making the civilian population or individual civilians the object of attack', provides as follows: '[...] the following acts shall be regarded as grave breaches of this Protocol, *when committed willfully*, in violation of the relevant provisions of this Protocol, and *causing death or serious injury to body or health*' (emphasis added).
- ³³ The ICRC Commentary explains the term 'wilfully' used in Art 85(3) of AP I as follows: 'the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them ("criminal intent" or "malice aforethought"); this encompasses the concept of "wrongful intent" or "recklessness", viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences': see Commentary AP I and II, 994, § 3473.
- ³⁴ See ICTY, Trial Chamber, *Galić*, Judgment 5 December 2003, § 54, where the Chamber agreed with the explanation of the term 'willfully' provided by the ICRC Commentary (n 33) and stated as follows: 'The Trial Chamber accepts this explanation [ie the one provided by the ICRC Commentary], according to which the notion of "wilfully" incorporates the concept of recklessness, whilst excluding mere negligence. The perpetrator who recklessly attacks civilians acts "wilfully". The Appeals Chamber in the same case confirmed this stand' (see ICTY, Appeals Chamber, *Galić*, 30 November 2006, § 140).
- ³⁵ See Art 8 (2)(b)(i), providing that for the purpose of the Rome Statute, war crimes means: 'Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individuals not taking part in the hostilities; [...]'. See also, in the context of non-international armed conflicts, Art 8 (2)(e)(i) of the Rome Statute.
- ³⁶ See in this regard H. Olásolo, *Unlawful Attacks in Combat Situations. From the ICTY's Case Law to the Rome Statute* (Leiden/Boston: Martinus Nijhoff, 2008), 220.
- ³⁷ According to the ICTY Trial Chamber in *Lubanga*, Art 30 of the Rome Statute excludes both *dolus eventualis* and recklessness (where the difference between the two forms of *mens rea* can be identified in the fact that the perpetrator in the former case acts with a degree of intent, ie awareness that the forbidden results will likely occur in the ordinary course of events): see ICC, Trial Chamber I, *Lubanga*, Judgment, 14 March 2012, §§ 1011–12. Recklessness would still not be sufficient even if one accepts the view that in the Rome

Statute the *mens rea* of the crime of attacking civilians is set forth by the pertinent provisions of Art 8 and does not correspond to the mental element generally set forth in Art 30. See in this respect Olásolo (n 36), 219–23.

³⁸ The principle is codified in Art 51(5)(b) of Additional Protocol I, providing that it is considered as indiscriminate, hence prohibited: ‘an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’. Compare Art 8(2)(b)(iv).

³⁹ See Olásolo (n 36), 218.

⁴⁰ See Art 32(1) of the Rome Statute.

⁴¹ See for instance W. Fenrick, ‘War Crimes’, in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1st edn, Baden-Baden: Nomos Verlagsgesellschaft, 1999), 187. See also Olásolo (n 36), 223.

⁴² For example, G. Mettraux, ‘Nexus with Armed Conflict’, in Cassese (n 30), 435.

⁴³ See for instance ICTR, Appeals Chamber, *Akayesu*, Judgment, 1 June 2001, § 444; ICTR, Appeals Chamber, *Rutaganda*, Judgment, 26 May 2003, § 570; ICTR, Trial Chamber, *Semanza*, Judgment and Sentence, 15 May 2003, §§ 518–21. On the nexus requirement, see *amplius* H. van der Wilt, ‘War Crimes and the Requirement of a Nexus with an Armed Conflict’, 10 *JICJ* (2012) 1113.

⁴⁴ In the wording of the ICTY Appeals Chamber in *Kunarac*, Judgment, 12 June 2002, § 58: ‘What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment—the armed conflict—in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient that his acts were closely related to the armed conflict.’

⁴⁵ Article 6(c) of the Charter of the Nuremberg Tribunal.

⁴⁶ See Cassese and Gaeta (n 27), 84–5.

⁴⁷ Article 5(c) of the Charter of the Tokyo Tribunal.

⁴⁸ Article II(1)(c) defined crimes against humanity as: ‘Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.’

⁴⁹ M.M. DeGuzman, ‘Crimes Against Humanity’, in W. Schabas and N. Bernaz (eds), *Routledge Handbook of International Criminal Law* (London/New York: Routledge, 2011), 121, 123.

⁵⁰ ICTY, Trial Chamber, *Kupreškic and others*, Judgment, 14 January 2000, §§ 563–6.

⁵¹ ICTY, Appeals Chamber, *Kronjelac*, Judgment, 17 September 2003, § 185. For the contribution of the ICTY to the clarification of the crime of persecution, see J. Nilsson, ‘The Crime of Persecution in the ICTY Case-Law’, in B. Swart, A. Zahar, and G. Sluiter (eds), *The*

Legacy of the International Criminal Tribunal for the Former Yugoslavia (Oxford: Oxford University Press, 2011), 219.

⁵² Article 7(1)(h) of the Rome Statute.

⁵³ See Art 7(1) of the Rome Statute. On the contextual element of crimes against humanity, see below.

⁵⁴ The Tribunal stated that: 'To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter' (see Nuremberg Tribunal, Judgment and Sentence, 1 October 1946, in *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945 to 1 October 1946 (Nuremberg, IMT, 1947), vol I, 254).

⁵⁵ See § 7 (3.76) of the Canadian Criminal Code and Art 212-1, § 1 of the French Criminal Code (enacted by Law no 92-1336 of 16 December 1992, modified by Law no 93-913 of 19 July 1993).

⁵⁶ ICTY, Appeals Chamber, *Tadić* (n 29), § 141.

⁵⁷ See *amplius* Robinson (n 25), 43.

⁵⁸ See Cassese and Gaeta (n 27), 92-3, notes 26 and 27.

⁵⁹ The provision must be read in conjunction with Art 7(2)(a), defining 'attack directed against any civilian population' as: 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'. The ICC Elements of Crime further adds that 'the policy to commit such attack' 'requires that the state or organization *actively promote or encourage* such an attack against a civilian population' (emphasis added). It would thus seem that any practice involving the commission of crimes against the civilian population which is simply tolerated or condoned by a state or an organization would not constitute an attack under the Rome Statute. These crimes would therefore not qualify as crimes against humanity under the Statute. It is doubtful, however, whether the definition of customary international law on crimes against humanity requires the offences to be committed 'pursuant to or in furtherance of a State or organizational policy'. The ICTY and ICTR case law point to a different direction. Both ad hoc Tribunals held that crimes against humanity do not necessarily require a policy. See, however, the critical remarks in this respect by W. Schabas, 'State Policy as an Element of International Crimes', 98 *Journal of Criminal Law and Criminology* (2008) 953 at 959.

⁶⁰ The matter has been discussed intensively at the ICTY and the ICTR: see A. Bogdan, 'Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the former Yugoslavia and Rwanda', 3 *Melbourne Journal of Int'l Law* (2002) 1.

⁶¹ R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Governments, Proposals for Redress* (Washington DC: Carnegie Endowment for International Peace, 1944), 79.

⁶² See in this regard, Y. Shany, 'The Road to the Genocide Convention and Beyond', in P. Gaeta (ed), *The UN Genocide Convention. A Commentary* (Oxford: Oxford University Press, 2009), 7.

⁶³ The word genocide was neither used in the Charter establishing the International Military Tribunal for the Far East (the so-called Tokyo Tribunal), nor in the final judgment issued by this Tribunal. It was, however, used in the indictment before the IMT, in some of the speeches of the Prosecutors before such a Tribunal, and in the *Justice* case before a US military court sitting at Nuremberg and operating under Control Council Law no 10. See also for the necessary reference, Shany (n 62).

⁶⁴ The process which led to the adoption of the Convention is concisely described by N. Robinson, *The Genocide Convention. A Commentary* (New York: Institute of Jewish Affairs–World Jewish Congress, 1960), 17–28. See also W.A. Schabas, *Genocide in International Law* (2nd edn, Cambridge: Cambridge University Press), 59–90.

⁶⁵ See ICJ, *Reservation to the Convention on Genocide*, 1951 ICJ Report, 23, where the Court stated: ‘the principles underlying the Convention are principles that are recognized by civilized nations as binding on states, even without any conventional obligation’.

⁶⁶ ‘In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

This definition has been reproduced verbatim in the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) (Art 4), the International Criminal Tribunal for Rwanda (ICTR) (Art 2), and the International Criminal Court (ICC) (Art 6). In addition, it has been adopted, usually unchanged, in most national criminal legislation. See, in the last respect, B. Saul, ‘The Implementation of the Genocide Convention at the National Level’, in Gaeta (ed) (n 62), 62–6.

For the expression ‘crime without a name’, see ‘Prime Minister Winston Churchill’s Broadcast to the World About the Meeting with President Roosevelt’, 24 August 1941, available at <<http://www.ibiblio.org/pha/timeline/410824awp.html>>, speaking of the mass killings committed by the Nazis in occupied Russia: ‘The aggressor [...] retaliates by the most frightful cruelties. As his Armies advance, whole districts are being exterminated. Scores of thousands—literally scores of thousands—of executions in cold blood are being perpetrated by the German Police-troops upon the Russian patriots who defend their native soil. Since the Mongol invasions of Europe in the Sixteenth Century, there has never been methodical, merciless butchery on such a scale, or approaching such a scale. And this is but the beginning. Famine and pestilence have yet to follow in the bloody ruts of Hitler’s tanks. We are in the presence of a crime without a name.’

⁶⁷ See, in particular, ICTR, Trial Chamber, *Akayesu*, Judgment, 2 September 1998, §§ 500–1; ICTR, Appeals Chamber, *Kayishema and Ruzindana*, Judgment, 1 June 2001, § 151; ICTR, Trial Chamber, *Semanza* (n 44), § 319.

⁶⁸ *Akayesu* (n 67), § 502.

⁶⁹ ICTY, Trial Chamber, *Krstić*, Judgment, 2 August 2001, § 513.

⁷⁰ *Krstić* (n 69).

⁷¹ *Kayishema and Ruzindana* (n 67), § 109.

⁷² *Semanza* (n 44), §§ 321–2; ICTR, Trial Chamber, *Ntagerura, Bagambiki and Imanishimwe*, Judgment, 25 February 2004, § 664.

⁷³ *Akayesu* (n 67), §§ 706 and 731.

⁷⁴ See the Draft of the Convention prepared by the Secretary-General of the UN: Secretariat Draft E/447, reproduced in H. Abtahi and P. Webb, *The Genocide Convention. The Travaux Préparatoires*, vol I (Leiden/Boston: Martinus Nijhoff, 2008), 233.

⁷⁵ The relevant comment in the Secretariat Draft explains that '[i]n such cases, the intention of the author of genocide may be less clear. Obviously, if members of a group of human beings are placed in concentration camps where the annual death rate is thirty per cent to forty per cent, the intention to commit genocide is unquestionable. There may be borderline cases where a relatively high death rate might be ascribed to lack of attention, negligence or inhumanity, which, though highly reprehensible, would not constitute evidence of intention to commit genocide. At all events, there are such borderline cases which have to be dealt with on their own merits' (Abtahi and Webb (n 74)).

⁷⁶ *Akayesu* (n 67), § 507.

⁷⁷ The forcible transfer of children skirts along the borderline of 'cultural genocide'. This conduct may not result in the biological or physical destruction, but cause the disappearance of the group through the severance of the links of the youngest generation with the group of origin. In this way, the children will lose their original cultural identity and their original group will be destroyed.

⁷⁸ As the Trial Chamber of the ICTR has put it in *Akayesu*, 'the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group' (*Akayesu* (n 67), § 521). It is, however, not requested that the individual victim actually belongs to the group, for what counts is the perception or belief of the perpetrator that the victim is a member of the targeted group. It has therefore been affirmed by a Trial Chamber of the ICTR that 'if a victim was perceived by the perpetrator as belonging to a protected group, the victim could be considered [...] as a member of the protected group, for the purposes of genocide'. See ICTR, Trial Chamber, *Musema*, Judgment, 27 January 2000, § 161. On this issue, see Schabas (n 64), 125–6, also for further reference to case law.

⁷⁹ *Mpambara*, Judgment, 11 September 2006, § 8.

⁸⁰ *Mpambara*, Judgment, 11 September 2006, § 8, note 7.

⁸¹ This is the interpretation put forward by the ICTR Trial Chamber in *Akayesu* (n 67), § 511.

⁸² *Akayesu* (n 67), § 512. This definition of 'national group' has been criticized, among others, by Schabas, who rightly observes that the ICTR Trial Chamber has mixed up the notion of 'nationality' with that of membership in a national group by referring, as it did, to the decision of the International Court of Justice in *Nottembohm* to ground the definition of 'national group'. Schabas correctly underlines that in the *Nottembohm* case the Court focused on the effectiveness of the nationality, in the sense of citizenship, of an individual, and did not examine at all the question of individuals who, while sharing cultural, linguistic and other bonds of a particular 'nation', have in fact the citizenship of another state or have even stateless: see Schabas (n 64), 134–5.

⁸³ *Akayesu* (n 67), § 514.

⁸⁴ *Akayesu* (n 67), § 513.

⁸⁵ *Akayesu* (n 67), § 515.

⁸⁶ The paradigmatic example is that of ‘racial group’, since the notion of race or racial group does not find room from a scientific point of view.

⁸⁷ *Akayesu* (n 67), § 702.

⁸⁸ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, 25 January 2005 (UN Doc S/2005/60), §§ 509–12.

⁸⁹ See the Commentary on Art 17 (on genocide) of the Draft Code of Crimes against the Peace and Security of Mankind, adopted in 1996 by the UN International Law Commission (ILC), 45, § 8, where the ILC observes: ‘the intention must be to destroy a group “in whole or in part”. It is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. None the less the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group’.

⁹⁰ *Kayishema and Ruzindana* (n 67), §§ 96–7.

⁹¹ *Akayesu* (n 67), § 521.

⁹² *Kayishema and Ruzindana* (n 67), § 94; ICTY, Appeals Chamber, *Jelisić*, Judgment, 5 July 2001, § 48.

⁹³ *Kayishema and Ruzindana* (n 67), § 276; *Jelisić* (n 92), § 48.

⁹⁴ See, for instance, Schabas (n 65), 243–56. See also, among others, A.K.A. Greenawalt, ‘Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation’, 99 *Columbia Law Review* (1999) 2259; C. Kress, ‘The Darfur Report and Genocidal Intent’, 3 *Journal of International Criminal Justice* (2005) 562. Another distinguished commentator argues instead that three out of the five acts that may amount to genocide ‘not only presuppose, but rather take the shape of, some sort of collective or even organized action’, namely: ‘(i) deliberately inflicting on a protected group or members thereof conditions of life calculated to bring about its physical destruction, in whole or in part; (ii) imposing measures intended to prevent births within a protected group; (iii) forcibly transferring children of a protected group to another group’. It is maintained that these acts ‘are necessarily carried out on a large scale and by a multitude of individuals in pursuance of a common plan, possibly with the support of at least the acquiescence of the authorities’. See A. Cassese, ‘Is Genocidal Policy a Requirement for the Crime of Genocide?’, in Gaeta (ed) (n 62), 134–6.

⁹⁵ As Kress put it: ‘An individual perpetrator cannot realistically *desire* the destruction of a protected group to occur *as a result* of his or her *individual genocidal conduct*. The perpetrator’s desire must rather be related to the *results* to be brought about by the *collective activity* to which he or she contributes’ (Kress (n 94), 566).

⁹⁶ ICTY, Trial Chamber, *Krstić*, Judgment, 2 August 2001, § 682. The Trial Chamber has stated that the genocidal acts must be committed ‘in the context of a manifest pattern of similar conduct, or themselves [must] constitute a conduct that could in itself effect the destruction of the group, in whole or in part, as such’. What is requested here, as it is clear, is the systematic or widespread attack against a protected group, to use two expressions that describe the contextual element of crimes against humanity.

⁹⁷ One could go so far to say that, national judges, if and when they step in and exercise their criminal jurisdiction over those crimes, also act as judicial organs of the international community thereby accomplishing a sort of *dédoublement fonctionnel*, a phenomenon well known to international lawyers and of which some national courts seemed to have been fully aware. It is as though the international community, still a *communitas imperfecta*, availed itself of national criminal courts to enforce its criminal prohibitions.

98 Lachs (n 1), 103.

**Part VII Accountability/Liability for Violations of
the Law in Armed Conflict, Ch.30 Focusing on
Armed Non-State Actors**

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(p. 766) Chapter 30 Focusing on Armed Non-State Actors

THIS Chapter considers the obligations of armed non-state actors. It covers their obligations both in times of armed conflict, and at all other times as well. We address issues of international humanitarian law, human rights law, and international criminal law; and we make a number of suggestions to ensure respect for the law by armed non-state actors so as to improve the protection of the victims of armed conflict. The topic is a controversial one because some people tend to assume that engaging in this discussion bestows inappropriate recognition on armed groups; these people would prefer that such groups be simply outlawed as criminals or labelled as terrorists.

It is obvious that a state-centric approach to holding armed groups accountable has reigned for many years, but in recent times the need to address the international obligations of these groups has become self-evident, especially for those involved in humanitarian protection work. The legal landscape is being reshaped by the recent practices of some parts of the United Nations and certain non-governmental organizations, who are determined to ensure better protection for civilians in armed conflict.

It would be facile to suggest that today most violations in armed conflict are committed by lawless non-state actors and that these entities should be our primary focus. In fact the record is mixed, some non-state actors are worse than others, some non-state actors commit fewer violations than the states they are fighting (p. 767) against, some commit many more.¹ The point of this Chapter is to show what can be done to address these armed non-state actors directly. While the state has an on-going role to protect people from all sorts of violence—the international law applicable in armed conflicts need not be focused only on states.²

1 Introduction

Although much has been written on the need to engage with non-state armed groups in order to encourage respect for humanitarian norms,³ less attention has been given to examining the actual obligations of these groups. This is understandable at one level. The exclusion of armed groups from the normal treaty-making process,⁴ and their subsequent inability to become parties to the relevant treaties, mean that alternative non-legal regimes have had to be adopted. These regimes, whether established by the UN Security Council, the UN Human Rights Council, NGOs, or by national truth commissions, operate in a grey zone between law and politics: relying on international legal principles for the normative framework, and remaining dependent on political pressure, rather than courts, for the enforcement of these norms. Only rarely do we see court cases brought against armed groups as such (as opposed to the prosecution of their individual members).⁵(p. 768)

Again this is not surprising. Why sue a group in court when it is unlikely that the group will have easily traceable assets in the relevant jurisdiction? Governments fighting an armed group will usually proscribe membership in the group, making membership or association a crime; no need then for the government to show that the group is violating international law—when the group as such is already outlawed in national law.

For several observers, armed non-state actors, inevitably labelled as ‘criminals’ or ‘terrorists’, have little or no incentive to apply international norms related to humanitarian law and human rights. The challenge is therefore said to be to create a new norm to protect certain ‘captured combatants’ who have respected the rules of armed conflict. This new law would protect such fighters from being prosecuted for ‘the mere fact of having taken up arms against the central authorities’.⁶ This in turn would provide an incentive to abide by the laws of war, and would reflect the rule that states that combatants in an international

armed conflict have the right to participate in hostilities, and that they cannot be prosecuted for fighting, unless their acts amount to war crimes.

Several authors have therefore suggested that one builds on the encouragement, contained in Additional Protocol II of 1977, which states that those in power at the end of the internal armed conflict 'endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'.⁷ The idea would be that the law would develop so that such an amnesty would become compulsory.

In effect this train of thought would make it illegal or difficult for a state to punish those non-state actors who took up arms against it. For the present author such a development seems unlikely. While laudable from a humanitarian point of view, it seems implausible that states today would vote to empower those who would do them harm. Not to put too fine a point on it, this seems as likely as turkeys voting for Christmas.

Evidence of how far we are from any right to rebellion can be found in a recent Court of Appeal judgment in the United Kingdom. The Court rejected the argument that any combatant immunity would apply to insurgents involved in attacks on the UK military in Afghanistan and Iraq, such acts were considered terrorism even though they are not outlawed in international humanitarian law.⁸

At a more abstract level, the doctrinal notion that the international legal system has a limited number of 'subjects', and that these subjects are primarily states (or (p. 769) the entities that states create), has meant that many international lawyers see international law (beyond certain traditional rules of armed conflict) as inapplicable to armed groups. And from the point of view of the armed groups, international law is seen as inimical or even hostile to the aims of the armed groups at issue. As long as the armed group is considered to be a non-state actor rather than the government of a state, its rights and responsibilities mostly remain apparently suspended until the day it achieves control of the state or separate statehood.⁹ Klabbers concludes: 'A legal system which treats actors as second-rank citizens should not be surprised that those second-class citizens aim to upgrade their status, and the shortest route to being heard and being taken seriously is through violence'.¹⁰

This Chapter considers that the traditional approach, which sees international law as based solely on inter-state consent, excluding armed non-state actors from its list of suitable subjects, is not only unhelpful, but also dangerous as it creates the impression that armed groups inhabit a lawless world. Moreover, it will be argued that the time has come for a radical rethinking of these issues due to the fact the international legal system itself has undergone major upheavals since the traditional approach first took hold.

One major development has been that international law is now concerned with individuals, and that these individuals have international rights and obligations. Let us consider for a moment the individual insurgent in this context. The individuals that compose these armed groups have rights and responsibilities under international law.¹¹ It is now uncontroversial that every individual is entitled to a catalogue of international rights under customary international law;¹² these rights are complemented by the rights enjoyed under certain treaties where the state party to the treaty is responsible for its acts or omissions towards that individual. It is also uncontroversial that every individual in the world has certain international (p. 770) obligations not to commit international crimes, such as genocide, crimes against humanity, or war crimes. These international obligations are not dependent on whether or not the individual acts through a state or non-state actor. In both situations, the individual has violated international law, and in some cases there will be a court with jurisdiction ready and willing to prosecute such acts as violations of international law. The question of consent is seen as irrelevant. Individuals are bound by this customary

international law, whether or not they or their state or their non-state armed group consented to be bound by the rule.

When we turn to the organizations themselves, the scope of international obligations which attach to armed non-state groups is underdeveloped in law and practice. All relevant existing international courts only allow for cases to be brought against states or individuals. One should not, however, draw the conclusion that the absence of an international jurisdiction means that non-state armed groups have no obligations under international law. First, the historic practice of recognizing such groups as belligerents or insurgents was nothing less than an explicit acceptance by the relevant states that the armed non-state actor had international rights and obligations that were to be respected.¹³ Secondly, Common Article 3 to the 1949 Geneva Conventions sets out provisions which 'each Party to the conflict' is bound to apply; and this has been interpreted to confirm that armed non-state groups have a set of international obligations when they become a party to an armed conflict. Thirdly, the Security Council has increasingly called on armed non-state groups to respect international law. Fourthly, the UN Human Rights Council, and its special procedures, have condemned violations of human rights by armed groups and detailed some of the responsibilities of these groups in different contexts. Fifthly, national courts have had occasion to consider the international obligations of armed groups. This can happen, for example, when a court has to determine whether a government supplying arms to an armed non-state actor was facilitating crimes against humanity.¹⁴ Lastly, as we shall see, there are multiple initiatives which focus on the unilateral or negotiated commitments made by armed non-state actors.

A further development has been the growing acceptance that international law imposes various positive obligations on states to ensure that private individuals and non-state actors respect the rights of others. These state obligations are beyond the scope of this Chapter, but we will quickly mention three sources of obligation. First, we might recall the general obligation found in Common Article 1 to the Geneva Convention whereby the states parties undertake to 'ensure respect for the present Convention in all circumstances'. Secondly, in human rights law, the case law of the regional Human Rights Courts and UN treaty bodies is replete with examples of states being held accountable for failing to prevent, investigate, prosecute or punish (p. 771) the acts of non-state actors that violated the rights of those falling within the state's jurisdiction.¹⁵ Thirdly, in some circumstances these international obligations on states may flow from UN Security Council resolutions. Obviously an arms embargo adopted by the Security Council may entail binding obligations for states, with the aim of cutting off arms supplies or other support to certain armed non-state actors. With regard to weapons of mass destruction, the Security Council has issued a blanket injunction (acting under Chapter VII) in Resolution 1540 (2004), which created binding obligations for states. It decided that 'all States shall refrain from providing any form of support to non-state actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery'. It also decided that:

all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-state actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them.

The Council included 'for the purpose of this resolution only', a definition of a non-state actor: 'individual or entity, not acting under the lawful authority of any state in conducting activities which come within the scope of this resolution'.

Our focus, however, for the rest of this Chapter is on the obligations of the groups and their members rather than the obligations of states.

2 International Humanitarian Law

In 2004, the Appeals Chamber of the Sierra Leone Special Court simply held that: ‘it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties’.¹⁶ It has now become quite common to refer to non-state parties to an armed conflict being bound by international humanitarian (p. 772) law.¹⁷ This is said to happen under a number of competing theories: because the treaties take effect in national law and therefore bind the armed group and its members (so-called ‘legislative jurisdiction’), because the groups aspire to be governments in charge of states, because the treaties are directly addressed to them, or because they are bound under customary international law.¹⁸ By searching for the theoretical underpinnings of the binding obligation in international humanitarian law,¹⁹ we may be able first, to develop these arguments so as to clarify the responsibilities of armed groups under other branches of international law, and secondly, determine legal routes for holding armed groups accountable.

A. The law of treaties

The principle that third states cannot be bound by a treaty to which they are not a party, is so familiar, and so obviously derived from principles of contract law, that it is often associated with the Latin maxim: *pacta tertiis nec nocent nec prosunt*. The Vienna Conventions on the Law of Treaties reinforce this message by allowing an exception to the rule, where the parties intend the provision to be binding on third states, or international organizations, and those entities agree in writing to be bound.²⁰ In the face of these concrete provisions, and a principle apparently dating back to Roman Law, should we simply conclude that there is nothing an inter-state treaty can do to bind an armed group? Perhaps not, perhaps we should look a little (p. 773) more closely at the rules in the law of treaties and consider the changing structure of the international legal system.

The law of treaties states that a third *state* cannot be bound by a treaty it is not a party to. Any other result would violate the rule of sovereign equality. How can two states bind a third state without its consent? The origins in contract law make sense—no two individuals should be able to contract to bind a third party. But it seems reasonable to suggest that two states could contract through treaty to bind certain non-state actors such as individuals or other entities within their jurisdiction. For some time it has been accepted that treaties between states have effects on third parties.²¹

First, as we have already mentioned, a treaty can create not only rights for individuals but also obligations. Dinstein puts it bluntly: ‘It is a commonplace today that treaties can directly impose obligations on—and accord rights to—individual human beings’.²² We can ask why these individual third parties can be bound—and yet conventional doctrine would suggest that a group composed of such individuals is not so bound?²³

Secondly, the UN Charter is a treaty, and, as such, one might assume that it is merely binding on the member states. And yet from early on in the United Nations’ history there has been a sense that the purposes of the United Nations were so essential that non-member states could be bound by decisions of the member states. In the words of one authoritative treatise discussing the effect of the UN Charter on non-member states: ‘as international society becomes a more integrated community, a departure from the accepted principle becomes unavoidable, in particular in the sphere of international peace and security’.²⁴ It seems that, with regard to certain principles in the UN Charter, this treaty can be seen as creating binding obligations on non-parties, but we can admit that this

manoeuvre is probably dependent on the fact that those same Charter principles are now seen as binding customary international law.²⁵

Thirdly, under the 1949 Geneva Conventions, Common Article 3 is addressed to 'each Party to the conflict', and this Article applies to conflicts 'not of an international character'. The treaties then would seem to have a provision which directly (p. 774) binds the non-state armed group. This seems to add a further exception to the rule that treaties are considered as only binding on the parties to the treaty. In the case of the Geneva Conventions, only states may become parties.²⁶

Applying this reasoning to Common Article 3 of the Geneva Conventions, we might assume that universal adherence to the Geneva Conventions, together with the legal consensus that the Article applies as customary international law,²⁷ allow us to conclude that this provision is indeed binding on armed groups.²⁸ It is worth noting that the UK Ministry of Defence relies on the treaty as such, and with reference to Common Article 3 states: 'This purports to bind *all* parties, both states and insurgents, whether or not the latter have made any declaration of intent to apply the principles'.²⁹ Similarly, the language of the International Court of Justice suggests that the *Contras* in Nicaragua were bound by the terms of Common Article 3 rather than merely by the principles which it embodied: 'The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions'.³⁰

Before we simply apply this logic to all humanitarian law provisions applicable in internal armed conflict, we need to admit that Common Article 3 was singled out by the International Court of Justice 'as a minimum yardstick [...] rules which, in the Court's opinion, reflect [...] "elementary considerations of humanity"'.³¹ While we can conclude that international law accepts that Common Article 3 is binding on non-state parties to a conflict, due perhaps to a combination of the special nature of the norms and the universal acceptance of the treaties, the case may be less certain (p. 775) for other norms found in treaties applicable in non-international armed conflicts. These treaties may enjoy less than universal adherence, and the norms they detail may not always be considered as representing customary international law. In practice, armed groups have at various times rejected norms found in treaties that they did not negotiate or sign.³² While arguments can be made that Protocol II is an elaboration of the norms contained in Common Article 3,³³ and that many of the norms are now reflected in customary international law,³⁴ the search for a theory to explain how armed groups become bound by the Geneva Conventions and Protocol II continues.³⁵

Another set of treaties we need to consider are those relating to weapons. As with Additional Protocol I (1977),³⁶ national liberation movements can make a declaration under 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 (CCW) (1980).³⁷ Such a declaration can bring into force, not only the Weapons Convention and its Protocols, but also the Geneva Conventions, even where the state against which the liberation movement is fighting is not a party to 1977 Protocol I.³⁸ No such Declaration has been successfully made either under this Convention or under 1977 Protocol I.³⁹

Since 2001 the CCW has been amended so that it now reads: 'In case of armed conflicts 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 the prohibitions and restrictions of this Convention and its annexed Protocols'.⁴⁰ This applies only in situations where the relevant state has ratified the amendment, in other cases the relevant provisions will only apply to inter-state conflicts, with the exception of the provisions in Amended Protocol II

(Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices) and Protocol V (Explosive Remnant of War).⁴¹(p. 776)

Other weapons treaties may or may not extend to situations of internal armed conflict but there are apparently no explicit provisions aimed at the non-state parties to the conflict.⁴² Despite the fact that the Cluster Munitions Convention recognizes the need to prevent the use of cluster munitions by all persons,⁴³ this recent Convention confines itself to a preambular commitment that the states parties are: '*Resolved* also that armed groups distinct from the armed forces of a State shall not, under any circumstances, be permitted to engage in any activity prohibited to a State Party to this Convention'. Commentators have not seen this as creating any international obligations on the armed groups as such; nevertheless it has been argued that, as the treaty refers to a ban on assistance to 'anyone' engaged in prohibited activities, this must be read to include assistance to such armed groups.⁴⁴ So under this reading states parties are prohibited under the treaty from assisting non-state actors to use cluster munitions, while the non-state actors themselves are not considered as subject to obligations under the same treaty.

This duality (obligations for states, nothing internationally binding on armed groups) is apparently not confined to weapons treaties applicable to internal armed conflict. Even where a humanitarian treaty on the methods of war applies to the state party in an internal armed conflict, there may be doubts as to whether international obligations are generated for the armed non-state actor. Like Common Article 3, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict seeks to single out a set of obligations for the non-state armed group. Article 19(1) states that 'each Party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property'. But the 1999 Protocol II to the Hague Convention of 1954, while it extends to internal armed conflicts, seems specifically to address its key obligations to a *state* 'Party' (with a capital P) to the Protocol rather than the 'parties' to the conflict (with a small p). This exclusive capitalization for state 'Parties' is not present in the Geneva Conventions of 1949 nor in the Hague Convention of 1954. Article 1(a) to Protocol II, however, draws this distinction in unambiguous terms: 'For the purposes of this Protocol: a. "Party" means a State Party to this Protocol'.(p. 777)

Moreover the Protocol, while it is extended to non-international armed conflicts on the territory of a 'State Party' to the Protocol,⁴⁵ nowhere demands substantive obligations from the non-state party, as the obligations are addressed to Parties or a Party. The Protocol seems on its face to refer to non-state actor 'parties' to the conflict (with a small p) simply to remind that the application of the Protocol to an internal armed conflict 'shall not affect the legal status of the parties to the conflict'.⁴⁶ This state-centric reading is, however, contradicted by Henckaerts, who participated in the drafting, and who writes that such 'a literal interpretation would lead to a manifestly absurd result of declaring a treaty applicable to non-international armed conflicts and at the same time eliminating most of its practical relevance in such conflicts'.⁴⁷ According to Henckaerts' appreciation at the time:⁴⁸

Although Article 22 of the Second Protocol does not spell it out as clearly as it could have, the Protocol applies to all parties to a non-international armed conflict, whether governmental or insurgent forces. This was clearly acknowledged at the final plenary session. A certain confusion arose because Article 1 of the Protocol defines the word 'Party' as a State Party to the Second Protocol. However, the understanding was that throughout the text the word 'Party' in the phrase 'Party to the conflict' includes rebel groups of States party to the Second Protocol but not third States which have not ratified the Second Protocol.⁴⁹ The reasoning was that non-governmental forces involved in a non-international armed conflict within a

State party to the Protocol are bound by the Protocol through the ratification of the State concerned.⁵⁰

(p. 778)

We find here an echo of the so called 'legislative jurisdiction' doctrine. Kleffner explains the doctrine as follows: 'According to this construction, the capacity of a state to legislate for all its nationals entails the right of the state to impose upon them obligations that originate from international law, even if those individuals take up arms to fight that state or (an)other organized armed group(s) within it'.⁵¹ It is suggested that this approach is 'fully compatible with other areas of international law, through which states grant rights to, or impose obligations on, individuals and other legal persons'.⁵²

But confusion remains: this doctrine seems to rely in part on the idea that states transform their international obligations into binding legal obligations for their nationals. While some states do this some of the time for some obligations, we cannot really reliably infer that the outlawed group as such is considered to be bound simply by the act of a state's ratification of a treaty. Furthermore, the doctrine seems to rely on a nationality link. This is problematic for two reasons. First, the rebels are often rebelling against the state of nationality and rejecting their laws as illegitimate. Engaging a group on the grounds that it should respect national law imposed by the enemy is unlikely to be fruitful. Secondly, this could be taken to suggest that foreign fighters or foreign rebels groups are not so bound. Today's conflicts often involve multinational rebel groups and include cross-border armed conflicts involving multiple armed non-state actors.

Perhaps one way out is to see the obligation as taking effect, not through domestic law, but rather through the will of the states parties to create an obligation for a third party (which is not a state). As we have seen, this has been accomplished without major doctrinal objections in the field of international criminal law. The proof being that individuals have been prosecuted for international crimes even in the absence of identical national law. There is no reason to limit this prosecutorial power of states to obligations for their nationals. States may also agree to international obligations for anyone operating on their territory.⁵³ In short, the doctrine that treaties only bind those who are parties to them is misleading, as treaties are today considered as capable of creating obligations for other entities (that are not sovereign states). There may be limits as to the scope of the obligations that states can create in this way according to the traditional rules limiting a state's jurisdiction, but a combination of the active personality and territorial jurisdictions should resolve that issue.

While treaty law remains important, as we have seen, it can be ambiguous as to whether the states intended it to bind non-state actors. Even where we can discern at least a developing consensus over its binding nature, the treaty may not have (p. 779) universal application. It is suggested that the tendency today is to focus on those obligations which are considered to be binding due to their customary international status.⁵⁴ Let us now see how custom is applied to armed non-state actors.

B. Contemporary customary international law

Inquiries into customary international humanitarian law have taken off in recent years.⁵⁵ In part this is due to the perceived need to prove that certain obligations are customary, so that they can form the basis for the prosecution of an individual for an international crime before an international criminal tribunal. International Criminal Tribunals have had to examine whether the events are covered by applicable customary international law,⁵⁶

before going on to determine whether customary international law entails individual criminal responsibility.⁵⁷

But the turn to custom is also essential beyond the question of individual prosecution. It has been central in the context of fact-finding missions and commissions of inquiry charged with determining violations of international law by armed non-state actors. In contrast to many provisions of treaty law, customary international law is often seen as binding on the non-state actor as such.⁵⁸ In this context the work of the Darfur Commission is instructive. The Commission set a threshold for the capacity of any rebel group to bear international obligations under customary international law.

The SLM/A and JEM, like all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and (p. 780) are therefore bound by the relevant rules of customary international law on internal armed conflicts referred to above. The same is probably true also for the NMRD.⁵⁹

The next step then is to determine what are the relevant rules. Of course one set of rules can be found in the study on customary international humanitarian law,⁶⁰ another much shorter list was attempted in the Darfur Commission's report. The list is reproduced here without the relevant footnotes:

- (i) the distinction between combatants and civilians, and the protection of civilians, notably against violence to life and person, in particular murder (this rule was reaffirmed in some agreements concluded by the Government of the Sudan with the rebels);
- (ii) the prohibition on deliberate attacks on civilians;
- (iii) the prohibition on indiscriminate attacks on civilians, even if there may be a few armed elements among civilians;
- (iv) the prohibition on attacks aimed at terrorizing civilians;
- (v) the prohibition on 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;
- (vi) the prohibition of attacks against civilian objects;
- (vii) the obligation to take precautions in order to minimize incidental loss and damage as a result of attacks, such that each party must do everything feasible to ensure that targets are military objectives and to choose means or methods of combat that will minimise loss of civilians;
- (viii) the obligation to ensure that when attacking military objectives, incidental loss to civilians is not disproportionate to the military gain anticipated; (p. 781)
- (ix) the prohibition on destruction and devastation not justified by military necessity;
- (x) the prohibition on the destruction of objects indispensable to the survival of the civilian population;
- (xi) the prohibition on attacks on works and installations containing dangerous forces;
- (xii) the protection of cultural objects and places of worship;

- (xiii) the prohibition on the forcible transfer of civilians;
- (xiv) the prohibition on torture and any inhuman or cruel treatment or punishment;
- (xv) the prohibition on outrages upon personal dignity, in particular humiliating and degrading treatment, including rape and sexual violence;
- (xvi) the prohibition on declaring that no quarter will be given;
- (xvii) the prohibition on ill-treatment of enemy combatants *hors de combat* and the obligation to treat captured enemy combatants humanely;
- (xviii) the prohibition on the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognized as indispensable by the world community;
- (xix) the prohibition on collective punishments;
- (xx) the prohibition on the taking of hostages;
- (xxi) the prohibition on acts of terrorism;
- (xxii) the prohibition on pillage;
- (xxiii) the obligation to protect the wounded and the sick;
- (xxiv) the prohibition on the use in armed hostilities of children under the age of 15.

Although these prohibitions would normally be seen as binding on both sides, and easily transposable to armed non-state armed groups, the idea of armed non-state actors creating a 'regularly constituted court', or having the right to intern detainees, continues to confound scholars.⁶¹ Clearly, a rebel group has no legal authority to constitute a court in the regular way that a government can. Nevertheless, the practice shows that armed non-state actors do fashion a form of judicial process, and will be judged against international standards in this field.⁶² Because these standards (p. 782) have to be gleaned from human rights law, this is dealt with in more detail in this section below. For the moment, suffice to say that the question of whether one can adjust the scope of the obligations to meet the capacity of the armed non-state group remains divisive. Some would argue that a 'sliding scale' would be appropriate depending on the situation;⁶³ others would counter that this would undermine the fundamental premise that the laws of war are equally binding on both sides (often evoking the level playing field metaphor).⁶⁴

C. Special agreements, unilateral declarations, and codes of conduct

A further source of international obligations may be found in the special agreements entered into by armed non-state actors. Such agreements will not be applied in international courts where they conflict with peremptory norms of international law, which according to the International Tribunal for the former Yugoslavia (ICTY) include: 'most customary rules of international humanitarian law'.⁶⁵ These agreements are not always easy to find or monitor,⁶⁶ but it has been suggested by the ICTY that violations of such agreements can be the basis for international prosecutions where these agreements go beyond customary international law.⁶⁷

Such agreements are encouraged by the Geneva Conventions, which state in their Common Article 3 that '[t]he Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention'. The Hague Convention of 1954 arguably strengthens this obligation, converting the 'should' into a 'shall'.⁶⁸ And the CCW reminds parties to a conflict involving an authority representing a people engaged in a national liberation struggle, that '[t]he High

Contracting Party and the authority may also agree to accept and apply the obligations of Additional Protocol I to the Geneva Conventions on a reciprocal basis'.⁶⁹(p. 783)

Such special agreements have been considered international agreements by the Darfur Commission, and can be seen as giving rise to international rights and obligations.⁷⁰ The Commission seems to limit international obligations to those rebel groups that have a sufficient degree of control to bear the obligations.⁷¹

Unilateral declarations by armed non-state actors are of considerable relevance, not only for the obvious sense of ownership they engender, but also for those seeking to ensure compliance with these promises. One can make the case that such a declaration, whether or not it is written or formally witnessed, could be considered binding under international law and therefore a further source of obligation; this would be the case even in a situation where the relevant treaty made no provision for declarations with the depositary. In the words of Klabbers:⁷² 'Of course, non-state entities may make unilateral declarations even in the absence of a specific provision to that effect, and following general international law, it may very well be that by making unilateral declarations those entities bind themselves on the international level.'⁷³

These unilateral declarations are often at a level of generality, for example agreeing to respect humanitarian law. The ICRC has recently proposed that where an armed group has made such a unilateral declaration, 'the development of a code of conduct that includes IHL can be suggested as a logical "next step"'.⁷⁴ Key here is the need to reduce the obligations down to a workable list. According to Sassòli: 'a declaration by an armed group that it will comply with "the Geneva Conventions and Additional Protocols" deserves scepticism. There are some 500 articles in those treaties! Often, a two page code of conduct is preferable, which really addresses the genuine humanitarian issues that arise for a given armed group in the field'.⁷⁵

One study of 11 such codes with regard to Afghanistan, Angola, Burundi, Democratic Republic of the Congo, Democratic People's Republic of Korea, Liberia, Sierra Leone, Somalia, Sudan, the Russian Federation, and East and West Timor (p. 784) revealed that 'for non-State actors, the agreements refer to international human rights customary law',⁷⁶ and that all the agreements state that the beneficiaries of humanitarian aid are to enjoy the following rights:

- the right to live in security and dignity,
- the right to basic needs,
- the right to receive humanitarian assistance without discrimination and according to basic needs,
- the right to be involved in humanitarian activities of concern to them,
- the right to legal and effective human rights protection, and
- the right to protection against forced population transfer.⁷⁷

The ICRC has published a number of codes of conduct (some older and some more recent) covering groups from China, Philippines, Colombia, Uganda, Sierra Leone, and Libya. It introduces the collection in the following way: 'Codes of conduct rarely specify whether a particular rule is derived from a certain branch of law—such as IHL or human rights law—or whether they stem from other ethical or social norms. The content of these documents demonstrates the acceptance of the included norms, rather than their concrete foundations in law.'⁷⁸ Reflecting on the utility of such codes the following points are made:

First, codes of conduct have the advantage of being short and simple texts. If integrated properly, IHL rules can be stated in a way that is easy to understand and to be followed by members of the armed group. Complex legal texts are unlikely to capture the attention of fighters.

Second, discussions on, and the drafting of, codes of conduct may cause groups to reflect on IHL and on their behaviour in comparison to it. In some cases, the inclusion of norms of IHL in codes of conduct may mean that the leadership of an armed group expresses its willingness to recognize IHL as the applicable law. Even when an armed group chooses to do so purely for reasons of propaganda, the passing of a code of conduct can represent a first step towards the group's improved 'ownership' of rules originally created by states, and towards ensuring respect for the mentioned provisions of IHL. Acceptance of a code of conduct containing IHL norms may lead to further preventative steps within the group, such as the dissemination of the code itself or the instruction and training of the members in its rules. It is to be hoped that a better overall knowledge of the rules of IHL will induce better compliance with IHL.

Finally, the potential of these instruments lies in the reality that armed actors who commit violations in NIACs are not acting completely autonomously. They are usually part of a hierarchical structure, and their actions depend, at least in part, on orders and rules passed on by the hierarchy. As an expression of such rules, codes of conduct can be a powerful tool for compliance. In many instances, the perceived deterrent value of punishment for violations (p. 785) of rules stipulated by the group itself may be greater than the threat of international prosecution for violations of IHL.⁷⁹

D. When will an armed non-state actor be the bearer of these international obligations?

Having established that armed non-state actors have international obligations that can stem from treaty law, customary international law, special agreements, and unilateral declarations, we still have to consider when exactly these obligations will attach to the group in question. A first question concerns the issue of attribution. There will be complex questions to answer with regard to which acts of which individuals can be attributed to the group, so that the armed group *as such* is in violation of international law. While considerable case-law exists explaining when states are responsible for the acts of their agents, or those under their control and direction, very little thinking has been done with regard to non-state actors and when they might be responsible for the acts of their 'officials'.⁸⁰

A second question concerns the preconditions for the application of humanitarian law. Common Article 3 and 1977 Protocol II apply to various types of non-international armed conflict where the violence has reached a certain threshold. The test in customary international law is similar. This is not the place to go into detail (the reader can find fuller discussions in the Chapters on Terrorism and Internal Armed Conflict) but a citation from the case law of the ICTY may be helpful to understanding the violence threshold.

The criterion of protracted armed violence has therefore been interpreted in practice, including by the *Tadić* Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration. 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.⁸¹

(p. 786)

A second criterion is, however, required for the application of humanitarian law to a non-state armed group in a non-international armed conflict. The armed non-state actor has to fulfil certain organizational requirements.⁸² While these might be more demanding in the text of Protocol II, the requirements under custom have most recently been spelt out in some detail by the ICTY.

These cases highlight the principle that an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means. State governmental authorities have been presumed to dispose of armed forces that satisfy this criterion. As for armed groups, Trial Chambers have relied on several indicative factors, none of which are, in themselves, essential to establish whether the 'organization' 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.⁸³

In order for international humanitarian law to apply to the armed non-state actor, these two criteria (protracted armed violence and organization) need to be satisfied. Having determined the preconditions for the application of international humanitarian law to armed groups, we now turn to another branch of international law: human rights.

3 Human Rights Law

While it may be seen as 'well settled' that international humanitarian law is applicable to the armed non-state actor party to an internal armed conflict, there is an apparent problem with the application of human rights law to such armed groups. This is for three main reasons. First, because, in contrast to international humanitarian law, human rights law is seen in the doctrine as applicable only to states, and is moreover seen as ill-suited to regulating the non-state actors. Secondly, human rights treaties only rarely address armed non-state armed groups. Thirdly, there is a perception that engaging with rebel groups on human rights issues lends such (p. 787) groups a certain legitimacy. This is in part related to the first issue: by claiming that a group has violated human rights one is implying that they are a state-like entity because it is presumed that only states have human rights obligations. Let us look at these obstacles in turn.

Several commentators insist that only states have human rights obligations in this context, and that the non-state actors are exclusively bound by international humanitarian law. Moir, for example, accepts the full application of international humanitarian law obligations for insurgents, but is adamant that such non-state actors have no human rights obligations: 'Human rights obligations are binding on governments only, and the law has not yet reached the stage whereby, during internal armed conflict, insurgents are bound to observe the human rights of government forces, let alone of opposing insurgents. Non-governmental parties are particularly unlikely to have the capacity to uphold certain rights (e.g. the duty to ensure a "regularly constituted" court, the right to due process, being unlikely to have their own legal system, courts, etc.).'⁸⁴ Hampson has suggested that there is little legal (as opposed to political) evidence that human rights law applies to armed non-state actors, and,

that if we assume that human rights law is based on the relationship between the individual and the authorities, then 'there may be an assumption that the individual owes some measure of loyalty to those authorities, to the extent of accepting the legal character of the rules they promulgate. Such authorities could legitimately punish attempts to overthrow them. Does Colombia, for example, really accept that the FARC can legitimately criminalize opposition to itself on the part of individuals living in areas under their control?'⁸⁵ Zegveld considers the issue, but seems to exclude the application of human rights law on the grounds that: 'The main feature of human rights is that these are rights that people hold against the state only'.⁸⁶ Pejic sees little reason to take the inquiry further as: 'Given that in most cases the human rights obligations allegedly binding non-state armed groups would be identical to those that clearly bind them under international humanitarian law, the value added of invoking human rights law remains unclear'.⁸⁷

My insistence on the relevance of human rights law can be explained as follows. First, there will be situations where armed groups abuse people outside an armed conflict. In such situations international humanitarian law does not apply. Recent (p. 788) examples of where this was an issue include the post conflict period in Nepal, where the in-country field mission of the Office of the High Commissioner for Human Rights had to deal with multiple allegations against the Maoists, and the early stages of the uprising in Syria where allegations against the opposition forces had to be addressed by the UN Human Rights Council's Commission of Inquiry. Secondly, there will be bodies whose mandate is limited to questions of human rights. This includes not only intergovernmental bodies and their secretariats, but also national human rights institutions and non-governmental organizations. International humanitarian law currently has far fewer fora and experts bodies for scrutinizing its implementation. Thirdly, human rights protection may supplement and not just complement international humanitarian law in times of armed conflict. Apart from freedoms which are not reflected in the law of armed conflict, for example freedom of expression or the right to privacy, there will be categories of people who fall outside the scope of international humanitarian law: deserters, those being detained by their own side for breach of discipline, those subject to sexual violence by their own side, and so on. Moreover, as we shall see below, human rights law has taken an expansive approach to what constitutes an armed group and may reach entities that international humanitarian law cannot reach.

It is suggested, therefore, that armed groups should be subject to a wide range of human rights obligations which go beyond their obligations under the laws of war. If armed groups possess enough international legal personality to be subject to a sliding scale of obligations under international humanitarian law, it seems logical that they should also be subject to international obligations under human rights law.⁸⁸

While political scientists have studied the reasons why some groups are more likely to commit atrocities than other groups,⁸⁹ and humanitarians see the case for negotiating with such groups in order to reduce such abuses, international lawyers have done hardly any work in developing a theory as to why such groups might have human rights obligations at all. And while some human rights obligations might be admitted, such obligations are simultaneously seen as problematic, as the actors will either not have the facilities to ensure respect for rights such as those associated with fair trial, or the human rights obligations with regard to liberty of the person will make 'efficient fighting impossible'.

Whereas the assumption that international humanitarian law binds armed non-state actors dates back some time (and arguably to the older practice of recognizing insurgency and civil war), the argument that armed non-state actors are bound by (p. 789) international human rights law has only recently been made with conviction. Fleck puts it as follows:

Whereas the binding effect of international humanitarian law on non-state actors was never seriously disputed, the extent to which this would also apply to underlying human rights norms was shadowed by a widely believed myth according to which human rights could be claimed against the state, but not against individuals. That myth may have been supported by a limited textual understanding of human rights conventions, but was never keeping with custom, neither with practice, and cannot be upheld.⁹⁰

Similarly, the application 'in principle' of human rights *treaties* has been recently recognized by Greenwood who writes:

The obligations created by international humanitarian law apply not just to states but to individuals and to non-state actors such as a rebel faction or secessionist movement in a civil war. The application to non-state actors of human rights treaties is more problematic and even if they may be regarded as applicable in principle, the enforcement machinery created by human rights treaties can normally be invoked only in proceedings against a state.⁹¹

Leaving aside the question of the enforcement machinery, we can suggest, along with several other commentators,⁹² that international human rights principles are increasingly considered applicable to armed non-state actors. The doctrinal debate continues, but the assumptions may be changing. This is due in part to recent UN practice with regard to human rights reports on non-state actors by Commissions of Inquiry and Special Rapporteurs of the Human Rights Council, as well as demands by the Security Council for armed groups to respect human rights (discussed in more detail below).⁹³ Furthermore, we should recall the reports of the various truth commissions (such as those in Guatemala and Sierra Leone) which (p. 790) detail the human rights violations committed by the relevant armed non-state actors.⁹⁴

A. Human rights treaties addressing the behaviour of armed non-state actors

Let us first, however, look at some recent human rights treaties and dispel the myth that human rights law is exclusively addressed to states. Article 4 of the Optional Protocol to the Convention on the Rights of the Child (2000) reads:

1. Armed 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.
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
3. The application of the present article under this Protocol shall not affect the legal status of any party to an armed conflict.

The ICRC Manual on the Domestic Implementation of IHL suggests that this treaty provision gives rise to binding obligations on the armed non-state actor. The authors enumerate a number of guiding principles with regard to the protection of children, and then state that the 'Guiding Principles emphasize the *obligations of the States party to international treaties*, but that in no way alters the fact that these obligations also apply to armed groups involved in armed conflicts'.⁹⁵ The footnote reference is then to Article 4(1) of the Optional Protocol. Not everyone will share this interpretation. It has been suggested that the use of the word 'should', with regard to the injunction on the armed groups, means that they have something less than a full immediate international obligation. States are said

by some to be expressing a desire rather than a command.⁹⁶ Nevertheless, it is suggested that one could interpret the assertion that children should not be recruited or used '*under any circumstances*' as a clear indication that the text creates (or crystallizes) a meaningful obligation that allows for no doubt, delay, or derogation.

Turning to the International Convention for the Protection of All Persons from Enforced Disappearance (2006) we find an Article which states that '[e]ach State Party shall take appropriate measures to investigate acts defined in article 2 [enforced (p. 791) disappearances by state agents] committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice'. Although there were moments in the negotiations where it seemed as though enforced disappearances would be defined to include acts committed by non-state armed groups, this did not happen.⁹⁷ While the definition of enforced disappearance is confined by Article 2 to acts committed 'with the authorization, support or acquiescence of the State', the treaty foresees an obligation on states parties to investigate and prosecute the same acts when committed by armed non-state groups (whether or not there is an armed conflict). Interestingly, the provisions which provide for accountability are not necessarily linked to enforced disappearances carried out by state agents. Articles 30 and 31 allow for communications to be sent to the UN Committee responsible for the supervision of compliance with this treaty. The Committee could therefore find itself dealing with complaints concerning 'a disappeared person' where the principal perpetrators were members of an armed group.

Of course the international crime against humanity (rather than the treaty crime defined in this Convention) can still be committed by an individual operating within an armed non-state armed group where the enforced disappearance is 'part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack', and that group is considered a 'political organization' in the words of the Statute of the International Criminal Court.⁹⁸

The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2009) is perhaps the most explicit treaty to date with regard to what is expected of armed non-state actors. The first point to note is that two different types of actors are included in the scope of the treaty. According to Article 1(d) of the treaty "'Armed Groups" means dissident armed forces or other organized armed groups that are distinct from the armed forces of the state'; and under Article 1(n) "'Non-state actors" means private actors who are not public officials of the State, including other armed groups not referred to in article 1(d) above, and whose acts cannot be officially attributed to the State'. The obligations for the members of the *armed groups* and the *non-state actors* are distinguished. The treaty states that:

Members of armed groups shall be prohibited from:

- a. Carrying out arbitrary displacement;
- b. Hampering the provision of protection and assistance to internally displaced persons under any circumstances; (p. 792)
- c. Denying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter; and separating members of the same family;
- d. Restricting the freedom of movement of internally displaced persons within and outside their areas of residence;

- e. Recruiting children or requiring or permitting them to take part in hostilities under any circumstances;
- f. Forcibly recruiting persons, kidnapping, abduction or hostage taking, engaging in sexual slavery and trafficking in persons especially women and children;
- g. Impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons;
- h. Attacking or otherwise harming humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons and shall not destroy, confiscate or divert such materials; and
- i. Violating the civilian and humanitarian character of the places where internally displaced persons are sheltered and shall not infiltrate such places.

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On the other hand Article 3(1) (h) and (i) provides that state parties shall:

Ensure the accountability of non-State actors concerned, including multinational companies and private military or security companies, for acts of arbitrary displacement or complicity in such acts;

Ensure the accountability of non-State actors involved in the exploration and exploitation of economic and natural resources leading to displacement.

The bigger point here is that these three human rights treaties have started developing their own terminology for armed non-state actors, and the terms are not dependent on the relatively demanding criteria set out in international humanitarian law. There is no suggestion that the group needs to be organized or be engaged in the level of violence required for it to be considered a 'Party to the conflict' under international humanitarian law.

Turning to the legitimacy question, this still dogs the discussion. The African Union Convention is careful to include references to avoid the treaty ever being used as proof of legitimacy for the groups addressed. 'The provisions of this Article shall not, in any way whatsoever, be construed as affording legal status or legitimizing or recognizing armed groups and are without prejudice to the individual criminal responsibility of the members of such groups under domestic or international criminal law'.¹⁰⁰ The emphasis reflects, not only the importance attached to the issue, but also how apparently simple it is to dispel the spectre of legitimacy with simple treaty language. Now that human rights treaties have started to address the behaviour (and obligations) of armed non-state actors, one might hope that such a savings clause will be considered enough to eliminate any legitimacy (p. 793) fears in the future.¹⁰¹ Human rights treaties could address armed groups in the same language that humanitarian law treaties address parties to the conflict.¹⁰² In both situations a simple provision precluding any legitimacy implications ought to be enough to see off any legitimacy implications that might be drawn from the existence of the treaty.

B. Human rights field missions, commissions of inquiry, and the UN human rights council

A recent UN report on the protection of civilians in Afghanistan explicitly addresses the human rights obligations on non-state actors.¹⁰³ 'While non-State actors in Afghanistan, including non-State armed groups, cannot formally become parties to international human rights treaties, international human rights law increasingly recognizes that where non-State actors, such as the Taliban, exercise *de facto* control over territory, they are bound by

international human rights obligations'.¹⁰⁴ It is suggested that reports such as this which address the various armed groups undermining the enjoyment of human rights will become ever more common. Increasingly, UN field operations have had to address the behaviour of armed non-state actors through the lens of human rights law, this may be due to the absence of an armed conflict, due to the need to avoid the language of civil war (non-international armed conflict), in order to respect the sensibilities of the government, or simply due to the mandate and expertise of the personnel involved.¹⁰⁵ In many cases field operations will simply use the language of human rights obligations to ensure a more productive dialogue.

The UN Commission of Inquiry on Libya, in contrast to the Commission on Darfur, has seemingly eased the restrictions relating to the degree of organization (p. 794) and stability required to be the bearer of international obligations, and referred only to *de facto* control of territory when addressing the human rights obligations of armed groups.¹⁰⁶ Although the Libya Commission of Inquiry went on in that report to apply the rules on international humanitarian law, a later report was forced to deal with armed groups operating in the post conflict situation. The Commission took 24 October 2011 as the cut off point for the application of international humanitarian law, and so it applied international human rights law to the continuing activities of armed groups after that date. The Commission separates the same sort of violations by the *thumar* during the conflict from those committed after the cessation of hostilities, referring in the summary to the former as the war crime or murder and the latter as arbitrary deprivations of life.¹⁰⁷ The full report is more detailed:

The Commission established that *thumar* from various brigades across the country, as well as other opponents of the Qadhafi government, have executed, otherwise unlawfully killed and tortured to death Qadhafi soldiers, security officials as well as those they perceive to be loyalists or mercenaries. During the armed conflict, killing fighters or others who have surrendered, captured or otherwise rendered *hors de combat* amounts to a war crime. Once the conflict ended, such acts have constituted violations of international human rights law.¹⁰⁸

Similarly with regard to torture and ill-treatment, the Commission reiterated the same formula: 'These acts are violations of international human rights law, and when committed during armed conflict constitute war crimes'.¹⁰⁹ By contrast, with regard to arbitrary detention and enforced disappearances the Commission uses human rights language to describe the acts of the *thumar*, but fails to draw any legal conclusions, focusing instead on the obligations of the state of Libya under the International Covenant on Civil and Political Rights.

Thumar forces have been involved in the arbitrary arrest and enforced disappearance of perceived Qadhafi loyalists, security officers, alleged mercenaries and members of the former government. Detainees have been arrested without a warrant, without being told the reasons for their arrest, and without a reasonable suspicion that they have been individually involved in criminal activity. Such arrests have often been accompanied by extortion and pillaging. Detainees are neither informed of their rights, nor provided them in practice. (p. 795) The Commission has information that a number of detainees are being held outside any legal framework in unacknowledged centres, although it was unable to independently confirm this information. The Commission received accounts of enforced disappearance that it deems to be credible.¹¹⁰

The early reports of the Commission of Inquiry on Syria remained within the ambit of international human rights law. Interestingly, in the case of Syria in the early stages of the violence there may have been difficulty in showing that the relevant groups were in *de facto* control of territory. The Commission makes no reference to control as a condition for the application of human rights law, and goes on to apply a limited set of human rights obligations to the armed non-state groups. The Commission stated with regard to the Free Syrian Army (FSA):

The commission carefully reviewed the information gathered on the operations and activities to date of FSA groups. In this regard, the commission notes that, at a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities, including armed groups. Acts violating *ius cogens*—for instance, torture or enforced disappearances—can never be justified.

FSA leaders abroad also assured the commission that the FSA was committed to conducting its operations in accordance with human rights and international law. They requested guidance in shaping rules of engagement consistent with this undertaking. The FSA leadership indicated to the commission that commanders in the field currently made their own rules of engagement in accordance with the training received in the Syrian Armed Forces.¹¹¹

The Syria inquiry relied neither on treaty law, nor on the traditional formation of customary international law, but chose to invoke peremptory norms of international law (or *jus cogens*). Considering the scope of *jus cogens* we might add to the prohibition on torture and enforced disappearances by reproducing some of the lists of *jus cogens*.

Chapter III of the International Law Commission's articles on state responsibility is entitled 'Serious breaches of obligations under peremptory norms of general international law'. The Commentary states: 'Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.'¹¹² Other examples included in the Commentary are 'the slave trade [...] and apartheid[,] [...] the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[,] [...] the basic rules of international humanitarian law (p. 796) applicable in armed conflict'.¹¹³ This list is carefully described as exemplary rather than definitive. For completeness one should note that the UN Human Rights Committee has referred to the following as acts which would violate *jus cogens* norms: arbitrary deprivations of life, torture and inhuman and degrading treatment, taking hostages, imposing collective punishments, arbitrary deprivations of liberty or deviating from fundamental principles of fair trial, including the presumption of innocence.¹¹⁴

In related developments the UN High Commissioner for Human Rights and the UN Human Rights Council have had to confront the violence in Mali. In a consensus resolution the Council *condemned* 'the human rights violations and acts of violence committed in northern Mali, in particular by the rebels, terrorist groups and other organized transnational crime networks, including the violence perpetrated against women and children, the killings, hostage-takings, pillaging, theft and destruction of religious and cultural sites, as well as the recruitment of child soldiers, and calls for the perpetrators of these acts to be brought to justice'.¹¹⁵

The High Commissioner's January 2013 report goes further than the lists of *jus cogens* norms just mentioned. It catalogues a series of human rights violations committed by the armed groups including: the right to life; extrajudicial and summary executions; torture and other cruel, inhuman, or degrading treatment; arbitrary arrests and detentions; recruitment of child soldiers; sexual abuse; attacks on property; violations of freedom of expression and

of the right to information; violations of the right to education; violations of the right to health; violations of cultural rights, and violation of the right to freedom of religion.¹¹⁶

The Mali resolutions in 2012 and the 2013 report did not need to address the thorny of issue of the mandate of the Human Rights Council in situations of armed conflict or the relationship between these two branches of law. Unlike the situations in Iraq and Afghanistan the focus was solely on the armed groups and no state sought to question the role of the Human Rights Council. Some governments have suggested in other contexts that the United Nations' human rights bodies and (p. 797) mechanisms have no mandate in times of armed conflict.¹¹⁷ This suggestion has been convincingly refuted and need not detain us here.¹¹⁸ It is quite clear that the United Nations and its mechanisms are now reporting on human rights and humanitarian law violations in times of armed conflict. What is changing is the underlying legal basis for holding armed groups accountable for violating human rights.

The United Nations' Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, grappled with the question in the context of his report on Sri Lanka. He concluded in the following terms:

Human rights law affirms that both the Government and the LTTE must respect the rights of every person in Sri Lanka. Human rights norms operate on three levels—as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community. The Government has assumed the binding legal obligation to respect and ensure the rights recognized in the International Covenant on Civil and Political Rights (ICCPR). As a non-State actor, the LTTE does not have legal obligations under ICCPR, but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights [...].¹¹⁹

It is increasingly understood, however, that the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to whom they are addressed. The Security Council has long called upon various groups that Member States do not recognize as having the capacity to formally assume international obligations to respect human rights.¹²⁰ The LTTE and other armed groups must accept that insofar as they aspire to represent a people before the world, the international community will evaluate their conduct according to the Universal Declaration's 'common standard of achievement'.¹²¹

Alston went on to include specific human rights recommendations addressed to the non-state actor: 'The LTTE should refrain from violating human rights, including those of non-LTTE-affiliated Tamil civilians. This includes in particular respect for the rights to freedom of expression, peaceful assembly, freedom of association with others, family life, and democratic participation, including the right to vote. The LTTE should specifically affirm that it will abide by the North-East Secretariat on (p. 798) Human Rights charter'.¹²² This approach was reprised in the joint report on Lebanon and Israel by a group of four UN Special Mechanisms.¹²³

It is suggested that the situations in Syria, Libya, and Mali have taken the debate forward into new realms. The groups addressed were not necessarily organized or in control of territory in a government like function, and the human rights issues raised in Mali were not simply similar to the obligations expected from groups under international humanitarian law, but rather related to a broad range of issues. These included, for example, 'degrading treatment by armed groups which, because of their extreme interpretation of sharia, harass, flog and beat women who are not wearing the veil or are not properly veiled, as well

as men involved in the sale or consumption of cigarettes and alcohol or any other practices or conduct that they consider as not in conformity with sharia'.¹²⁴

Calling for a group to respect human rights is one thing, engaging with the group over why it has not respected such human rights, or even assisting the group to come into compliance, raises a whole new set of legitimacy problems. The issue is less whether the standards apply, but rather that there is a perceived sense of legitimization through the act of engagement. To the extent that the group is most probably proscribed under national law, or even targeted under international law, then association with or assistance to the group carries with it the risk of being considered to have aided or abetted terrorism. While governments have usually understood that the International Committee of the Red Cross have to engage such groups in a dialogue about the laws of war, human rights monitors have been wary of engagement, and humanitarian workers are becoming cautious regarding their dealings with such armed groups due to the risks of guilt by association in the 'war on terror'.¹²⁵

Alston's report on Afghanistan illuminates the dilemma for human rights monitors. Having recalled the demand from some quarters for more pressure to be brought on the Government of Pakistan, he continues:

Others argued that there was a need for international actors to engage directly with the Taliban to understand the rationales for its abusive tactics and to apply targeted pressure (p. 799) for change. Prominent elders in the South told me directly that the problem with visits by international envoys was that they only spoke to one side. An international military commander expressed surprise that I was not speaking with Taliban representatives. In general, when I conduct country visits and fact-finding missions, I speak with armed opposition groups, but I did not speak with any formal representatives of the Taliban or other armed groups during my visit.¹²⁶ In retrospect, this was a mistake. Taking account of information provided by such sources would permit a more nuanced understanding of Taliban and other AGE [anti-government-element] strategies. While some of the explanations and justifications provided for engaging in abusive tactics would be self-serving and deceitful, there is no reason to assume that the Taliban could never be persuaded to modify its conduct in ways that would improve its respect for human rights. And purely humanitarian contacts have had a positive impact in the past.¹²⁷

The distinction between the 'purely humanitarian' and the human rights approach is narrowing. Why should 'humanitarian' engagement over the treatment of detainees, or access to food parcels, be seen as radically different from human rights engagement over the treatment of women or extrajudicial execution? The assumption may be that such human rights topics suggest that the addressee is a state-like entity while humanitarian engagement suggests a rebel group that has achieved a degree of control and organization. Moreover some may argue that the human rights norms are less universally accepted than the humanitarian law norms. Neither of these suggestions seems convincing. It seems most likely that the Human Rights Council, through its special procedures and ad hoc fact finding missions will inevitably have to monitor both the behaviour of governments and those armed non-state actors that are operating in their territory. In many cases, and Mali is perhaps just the most recent example, the issues may not relate to an armed conflict, and engagement over issues of punishment, discrimination, health care, education, and discrimination will turn solely on an application of human rights law and principles. Furthermore, the UN Human Rights Council's Special Mechanisms will be more and more

likely to engage with these armed groups in order, not only to gather information about the situation, but also in order to attempt to get these actors to change their behaviour.(p. 800)

C. The work of the Security Council and the Special Representative on Children in Armed Conflict

The Security Council has over the last decade addressed armed non-state actors directly (using the expressions 'all parties', 'factions', or referring directly to the groups by name) and called on them to respect international humanitarian law and human rights. In 2011 it condemned 'human rights violations perpetrated by the FPR' (*Front Populaire pour le Redressement*) in the Central African Republic,¹²⁸ and called on the United Nations Integrated Peacebuilding Office in the Central African Republic 'to report on human rights violations perpetrated by armed groups particularly against children and women'.¹²⁹ In 2012 the Council strongly condemned 'all abuses of human rights in the north of Mali by armed rebels, terrorist and other extremist groups, including those involving violence against civilians, notably women and children, killings, hostage-taking, pillaging, theft, destruction of cultural and religious sites and recruitment of child soldiers, *reiterating* that some of such acts may amount to crimes under the Rome Statute and that their perpetrators must be held accountable'.¹³⁰

The reference to the Rome Statute in this context suggests a political will to ensure prosecutions of the individuals from the relevant armed groups, but because Mali was already a state party, and had already referred the situation to the International Criminal Court, it would not seem to change much on the legal plane. This can be contrasted with the referrals to the International Criminal Court by the Security Council with regard to Darfur and Libya. In those situations the Security Council's action led directly to jurisdiction over the international crimes committed by members of the relevant armed groups. But we should not overly focus on these jurisdictional questions, the role of the Security Council in this context is also to send a message about the international community's commitment to prosecution and accountability.

The UN's work on children in armed conflict has led to an innovative approach which details violations by non-state actors. Reports by the UN Secretary-General to the Security Council on certain country situations now list the non-state actors concerned and whether or not they are involved in any of six categories of 'grave violations':

- (a) killing or maiming of children;
- (b) recruiting or using child soldiers;
- (c) attacks against schools or hospitals;
- (d) rape or other grave sexual violence against children; (p. 801)
- (e) abduction of children;
- (f) denial of humanitarian access for children.

The UN Secretary-General's initial report explains that these violations are based on international norms, and commitments that have been made by the parties to the conflict, as well as national laws and peace agreements.¹³¹ Subsequent reports on various country situations have detailed the 'grave violations of children's rights' committed by the non-state actors concerned.¹³² These reports dedicate as much, if not more, space to the violations committed by the non-state actors, as they do to addressing the states concerned. Although the focus started with recruitment, the Security Council has now requested the Secretary-General to include in his reports 'those parties to armed conflict that engage, in

contravention of applicable international law, in patterns of killing and maiming of children and/or rape and other sexual violence against children, in situations of armed conflict'.¹³³

The mechanism *vis-à-vis* the non-state actor works not only through naming and shaming, but by encouraging the non-state actor to submit an 'action plan' to the Security Council, in this way the group can be removed from the list of violators. One non-state armed group that has supplied such an action plan and claimed to no longer be a violator is the Forces Nouvelles (FAFN) in Côte d'Ivoire, and they were eventually delisted by the Security Council in 2008.¹³⁴ The Security Council also has in mind that it could adopt 'country-specific resolutions, targeted and graduated measures, such as, inter alia, a ban on the export and supply of small arms and light weapons and of other military equipment and on military assistance, against parties to situations of armed conflict which are on the Security Council's agenda and are in violation of applicable international law relating to the rights and protection of children in armed conflict'.¹³⁵

While the focus seems to be on violations of applicable law in situations of armed conflict, the work is not restricted to the applications of international humanitarian law. The question of the criteria for a group to be considered a party to an armed conflict is not carefully examined. The universal standard seems to apply outside (p. 802) the strict framework of international humanitarian law. These reports are complemented by the work of the Special Representative of the Secretary-General, whose work not only feeds into the reports to the Security Council, but also relies on country visits, engaging with non-state actors and facilitating commitments by those armed groups.¹³⁶ The Special Representative's reports and activities have covered groups which were not recognized as parties to a conflict by the states concerned.¹³⁷ Furthermore, the Special Representative has developed a methodology based on commitments by the armed non-state actor rather than a strict application of humanitarian law to a party to a conflict.¹³⁸ For these reasons it seems more appropriate to consider this question as a matter of international human rights standards rather than international humanitarian law, and the obligations can be said to exist whether or not there is an armed conflict. This technique of applying universal standards to armed non-state actors, and then engaging with them to monitor and encourage consent has been developed by various non-governmental organizations including, in particular, Geneva Call.

4 Non-Governmental Approaches and the Example of Geneva Call

Engagement with armed groups is not limited to UN human rights mechanisms. Non-governmental organizations such as Human Rights Watch increasingly report on human rights abuses committed by armed non-state actors.¹³⁹ So far its reports on Hamas and Fatah emphasize the commitment of the Palestinian Authority to human rights, and the fact that these groups are seen to be in control of territory.¹⁴⁰ In other situations human rights law is transposed from the state-based treaty (p. 803) provisions in ways that allude to customary international law or, in one case, where a non-state actor's justice system was found wanting the report stated: 'The fairness of any justice system should be tested against international human rights law criteria that include independence, impartiality, and competency of judges, presumption of innocence, right to legal counsel and adequate time for preparation of defense, and the right to appeal.'¹⁴¹ We see here that the apparent doctrinal problem of applying human rights law to armed non-state actors has been overcome through simply invoking universally accepted values: fairness, independence, impartiality, competence, the presumption of innocence, and the right to defend oneself.

Amnesty International's reports similarly address their concerns to the armed non-state actors in terms which go beyond the strict obligations found under the laws of war.¹⁴²

Let us now consider the approach of a third organization, Geneva Call. The International Campaign to Ban Landmines, having recognized the limits of the Ottawa Treaty to address the possession and use of landmines by non-state actors, set up their own working group which led eventually to the establishment of the NGO Geneva Call.¹⁴³ The organization Geneva Call has engaged armed groups in 'Deeds of Commitment' regarding a 'total ban on anti-personnel mines and for cooperation in mine action'. Having negotiated the signature of the Deed, Geneva Call receives the armed non-state actors' regular reports, monitors compliance with the Deed, and helps arrange mine action including demining and destruction of stocks. It is worth inquiring at this point what might be the incentives for such a non-state actor to bind themselves to such a Deed.

First, rebel groups realize the advantages of being seen to abide by international norms in the context of moves towards peace negotiations; secondly, it is much easier to criticize governments and their armed forces for violating humanitarian norms if the group has policies in place to avoid and punish similar violations; (p. 804) thirdly, factions may be able to distinguish themselves from other armed groups and thus 'get ahead' in terms of dialogue with the government or other actors; finally, in some circumstances entering into such commitments will facilitate access to assistance from the international community in the form of mine clearance.¹⁴⁴

Such explicit recognition of specific obligations by the groups themselves helps to transform the debate about the human rights obligations of non-state actors. If armed groups are prepared to take on such obligations, arguments about their non-applicability under international law lose much of their force. States may fear the legitimacy that such commitments seem to imply, and international lawyers may choose to accord them no value, but from a victim's perspective such commitments may indeed be worth more than the paper they are written on. In some cases commitments may even go beyond the obligations that would be applicable to them under international law, or indeed go beyond even the obligations on the states they are fighting. In other cases the commitment may fall below what is considered binding under international law. In both cases we should move beyond doctrinal debate over the legal significance of these commitments, and focus instead on their effectiveness and potential to help the victims of armed conflict and violence.¹⁴⁵

Two further Deeds of Commitment have now been developed by Geneva Call to address first, the issue of the participation of children (defined as those under 18) in armed conflict, and second gender violence. The first states, *inter alia*, that the group solemnly commits:

1. TO ADHERE to a total ban on the use of children in hostilities.
2. TO ENSURE that children are not recruited into our armed forces, whether voluntarily or non-voluntarily. Children will not be allowed to join or remain in our armed forces.
3. TO NEVER COMPEL children to associate with, or remain associated with, our armed forces.

The second, states, *inter alia*, that the group solemnly commits:

1. TO ADHERE to an absolute prohibition of sexual violence against any person, whether civilian, member of state armed forces, or member of an armed non-state actor. (p. 805)

2. TO TAKE all feasible measures towards effectively preventing and responding to acts of sexual violence committed by any person, in areas where we exercise authority.
3. TO ENSURE that persons deprived of their liberty are protected from sexual violence.

By the beginning of 2014 there were 43 signatories to the deed banning anti-personnel mines, nine with regard to the deed on children in armed conflict, and seven for the deed on gender and armed conflict. Geneva Call investigates complaints concerning non-compliance and examines the periodic reports sent in by the groups concerned. While there is said to be overall compliance with regard to the non-use of land-mines, the crucial point is that signature acts as a catalyst for 'undertaking humanitarian mine action activities, such as demining, stockpile destruction, mine risk education and victim assistance'.¹⁴⁶

5 International Criminal Law

The development of international criminal law so as to apply to individuals fighting with non-state armed groups has been rapid and sophisticated. The International Criminal Tribunals for the former Yugoslavia and Rwanda have developed, not only a complex catalogue of crimes, but also rules concerning command responsibility and joint criminal enterprise.¹⁴⁷ Furthermore, individual criminal responsibility clearly applies outside the context of armed conflicts to situations which constitute crimes against humanity or genocide. And, in some cases, international criminal law has been used to prosecute the members of armed non-state groups for treaty crimes such as torture and hostage-taking.¹⁴⁸ The list is not closed and one should mention the crimes of piracy, forced labour, and enforced disappearance as clearly relevant in this regard.

A cursory glance at the work of the International Criminal Court reveals that it will be individuals from armed non-state actors who are likely to make up the bulk of the defendants there. Four states have all referred their own situations to the Court (Central African Republic, the Democratic Republic of the Congo, Uganda, and Mali); in all four cases the Government is cooperating in order to see non-state (p. 806) actors tried before the Court. Nearly all the detainees in custody at the time of writing were non-state actors. Governments will not lightly hand over their own forces for international prosecution.

With regard to crimes against humanity, recent developments suggest that non-state actors can be prosecuted for these crimes even where the group is not 'state-like' or a *de facto* authority. This issue remains divisive in the International Criminal Court. The issue turns on an interpretation of Article 7 of the ICC Statute which defines crimes against humanity for the purpose of the Statute as any of a number of listed acts 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. And then states that for these purposes, "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'. In the context of the Kenyan case the majority in the Pre-Trial Chamber ruled as follows:

With regard to the term 'organizational', the Chamber notes that the Statute is unclear as to the criteria pursuant to which a group may qualify as 'organization' for the purposes of article 7(2) (a) of the Statute. Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be

drawn on whether a group has the capability to perform acts which infringe on basic human values.¹⁴⁹

Judge Kaul, in his dissent, sets out a threshold for separating organizations that can commit crimes against humanity from other non-state actors that simply commit serious crimes.

I read the provision such that the juxtaposition of the notions 'State' and 'organization' in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a State. Those characteristics eventually turn the private 'organization' into an entity which may act like a State or has quasi-State abilities. These characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.

In contrast, I believe that non-state actors which do not reach the level described above are not able to carry out a policy of this nature, such as groups of organized crime, a mob, groups of (armed) civilians or criminal gangs. They would generally fall outside the scope of (p. 807) article 7(2)(a) of the Statute. To give a concrete example, violence-prone groups of persons formed on an *ad hoc* basis, randomly, spontaneously, for a passing occasion, with fluctuating membership and without a structure and level to set up a policy are not within the ambit of the Statute, even if they engage in numerous serious and organized crimes. Further elements are needed for a private entity to reach the level of an 'organization' within the meaning of article 7 of the Statute. For it is not the cruelty or mass victimization that turns a crime into a *delictum iuris gentium* but the constitutive contextual elements in which the act is embedded.¹⁵⁰

In some ways, this sharp difference of opinion mirrors the doctrinal differences that surround the issue of whether armed non-state actors can commit violations of human rights law.¹⁵¹ The final judgment and sentencing in the ICC's Kenyan cases will have implications beyond the actual situation in Kenya. The Court's approach will certainly influence how we see the international responsibilities and accountability of non-state actors and the individuals that comprise them.

6 The Alien Tort Statute

We have seen that international tribunals can prosecute individuals. But what of the obligations of the armed non-state actor itself? Is it bound by international criminal law? And, if so, how? It is worth looking at these questions in a little more detail as it is suggested there are some quite unusual practical applications. Although the group as such cannot be tried before the International Criminal Court, national jurisdictions may have to consider the responsibility of the group under these international criminal norms. In this regard it is worth looking in particular at developments surrounding the US Alien Tort Statute.

Let us consider a complaint brought against Chiquita for complicity in crimes against humanity, war crimes, and torture allegedly committed with a paramilitary organization (the United Self-Defence Committees of Colombia, AUC). This civil suit under the Alien Tort Statute depends on proving that the protection money offered by Chiquita facilitated international crimes committed by the group (rather than showing that the crimes were committed by any one or more individuals).¹⁵² Other suits have been brought against

Chiquita for contributing to the deaths of (p. 808) individuals at the hands of the rebel group the Revolutionary Armed Forces of Colombia (FARC).¹⁵³ Whether or not these suits are successful, the point remains that there will be situations where the victims of international crimes committed by armed groups may need to rely on the notion that an armed group can commit violations of international criminal law as a group (even if this is only as a way to recover reparation from a corporate accomplice).

A further example of a third party being accused of complicity in an international crime being committed by an armed opposition group is the suit brought against Libya for complicity in the international crimes committed by the Provisional IRA (PIRA). The suit alleges, *inter alia*, in Count IX that the:

PIRA bombings utilized Semtex as the primary explosive ingredient against the Alien Plaintiffs and the unarmed British population constitute crimes against humanity in violation of the law of nations [...]

Throughout the 1980s and 1990s, this campaign by the PIRA was widespread and systematic against the civilian population.

Libya, through its officials, employees, and agents including but not limited to defendants Qadhafi, Senoussi, Kusa, Ashour, and Bazelya, knowingly, intentionally and directly aided and abetted, intentionally facilitated, and/or recklessly disregarded crimes against humanity in violation of the law of nations.¹⁵⁴

The complaint goes on to allege the supply of arms and ammunition, training, training facilities, and a base of operations within Libya. And the complaint also alleges that Libya knew that its provisions of arms, etc, would 'be used to carry out crimes against humanity against the civilian populations in Great Britain and Northern Ireland by the PIRA'.¹⁵⁵ An essential link in the legal argumentation is that the PIRA as such committed international crimes. Knowingly assisting such a group with the provision of arms then becomes a violation of international law.

The most recent decisions of the US courts in this area have set down some parameters for what sort of violations by non-state armed groups might fall under this Statute, and what sort of knowledge or purpose will be necessary to find an organization liable for complicity in a violation of the law of nations. It is now becoming clear that the US Courts will not demand a link to state action for the following violations of international law: war crimes, genocide, and crimes against humanity. A Court of Appeals decision reviewed the case law and recalled the jurisprudence which sees violations of Common Article 3 to the Geneva Conventions as war crimes and mentions that: 'This standard applies to all "parties" to a conflict [...] which includes insurgent military groups.'"¹⁵⁶(p. 809)

7 Options for Prevention, Prosecution, and Punishment

By way of a summary we list here some of the options that could be considered when addressing violations of international law committed by armed non-state actors. It should be stressed at the outset that the response should vary according to the type of conflict and the sort of group one is dealing with. As the research by Weinstein illustrates, rebel groups may have different incentives to respect international law depending for example on their dependency on certain natural resources, the relationship with the local population, and the situation of their leaders.¹⁵⁷

1. *Criminal accountability* can be emphasized, and, as the prospect of prosecution becomes better understood and more realistic, there is a chance that this can be dissuasive. The scope of the jurisdiction of the International Criminal Court is potentially universal (as the Security Council or a future territorial government can trigger jurisdiction retroactively). But for the moment there is only sparse evidence

that fighters or their leaders are dissuaded by this prospect.¹⁵⁸ Nevertheless, as the sentences against former rebel leaders start to trickle out from the International Criminal Court, the dissuasive effect can only grow. Similarly, a few well-chosen prosecutions at the national level in states that have legislation that allows for universal jurisdiction over international crimes committed abroad, could have a dissuasive effect, especially as this implies restrictions on future freedom to travel abroad or to become a respected partner in any future peace deal.

2. *Sanctions* have been adopted by governments, regional organizations and the UN Security Council with a view to changing rebel behaviour. These can take the form of an embargo on a particular commodity from a particular area (say timber), on a travel ban naming certain individuals or members of their family, the freezing of assets, or the exclusion of certain groups from peace talks or other international initiatives. Of course care should be taken not to engage in sanctions which have unintended consequences such as forcing armed groups or factions within groups to take an even more destructive course.¹⁵⁹

3. *Monitoring and reporting*, as we have seen, are already undertaken by NGOs, the United Nations, and regional organizations. Detailing the atrocities and describing the acts as violations of international humanitarian law, war crimes, crimes against humanity, and so on can focus the debate and the information (p. 810) may build the case for triggering an international jurisdiction or eventual trials at the national level. Reporting acts as violations of human rights has in the past been seen as questionable, however, the examples from Mali, Syria, and Libya demonstrate that there will be situations outside armed conflict where a body will be obliged to report on armed groups as human rights violators under international law. This may be because the mandate is focused on human rights violations, because there is no armed conflict, or because no other international normative framework fits the facts.

4. *Encouraging codes of conduct and deeds of commitment* may be appropriate where an armed group is serious about committing to international standards or adapted humanitarian norms. Such codes or commitments may be tailor-made or based on existing texts such as the Geneva Conventions (and their Protocols), they may involve templates such as those used by Geneva Call in the context of landmines, children associated with armed conflict, or violence against women. Such initiatives may prove worthwhile where the group has realized the incentives to comply are significant.¹⁶⁰ Such incentives may include: enhancing reputation with the local and international community, creating better internal military discipline leading to greater efficiency, and a sense of bringing behaviour into line with professed values and goals.

5. *Initiatives aimed at the underlying causes of the conflict* may sap the support which the group enjoys as the group loses any justification that it might enjoy. Of course, these issues are complex and multiple conflicts may now exist primarily to satisfy the greed of the protagonists rather than for some political or group interest. Grievances are often expressed in terms of human rights complaints thereby giving extra traction to appeals to the armed groups themselves to respect human rights. Thinking about the causes of the conflict is obviously the best way to find a longer-term solution, and prevent the next round of conflict.

Footnotes:

- ¹ O. Bangerter, 'Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not', 93 *IRRC* (2011) 353–84.
- ² This Chapter looks at rebel groups. One could also consider private military companies and international organizations as armed non-state actors. These issues are, however, dealt with in this *Handbook* in the Chapters by J. Cockayne and D. Fleck respectively.
- ³ 'Engaging Armed Groups', 93 *IRRC* (2011) 581–808; A. Bellal and S. Casey-Maslen, *Rules of Engagement: Promoting the Protection of Civilians Through Dialogue with Armed Non-State Actors* (Geneva: Geneva Academy of International Humanitarian Law and Human Rights, 2011); T. Whitfield, *Engaging With Armed Groups: Dilemma and Options for Mediators* (Geneva: Centre for Humanitarian Dialogue, 2010); O. Bangartner, 'Disseminating and Implementing International Humanitarian Law Within Organized Armed Groups. Measures Armed Groups Can Take to Improve Respect for International Humanitarian Law', in International Institute of Humanitarian Law, *Non-State Actors and International Humanitarian Law. Organized Armed Groups: A Challenge for the 21st Century* (Milano: FrancoAngeli, 2010), 187–212.
- ⁴ For proposals on how to include such groups in the formation of their international legal obligations, see M. Sassòli, 'Involving Organized Armed Groups in the Development of the Law?', in *Non-State Actors and International Humanitarian Law* (n 3), 213–21; S. Rondeau, 'Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts', 93(883) *IRRC* (2011) 649–72.
- ⁵ One example would be the case which reached the US Supreme Court: *Mohamed et al v Palestinian Authority and PLO 3*, 566 US ____ (2012).
- ⁶ A. Cassese, 'Should Rebels be Treated as Criminals? Some Modest Proposals for Rendering Internal Armed Conflicts Less Inhumane', in A. Cassese, (ed), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), 519–24 at 523; see also in the same volume N. Melzer, 'Bolstering the Protection of Civilians in Armed Conflict', 508–18; and S. Sivakumaran, 'How to Improve Upon the Faulty Legal Regime of Internal Armed Conflicts', 525–37.
- ⁷ Article 6(5).
- ⁸ *R v Gul* [2012] EWCA Crim 280 at §§ 28–31.
- ⁹ The International Law Commission has suggested that successful insurgents carry over their internationally wrongful acts so that they are then seen as the responsibility of the new state or government, see A. Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations', 88(863) *IRRC* (2006) 491–523 at 508–9; this approach has been challenged on the grounds that there is no legal evidence for such a rule, and that in policy terms it makes sense to limit such attribution to the state where 'a national reconciliation or power sharing agreement leads to democratic elections which eventually bring the rebels to power'. J. D'Aspremont, 'Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents', 58 *ICLQ* (2009) 427–42 at 437.
- ¹⁰ J. Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors', in J. Petman and J. Klabbers (eds), *Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi* (Leiden: Martinus Nijhoff, 2003), 351–69 (reproduced in A. Bianchi, (ed), *Non-State Actors and International Law* (Dartmouth: Ashgate, 2009), 54–5).

¹¹ See eg Y. Dinstein, 'The Interaction Between Customary International Law and Treaties', 322 *RCADI* (Brill, The Hague, 2006), 228: 'Since the dawn of international law, obligations have been imposed directly on individual human beings through customary prohibitions of certain modes of conduct [...] Only in more recent times has customary international law conferred rights straightly on human beings.'

¹² According to Dinstein: 'But it is impossible to deny today that the core of the Universal Declaration of Human Rights has come to reflect customary international law' (Dinstein (n 11), 338).

¹³ See further H. Lauterpacht (ed), *Oppenheim's International Law: A Treatise (Disputes, War and Neutrality)*, vol II (7th edn, London: Longmans, 1952), 248 ff.

¹⁴ Dealt with in Section 6 below.

¹⁵ C. Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?', 21 *EJIL* (2010) 125–71; on the human rights obligations, see A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), Chs 8 and 9; W. Kälin and J. Künzli, *The Law of International Human Rights Protection* (Oxford: Oxford University Press, 2009), 96–113 and on the right to life in armed conflict see esp 284–303.

¹⁶ *Prosecutor v Sam Hinga Norman* (Case No SCSL-2004-14-AR72(E)) Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Decision of 31 May 2004, § 22.

¹⁷ Consider the Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL) (2009/C 303/06) 15 December 2009, '§ 5: States are obliged to comply with the rules of IHL to which they are bound by treaty or which form part of customary international law. They may also apply to non-State actors. Such compliance is a matter of international concern.' Note that the source of obligation for non-state actors is not specified. Compare the Swiss Federal Department of Foreign Affairs: 'Non-state actors—including armed groups—are playing an ever greater role today in armed conflicts. Although they are not parties to international law treaties, non-state actors are obliged to respect the rules of customary international law. It follows that international humanitarian law is also legally binding on non-state actors.' *ABC of International Humanitarian Law* (2009), 32.

¹⁸ For a good discussion, see J.K. Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups', 93 *IRRC* (2011) 443–61.

¹⁹ For analyses of this question, see S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012), esp 236ff; S. Sivakumaran 'Binding Armed Opposition Groups', 55 *ICLQ* (2006) 369–94; M. Sassòli, *Transnational Armed Groups and International Humanitarian Law* (Harvard University: Program on Humanitarian Policy and Conflict Research, 2006), esp 14; K. Nowrot, 'International Legal Personality of Influential Non-State Actors: Towards A Rebuttable Presumption of Normative Responsibilities', 80 *Philippines Law Journal* (2006) 563–86 at 580–6; L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002); A. Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts', 30 *ICLQ* (1981) 416–39.

²⁰ Article 34 of the Vienna Convention on the Law of Treaties (1969); Article Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), 'An obligation arises for a third State or a third organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State or the third organization

expressly accepts that obligation in writing.’ See further, Sivakumaran, *The Law of Non-International Armed Conflict* (n 19), 277–9.

²¹ M. Fitzmaurice, ‘Third Parties and the Law of Treaties’, in J.A. Fowein and R. Wolfrum (eds), 6 *Max Planck Yearbook of United Nations Law* (2002) 37–137; C. Chinkin, *Third Parties in International Law* (Oxford: Clarendon Press, 1983).

²² The Interaction Between Customary International Law and Treaties (n 11), 339.

²³ Dinstein: ‘At the present juncture, there is no decisive authority for holding a constitutive provision of a treaty applicable to insurgents who refuse to abide by it and deny the rights of the State to exercise its treaty-making power on their behalf’ (Dinstein (n 11), 344).

²⁴ R. Jennings and A. Watts (eds), *Oppenheim’s International Law*, vol I (9th edn, London: Longman, 1996), 1265.

²⁵ See M. Shaw, *International Law* (6th edn, Cambridge: Cambridge University Press, 2008), 929.

²⁶ The Geneva Conventions and related humanitarian law treaties are not normally open for signature by armed non-state groups. There is a sort of exception to this in Art 96(3) of the 1977 Additional Protocol I to the Geneva Convention of 1949 allowing for a declaration by certain armed non-state actors (known as national liberation movements) that such an actor undertakes to apply the Protocol and the Geneva Conventions to that particular conflict. No such Declaration has ever entered into force. Note for the purposes of this provision the non-state actor would have to be an ‘authority’ representing a people ‘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 Co-operation among States in accordance with the Charter of the United Nations’. See Arts 96(3) and 1(4). This issue is dealt with again in more detail in the section on weapons.

²⁷ See ICJ, *Nicaragua v United States of America*, International Court of Justice, 27 June 1986, §§ 218–20.

²⁸ Compare the Sierra Leone Special Court: ‘It suffices to say, for the purpose of the present case, that no one has suggested that insurgents are bound because they have been vested with personality in international law of such a nature as to make it possible for them to be a party to the Geneva Conventions. Rather, a convincing theory is that they are bound as a matter of international customary law to observe the obligations declared by Common Article 3 which is aimed at the protection of humanity.’ Appeals Chamber Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Case Nos SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), § 47, 13 March 2004.

²⁹ *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), 385, fn 19.

³⁰ *Nicaragua v United States* (n 27), § 220.

³¹ *Nicaragua v United States* (n 27), § 218.

³² A. Roberts and S. Sivakumaran, ‘Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law’, 37 *Yale Journal of International Law* 1 107–52, esp 127; O. Bangerter, ‘Reasons Why Armed Groups Choose to Respect International Humanitarian Law Or Not’, 93 *IRRC* (2011) 353–84, esp 380–2.

- ³³ See R. Geiss, 'Humanitarian Law Obligations of Organized Armed Groups', in International Institute of Humanitarian Law, *Non-State Actors and International Humanitarian Law. Organized Armed Groups: A Challenge for the 21st Century* (Milano: FrancoAngeli, 2010), 93–101.
- ³⁴ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law—Volume 1: Rules* (Cambridge: Cambridge University Press, 2005).
- ³⁵ S. Sivakumaran, 'The Addressees of Common Article 3', in A. Clapham, P. Gaeta, and M. Sassòli, (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, forthcoming).
- ³⁶ See n 27.
- ³⁷ 10 October 1980, see Art 7(4).
- ³⁸ Article 7(4)(b).
- ³⁹ Although certain declarations have been sent to the ICRC, the procedure demands a communication with the Swiss Federal authorities.
- ⁴⁰ Article 1(3).
- ⁴¹ Amended Protocol II states: '1(3) In case of armed conflicts 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 the prohibitions and restrictions of this Protocol.' Protocol V Art 1(3) 'This Protocol shall apply to situations resulting from conflicts referred to in Article 1, paragraphs 1 to 6, of the Convention, as amended on 21 December 2001'.
- ⁴² See W.H. Boothby, *Weapons and the Law of Armed Conflict* (Oxford: Oxford University Press, 2009), Ch 18.
- ⁴³ See Art 9. See further T. Boutruche, S. Casey-Maslen, A. Clapham, T. Nash, M. Reiterer, and M. Smyth, 'The Title and Preamble of the Convention', in G. Nystuen and S. Casey-Maslen (eds), *The Convention on Cluster Munitions: A Commentary* (Oxford: Oxford University Press, 2010), 37–94 at 64–9. National legislation should therefore outlaw the use or possession of cluster munitions without requiring that the individual be a member of the state's armed forces, see eg the UK Cluster Munitions (Prohibition) Act 2010; New Zealand Cluster Munitions Prohibition Act 2009. Similarly see the UK Landmines Act 1998.
- ⁴⁴ B. Docherty, 'Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law', 34 *Human Rights Quarterly* (2009) 934–63 at 959–62, esp 960.
- ⁴⁵ Article 22.
- ⁴⁶ See Protocol II of 1999 to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Arts 1 and 22(6), see also Arts 22(7), 32(4), and 35(2). Note the provision for a party to a conflict to accept the protocol only applies to a 'state party', Art 3(2).
- ⁴⁷ 'The Protection of Cultural Property in Non-International Armed Conflicts', in N. van Woudenberg and L. Lijnzaad (eds), *Protecting Cultural Property in Armed Conflict: The First Ten Years of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of an Armed Conflict* (Leiden: Martinus Nijhoff, 2010), 81–94 at 84; see also Henckaerts in the same volume, 'New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict', 21–42 esp 39–40. See also R. O'Keefe, 'Protection of Cultural Property', in D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict* (2nd edn, Oxford: Oxford University

Press, 2007), 433–74 who separates the rules applicable in international and non-international armed conflict in a detailed examination.

⁴⁸ ‘New Rules for the Protection of Cultural Property in Armed Conflict’, 835 *IRRC* (1999) 593–620 at 618–19.

⁴⁹ [Third States which have not ratified the Second Protocol are generally referred to as ‘party’ (in lower case).] Footnote in the original.

⁵⁰ [It is unfortunate that recognition of the potential confusion of the definition of ‘Party’ and the use of the term ‘Party to the conflict’ came only in the last hours of the Diplomatic Conference. As a result, there was no discussion on whether the general understanding that the Second Protocol applies to governmental forces and rebel groups in a non-international armed conflict is also valid for Article 11(9). It is difficult to say whether this was indeed the intention of States, as the Working Group on Chapter 3 (Enhanced Protection) did not discuss the issue.] Footnote in the original.

⁵¹ J.K. Kleffner, ‘The Applicability of International Humanitarian Law to Organized Armed Groups’, 93 *IRRC* (2011) 443–61 at 445.

⁵² Kleffner (n 51), 443–61 at 445.

⁵³ This would seem to be the logic of the Statute for the International Criminal Court (1998) Art 12.

⁵⁴ See eg Geiss (n 34), 96: ‘In any case, given that the vast corpus of rules applicable to non-international armed conflict has acquired the status of customary international law, and given that this particular source of law binds any entity even with a limited personality under international law, the debate has arguably lost much of its verve. Non-state parties to an armed conflict are bound to IHL by virtue of customary international law.’ At the time he wrote this, Geiss was a legal adviser in the ICRC. For an example of an international criminal tribunal applying a treaty to ground the war crime of ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’, see *Prosecutor v Galić*, ICTY (Case No IT-98-29-T), 5 December 2003, see also the Appeals Chamber (IT-98-29-A, 30 November 2006): ‘However, while binding conventional law that prohibits conduct and provides for individual criminal responsibility could provide the basis for the International Tribunal’s jurisdiction, in practice the International Tribunal always ascertains that the treaty provision in question is also declaratory of custom’ (§ 85).

⁵⁵ See in this regard Henckaerts and Doswald-Beck (n 35).

⁵⁶ See *Tadić* (Appeal) (Decision on the defence motion for Interlocutory Appeal on Jurisdiction) ICTY, Appeals Chamber, Decision, 2 October 1995 (Case No IT-94-1-AR72), esp §§ 94–127.

⁵⁷ *Tadić* (Appeal) (n 56), §§ 128–36.

⁵⁸ ‘[C]ustom may be opposable beyond States, not only to armed opposition groups but also to other non-State actors and individuals.’ D. Bethlehem, ‘The Methodological Framework of the Study’, in E. Wilmschurst and S. Breua (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2007), 3–14 at 8.

⁵⁹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, § 172.

⁶⁰ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law—Volume 1: Rules* (Cambridge: Cambridge University Press, 2005) and helpfully available online in summary form at J.-M. Henckaerts, ‘Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict’, 857 *IRRC* (2005) 175–212. The methodology for finding customary

obligations for non-state actors is not obvious, in fact where the existing human rights obligations of states have been used to divine customary humanitarian law for non-state actors this methodology has been criticized, for states may have only have intended to create obligations for themselves in this context: R. Piotrowicz, 'Displacement and Displaced Persons', in Wilmshurst and Breua (n 58), 337-53 at 340-1. Some of the transposition of obligations from states to armed non-state actors has been similarly criticized as 'aspirations rather than practical' in the context of the obligation to instruct armed forces in international humanitarian law; D. Turns, 'Implementation and Compliance', in the same volume, 354-76 at 362. A more general caution is expressed by M. Schmitt, 'The Law of Targeting', in the same volume, 131-68 at 135, Schmitt invites a comparison with the rules in the *Manual on the Law of Non-International Armed Conflict*, International Institute of Humanitarian Law, San Remo, 2006 (drafting committee: M.N. Schmitt, C.H.B. Garraway, and Y. Dinstein).

⁶¹ Commenting on Rule 100 in the ICRC Study, Hampson writes: 'It is difficult to envisage many circumstances in which a non-State armed group would be able to afford detainees the due process guarantees contained in the Study.' For her 'it is difficult to see how any non-State armed group could ensure that a tribunal was established by law without implying some degree of recognition of legitimacy. To require that a group respect a rule that the State makes it impossible to comply with makes a nonsense of the law.' F. Hampson, 'Fundamental Guarantees', in Wilmshurst and Breua (n 58), 282-301 at 287 and fn 20. See also M. Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts', in O. Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford: Oxford University Press, 2011), 34-94, esp 92-3.

⁶² See further, S. Sivakumaran, 'Courts of Armed Opposition: Fair Trials or Summary Justice?', 7 *JICJ* (2009) 489-513; J. Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict', 89(867) *IRRC* (2007) 655-90.

⁶³ See especially the carefully argued contribution by M. Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law', 1 *International Humanitarian Legal Studies* (2010) 5-51.

⁶⁴ See the engaging debate between Marco Sassòli, Yval Shany, and René Provost in 93 *IRRC* (2011) 425-42.

⁶⁵ *Tadić* (Appeal) (Decision on the defence motion for Interlocutory Appeal on Jurisdiction) ICTY, Appeals Chamber, Decision of 2 October 1995 (Case No IT-94-1-AR72), § 143.

⁶⁶ For a useful set of references, see C. Ewumbue-Monono, 'Respect for International Humanitarian Law by Armed Non-State Actors in Africa', 88 *IRRC* (2006) 905-24.

⁶⁷ *Tadić* (n 65), §§ 143-4.

⁶⁸ 'The Parties to the Conflict shall endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention', Art 19(2) of the Hague Convention of 1958.

⁶⁹ Article 7(4).

⁷⁰ 'All the parties to the conflict (the Government of the Sudan, the SLA and the JEM) have recognised that this is an internal armed conflict. Among other things, in 2004 the two rebel groups and the Government of the Sudan entered into a number of international agreements, *inter se*, in which they invoke or rely upon the Geneva Conventions', § 76; and see §§ 168-71 and 173 of the Report on Darfur (n 59) for an application of the principles of international humanitarian law through the special agreements.

⁷¹ Report on Darfur (n 59), § 174.

⁷² Klabbers (n 10).

⁷³ Footnote in the original reads: 'As much follows from in particular the *Nuclear Tests* cases (Australia v France, and New Zealand v France), ICJ Reports (1986) at 253 and 457. But see the *Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, ICJ Reports (1986) 554, in which the Court held that unilateral declarations may not automatically be presumed to create binding commitments if there was a more obvious way to create such commitments, for instance through a negotiating process.'

⁷⁴ ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts* (Geneva: ICRC, 2008), 22.

⁷⁵ M. Sassòli, 'The Implementation of International Humanitarian Law: Current and Inherent Challenges', 10 *Yearbook of International Humanitarian Law* (2007) 45-73 at 64.

⁷⁶ J.-D. Vigny and C. Thompson, 'Fundamental Standards of Humanity: What future?', 20 *Netherlands Quarterly of Human Right* (2002) 185-99 at 193. See also International Council on Human Rights Policy (ICHRP), *Ends and Means: Human Rights Approaches to Armed Groups* (Versoix: ICHPR, 2000), 52.

⁷⁷ Vigny and Thompson (n 76), 194.

⁷⁸ 'A Collection of Codes of Conduct Issued by Armed Groups', 93(882) *IRRC* (2011) 483-501 at 484.

⁷⁹ 'A Collection of Codes of Conduct Issued by Armed Groups' (n 78), 485-6.

⁸⁰ For an exception, see J.K. Kleffner, 'The Collective Accountability of Organized Armed Groups for System Crimes', in A. Nollkaemper and H. van der Wilt (eds), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009), 238-69.

⁸¹ *Prosecutor v Haradinaj*, Case No. IT-04-84-84-T, 3 April 2008, § 49; see also S. Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', 91(873) *IRRC* (2009) 69-94.

⁸² We saw above how the Darfur Commission introduced such a threshold to distinguish the groups fighting in Darfur.

⁸³ *Prosecutor v Haradinaj* (n 81), § 60. And see further ICTY *Prosecutor v Boškoski*, Case No IT-04-82, 10 July 2009, § 175.

⁸⁴ L. Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002), 194.

⁸⁵ F. Hampson, 'Other Areas of Customary Law in Relation to the Study', in E. Wilmschurst and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2007), 55-6 at note 17.

⁸⁶ L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002), 53.

⁸⁷ J. Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force', in E. Wilmschurst (ed), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), 80-116 at 84 fn 22.

⁸⁸ For discussion of the ways in which international law is changing to admit participation by actors other than states, see W.M. Reisman 'The Actors Theory Has Ignored' in his General Course, *The Quest for World Order and Human Dignity in the Twenty-First*

Century: Constitutive Process and Individual Commitment (Leiden: Martinus Nijhoff, 2012), vol 351 *Collected Courses*.

89 J.M. Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge: Cambridge University Press, 2007).

90 D. Fleck, 'The Law of Non-international Armed Conflicts', in D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict* (2nd edn, Oxford: Oxford University Press, 2007), 605–33.

91 C. Greenwood, 'Scope of Application of Humanitarian Law', in D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict* (2nd edn, Oxford: Oxford University Press, 2007), 45–118 at 76.

92 See also E. Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (Oxford: Oxford University Press, 2010), 126–9; C. Tomuschat, 'The Applicability of Human Rights Law to Insurgent Movements', in H. Fischer, U. Froissart, W. Heintschel von Heinegg, and C. Raap (eds), *Krisensicherung und Humanitärer Schutz—Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (Berlin: Berliner Wissenschafts-Verlag, 2004), 573–91; D. Fleck, 'Humanitarian Protection Against Non-State Actors', in J.A. Frowein, K. Scharioth, I. Winkelmann, and R. Wolfrum (eds), *Verhandeln für den Frieden—Negotiating for Peace: Liber Amicorum Tono Eitel* (Berlin: Springer, 2003), 69–94; Institute of International Law, *L'application du droit international humanitaire et des droits fondamentaux de l'homme dans les conflits armés auxquels prennent part des entités non étatiques: résolution de Berlin du 25 août 1999—The application of international humanitarian law and fundamental human rights in armed conflicts in which non-state entities are parties: Berlin resolution of 25 August 1999 (commentaire de Robert Kolb) Collection 'résolutions' no 1* (Paris: Pedone, 2003).

93 See eg Resolutions 1193, 1213, 1214, 1216, 1471, 1479, 1509, and 1528 discussed in A. Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations', 88(863) *IRRC* (2006) 491–523 at 499–504.

94 Clapham (n 93), 503–4.

95 'Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups', in the *Domestic Implementation of International Humanitarian Law: A Manual* (Geneva: ICRC, 2011), 371.

96 For references to different opinions over the effect of this provision of the Optional Protocol, see A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), 75; see also UNICEF and Coalition to Stop the Use of Child Soldiers, *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* (New York: UNICEF, 2003), 17.

97 For detail and the statement made by the Philippines that disappearances by non-state actors should be criminalized at the national level, see T. Scovazzi and G. Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention* (Leiden: Martinus Nijhoff, 2007), 278–82.

98 See Statute of the International Criminal Court 1998, Arts 7(1)(d) and 7(2)(i), discussed further in Section 5 below.

99 Article 7(5).

100 Article 7(1).

- 101** Note the Convention suggests that the states intended to set out obligations for the non-state actors: ‘The objectives of this Convention are to: [...] (e) Provide for the respective obligations, responsibilities and roles of armed groups, non-state actors and other relevant actors, including civil society organizations, with respect to the prevention of internal displacement and protection of, and assistance to, internally displaced persons’.
- 102** See for a recent example: Art 1(6) of the Amended Protocol II of 1996 to the CCW: ‘The application of the provisions of this Protocol to parties to a conflict, which are not High Contracting Parties that have accepted this Protocol, shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.’
- 103** *Afghanistan Annual Report on Protection of Civilians in Armed Conflict 2011* (2012), iv.
- 104** ‘See UN Secretary-General, Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 31 March 2011, § 188. Also see Report of the International Commission of Inquiry to investigate all Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya A/HRC/17/44, 1 June 2011.’ Footnote in the original.
- 105** See also F. Rawski, ‘Engaging with Armed Groups: A Human Rights Field Perspective from Nepal’, 6(2) *International Organizations Law Review* (2009) 601–26.
- 106** See esp § 72: ‘Non-state actors in Libya, in particular the authorities and forces of the National Transitional Council cannot formally become parties to the international human rights treaties and are thus not formally given obligations under the treaties. Although the extent to which international human rights law binds non-state actors remains contested as a matter of international law, it is increasingly accepted that where non-state groups exercise de facto control over territory, they must respect fundamental human rights of persons in that territory. The Commission has taken the approach that since the NTC has been exercising de facto control over territory akin to that of a Governmental authority, it will examine also allegations of human rights violations committed by its forces.’ UN Doc A/HRC/17/44, 1 June 2011 (footnotes omitted).
- 107** UN Doc A/HRC/19/68, 2 March 2012, § 36.
- 108** UN Doc A/HRC/19/68, 2 March 2012, § 252. The full details of the violations committed by the armed non-state actors can be found at §§ 204–50.
- 109** UN Doc A/HRC/19/68, 2 March 2012, § 53.
- 110** UN Doc A/HRC/19/68, 2 March 2012, § 316, although the details of the report seem directed at the *thumar*, the Commission seems to be applying the ICCPR to the state of Libya (see §§ 259–61) rather than the non-state entity the *thumar*, and the conclusions do not refer to human rights violations (at § 41), although reference is made to the crimes against humanity of enforced disappearance and how that can involve not only the support of a state but also of a ‘political organization’ (at § 267).
- 111** UN Doc A/HRC/19/69, 22 February 2012, §§ 106–7.
- 112** Commentary to Art 26(5), Report of the ILC, GAOR, Supp No 10 (A/56/10), 208.
- 113** Commentary to Art 40(3)–(5), Report of the ILC, GAOR, Supp No 10 (A/56/10), 283–4.
- 114** See General Comment No 29, ‘Article 4: Derogations during a state of emergency’, adopted on 24 July 2001, § 11, UN Doc HRI/GEN/1/Rev.6, 12 May 2003.
- 115** A/HRC/RES/20/17, 6 July 2012, § 2; the subsequent Resolution in October speaks of ‘abuses’ rather than violations, this probably reflects the ongoing reticence over recognizing that armed groups have legal obligations rather than some sort of moral responsibility (cf Pejic (n 88), who admits that armed groups that control territory so that they have developed and can perform government like functions ‘could be said to have de facto human rights responsibilities’.) At the level of the UN Human Rights Council it seems to make no difference whether we talk about abuses or violations, about legal obligations or

de facto responsibilities, the accountability through public reporting of the facts and condemnation of the groups will be to the same effect.

116 Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Mali, UN Doc A/HRC/22/33, 7 January 2013.

117 See the discussion by F. Hampson, 'Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?', in M. Schmitt (ed), *The War in Afghanistan: A Legal Analysis* (Rhode Island: Naval War College, 2009), 485-524.

118 P. Alston, J. Morgan-Foster, and A. William, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror"', 19(1) *EJIL* (2008) 183-209.

119 Footnote in the original reads: '14 Consistent with this analysis, the LTTE-created North East Secretariat on Human Rights released the final version of the NESOHR Charter of human rights in Oct. 2005. Its stated objectives include promoting respect for human rights "according to the Universal Declaration of Human Rights and the International Covenants on human rights [...]".'

120 Footnote in the original reads: 'UNSC Res 1265 (1999), preamble; UNSC Res 1193 (1998), §§ 12, 14; UNSC Res 814 (1993), § 13.'

121 UN Doc E/CN.4/2006/53/Add.5, 27 March 2006 (footnote omitted), §§ 25-7.

122 UN Doc E/CN.4/2006/53/Add.5, 27 March 2006, § 85. See also the letter addressed directly to the LTTE concerning prevention of killings, investigation, and the application of the death penalty, 'Allegation letter sent 21 November 2005', UN Doc E/CN.4/53/Add.1, 27 March 2006, 320. Note the 'Urgent appeal' sent to the Palestinian Authority regarding death sentences, on 28 February 2005, 321.

123 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari; UN Doc A/HRC/2/7, 2 October 2006, § 19.

124 UN Doc A/HRC/22/33, § 26.

125 K. Thorne, 'Terrorist Lists and Humanitarian Assistance', 37 *Humanitarian Exchange* (2007) 13-16; G.J. Andreopoulos, 'The Impact of the War on Terror on the Accountability of Armed Groups', in H.M. Hensel (ed), *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force* (Aldershot: Ashgate, 2005), 171-91.

126 'Initially, I assumed that security concerns, largely of the armed groups' own making, would make doing so impossible. I was also aware that various actors had reservations about the political implications of doing so. Ultimately, I felt I had no option but to abide by these reservations despite the fact that realistic opportunities were presented to me.' Footnote in the original.

127 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Afghanistan, UN Doc A/HRC/11/2/Add.4, 6 May 2009, § 42.

128 S/RES/2031 (2011) § 13; see also S/RES/2088 (2013) § 13.

129 S/RES/2031 § 14.

- 130** S/RES/2085 (2012) preambular § 6. There have also been multiple resolutions on Afghanistan, Liberia, Sierra Leone, the Democratic Republic of Congo, Sudan, Somalia, and Côte d'Ivoire.
- 131** UN Doc S/2005/72; for a recent look at the legal aspects of these categories, see *The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation*, Working Paper No 1, Office of the Special Representative of the Secretary-General for Children and Armed Conflict (2009).
- 132** The most recent SG report is S/2009/158. Relevant country reports are: Democratic Republic of the Congo, S/2006/389; Sudan, S/2006/662; Côte d'Ivoire, S/2006/835; Burundi, S/2006/851; Sri Lanka, S/2007/758; Burundi, S/2007/68; Myanmar, S/2007/666; Côte d'Ivoire S/2007/515; Sudan, S/2007/520; Chad, S/2007/400; Democratic Republic of the Congo, S/2007/391; Uganda, S/2007/260; Somalia, S/2007/259; Nepal, S/2006/1007; Sri Lanka, S/2006/1006; Nepal, S/2008/259; Philippines, S/2008/272; Somalia, S/2008/352; Chad, S/2008/532; Democratic Republic of the Congo, S/2008/693; Afghanistan, S/2008/695; Central African Republic, S/2009/66; Sudan, S/2009/84; Sri Lanka, S/2009/325; Myanmar, S/2009/278; Sudan, S/2009/84; Central African Republic, S/2009/66.
- 133** UNSC Res 1882 of 4 August 2009.
- 134** See UN Doc S/AC.51/2008/5, 1 February 2008 for more detail.
- 135** Security Council Resolution 1612, § 9.
- 136** See eg the report A/63/227 of 6 August 2008; see further A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), 289–90.
- 137** Discussed in Clapham (n 93), 512–13.
- 138** See the discussion in Clapham (n 136), 289–91.
- 139** Human Rights Watch: 'You'll Learn not to Cry: Child Combatants in Colombia' (2003); 'No Exit: Human Rights Abuses Inside the MKO Camps' (2005); 'A Face and a Name: Civilian Victims of Insurgent Groups in Iraq' (2005); 'A Question of Security: Violence against Palestinian Women and Girls' (2006); 'Renewed Crisis in North Kivu' (2007); 'All the Men Have Gone: War Crimes in Kenya's Mt. Elgon Conflict' (2008); 'Internal Fight: Palestinian Abuses in Gaza and the West Bank' (2008); 'Trapped and Mistreated: LTTE Abuses against Civilians in the Vanni' (2008); 'War on the Displaced: Sri Lankan Army and LTTE Abuses against Civilians in the Vanni' (2009); 'Pursuit of Power: Political Violence and Repression in Burundi' (2009); 'Under Cover of War: Hamas Political Violence in Gaza' (2009); 'The Christmas Massacres: LRA attacks on Civilians in Northern Congo' (2009); 'Paramilitaries' Heirs: The New Face of Violence in Colombia' (2010).
- 140** See n 139.
- 141** 'Being Neutral is Our Biggest Crime': *Government, Vigilante, and Naxalite Abuses in India's Chhattisgarh State* (US: Human Rights Watch, 2008), 98. See further, S. Sivakumaran, 'Courts of Armed Opposition: Fair Trials or Summary Justice?', 7 *JICJ* (2009) 489–513.
- 142** See *Israel and the Occupied Territories and the Palestinian Authority: Without distinction—attacks on civilians by Palestinian armed groups*, AI Index MDE 02/003/2002; *Algeria: Steps towards change or empty promises?*, MDE 28/005/2003; *DRC: On the precipice: the deepening human rights and humanitarian crisis in Ituri*, AFR 62/006/2003; *DRC: Addressing the present and building a future*, AFR 62/050/2003; *Haiti: Abuse of human rights: political violence as the 200th anniversary of independence approaches*, AMR 36/007/2003; *Iraq: In cold blood: abuses by armed groups*, AI Index MDE 14/009/2005; *Democratic Republic of Congo North Kivu: No End to War on Women and Children*, AI Index AFR 62/005/2008; *Carnage and Despair: Iraq five years on* AI Index: MDE 14/001/2008;

Russian Federation; Rule without law: Human rights violations in the North Caucasus, AI Index EUR 46/012/2009.

143 See M. Busé, 'Non-State Actors and their Significance', 5(3) *Journal of Mine Action* (2001), online <http://jmu.edu/cisr/journal/5.3/features/maggie_buse_nsa/maggie_buse.htm>. See also S. Shackle, 'Landmine ban failing', *New Statesman*, 11 December 2008; P. Bongard and J. Somer, 'Monitoring Armed Non-State Actor Compliance With Humanitarian Norms: A Look at International Mechanisms and the Geneva Call *Deed of Commitment*', 93(883) *IRRC* (2011) 673–706.

144 For further reflections, see E. Decrey Warner, 'Characteristics and Motivation of Organized Armed Groups', in International Institute of Humanitarian Law, *Non-State Actors and International Humanitarian Law. Organized Armed Groups: A Challenge for the 21st Century* (Milano: Franco Angeli, 2010), 59–66; and more generally on the incentives which drive armed groups to comply with humanitarian norms, see P. Hayner, 'Creating Incentives for Compliance: Between Amnesty and Criminalization', in the same volume, 181–6.

145 S. Sivakumaran, 'Lessons from the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners Of War', 93 *IRRC* (2011) 463–82.

146 Decrey Warner (n 144), 60.

147 See S. Sivakumaran, 'Command Responsibility in Irregular Groups', 10(5) *JICJ* (2012) 1129–50.

148 See eg the *Zardad* trial in 2004; R. Cryer, 'Zardad', in A. Cassese (ed), *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), 979–80.

149 Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, dated 31 March 2010 and registered on 1 April 2010, § 90 (footnotes omitted).

150 Decision Pursuant to Art 15 of the Rome Statute (n 149), §§ 51–2 (footnotes omitted).

151 See further, G. Werle and B. Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or "State-like" Organization', 10 *JICJ* (2012) 1151–70.

152 *John Doe et al v Chiquita Brands International*, US District Court, District of New Jersey, filed 18 July 2007.

153 'Families Sue Chiquita in Deaths of 5 Men', *New York Times*, 17 March 2008.

154 Class Action, *McDonald et al v The Socialist People's Libyan Arab Jamahiriya*, US District Court for the District of Columbia, filed 21 April 2006, §§ 313, 319, 320.

155 *McDonald et al v The Socialist People's Libyan Arab Jamahiriya* (n 154), § 322.

156 *The Presbyterian Church of Sudan et al v Talisman Energy et al*, US Ct of Appeals 2nd Cir, Docket No 07-0016-cv, Decision of 2 October 2009, 35 of the unpublished Decision.

157 Weinstein (n 89).

158 For examples of the dissuasive effect of possible international criminal prosecution, see Hayner (n 144).

159 Weinstein (n 89), 346–8.

160 See for more discussion, A. Bellal and S. Casey-Maslen, *Rules of Engagement: Promoting the Protection of Civilians Through Dialogue with Armed Non-State Actors* (Geneva: Geneva Academy of International Humanitarian Law and Human Rights, 2011), esp 22–4.

**Part VII Accountability/Liability for Violations of
the Law in Armed Conflict, Ch.32 Transitional
Justice**

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(p. 840) Chapter 32 Transitional Justice

1 Introduction

‘TRANSITIONAL justice’ has been defined as ‘a response to systematic or widespread violations of human rights [...] [it] is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse’.¹ The term encompasses a number of different judicial and non-judicial mechanisms designed to assist the affected population in addressing large-scale violations of human rights and international humanitarian law (IHL), and in ‘transitioning’ towards national reconciliation, and in some cases, in the establishment of democracy.² Central (p. 841) to the notion of transitional justice is the idea that a comprehensive approach encompassing a number of complementary mechanisms and tailored to the needs of the particular state in question, is required to bring about a stable and ultimately successful transition.³ These mechanisms may include the establishment of truth commissions, reparation for victims, criminal prosecutions, and penal and other sanctions for the perpetrators of violations.⁴

At first blush, transitional justice appears to be primarily reactive insofar as it directly responds to past violations of IHL and human rights. However, it is important to note the preventive rationale underlying the mechanisms that it encompasses. For example, the criminal prosecution of individuals suspected of having committed a crime that falls under the jurisdiction of the International Criminal Court, is grounded on the logic that such a judicial process will eventually ‘contribute to the prevention of such crimes’,⁵ by acting as a deterrent to future offenders.⁶ Similarly, in addition to examining past events, truth commissions also look to the future by providing a government with recommendations on institutional and policy reforms needed to prevent further violations.⁷ Ultimately, transitional justice is about adequately and appropriately addressing past events in order to strengthen the prospect for national reconciliation and sustainable peace.

Transitional justice is entwined with broader post-conflict peace-building issues. Indeed, transitional justice mechanisms are often premised on, or they are intended to help bring about, fundamental institutional and policy changes and the establishment of the rule of law within a society, which may involve the participation of international organizations such as the United Nations and other international actors. This Chapter does not address transitional justice in this broader context, including the lustration and vetting of persons from official positions, the vast array of issues that fall under the heading of the ‘responsibility to rebuild’,⁸ the role played (p. 842) by UN peace operations in post conflict situations,⁹ and the UN Peacebuilding Commission.¹⁰

This Chapter focuses on transitional justice mechanisms that are established to respond to serious international crimes that have occurred in the context of armed conflict. For the purposes of this Chapter, a ‘serious international crime’ is a crime that falls under the jurisdiction of the International Criminal Court. Transitional justice mechanisms that are established in order to address human rights violations committed in the context of a repressive predecessor regime of governance, outside the context of armed conflict, are not addressed. Before examining a number of different transitional justice mechanisms, Part 2 of this Chapter addresses an issue that underpins the implementation of transitional justice in general, namely the relationship between peace and justice. Whereas peace and justice were once thought divisive, they are now usually considered to be complementary. Concretely this means that there is no need for transitional justice mechanisms to be put on hold in order for peace processes to go ahead; justice processes should accompany peace processes. Part 3 looks at the transitional justice mechanism of truth-seeking, and it focuses on three different truth-seeking processes: truth commissions, commissions of inquiry, (p. 843) and truth-seeking as part of the judicial process. Part 4 analyses the emerging culture

of the end of impunity for perpetrators of serious international crimes with respect to treaty obligations that require states to prosecute and punish the perpetrators of such crimes including the legality of amnesties, exercises of the International Criminal Court's jurisdiction, and exercises of universal jurisdiction. Finally, Part 5 analyses the issue of reparation for past atrocities.

2 Peace and Justice: Once Thought Divisive, Now Considered Complementary

Peace and justice were once generally considered divisive; that in order to broker a peace agreement between warring parties, sometimes justice had to be sacrificed. Concretely, this meant that in order to bring an armed conflict to an end and achieve short-term peace, forms of impunity—such as amnesties—had to be placed squarely on the negotiating table for individuals suspected of having committed serious international crimes in the course of an armed conflict. In addition to the unlikelihood of criminal investigations and prosecutions being pursued for the alleged commission of such crimes, an application of a 'peace versus justice' approach also meant that other transitional justice mechanisms were equally unlikely to see the light of day. Although Prince Zeid Ra'ad Zeid Al Hussein does not agree with the 'peace versus justice' approach, he aptly captured the frame of mind of those who may feel they are faced with a 'peace versus justice' dilemma, in the following terms:

Whatever the origins of [an] initial contact [among warring parties], which subsequently clears the way for a ceasefire or a condition we define as 'post-conflict', the challenge then confronting the parties, the international community, or a third party mediator, is how do they preserve it, hold on to that contact, how do they strengthen and enliven it, lest it be lost and the sides revert to another round of hostilities, and possibly the commission of further crimes. The means by which the parties can most easily lock a peace process into place, is if the party exercising sovereignty offers to its adversaries an amnesty for crimes thought to have been committed during the course of the conflict [...] Moreover, with the end of bloody conflict, a wounded nation must, it is often said, find rest [...] And this can be accomplished through a simple and official burial of facts, under layers of silence. So all and every effort on the part of a transitional government focuses instead on binding the citizenry in the fulfilment of a common aim: that of building peace and concentrating on what lies ahead.¹¹

(p. 844)

The 'peace versus justice' approach is outdated. The establishment of the International Criminal Court can be said to have brought about a 'paradigm shift', according to which there is now 'a positive relation between peace and justice'.¹² Indeed, it is now common to speak of justice reinforcing peace; that 'we cannot have peace without justice'.¹³ In 2004 UN Secretary-General Kofi Annan affirmed that '[j]ustice and peace are not contradictory forces. Rather, properly pursued, they promote justice and sustain one another'.¹⁴ The compatibility of peace with justice has been acknowledged by the Security Council which has recognized '[...] that ending impunity is important in peace agreements, and can contribute to efforts to come to terms with past abuses and to achieve national reconciliation to prevent future conflict',¹⁵ and it 'attaches vital importance to promoting justice and the rule of law, including respect for human rights, as an indispensable element for lasting peace'.¹⁶ It has also been recognized in the 2005 Nuremberg Declaration on Peace and Justice, circulated among members of the UN General Assembly.¹⁷ At the opening session of the Review Conference of the International Criminal Court in Kampala in

2010, UN Secretary-General Ban Ki-Moon called the perceived 'balance between peace and justice' a 'false choice'.¹⁸

Moreover, a 'peace with justice' approach is reflected in the practice of the Security Council, which has responded to situations of armed conflict amounting to threats to international peace and security by taking concrete measures in the pursuit of justice. For example, the Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) during the armed conflict in the former Yugoslavia;¹⁹ it referred the situation in Darfur to the International Criminal Court pursuant to Article 13(b) of the Rome Statute,²⁰ which has been described as a case (p. 845) in which 'justice is only viewed as instrumental for peace';²¹ it referred the situation in Libya of ongoing political violence to the International Criminal Court;²² and it adopted a Resolution in relation to the transfer of Charles Taylor to The Hague to be tried by the Special Court for Sierra Leone.²³ It is also reflected in the issuance of indictments against key political figures in the former Yugoslavia by successive Chief Prosecutors of the ICTY,²⁴ and the issuance of arrest warrants against the President of Sudan by the Pre-Trial Chamber of the International Criminal Court,²⁵ which illustrate that justice should not be sacrificed at the expense of the possibility of brokering peace agreements with key political figures.

The paradigm shift from 'peace versus justice' to 'peace with justice' is grounded on a definition of long-term, sustainable peace and an expansive understanding of justice. The following definitions of these terms were agreed upon by representatives of States and scholars who participated in the drafting of the 2005 Nuremberg Declaration on Peace and Justice:

'Peace' is understood as meaning sustainable peace. Sustainable peace goes beyond the signing of an agreement. While the cessation of hostilities, restoration of public security and meeting basic needs are urgent and legitimate expectations of people who have been traumatized by armed conflict, sustainable peace requires a long-term approach that addresses the structural causes of conflict, and promotes a sustainable development, rule of law and governance, and respect for human rights, making the recurrence of violent conflict less likely.

'Justice' is understood as meaning accountability and fairness in the protection and vindication of rights, and the prevention and redress of wrongs. Justice must be administered by institutions and mechanisms that enjoy legitimacy, comply with the rule of law and are consistent with international human rights standards. Justice combines elements of criminal justice, truth-seeking, reparations and institutional reform as well as the fair distribution of, and access to, public goods, and equity within society at large. Justice may be delivered by local, national and international actors.²⁶

In addition to the pursuit of justice benefiting long-term peace, short-term peace—in the form of a peace agreement—could even be achieved more quickly in some cases by pursuing justice. The former Chief Prosecutor of the ICTY, Richard (p. 846) Goldstone, recounted how an indictment he issued against Radovan Karadžić did not hamper, but rather assisted, in brokering the Dayton peace agreement:

In my experience the threat of prosecutions and the issue of indictments against senior political players have aided rather than retarded peace negotiations. In July of 1995, as Chief Prosecutor of the Yugoslav Tribunal, I issued indictments charging Radovan Karadžić [...] with crimes against humanity [...] [He] was the self-appointed President of the Bosnian Serb enclave called Republika Srpska [...] Two months later the Bosnia Serb Army massacred over 8 000 Muslim men and boys near Srebrenica. In November 1995, the United States called a meeting in Dayton, Ohio, of leaders of the former Yugoslavia to discuss an end to the Balkan war that

began in 1991. There can be no doubt that had Karadžić been a participant at Dayton, the Bosniak leaders, a mere two months after the massacre, would not have been prepared to attend the meeting. That was indeed confirmed in my presence some months later by the then Bosnian Foreign Minister, Mohamed Sacirbey. The indictment issued against Karadžić effectively prevented his attendance at Dayton [...] The Dayton meeting put an end to the war [...] I might add that I issued a second indictment against Karadžić [...] while the Dayton meeting was actually in progress. That indictment included a count of genocide arising from the Srebrenica massacre. The first indictment enabled the meeting to proceed and the second in no way inhibited the peace negotiations.²⁷

However, it is not always clear-cut whether criminal indictments against key political figures have directly assisted the settlement of peace agreements in the short-term. For example, the issuance of an indictment against the former President of Liberia, Charles Taylor, by the Chief Prosecutor of the Special Court for Special Leone disrupted the peace negotiations that were ongoing at that time under the auspices of the United Nations in Accra, Ghana.²⁸ Although both the criminal trial of Mr Taylor before the Special Court for Sierra Leone and peace negotiations later successfully went ahead, this example raises the delicate question of timing in the joint pursuit of peace and justice processes. As the UN Secretary-General Kofi Annan noted in 2004, '[t]he question [...] can never be whether to pursue justice and accountability, *but rather when and how*.'²⁹

There is debate about the timing of efforts to achieve both peace and justice: should these efforts be carried out concurrently? Should one be postponed in order to pursue the other? It could be argued that in cases in which the interests of peace and justice appear to come into conflict with one another, steps towards justice should be carefully calibrated in order not to negatively adversely impact on steps towards peace. However, great care should be taken not to allow the outdated (p. 847) 'peace versus justice' approach to re-enter current debates through the backdoor of a question of timing, and for this old doctrine to effectively be re-instated through an indefinite postponement of justice processes. Kenneth Roth noted during the Review Conference of the International Criminal Court in Kampala in 2010 that the sequencing of peace and justice mechanisms 'had been successful in some cases, but had resulted, in others, in *de facto* amnesties'.³⁰ In principle, there is nothing to prevent both peace and justice processes being carried out simultaneously in many contexts. Practice evinces that long-term peace can only be achieved with justice. It is clear that sensitivity and tact are required to ensure that both peace and justice processes move ahead smoothly,³¹ but '[t]he problem is not one of choosing between peace and justice, but of the best way to interlink the one with the other, in light of specific circumstances, without ever sacrificing the duty of justice'.³²

Regrettably, justice processes continue to be dogged by calls to give way to peace processes in almost all circumstances. The Chief Prosecutor of the International Criminal Court, Luis Moreno Ocampo, noted that:

[...] for each situation in which the ICC is exercising jurisdiction, we can hear voices challenging judicial decisions, their timing, their timeliness, asking the Prosecution to use its discretionary powers to adjust to the situation on the ground, to indict or withdraw indictments according to short term political goals. We also hear officials of States Parties calling for amnesties, granting of immunities and other ways to avoid prosecutions, supposedly in the name of peace; we can hear voices portraying the ICC as an impediment to progressing further with Peace processes.³³

In this respect, it is worth noting that the power of the Prosecutor under Articles 53(1)(c) and 53(2)(c) of the Rome Statute to conclude that there is no reasonable basis to proceed with an investigation or prosecution because it is not in, or would not serve, the interests of justice, is not viewed by the Office of the Prosecutor (OTP) as a discretionary power that should be used in order to further peace negotiations (p. 848) with persons suspected of having committed crimes that fall under the jurisdiction of the Court.³⁴ In a policy paper issued in 2007 the OTP stated that 'there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the [OTP]'.³⁵ Attempts like those made by members of the Lord's Resistance Army in Uganda to bargain their way to the negotiating table in exchange for assurances that they will not be investigated or prosecuted by the International Criminal Court in the future are not likely to be heeded by the OTP. As the Deputy Prosecutor stated on 17 August 2010, '[w]e can see from some of the situations before the Court that ignoring justice will not help peace efforts. In Northern Uganda, the international community was for a long time keen to appease Joseph Kony both before and after the warrant of the International Criminal Court. Kony, however, was only interested in impunity and repeatedly took advantage of peace talks to re-group and re-arm his forces'.³⁶

A potential mechanism for temporarily stalling justice processes before the International Criminal Court (ICC) in order to favour peace processes is Article 16 of its Statute, which allows the Security Council to defer an investigation or prosecution for a period of twelve months, renewable, by adopting a resolution under Chapter VII of the Charter to that effect.³⁷ According to some commentators, the drafting history of Article 16 confirms the Security Council's 'decisive role in dealing with situations where the requirements of peace and justice seem to be in conflict'.³⁸ However, the Security Council's primary responsibility for the maintenance of international peace and security, consecrated under the UN Charter, is not a role that *prima facie* conflicts with justice processes undertaken in the framework of the International Criminal Court. As explained above, peace can only be achieved (p. 849) with justice. To this end, a decision to defer an investigation or prosecution by the Security Council should take into account 'the current activity of the Court, and particularly the cases pending before it [...] [T]he evaluation of the existence of a threat to the peace, and of the appropriateness of a deferral as a measure under Chapter VII [...] [must be] determined by [giving due consideration to] the effect of the continuation of specific proceedings before the Court'.³⁹ The Security Council may consider not making use of its powers under Article 16 of the Rome Statute where a state claims that it is willing and able to prosecute an individual suspected of committing crimes that fall under the jurisdiction of the Court, and the Security Council attaches certain conditions to the temporary suspension of proceedings before the International Criminal Court.

3 Truth-Seeking as a Form of Justice

At the end of hostilities, and after a peace settlement, a society torn apart by serious international crimes committed during the course of an armed conflict may be tempted to simply turn the page; to forget, to forgive, and to move on. Nobel peace prize laureate Elie Weisel, reflecting upon our ability to both forget and remember, stated in his Nobel Lecture that '[o]f course we could try to forget the past. Why not? Is it not natural for a human being to repress what causes him pain, what causes him shame? Like the body, memory protects its wounds [...] [However] [r]emembering is a noble and necessary act'.⁴⁰ Placing systematic or widespread violations on record in order to address them is necessary because although memory can be repressed, it cannot be stifled indefinitely. It has been noted in this vein with respect to the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC), many years after the atrocities committed by the Khmer Rouge took place, that the establishment of the ECCC 'constituted a long-awaited response to the demands for justice from the victims, who had never forgotten what they had endured, even if their voices had not been heard for a long time'.⁴¹ Truth-seeking processes may also (p.

850) constitute prophylactic antidotes to future societal unrest and violence '[...] where mass crimes are not addressed, where the truth is not told, in short where there is no transitional justice, the embers of those conflicts remain, and it is often only a matter of time before they are rekindled'.⁴²

The process of truth-seeking is thus a useful transitional justice tool for establishing an accurate and impartial account of past atrocities for a transitional society. In some cases transitional governments may have positive obligations to investigate what happened to victims, and to inform their relatives of their fate.⁴³ States may be under a general obligation 'to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies'.⁴⁴ Philip Alston has noted that '[a]rmed conflict and occupation do not discharge the State's duty to investigate'.⁴⁵

Truth-seeking may constitute a stand-alone transitional justice mechanism in the form of truth commissions (Part A). In other cases, truth-seeking may constitute a preliminary step for other transitional justice mechanisms. For example, truth-seeking undertaken by an independent commission of inquiry may lead to the recommendation that criminal investigations be opened with a view to prosecuting individuals (Part B). Finally, there is an element of truth-seeking integral to other transitional justice mechanisms, such as criminal trials conducted both at the domestic and international levels, where a judicial account of past events is recorded (Part C). All forms of truth-seeking processes during and following an armed conflict face enormous challenges in the gathering of evidence for the purpose of documenting past atrocities, (p. 851) both in terms of logistics, and concerning serious ethical dilemmas that may arise. It is not within the scope of this Chapter to address these difficulties.⁴⁶

A. Truth commissions

Truth commissions have been defined as 'official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years'.⁴⁷ They usually examine a broad spectrum of past events, and various issues that may arise in connection with these events. Since the mid-1970s to the present day, some 40 truth commissions have been established.⁴⁸ It is to be expected that there is great divergence among truth commissions because each truth commission should be 'unique [and] country-specific'.⁴⁹ The core activities of many truth commissions include the collecting of statements from victims, witnesses, and perpetrators; researching and investigating the root causes of an armed conflict; holding public hearings; engaging in outreach programs; and issuing a final report that summarizes the truth commission's findings and recommendations.⁵⁰

The most celebrated example of a truth commission is the South African Truth and Reconciliation Commission.⁵¹ Controversially, the Amnesty Committee of the South African truth commission had the power to grant amnesties to individuals suspected of having committed serious crimes.⁵² The legal basis for the granting of amnesties by the truth commission in post-apartheid South Africa was the Promotion of National Unity and Reconciliation Act No 34 of 1995, which in turn was based on the amnesty agreement contained in a 'postamble' to the interim Constitution of 1993.⁵³ The 'postamble' to the 1993 Constitution provided that (p. 852) '[...] gross violations of human rights, the transgression of humanitarian principles in violent conflicts and the legacy of hatred, fear, guilt and revenge [...] can now be addressed on the basis that there is a need for understanding but not of vengeance, a need for reparation but not for retaliation [...] In order to advance such reconciliation and reconstruction, amnesty shall be granted [...]'.⁵⁴

The South African truth commission is arguably one of the most successful truth commissions to date, thus warranting considerable scholarly attention. However, because it is exceptional in many respects, too much emphasis on this truth commission can lead to a distorted view of the activities of other truth commissions. Indeed, there is a common misperception that a key function of truth commissions is to grant amnesties to persons suspected of having committed serious international crimes. Whilst some truth commissions have operated in contexts where amnesties were already in place, such as in Sierra Leone and in Ghana, and regrettably a blanket amnesty was put in place in El Salvador after the truth commission issued its report, '[m]ost truth commissions have no formal or informal relationship to amnesties. Those that have the power to recommend amnesty usually are proscribed from doing so for serious international crimes'.⁵⁵ For example, in exchange for testifying at a public hearing, the Kenyan Truth, Justice and Reconciliation Commission may grant an individual amnesty, except 'if the act, omission or offence to which the application relates is an act, omission or offence that constitutes crimes against humanity or genocide within the meaning of international human rights law'.⁵⁶ The legality of amnesties is addressed in greater detail in Part 4(A)(2) below.

The truth-seeking function of truth commissions means that they may become privy to evidence indicating that serious international crimes may have been committed during the armed conflict under examination. An important issue that arises in this respect is the relationship between truth commissions and other transitional justice mechanisms. Among the recommendations provided in the final reports of truth commissions is sometimes the proposal that the transitional government pursue criminal investigations and prosecutions against individuals suspected of having committed serious crimes. For example, the National Commission for Truth and Reconciliation in Chile concluded its report by stating that:

[...] as an indispensable element for achieving national reconciliation and avoiding the repetition of the deeds that have occurred, the State must exercise fully its powers of prosecution. Human rights can only be effectively protected under the true rule of law. And the rule of law presupposes that all citizens are subject to the law and to the courts of justice, which (p. 853) involves the application of the penalties provided in criminal legislation, on an equal basis, to all those who violate the standards that govern respect for human rights.⁵⁷

The relationship between truth commissions and the criminal prosecution of individuals raises delicate questions in relation to the presumption of innocence, the rights of the accused, and evidentiary matters. For example, it is uncertain how the rights of an accused are to be adequately protected if such an individual participates in a truth commission—which may offer incentives for testifying and for confessing to having committed crimes—and this same individual is later indicted before a criminal court with respect to the same matters. Conversely, truth commissions may be in the possession of potentially exculpatory evidence relevant to the criminal trial of an individual. Where witnesses have furnished the truth commission with such evidence under the assurance of confidentiality, it is unclear what recourse a prosecutor, a defence counsel, or a criminal court could have to such evidence.

Some of these concerns may be raised with respect to the dual functioning of the Sierra Leonean Truth and Reconciliation Commission and the Special Court for Sierra Leone. To date there has never been a request made by the Special Court for Sierra Leone for evidence obtained by the Commission on a confidential basis. However, the Commission outlined its concerns that 'at some time in the future, the Special Court for Sierra Leone [...] will seek to obtain information from its archives held under condition of confidentiality', and that for this reason the Commission recommended that 'Parliament should never authorise access by criminal justice mechanisms, either directly or indirectly, to information

in the archives of the Commission that was provided on a confidential basis'.⁵⁸ Regrettably, and despite calls from the UN Secretary-General for the two mechanisms to 'operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions',⁵⁹ the relationship between the Sierra Leonean Truth and Reconciliation Commission and the Special Court for Sierra Leone was never formalized, leading to a lack of cooperation and no detailed discussion on how to address some of the concerns outlined above.(p. 854)

A future case of interaction between a truth commission and a criminal court is potentially the relationship between the ICC and the Kenyan Truth, Justice and Reconciliation Commission. For his part, the Chief Prosecutor of the ICC has indicated that he 'aims to liaise with the different organizations set up by the Kenyan Government, including the Truth, Justice and Reconciliation Commission'.⁶⁰ It remains to be seen how these two transitional justice mechanisms will cooperate with one another in order to bring perpetrators of serious international crimes to justice, whilst ensuring that the rights of the accused, and the interests of witnesses, are protected.⁶¹

B. Commissions of inquiry

Like truth commissions, commissions of inquiry are temporary mechanisms the primary purpose of which is truth-seeking, and the outcome of their work is also a report which includes conclusions and recommendations. Unlike truth commissions, commissions of inquiry are often viewed as a preliminary step to the establishment of transitional justice mechanisms, rather than as a transitional justice mechanism in their own right. Compared with truth commissions, commissions of inquiry often operate in tighter time constraints, and consequently they place less emphasis on the participation of victims, and more emphasis on providing a general overview of the events that took place. A commission of inquiry may be established at the international level, typically under the auspices of the United Nations or another international organization, or at the domestic level.

Commissions of inquiry may have very narrow scopes of inquiry. In some cases they may only inquire into one particular event that occurred within the broader context of an armed conflict that took place over the course of many months, or even years. For example, The Bloody Sunday Inquiry was established by the House of Commons to inquire into the events of one day—30 January 1972—when 13 people were killed by military forces in Londonderry, Northern Ireland.⁶² In other cases, commissions of inquiry may have mandates with wider temporal and spatial scopes. For example, the Independent International Fact-Finding Mission on the Conflict in Georgia established by the Council of the European Union, had to investigate 'the origins and the course of the conflict in Georgia'.⁶³(p. 855)

It is essential that commissions of inquiry are perceived to be impartial and independent in their examination of past atrocities, and that they have not been set up in order 'to give legal cover to governments and justify or minimise their actions, while constructing an official version or "memory" that denies the original abuse'.⁶⁴ To this end, commissions of inquiry are often comprised of persons who are reputed to be independent and impartial, in many cases current or former judges. Some domestic commissions of inquiry may even be comprised of a majority of members who are nationals of other states. The Bloody Sunday Inquiry included two international members: Judge Hoyt of the Court of Appeal, New Brunswick, Canada, and Judge Toohey of the High Court of Australia.

The facts established in reports issued by commissions of inquiry may play an important role in criminal prosecutions and other judicial processes. The terms of reference of the Independent International Fact-Finding Mission on the Conflict in Georgia included the investigation of both inter-state violations, and violations committed by individuals during the course of the armed conflict that could be characterized as serious international crimes.⁶⁵ With respect to serious international crimes committed by individuals during the

armed conflict, these were contained in Volume II of the Report, which contains 'findings and opinions [...] [that] do not necessarily reflect the views of the Mission'.⁶⁶ It is interesting to note that after reaching the conclusion that there was no evidence to support allegations of genocide, a recommendation contained in Volume II of the Report was the dissemination of this information 'to ensure that unfounded allegations of genocide do not further fuel tensions or revengeful acts'.⁶⁷ The potential evidentiary weight of the Report in judicial contexts was recognized by the Mission, which recommended that the Report 'be made public in order to provide information in the context of judicial proceedings' before the International Court of Justice, the European Court of Human Rights, and possibly even potential proceedings before the International Criminal Court.⁶⁸

The factual findings of some commissions of inquiry have served to directly assist criminal investigations before the International Criminal Court. Both a domestic commission of inquiry, and an international commission of inquiry, may be cited in this respect. The former is the Commission of Inquiry into Post-Election Violence ('Waki Commission'), established in Kenya in order to examine the violence precipitated by the 2007 Presidential elections. The latter is the International Commission (p. 856) of Inquiry on violations of international humanitarian law and human rights in Darfur, chaired by Judge Antonio Cassese. Another example of a commission of inquiry that served to directly assist criminal investigations is the United Nations International Independent Investigative Commission (UNIIC), established to assist the Lebanese authorities in their investigation of the bombing on 14 February 2005 that killed former Lebanese Prime Minister Rafik Hariri and 22 others.⁶⁹ The series of reports published by the UNIIC have proved useful to the work of the Special Tribunal for Lebanon.

An issue that arose in the context of the Waki Commission was whether it should 'name names', and include in its final report a list of individuals alleged to have committed serious international crimes in the context of the violence it investigated. The Waki Commission placed the names of individuals in a sealed envelope together with supporting evidence, and it gave this envelope to the Panel of African Eminent Personalities, chaired by the former UN Secretary-General Kofi Annan. It recommended that this information be passed onto either a yet to be established special tribunal, or '[i]n default of setting up the Tribunal, consideration will be given by the Panel to forwarding the names of alleged perpetrators to the special prosecutor of the International Criminal Court in the Hague to conduct further investigations'.⁷⁰ The list of names of alleged perpetrators, together with the supporting evidence, was transferred to the Prosecutor of the International Criminal Court. It is possible that these names and the supporting evidence could have assisted the Court in deciding to respond favourably to the Prosecutor's request to open an investigation in Kenya.⁷¹ On 18 February 2010, the Chief Prosecutor of the International Criminal Court stated that '[t]here is more information from the Waki Commission including names that we can share with the Judges'.⁷²

The Darfur Commission was established by the UN Secretary-General at the request of the Security Council to 'investigate reports of violations of international humanitarian law and human rights law in Darfur'.⁷³ It acted as a fact-finding body by both soliciting information, and by collecting information during visits to Sudan, including the Darfur region; it characterized violations of human rights law and humanitarian law to determine if these violations amounted to genocide under international criminal law; it identified individual perpetrators; (p. 857) and it provided recommendations on how to hold these individuals accountable.⁷⁴ Among the recommendations set out in its final report, the Darfur Commission 'strongly recommend[ed] that the Security Council refer the situation in Darfur to the International Criminal Court pursuant to article 13(b) of its Statute' because '[m]any of the alleged crimes documented in Darfur have been widespread and systematic. They meet all the thresholds set in the Statute. The Sudanese justice system has demonstrated its inability and unwillingness to investigate and prosecute the perpetrators of these

crimes'.⁷⁵ In line with this recommendation, the Security Council referred the situation in Darfur to the International Criminal Court in a Resolution adopted under Chapter VII of the Charter, in which it took note of the Commission's report in the preamble.⁷⁶ On 5 April 2005, the Office of the Prosecutor of the International Criminal Court received 2,500 items of evidence collected by the Commission, and the names of persons contained in a sealed envelope that the UN Secretary-General passed on to the OTP from the Commission.⁷⁷

C. Truth-seeking in the criminal justice process

Unlike truth commissions and commissions of inquiry, truth-seeking by a court of law, at the domestic or international level, is of course a judicial process. Even if the temporal scope of judicial inquiries into past events may be broader in some instances than the temporal scope of inquiry by a commission of inquiry or even certain truth commissions, judicial truth-seeking in the context of criminal law is limited in many other respects. This form of truth-seeking is undertaken with the specific purpose of prosecuting individuals for certain crimes, and past events will be viewed within the legal parameters required to prove and disprove such crimes. Due to logistical and financial constraints, fewer crimes can be prosecuted at the international level than at the domestic level. Depending on the international or internationalized criminal court or tribunal in question, these may include serious international crimes such as genocide, crimes against humanity, war crimes, and in some cases also specific domestic crimes.⁷⁸ Furthermore, the international criminal (p. 858) prosecutor exercises greater prosecutorial discretion than her or his national counterpart, thereby further narrowing the scope of past events that will be examined in the course of the judicial process from the outset.

Despite the partial account of past events offered by a process of truth-seeking in the criminal justice context, this mechanism has certain characteristics that arguably ensure that a particularly reliable account of what has occurred will be obtained. These characteristics include the fact that the accused is provided with legal representation and legal assistance in the preparation of her or his defence, thereby ensuring that her or his account of events is presented in a rigorous manner; there are detailed rules in place pertaining to matters of proof and evidence, including the admissibility of certain forms of evidence, standards of proof, and burdens of proof; and there is a large body of procedural rules in place to ensure the fairness of judicial proceedings. It has been commented in the context of transitional justice that '[...] a society would be better served were the truth to find its origins in, and emerge from, a judicial process',⁷⁹ because a judicial account of past events may offer 'unassailable "pockets of truth"'.⁸⁰

Courts of law cannot examine past atrocities with the breadth that truth commissions and some commissions of inquiry are able to do. It has been noted in the context of the International Criminal Court, that the Court 'will not be in a position to take down and analyse thousands of statements of victims as, for example, a Truth Commission might do'.⁸¹ However, judicial accounts of past atrocities may go into greater depth of detail and allow otherwise reluctant victims to participate in the truth-seeking process due to the ability of courts and tribunals to address the needs of vulnerable witnesses through well-developed frameworks of witness protection. Indeed, some truth commissions and commissions of inquiry have acknowledged that certain witnesses may have declined to provide them with information due to personal safety concerns. For example, the Waki Commission of Inquiry (Kenya) noted in its Final Report that 'we did not have a reliable witness protection program which might have given greater solace to [some individuals] who avoided speaking to us'.⁸² The challenge in the judicial context is in ensuring that demanding measures taken to protect witnesses, such as the suppression of names and voice and image distortion in recorded testimonies, do not unduly place the accused at a

disadvantage in defending her or his rights, and ultimately in ensuring the accurate judicial recording of past events.(p. 859)

There are many challenges faced by criminal courts and tribunals in obtaining and securing evidence during or following an armed conflict, particularly at the international level where international and internationalized criminal courts and tribunals rely on the cooperation and assistance of states and organizations. The assistance provided to the ICTY by the Kosovo Force (KFOR), the military component of the international administration established by the Security Council in Kosovo, and the NATO-led Stabilisation Force in Bosnia and Herzegovina (SFOR, replaced by European Forces in Bosnia and Herzegovina (EUFOR) in 2005), on the basis of a broad obligation to cooperate with the ICTY, has been highly valuable to the work of the ICTY in fulfilling its truth-seeking role. The type of assistance provided to the ICTY has included—in relation to KFOR—finding and securing the sites of mass graves,⁸³ providing aerial surveillance of reported mass grave sites,⁸⁴ assisting in mass grave exhumations,⁸⁵ and other investigative activities.⁸⁶ In relation to SFOR, it amounted to providing security for the ICTY Prosecutor's investigation missions,⁸⁷ assisting in investigation missions,⁸⁸ and assisting in mass grave exhumations.⁸⁹

The International Criminal Court may be assisted by evidence supplied to it by commissions of inquiry, as discussed above with respect to the situations in Kenya and in Darfur, Sudan. It is important to stress that although commissions of inquiry may provide significant amounts of material evidence to the OTP, and they may even suggest the names of persons they consider could have committed serious international crimes that fall within the jurisdiction of the International Criminal Court, the Prosecutor will operate independently. The OTP will thus 'conduct its own independent investigations, in accordance with the Rome Statute and the policies of the Office, in order to determine those persons bearing greatest responsibility for the crimes to be prosecuted by the Court', and the names of persons suspected of having committed serious international crimes, submitted to the Prosecutor by a commission of inquiry, are considered by the OTP merely to (p. 860) 'represent the conclusions of the Commission'.⁹⁰ Similarly, although the OTP of the Special Tribunal for Lebanon continues the investigative function carried out by the UNIIC, the factual findings made by the UNIIC are not binding on the OTP, although they serve to assist the work carried out by the OTP.

4 The Emerging Culture of the End of Impunity for Perpetrators of the Most Serious International Crimes

For a society in transition, it is crucial that there is no impunity for individuals suspected of having committed the most serious international crimes. Impunity has been defined as 'the exemption from accountability, penalty, or punishment for perpetrators of illegal acts'.⁹¹ The UN Security Council has affirmed that '[...] ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians affected by armed conflict and to prevent future such abuses'.⁹² With respect to perpetrators of the most serious international crimes, the last 20 years have witnessed the emergence of a culture of the end of impunity that builds on the pioneering work of the Nuremberg and Tokyo tribunals at the beginning of the twentieth century.⁹³ This is evidenced by concerted efforts taken by the international community of states, and a great many dedicated individuals, in the establishment and functioning of different international and internationalized criminal courts and tribunals,⁹⁴ culminating in a permanent (p. 861) international criminal court of potential universal reach, the International Criminal Court.⁹⁵ It is also evidenced in more recent years—in line with the principle of 'complementarity' within the framework of the International Criminal Court—by a shift in focus from the prosecution of perpetrators of serious international crimes at the international level, to the primary responsibility of states to end impunity for these individuals within the framework of their domestic legal systems. The treaty-based obligations that require states to

prosecute and punish perpetrators of the most serious international crimes are addressed in Section A, below.

For states parties to the Rome Statute, this primary responsibility to exercise criminal jurisdiction is complemented by the jurisdiction of the International Criminal Court where a state party is unable or unwilling to exercise its primary responsibility. However, there is also a positive aspect to states parties' conduct concerning the principle of complementarity. This 'positive complementarity' arises where a state is willing, but unable, to exercise its primary territorial criminal jurisdiction. In such cases, it was remarked that '[i]t would appear that States, in particular States parties to the Statute, should make every effort, either individually or collectively, to give appropriate *assistance* to such a State in building its capacities, with a view to the establishment of a functioning criminal justice system in that State. Such assistance represents—politically, not legally speaking—an “extension” of the complementarity principle: states enable other states to better fulfil their primary responsibility under the Rome Statute to investigate and prosecute the most serious crimes.'⁹⁶ This 'positive complementarity' was consecrated on 8 June 2010 when the Review Conference of the Rome Statute adopted a Resolution that recognized 'the desirability of States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level'.⁹⁷ The role of the International Criminal Court in the culture of the end of impunity for persons suspected of having committed serious international crimes is addressed in Section B, below.(p. 862)

Exercises of 'positive complementarity' can assist a willing albeit unable state party to the Rome Statute ultimately to carry out criminal investigations and prosecutions in line with its primary responsibility to exercise criminal jurisdiction with respect to serious international crimes. For transitional societies, where institutional structures may be in disarray or in need of reform, it will be particularly important to ensure that the state in question is assisted in establishing a robust and effective legal system. However, in cases where a non-state party to the Rome Statute is unwilling to investigate and prosecute suspected perpetrators of serious international crimes, and where such persons are beyond the reach of the jurisdiction of the Court, including in cases where no recourse to Article 13 of the Rome Statute is envisaged by the Security Council, there arise gaps of impunity in the fabric of the emerging culture to bringing alleged perpetrators to trial. It is arguable that in such instances other states could exercise universal criminal jurisdiction in order to bring suspected perpetrators of serious international crimes to justice. This argument is addressed in section C, below.

A. Individual criminal responsibility at the domestic level

The emerging culture of the end of impunity for perpetrators of serious international crimes is manifested in two respects at the domestic level. On the one hand, states must take 'effective action to combat impunity',⁹⁸ in line with their existing responsibilities. There exist different treaty obligations to prosecute and punish individuals suspected of having committed serious international crimes that may be binding on states. These obligations are addressed in section (i). On the other hand, a corollary to the obligation to take effective action to combat impunity for serious international crimes is the prohibition on granting amnesties to the suspected perpetrators of such crimes. The granting of amnesties may also conflict with human rights obligations binding on states. The issue of amnesties for the commission of serious international crimes is addressed in section (ii).

(i) *Obligations to prosecute and to punish*

It remains controversial whether—and to what extent—there exists a general obligation binding on states, either under customary international law or as a general principle of law, to prosecute and punish those persons suspected of having committed the most serious international crimes.⁹⁹ According to the Basic (p. 863) 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, submitted to the UN General Assembly, '[i]n cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violation and, if found guilty, the duty to punish her or him'.¹⁰⁰ The Security Council has limited itself to emphasizing '[...] the responsibility of States *to comply with their relevant obligations* to end impunity to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law, while recognizing, for States in or recovering from armed conflict, the need to restore or build independent national judicial systems and institutions'.¹⁰¹

Although the existence of a general obligation is debatable, it is clear that some states are bound by treaty obligations to prosecute and punish suspected perpetrators of serious crimes that have been committed on their territory. There is no obligation contained in the operative parts of the Rome Statute, according to which states parties must prosecute individuals suspected of having committed serious international crimes that fall under the jurisdiction of the International Criminal Court. However, it is arguable that on the basis of Article 17 of the Statute (principle of complementarity), read together with paragraphs 4 to 6 of the preamble, states parties to the Rome Statute have a primary obligation to prosecute and punish individuals suspected of having committed crimes contained in the Statute, namely war crimes, crimes against humanity, genocide, and possibly aggression, on their territory.¹⁰² Pursuant to the very *raison d'être* of the International Criminal Court set out in paragraphs 4 to 6 of the preamble to its Statute, states parties affirm 'that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level', they express their determination 'to put an end to impunity for the perpetrators of these crimes [...]', and they recall 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.¹⁰³(p. 864)

States parties to the Convention on the Prevention and Punishment of the Crime of Genocide have undertaken—in addition to their obligation to prevent genocide—to punish genocide.¹⁰⁴ Concretely, this means that states parties to this Convention must exercise their criminal jurisdiction, to ensure that '[p]ersons charged with genocide or any of the other acts enumerated in article III [of the Genocide Convention] shall be tried by a competent tribunal of the State in the territory of which the act was committed [...]'.¹⁰⁵ This obligation to prosecute under the Genocide Convention is limited to exercises of territorial jurisdiction. However, this does not prevent states parties to the Genocide Convention from conferring other forms of jurisdiction on their domestic criminal courts, even though they are not obliged to do so. The International Court of Justice has noted in this respect that '[a]rticle VI [of the Genocide Convention] only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so'.¹⁰⁶

States parties to the 1949 Geneva Conventions, and Additional Protocol I to the Geneva Conventions, arguably have a broader obligation to prosecute or extradite those persons suspected of having committed grave breaches of the Geneva Conventions that extends beyond conferring territorial criminal jurisdiction on their domestic courts.¹⁰⁷ Once a state party to the Geneva Conventions 'is aware that a person on its territory has committed such an offence, it is its duty to see that such person is arrested and prosecuted without delay'.¹⁰⁸ Similarly, in accordance with the *aut dedere aut judicare* obligation contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),¹⁰⁹ states parties have an obligation to either submit a case concerning torture to their relevant (p. 865) prosecutorial authorities, or to extradite the person, in line with the provisions of the Convention Against Torture.¹¹⁰ Furthermore, Article I of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity provides that no statutory limitation applies to war crimes, crimes against humanity and genocide, irrespective of the date of the commission of such crimes, and 'even if such acts do not constitute a violation of the domestic law of the country in which they were committed'.¹¹¹ It has been argued that this treaty 'by necessary implication places an obligation on States to prosecute' these crimes.¹¹²

Two remarks are warranted with respect to obligations to prosecute and punish persons suspected of having committed serious international crimes in the context of a transitional society. First, it could be argued that the prosecution and punishment of individuals suspected of committing past abuses could destabilize a fragile, newly established democracy. However, rather than undermining progress towards national reconciliation, such criminal trials conducted in the public sphere may serve as a vehicle for reconciliation. Luis Moreno Ocampo noted in the context of Argentina that '[c]ivil society was strengthened as a result of the investigations and public trials, which increased the public's commitment to, and respect for, democracy and permitted—through the newly-created free press—a constructive public debate'.¹¹³ Secondly, it is important to stress the need for an equal application of the law. The prosecution of individuals suspected of serious international crimes, regardless of their current or past membership or allegiance to an armed group or a regime of governance is desirable. The Security Council noted with regard to Haiti in 2004 that 'an end to impunity is key to national reconciliation in Haiti. The Council stresses that justice should apply equally to all citizens in that country and be carried out by an independent judicial system with the support of a reformed correctional system. The Council expresses its strong concern at reports of double standards in the administration of justice'.¹¹⁴

(ii) Amnesties

Amnesties are domestic laws the purpose of which is to provide persons suspected of having committed unlawful conduct in the past with prospective criminal (p. 866) impunity and civil indemnity. The attitude of the international community towards amnesties has drastically changed over the years. In the 1960s and 1970s, human rights advocates and legal scholars actively supported amnesties for political prisoners, particularly in the context of dictatorial regimes of governance. The non-governmental organization Amnesty International even went so far as to adopt the notion as part of its name.¹¹⁵ In the context of crimes committed during armed conflict, Article 6(5) of Additional Protocol II to the Geneva Conventions famously provides that '[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'.¹¹⁶

Nowadays there is general consensus that ‘unconditional amnesties’ or ‘blanket amnesties’, ie amnesties that cover any crime committed in the past, are unacceptable. The reason for this is that a prohibition of amnesties for persons suspected of having committed serious international crimes is a logical corollary of the emerging culture of the end of impunity for perpetrators of such crimes. Amnesties may also be incompatible with other obligations binding on states, such as human rights obligations.¹¹⁷ The Nuremberg Declaration on Peace and Justice asserts that ‘amnesties must not be granted to those bearing the greatest responsibility for genocide, crimes against humanity and serious violations of international humanitarian law’.¹¹⁸

Although there is general consensus that amnesties for serious international crimes are unacceptable under international law, it is acknowledged from the outset that there are instances where amnesties for other crimes may not only be acceptable, but desirable. In the context of transitional societies, where large parts of the population may have participated in a non-international armed conflict without having committed serious international crimes, amnesties may be an appropriate mechanism to assist the reintegration of such persons into society by granting them impunity for the domestic crime of participation in the conflict, in line with Article 6(5) of AP II.¹¹⁹ In this vein, the Nuremberg Declaration on Peace and Justice (p. 867) noted that ‘[a]mnesties, other than for those bearing the greatest responsibility for genocide crimes against humanity and war crimes, may be permissible in a specific context and may even be required for the release, demobilization and reintegration of conflict-related prisoners and detainees’.¹²⁰ Similarly, the UN has recognized that ‘[i]t may be necessary and proper for immunity from prosecution to be granted to members of the armed opposition seeking reintegration into society as part of a national reconciliation process’.¹²¹

The practice of the United Nations provides a guide to the changing attitude towards amnesties for perpetrators of serious international crimes. Although the United Nations may have harboured concerns about amnesties being granted to persons suspected of having committed serious international crimes in the early to mid-1990s, it stopped short of outright condemning them. For example, in response to a general amnesty that was adopted by El Salvador one week after the release of the El Salvador Commission on the Truth’s report, the UN Secretary-General did not expressly condemn this measure. Rather, he noted in his Report in 1993 that ‘I expressed my concern at the haste with which this step had been taken and my view that it would have been preferable if the amnesty had been promulgated after creating a broad degree of national consensus in its favour’.¹²² Similarly, when the Abidjan Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone was signed on 30 November 1996, it contained an Article granting amnesty to ‘any member of the RUF/SL in respect of anything done by them in pursuit of their objectives as members of that organization up to the time of the signing of this Agreement’.¹²³ The UN Special Envoy who witnessed the signing of the Abidjan Agreement did not raise the issue of the blanket amnesty contained therein. The UN Secretary-General simply noted in his Report that the ‘political provisions of the Accord [...] also include the provision of amnesty for members of the RUF [...]’.¹²⁴(p. 868)

Although the United Nations did not openly condemn amnesties during the early and mid-1990s, this period marked a shift in attitude of the international community towards amnesties as a result of the developing culture of the end of impunity for perpetrators of serious international crimes, which in turn impacted upon UN practice. In 1992, the UN General Assembly adopted a ‘Declaration on the Protection of All Persons from Enforced Disappearance’, containing the principle that ‘[p]ersons who have or are alleged to have committed [acts of enforced disappearance] shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction’.¹²⁵ Furthermore, it was during this same decade that the UN

Security Council established two ad hoc international criminal tribunals: the ICTY on 25 May 1993 and the International Criminal Tribunal for Rwanda (ICTR) on 8 November 1994.

Although the Statutes of these tribunals make no reference to amnesties, it is clear that they were established '[...] for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law',¹²⁶ and '[...] for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law',¹²⁷ respectively. The Trial Chamber of the ICTY in the case of *Prosecutor v Anto Furundžija* stated that the granting of amnesty laws with respect to the commission of torture would have the legal effect of 'international legal [non-]recognition'.¹²⁸ The 1990s also marked growing calls for unconditional amnesties to be prohibited by a number of human rights bodies because of the bar that amnesties pose to the protection of certain human rights.¹²⁹ In 1994, the UN Human Rights Committee stated in its General Comment No 20 concerning Article 7 of the International Covenant on Civil and Political Rights,¹³⁰ that '[a]mnesties are generally incompatible with the duty of States to investigate [...] acts [of torture]'.¹³¹

One of the most significant developments in the 1990s in the emerging culture of the end of impunity for perpetrators of serious international crimes occurred in (p. 869) 1998 with the adoption of the Rome Statute, a criminal court of potential universal jurisdiction. This occurred with the support of the UN Secretariat, which acted as the Secretariat of the Preparatory Committee until 31 December 2003. The adoption of the Rome Statute put all perpetrators of serious international crimes on notice that once the Rome Statute entered into force, the International Criminal Court could potentially exercise its jurisdiction in large parts of the world by virtue of its various forms of jurisdiction from the date of entry into force of its Statute.¹³² It thus tolled the bell for amnesties being granted in relation to serious international crimes that fall under its jurisdiction.

By 1999, it had become apparent that the position of the United Nations was to henceforth take positive steps in expressing its non-acceptance of amnesty provisions contained in peace treaties that would cover serious international crimes. According to paragraph 12 of the 1999 Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution, UN representatives were put on notice that 'the United Nations cannot condone amnesties regarding war crimes, crimes against humanity and genocide or foster those that violate treaty obligations of the parties in this field'.¹³³ This practice was first manifested when the Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone was signed on 3 June 1999. The Representative of the UN Secretary-General, when signing the Lomé Peace Agreement, penned the following statement next to his signature: 'The United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law'.¹³⁴ Although no legal obligations from peace agreements are opposable to the United Nations, the implication of a UN representative witnessing such a peace agreement is 'an indication of a moral or political support for the principles contained therein', and '[a]s far as the United Nations is concerned, a signature as a witness is a "stamp of legitimacy" of a kind'.¹³⁵(p. 870)

The following year, in 2000, the UN Secretary-General stated in a report on the establishment of the Special Court for Sierra Leone that '[w]hile recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law [...]'.¹³⁶ Article 10 of the Statute of the Special Court for Sierra Leone makes clear that there is no amnesty for crimes falling under the jurisdiction of the Special Court.¹³⁷ The mounting international condemnation of amnesties for perpetrators of serious international

crimes led a respected legal scholar to conclude in 2002 that '[a]lthough international law does not—yet—prohibit the granting of amnesty for international crimes, it is clearly moving in that direction'.¹³⁸

In 2006, the Legal Counsel of the UN stated during a meeting of the Security Council that '[...] amnesty for international crimes has been regarded as unacceptable in international practice. Today, its rejection must be enshrined as a standard to be enforced'.¹³⁹ Legal advice issued by the UN Secretariat in 2006 for UN envoys to regions where an amnesty law for persons indicted by the International Criminal Court was in place, stipulated that '[...] in the event that the Special Envoy is called upon to conduct, facilitate or otherwise participate in negotiations of a permanent cease-fire or a peace agreement, especially if the Agreement includes an amnesty clause, the following should be borne in mind. It has been a long-standing position of the United Nations not to recognize, let alone condone any amnesties for the crime of genocide, crimes against humanity, war crimes and other serious (p. 871) violations of international humanitarian law'.¹⁴⁰ Similarly, an interoffice memorandum provided:

The United Nations does not recognize any amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This principle, which reflects a long-standing position and practice, applies to peace agreements negotiated or facilitated by the United Nations, or otherwise conducted under its auspices. In the event that such a peace agreement nevertheless grants amnesty for such crimes, the United Nations representative, when witnessing the agreement on behalf of the United Nations, shall affix a declaration next to his or her signature, stating that 'the United Nations does not recognize amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law'.¹⁴¹

There is now general consensus that amnesties for serious international crimes are unacceptable under international law, and that persons suspected of having committed such crimes should be prosecuted. It remains debatable whether the act of granting amnesties for serious international crimes per se is unlawful under international law. It is clear, however, that the granting of amnesties conflicts with obligations binding on states to prosecute perpetrators of serious international crimes, as well as other human rights obligations including a duty to investigate human rights violations. The unacceptable nature of unconditional amnesties has developed in direct proportion to the emergence of the culture of the end of impunity for serious international crimes. Furthermore, with respect to transitional societies, the Security Council has called on amnesties not to be granted for sexual crimes. In 2008, it

*stress[ed] the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes, and call[ed] upon Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and stress[ed] the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation.*¹⁴²

(p. 872)

B. Individual criminal responsibility at the international level

International and internationalized criminal courts and tribunals play a pivotal role in the emerging culture of the end of impunity for perpetrators of serious international crimes.¹⁴³ There are some advantages to prosecuting those persons most responsible for serious international crimes before international and internationalized criminal courts and tribunals, rather than before national courts. Institutional reforms may need to take place before criminal trials can be held within the framework of a domestic court system. The highly charged political environment in a post-conflict transitional society may mean that a criminal trial at the domestic level would raise serious safety concerns for the accused, members of the court, witnesses, and the general public. Indeed, the political environment in the region may be of such intensity that even a criminal trial of a former political leader before an international or internationalized criminal court or tribunal may need to take place on the territory of a state far removed from the region. For example, instead of taking place in Freetown, Sierra Leone, the criminal trial of the former President of Liberia, Charles Taylor, is being conducted by the Special Court for Sierra Leone in The Hague, the Netherlands, initially at the premises of the International Criminal Court, and subsequently at the premises of the Special Tribunal for Lebanon.

The future of international criminal prosecutions is the system created by the Rome Statute, to which an impressive and steadily increasing number of states are parties. It should be emphasized from the outset that unlike other international and internationalized criminal courts and tribunals, which exercise primary jurisdiction over domestic courts in relation to the crimes that fall under their respective jurisdictions, the International Criminal Court functions on the basis of the principle of 'complementarity', meaning that it can only exercise its jurisdiction in situations in which a state is unable or unwilling to exercise its primary, domestic criminal jurisdiction. As explained above, the notion of complementarity extends beyond the primary responsibility of states to exercise their domestic criminal jurisdictions, and it includes 'positive complementarity', namely assistance that states and international organizations can provide to other states in building the capacity of domestic legal systems to ensure the criminal prosecution of suspected perpetrators of serious international crimes.

'Positive complementarity' may also be viewed within the broader context of the notion of the 'responsibility to protect', and in particular, the 'responsibility to prevent'. In 2005, the UN General Assembly adopted a Resolution in which states agreed that '[t]he international community should, as appropriate, encourage and (p. 873) help States to exercise this responsibility [to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity] and support the United Nations in establishing an early warning capability'.¹⁴⁴ According to Sheri Rosenberg, this 'collective responsibility to take coordinated action' also 'implies individual state responsibility to take reasonable steps to prevent the acts it seeks to prohibit'.¹⁴⁵ There is thus a need both for individual states, and the international community of states as a whole, to provide assistance in the form of capacity-building to those states struggling to fulfil their primary obligations to prevent and punish the commission of serious international crimes. The kinds of assistance that may be provided to individual states include:

[...] (a) ensuring that donors place on their agenda the need for legal reform, such as domestication of the Rome Statute and implementing legislation; (b) adopting a whole government approach to complementarity, i.e. aligning development cooperation projects with other forms of bilateral technical cooperation such as among police forces; [...] (c) creating a support community that consists of international justice and humanitarian actors on the one hand, and development and peace-building efforts on the other [...] [and (d)] developing a comprehensive

tool kit on complementarity as well as developing a roster of expertise comprising ex-tribunal personnel to be administered by some mechanism.¹⁴⁶

It is debatable whether the notion of 'positive complementarity' also extends to assistance that the International Criminal Court itself may provide to state parties. The Office of the Prosecutor has adopted a strategy that is 'a *positive approach* to complementarity, meaning that it encourages genuine national proceedings where possible, relies on national and international networks and participates in a system, of international cooperation'.¹⁴⁷ This 'positive' prosecutorial strategy does not equate with assistance in the form of capacity-building. Rather, it is more aptly defined as 'a managerial concept that organizes the relationship between the court and domestic jurisdictions on the basis of three cardinal principles: the idea of shared burden of responsibility, the management of effective investigations and prosecutions, and the two-pronged nature of the cooperation regime'.¹⁴⁸ To avoid confusion with the notion of 'positive complementarity' as consecrated in a Resolution adopted by the Review Conference of the Rome Statute in 2010,¹⁴⁹ a prosecutorial strategy of the International Criminal Court that serves to positively encourage states parties (p. 874) to fulfil their primary responsibility to prosecute suspected perpetrators of serious international crimes at the domestic level is perhaps more appropriately referred to as 'proactive complementarity'.¹⁵⁰

The success of the International Criminal Court is dependent upon the cooperation of states parties with the Court. The Rome Statute obliges states parties to cooperate with the Court in various respects. There exists both a general obligation to cooperate under Article 86 of the Statute, and a number of specific obligations contained under Part IX thereof. Additionally, states parties to the Genocide Convention have a distinct treaty obligation to cooperate with the International Criminal Court contained under Article VI of the Genocide Convention, which requires states parties to cooperate with 'all international criminal courts created after the adoption of the Convention [...] of potentially universal scope, and competent to try the perpetrators of genocide',¹⁵¹ thus including the International Criminal Court. The Security Council may also require non-states parties to the Rome Statute to cooperate with the Court in a binding resolution adopted under Chapter VII of the UN Charter, as occurred in relation to the Government of Sudan,¹⁵² and in relation to the Libyan authorities.¹⁵³

Although the UN Organization is not, and cannot become, a party to the Rome Statute, it does have an obligation to cooperate and assist the International Criminal Court as stipulated in the Relationship Agreement between the United Nations and the International Criminal Court.¹⁵⁴ From its terms it is clear that '[...] the Relationship Agreement does not oblige the United Nations to support any policy or strategy decision of the ICC'.¹⁵⁵ However, the UN Secretariat has insisted that '[t]he United Nations should, if possible, avoid any action that would undermine or counteract key ICC policies and strategies'.¹⁵⁶ In practice this means that considerable tact should be exercised by representatives of the United Nations who may come into contact with persons indicted by the International Criminal Court in the context of their work. According to a legal opinion issued by the UN Secretariat in 2006, if a UN Special Envoy cannot avoid direct contact with persons indicted by (p. 875) the International Criminal Court in carrying out his or her mandate, then such contact should 'be limited to what is strictly required for carrying out [the] mandate. The presence of the Special Envoy in any ceremonial or similar occasions should be avoided. We should also add that when contacts with the [Rebel Group] are necessary, an attempt should be made to interact with *non-indicted [Rebel Group] leaders*, if at all possible'.¹⁵⁷

C. Filling the ‘impunity gap’ through exercises of universal criminal jurisdiction

The steady increase in the number of states parties to the Rome Statute is leading to a greater jurisdictional reach of this international judicial body. Pending this future development, there arise ‘gaps of impunity’ in the fabric of the culture of the end of impunity in cases in which a non-state party to the Statute is unable or unwilling to investigate and prosecute suspected perpetrators of serious international crimes, and when the International Criminal Court does not have jurisdiction. It has been argued that in such cases the domestic criminal courts of other states should exercise universal criminal jurisdiction with regard to the suspected perpetrators.¹⁵⁸ It is important to recall in this respect that the establishment of international and internalized criminal courts and tribunals has not replaced the role of the domestic courts of other states in the fight against impunity. Judges Higgins, Kooijmans, and Buergenthal noted in relation to exercises of universal criminal jurisdiction that the fight against impunity for perpetrators of serious international crimes has not been ‘[...] “made over” to international treaties and tribunals, with national courts having no competence in such matters’.¹⁵⁹

‘Universal criminal jurisdiction’ refers to exercises of domestic jurisdiction ‘based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, (p. 876) or any other connection to the state exercising such jurisdiction’.¹⁶⁰ Exercises of this form of jurisdiction—where there is no connecting factor to the forum—are highly controversial.¹⁶¹ Some scholars advocate exercises of universal jurisdiction only in those cases in which the accused is found on the territory of the state wishing to prosecute, because ‘[o]therwise, we may be faced with the Belgian situation, where judges are flooded with complaints against dictators and generals from everywhere in the world’.¹⁶² Courts exercising universal jurisdiction must surmount challenges during the judicial process that could be exacerbated by the distance of the court from the scene of the crime, and the court’s lack of powers of enforcement in the territory where the serious international crimes occurred, such as the securing of evidence and the protection of witnesses.

Conversely—and to some extent, counter-intuitively—it may be the case that certain aspects of the judicial process are enhanced by virtue of the fact that a court outside the forum is conducting the criminal proceedings. Witnesses reluctant or unable to testify in the forum state may be willing to travel to another state in order to testify. For example, in relation to the exercise of universal criminal jurisdiction by Spanish courts concerning events that took place in Argentina under the dictatorship regime, Judge Garzón was able to hear ‘the testimonies of a large number of witnesses, including family members of the disappeared, and victims of torture and other acts of state repression’¹⁶³ who had travelled to Spain in order to take part in the proceedings.

There is no general obligation binding on states to confer universal criminal jurisdiction on their domestic courts. However, some states may have treaty-based obligations to extend their criminal jurisdiction in different ways, such as on the basis of the principles of active or passive nationality. For example, under Article 5 of CAT, states parties must establish criminal jurisdiction for acts of torture committed in the jurisdiction of the forum state,¹⁶⁴ when the alleged offender is a national of the forum state,¹⁶⁵ when the victim is a national of the forum state ‘if that State (p. 877) considers it appropriate’,¹⁶⁶ and when the alleged offender is on the territory of the forum and is not extradited pursuant to other provisions of the Convention Against Torture.¹⁶⁷ In line with the *Case of the S.S. ‘Lotus’* before the

Permanent Court of International Justice, states are arguably free to extend their criminal jurisdiction in any way that does not violate international law.¹⁶⁸

Unlike international and internationalized criminal courts and tribunals, a domestic court may be barred from exercising criminal jurisdiction with respect to foreign state representatives who enjoy immunity. Thus, even though a state may have conferred universal criminal jurisdiction on its domestic courts pursuant to a treaty obligation to prosecute and punish serious international crimes, this jurisdiction cannot be exercised by the domestic courts of that state with respect to incumbent Heads of State, Ministers for Foreign Affairs, and other state representatives who enjoy immunity from criminal jurisdiction. The International Court of Justice stated in the *Arrest Warrant* case that:

[...] although international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law [...] These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.¹⁶⁹

Immunity from jurisdiction provides legal protection from prosecution for foreign state representatives, thereby ensuring the day-to-day functioning of states and stability in international relations. This is understandable, but nevertheless frustrating in those situations in which a Head of State suspected of having committed serious international crimes is able to travel freely to other countries without risk of being held accountable for these crimes. The International Court of Justice has taken care to distinguish immunity from impunity, noting that '[j]urisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility'.¹⁷⁰ It may come to pass that although the domestic criminal courts of a state are barred from exercising jurisdiction *vis-à-vis* an incumbent foreign state representative for serious international crimes committed over a certain period of time, once this person ceases to hold office, the state may be free to prosecute this person based on universal criminal jurisdiction in relation to 'acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity'.¹⁷¹(p. 878)

5 Justice for Victims in the Form of Reparation

Reparation is premised on 'a principle of international law, that a breach of an engagement involves an obligation to make reparation in an adequate form'.¹⁷² Reparation has been identified as a key component of a holistic approach to transitional justice. According to the Basic Principles and Guidelines, '[a]dequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law'.¹⁷³ Reparation to victims of serious international crimes may take the form of either individual or collective reparation.¹⁷⁴ Emphasis is placed here on individual reparation.

It is debatable whether there is a right to reparation for victims of serious international crimes,¹⁷⁵ and if so, the scope of this right. In relation to an obligation binding on states to provide reparation to victims, states parties to the 1907 Hague Convention (IV) and the 1977 Additional Protocol I have an obligation to provide reparation to other states parties to these treaties for IHL violations.¹⁷⁶ According to a traditional understanding of these treaty provisions, this means that only states—and not individual victims—can invoke these treaty obligations in a claim for (p. 879) reparation.¹⁷⁷ Thus, through diplomatic protection, a state may bring a claim against another state in a judicial forum, or via another mechanism for the peaceful settlement of disputes, and claim reparation for the injury suffered by its nationals.¹⁷⁸ However, a state is not obligated under international law to bring such a claim;

it may do so at its discretion. Furthermore, any reparation obtained will pass directly to the claimant state, which may—if it wishes—subsequently transfer some portion of it to the individual victim(s) concerned.

Some scholars have argued that individual victims should be able to directly claim reparation from a state party on the basis of the aforementioned treaties. In this vein, Riccardo Pisillo Mazzeschi argues that '[i]n our opinion, Article 3 [of the] Hague Convention No. IV and Article 91 of Protocol I should [...] be jointly interpreted as rules providing for an obligation of reparation in favour both of states and of injured individuals'.¹⁷⁹ This argument is consonant with the progressive development of international law. However, there remain concrete impediments to its full realization. One of the difficulties that this argument must overcome is determining the forum in which an individual victim could bring such a claim for reparation directly against a foreign state. National courts are barred from examining the merits of a claim for reparation brought by an individual victim against a foreign state for serious international crimes on the basis of the jurisdictional bar of state immunity.¹⁸⁰ There is limited practice in the national courts in Greece and Italy of allowing such claims to reach the merits stage on the basis of the *jus cogens* nature of the norm(s) allegedly violated.¹⁸¹ Further clarification on the international law (p. 880) governing state immunity may be provided by the International Court of Justice in due course.¹⁸²

Although state immunity may pose an insurmountable hurdle to claims brought by individuals against foreign states, there is no such jurisdictional bar under international law for claims brought against a state concerning serious international crimes committed by this state in the forum, before this same state's national courts. According to the Basic Principles and Guidelines, '[i]n accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law'.¹⁸³ Some international legal obligations stipulate that there is a requirement for states to provide reparation within the framework of their domestic legal systems. These include the right of reparation for those who have suffered discrimination under Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination,¹⁸⁴ and the right for victims of torture to obtain compensation under Article 14 of the Convention Against Torture.¹⁸⁵

Aside from national courts, victims of serious international crimes may also be able to bring claims for reparation against a state before human rights courts,¹⁸⁶ once domestic remedies have first been exhausted. Pursuant to Article 41 of the European Convention on Human Rights,¹⁸⁷ '[i]f the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party'. Similarly, Article 63(1) of the American Convention on Human Rights provides that '[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the (p. 881) breach of such right or freedom be remedied and that fair compensation be paid to the injured party'.¹⁸⁸

Reparation may also be obtained from a state for victims of serious international crimes via mechanisms established at the international level with the assistance of the United Nations. For example, the UN Compensation Commission was created in 1991 as a subsidiary organ of the UN Security Council in Resolution 692 of 20 May 1991, and pursuant to Resolution 687 of 3 April 1991, in which the Security Council established that 'Iraq [was] liable for any [...] injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'. Reparation could also be obtained from a state after the state establishes, of its own volition, mechanisms for providing reparation to victims of

serious international crimes with reparation, as Germany provided to some victims of the Holocaust.

Rather than bring a claim against a state, individual victims of serious international crimes may choose to bring claims directly against the individual suspected of having committed the serious international crime.¹⁸⁹ Claims may be brought before the national courts of a state, either as part of the criminal proceedings against the suspected perpetrator where the victim may participate as a '*partie civile*' in the proceedings—as is the case in many civil law countries—or as a separate judicial process, as is the case in common law countries. Reparation may also be obtained from the individual perpetrator in the institutional context of an international or internationalized criminal court or tribunal. For example, under Article 75(2), of the Rome Statute of the International Criminal Court, the Court may make an order against a convicted person for reparation to victims that may include restitution, compensation, and rehabilitation.¹⁹⁰ Claims could also be brought against individuals before national courts of a foreign state, depending on the enabling domestic legislation of that state. For example, the US Aliens Tort Claims Act¹⁹¹ allows US courts to hear civil suits brought by any foreigner who alleges a violation of the 'law of nations'. (p. 882)

Reparation may also be envisaged in the context of non-judicial transitional justice mechanisms, such as truth commissions (discussed above), and traditional justice mechanisms. In relation to traditional justice mechanisms, Rwanda established *Gacaca* courts in order to address the significant number of individuals allegedly involved in the commission of serious international crimes. It was simply not feasible to prosecute every suspect within the framework of the domestic criminal justice system nor before the ICTR, which—in line with the exercise of prosecutorial discretion and the institutional capacity of the Tribunal, including financial constraints—can only prosecute a small number of individuals deemed to be those most responsible. Only very limited forms of reparation are available for genocide survivors before *Gacaca* courts in the form of restitution of property, or symbolic reparation in the form of the provision of information leading to locating the remains of genocide victims.¹⁹²

In cases in which individual perpetrators are unable to provide reparation to their victims, it may be appropriate for the transitional government in the state in question to step in and provide such reparation. However, there is no legal obligation binding on the state to do so. To this end, the Final Report submitted to the UN Commission on Human Rights by Special Rapporteur Bassiouni on the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms, states that '[i]n the event that the party responsible for the violation is unable or unwilling to meet these obligations, the State *should* endeavour to provide reparation to victims [...] To that end, States *should* endeavour to establish funds for reparation to victims and seek other sources of funds wherever necessary to supplement these'.¹⁹³ Similarly, the Basic Principles and Guidelines provide that 'States *should endeavour* to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations'.¹⁹⁴ (p. 883)

6 Conclusion

Transitional justice demands a coordinated approach among a plurality of mechanisms to assist a society in transitioning from a state of armed conflict in which serious international crimes were committed, to a peaceful and reconciled future. This Chapter has provided an overview of a non-exhaustive number of transitional mechanisms, including the truth-seeking mechanisms of truth commissions, commissions of inquiry, and judicial fact-finding; the criminal prosecution of individuals at the international and national levels within the context of the emerging culture of the end of impunity for suspected perpetrators of serious international crimes; and forms of reparation for victims of serious international crimes. On a theoretical level it is not difficult to demand a coordinated approach among different

transitional justice mechanisms. However, it is challenging to achieve such coordination in practice. This Chapter has addressed some of the difficulties that may arise in the interaction among different transitional justice mechanisms, such as protection of the rights of the accused, and of witnesses that may arise in the relationship between a truth commission and a criminal court or tribunal.(p. 884)

Footnotes:

* The reader is advised that this chapter was completed in 2011.

¹ International Center for Transitional Justice, 'What is Transitional Justice?', available at <http://www.ictj.org/static/TJApproaches/WhatIsTJ/ICTJ_WhatIsTJ_pa2008_.pdf>. See also the definition provided by UN Secretary-General Kofi Annan in his report on 'The rule of law and transitional justice in conflict and post-conflict societies', 23 August 2004, UN Doc S/2004/616, § 8.

² UN Secretary-General Kofi Annan stated in his report on 'The rule of law and transitional justice in conflict and post-conflict societies', that '[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives', 23 August 2004, UN Doc S/2004/616, 1. On the adoption of democratic forms of governance in post-conflict transitional societies, see S. Ratner, 'New Democracies, Old Atrocities: An Inquiry in International Law', 87 *Georgetown Law Journal* (1999) 707-48.

³ Nuremberg Declaration on Peace and Justice, annexed to the letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany, and Jordan to the United Nations addressed to the Secretary-General, 19 June 2008, UN Doc A/62/885, recommendation 3.3, at 7.

⁴ A. La Rosa and X. Philippe, 'Transitional Justice', in V. Chetail (ed), *Post-Conflict Peacebuilding: A Lexicon* (New York: Oxford University Press, 2009), 368-79.

⁵ Preamble of the Rome Statute of the International Criminal Court, 17 July 1998, entered into force on 1 July 2002, A/CONF.183/9, 2187 UNTS 3.

⁶ J. Méndez, Special Advisor to the Prosecutor of the International Criminal Court on Crime Prevention, 'Quantative analysis of the deterrence impact', annexed to 'The Importance of Justice in Securing Peace', Review Conference of the Rome Statute, 30 May 2010, RC/ST/PJ/INF.3, at 8-11.

⁷ P. Hayner, *Unspeakable Truths. Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Oxon: Routledge, 2011), 23; Office of the United Nations High Commissioner for Human Rights, 'Rule-of-Law Tools for Post-Conflict States. Truth Commissions', UN Doc HR/PUB/06/1, 2006, 2.

⁸ The development of this notion can be traced in a chronological reading of the following documents: Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Ottawa, International Development Research Centre, December 2001, §§ 39-45; Report of the UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, September 2005, UN Doc A/59/2005; UN Secretary-General, *Implementing the responsibility to protect. Report of the Secretary-General*, 12 January 2009, UN Doc. A/63/677; UN Secretary-General, *Report of the Secretary-General on the protection of civilians in armed conflict*, 29 May 2009, UN Doc S/2009/277.

⁹ See 'Report of the Panel on United Nations Peace Operations', annexed to identical letters dated 21 August 2000 from the Secretary-General to the President of the General Assembly and the President of the Security Council, 21 August 2000, UN Doc A/55/305; Report of the High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN Doc A/59/565, 2 December 2004; Report of the UN Secretary-

General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, September 2005, UN Doc A/59/2005; UNGA Resolution 60/1, 'World Summit Outcome', 24 October 2005; UN Secretary-General, 'Uniting our strengths: Enhancing United Nations support for the rule of law', Report of the Secretary-General, 14 December 2006, UN Docs A/61/636-S/2006/980; UN Secretary-General, 'Strengthening and coordinating United Nations rule of law activities', Report of the Secretary-General, 6 August 2008, UN Doc A/63/226; UN Secretary-General, 'Annual report on strengthening and coordinating United Nations rule of law activities', Report of the Secretary-General, 17 August 2009, UN Doc A/64/298; Statement by the President of the Security Council, 12 February 2010, UN Doc S/PRST/2010/2.

¹⁰ See UN Secretary-General, *An Agenda for Peace. Preventative diplomacy, peacemaking and peace-keeping*, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 21 January 1992, 17 June 1992, UN Docs A/47/277-S/24111; Report of the High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN Doc A/59/565, 2 December 2004, §§ 224–30; UNGA Resolution 60/1, 'World Summit Outcome', 24 October 2005; UNSC Resolution 1645 (2005), 'Post-conflict peacebuilding', 20 December 2005; UNGA Resolution 60/180, 'The Peacebuilding Commission', 20 December 2005; UN Secretary-General, 'Uniting our strengths: Enhancing United Nations support for the rule of law', Report of the Secretary-General, 14 December 2006, UN Docs A/61/636-S/2006/980; UNSC Resolution 1820 (2008), 19 June 2008; UN Secretary-General, *Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict*, 11 June 2009, UN Docs A/63/881-S/2009/304; UN Secretary-General, 'Women's participation in peacebuilding', Report of the Secretary-General, 7 September 2010, UN Docs A/65/354-S/2010/466. See also V. Chetail, 'Introduction: Post-conflict Peacebuilding—Ambiguity and Identity', in V. Chetail (ed), *Post-Conflict Peacebuilding: A Lexicon* (New York: Oxford University Press, 2009), 1–33.

¹¹ Remarks by Prince Zeid Ra'ad Zeid Al Hussein, 'Peace v. Justice: Contradictory or Complementary', 100 *American Society of International Law Proceedings* (2006) 361–73 at 364.

¹² Remarks by K. Roth, Executive Director of Human Rights Watch and Moderator of the stock-taking exercise on the issue of peace and justice at the Review Conference of the Rome Statute of the International Criminal Court, in *Official Records of the Review Conference*, RC/11, Annex V(b), 'Stocktaking on international criminal justice. Peace and justice. Moderator's Summary', 106, § 29. See also remarks by D. Tolbert, President of the International Center for Transitional Justice, in *Official Records of the Review Conference*, RC/11, Annex V(b), 'Stocktaking on international criminal justice. Peace and justice. Moderator's Summary', 103, § 4.

¹³ Remarks by C. Bassiouni, 'Effectuating International Criminal Law through International and Domestic Fora: Realities, Needs and Prospects', 91 *American Society of International Law Proceedings* (1997), 259–62 at 262.

¹⁴ Report of the UN Secretary-General, 'The rule of law and transitional justice in conflict and post-conflict societies', 23 August 2004, UN Doc S/2004/616, 8, § 21.

¹⁵ Statement by the President of the UN Security Council, 12 July 2005, UN Doc S/PRST/2005/30, 1.

¹⁶ Statement by the President of the UN Security Council, 22 June 2006, UN Doc S/PRST/2006/28.

- ¹⁷ Nuremberg Declaration on Peace and Justice, annexed to the letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany, and Jordan to the United Nations addressed to the Secretary-General, 19 June 2008, UN Doc A/62/885.
- ¹⁸ Statement by Mr Ban Ki-Moon, Secretary-General of the United Nations, 'An Age of Accountability', Address at the Review Conference on the International Criminal Court, 31 May 2010, available at <http://www.un.org/sg/selected-speeches/statement_full.asp?statID=829>.
- ¹⁹ UN Security Council Resolution 827 (1993), 25 May 1993.
- ²⁰ UN Security Council Resolution 1593 (2005), 31 March 2005.
- ²¹ V. Gowlland-Debbas, 'Security Council Change. The Pressure of Emerging International Public Policy', 65 *International Journal* (2009-10), 119-139 at 130.
- ²² UN Security Council Resolution 1970 (2011), 26 February 2011.
- ²³ UN Security Council Resolution 1688 (2006), 16 June 2006.
- ²⁴ Indictments were brought against the key political and military figures Radovan Karadžić (Case No IT-95-5/18), Ratko Mladić (Case No IT-09-92), and Slobodan Milošević (Case No IT-02-54). Mr Karadžić and Mr Mladić are currently being tried before the ICTY, while Mr Milošević died in detention on 11 March 2006.
- ²⁵ *Prosecutor v Omar Hassan Ahmad Al Bashir ('Omar Al Bashir')*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009, Pre-Trial Chamber I, Case No ICC-02/05-01/09; *Prosecutor v Omar Hassan Ahmad Al Bashir ('Omar Al Bashir')*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010, Pre-Trial Chamber I, Case No ICC-02/05-01/09.
- ²⁶ Nuremberg Declaration on Peace and Justice (n 17), 4.
- ²⁷ R. Goldstone, 'Peace versus Justice', address delivered at the Law School of the University of Las Vegas on 15 October 2005, reprinted in 6 *Nevada Law Journal* (2005) 421-4 at 421 and 422.
- ²⁸ Remarks by M. Wierda, 'Peace v. Justice: Contradictory or Complementary', 100 *American Society of International Law Proceedings* (2006) 361-73 at 369. See also D. Crane, "'Back to the Future"—Reflections on the Beginning of the Beginning: International Criminal Law in the Twentieth Century', 32 *Fordham International Law Journal* (2009) 1761-9 at 1767.
- ²⁹ Report of the UN Secretary-General, 'The rule of law and transitional justice in conflict and post-conflict societies', 23 August 2004, UN Doc S/2004/616, at 8, para 21 (emphasis added).
- ³⁰ Remarks by K. Roth, Executive Director of Human Rights Watch and Moderator of the stocktaking exercise on the issue of peace and justice at the Review Conference of the Rome Statute of the International Criminal Court, in *Official Records of the Review Conference*, RC/11, Annex V(b), 'Stocktaking on international criminal justice. Peace and justice. Moderator's Summary', 106, § 30.
- ³¹ On some of the issues to be taken into account, see P. Hayner, 'Managing the Challenges of Integrating Justice Efforts and Peace Processes', Review Conference of the Rome Statute, 30 May 2010, RC/ST/PJ/INF.4.
- ³² Remarks by Mr N. Michel, Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, UN Security Council, 5474th meeting, 22 June 2006, UN Doc S/PV. 5474, 4. See also the address by Mr K. Annan, Review Conference of the Assembly of State Parties to the Rome Statute of the International Criminal Court, Kampala, Uganda, 31 May

2010, available at <<http://www.kofiannanfoundation.org/newsroom/speeches/2010/05/review-conference-assembly-states-parties-to-rome-statute-international>>, § 54.

33 L. Moreno Ocampo, 'Building a Future on Peace and Justice: The International Criminal Court', in K. Ambos, J. Large, and M. Wierda (eds), *Building a Future on Peace and Justice. Studies in Transitional Justice, Peace and Development. The Nuremberg Declaration on Peace and Justice* (Berlin/Heidelberg: Springer-Verlag, 2009), 9–13 at 11.

34 An overview of the different doctrinal positions taken to interpreting the meaning of 'interests of justice' is provided by K. Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC', in K. Ambos, J. Large, and M. Wierda (eds), *Building a Future on Peace and Justice. Studies in Transitional Justice, Peace and Development. The Nuremberg Declaration on Peace and Justice* (Berlin/Heidelberg: Springer-Verlag, 2009), 19–103 at 82–6.

35 Office of the Prosecutor of the ICC, 'Policy Paper on the Interests of Justice', September 2007, available at <<http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf>>, 1.

36 Ms F. Bensouda, Deputy Prosecutor of the International Criminal Court, 'Peace and Justice, Friends or Foes?', Keynote address at the 74th Conference of the International Law Association, *De iure humanitatis; Peace, justice and international law*, The Hague, 17 August 2010, available at <<http://www.icc-cpi.int/nr/exeres/2386f5cb-b2a5-45dc-b66f-17e762f77b1f.htm>>.

37 Article 16 of the Statute of the International Criminal Court reads: 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.'

38 M. Bergsmo and J. Pejić, 'Article 16. Deferral of investigation or prosecution', in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court. Observer's Notes, Article by Article* (2nd edn, München: C.H. Beck, 2008), 595–604 at 598.

39 L. Condorelli and S. Villalpando, 'Referral and Deferral by the Security Council', in A. Cassese, P. Gaeta, and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 627–55 at 647.

40 E. Wiesel, 'Hope, Despair and Memory', Nobel Lecture, 11 December 1986, available at <http://nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-lecture.html>.

41 Remarks by Y. Chhang, Director of the NGO Documentation Center of Cambodia, Review Conference of the Rome Statute of the International Criminal Court, in *Official Records of the Review Conference*, RC/11, Annex V(b), 'Stocktaking on international criminal justice. Peace and justice. Moderator's Summary', 105, § 18.

42 D. Tolbert and M. Wierda, 'Stocktaking: Peace and Justice', International Center for Transitional Justice briefing paper, May 2010, available at <<http://ictj.org/publication/stocktaking-peace-and-justice-rome-statute-review-conference>>, 2.

43 See the treaty-based human rights obligations addressed by R. Pisillo Mazzeschi, 'Responsabilité de l'état pour violation des obligations positives relatives aux droits de l'homme', 333 *RCADI* (2008) 175–506 at 345–51 ('obligation d'avoir un appareil adéquat d'enquête sur les violations des droits de l'homme'); D. Orentlicher, 'Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity', 27 February 2004, UN Doc E/CN.4/2004/88, paras 14–23 ('the right to know'); D. Orentlicher, 'Report of the independent

expert to update the Set of Principles to combat impunity', 18 February 2005, UN Doc E/CN.4/2005/102, §§ 17–35 ('the right to know').

⁴⁴ Human Rights Committee, General Comment No 31, 'Nature of the legal obligation on States Parties to the Covenant', 29 March 2004, UN Doc CCPR/C/21/Rev.1/Add.13, § 15. See also UN General Assembly Resolution 55/111 (2001), 'Extrajudicial, summary or arbitrary executions', 4 December 2000, § 6; Inter-American Court of Human Rights, *Velasquez Rodriguez Case*, Judgment of 29 July 1988 (Ser. C) No 4, § 176 '[t]he State is obligated to investigate every situation involving a violation of the rights protected by the Convention'; European Court of Human Rights, *Aksoy v Turkey*, Judgment of 18 December 1996, App No 00021987/93, § 98 '[article 13 of the European Convention on Human Rights imposes] an obligation on States to carry out a thorough and effective investigation of incidents of torture'; Human Rights Committee, *Bautista de Arellana v Colombia*, Comm No 563/1993, UN Doc CCPR/C/55/D/563/1993 (1995), § 8.6 '[t]he Committee nevertheless considers that the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life'.

⁴⁵ UN Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, P. Alston, 8 March 2006, UN Doc E/CN.4/2006/53, § 36.

⁴⁶ A publication by the International Center for Transitional Justice provides useful guidelines for addressing some of the logistical and ethical problems that may be encountered in the process of truth-seeking in general: L. Bickford, P. Karam, H. Mneimneh, and P. Pierce, 'Documenting Truth', International Center for Transitional Justice, 2009, available at <<http://ictj.org/publication/documenting-truth>>.

⁴⁷ D. Orentlicher, 'Report of the Independent Expert to update the Set of Principles to combat Impunity: Addendum', 8 February 2005, UN Doc E/CN.4/2005/102/Add.1, 6.

⁴⁸ These are analysed in detail by P. Hayner, *Unspeakable Truths. Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Oxon: Routledge, 2011).

⁴⁹ Office of the United Nations High Commissioner for Human Rights, 'Rule-of-Law Tools for Post-Conflict States. Truth Commissions', UN Doc HR/PUB/06/1, 2006, 5.

⁵⁰ UN Doc HR/PUB/06/1, 2006, 17–20.

⁵¹ The full report of the South African Truth and Reconciliation Commission is available at <<http://www.info.gov.za/otherdocs/2003/trc/>>.

⁵² See the detailed study on the work of the South African truth commission by A. du Bois-Pedain, *Transitional Amnesty in South Africa* (Cambridge: Cambridge University Press, 2007).

⁵³ Constitution of the Republic of South Africa, Act 200 of 1993. The amnesty provisions in the 1993 interim Constitution were preserved in Sch 6, s 22, of the Constitution of the Republic of South Africa Act No 108 of 1996.

⁵⁴ Constitution of the Republic of South Africa, Act 200 of 1993, Postamble. See P. van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission', 52 *Journal of International Affairs* (1999) 647–67.

⁵⁵ P. Hayner, *Unspeakable Truths. Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Oxon: Routledge, 2011), 104.

⁵⁶ The Truth, Justice and Reconciliation Commission Bill, 2008, Part III, § 34.

⁵⁷ Report of the Comisión Nacional de Verdad y Reconciliación ('Rettig Report'), February 1991, vol 2, 868. The original Spanish version of the Rettig Report is available at <http://www.ddhh.gov.cl/ddhh_rettig.html>. An English translation of the above cited paragraph is found in Inter-American Commission on Human Rights, Report No 36/96, Case No 10.843, Chile, 15 October 1996, available at <<http://www.cidh.org/annualrep/96eng/>>

Chile10843.htm>, para 76. A full English version of the Rettig Report is available on the website of the United States Institute of Peace at <<http://www.usip.org/publications/truth-commission-chile-90>>, however the wording in this translation of the above cited paragraph differs from the translation provided by the Inter-American Commission on Human Rights, with the latter being preferred.

⁵⁸ Report of the Sierra Leone's Truth and Reconciliation Commission, available at <<http://www.sierra-leone.org/TRCDocuments.html>>, vol 3B, 381, § 68.

⁵⁹ Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, 12 January 2001, UN Doc S/2001/40, 3, § 9.

⁶⁰ 'Press Conference by the Prosecutor of the International Criminal Court, Luis Moreno-Ocampo', Nairobi, Kenya, 7 November 2009, 3.

⁶¹ For a consideration of some of the issues that may arise, see A. Bisset, 'Rethinking the Powers of Truth Commissions in Light of the ICC Statute', 7(5) *Journal of International Criminal Justice* (2009) 963-82.

⁶² The Report of The Bloody Sunday Inquiry is available at <<http://www.bloody-sunday-inquiry.org/index.html>>.

⁶³ The full report of the Independent International Fact-Finding Mission on the Conflict in Georgia is available at <<http://www.ceiig.ch/Report.html>>.

⁶⁴ A. Hegarty, 'The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland', 26 *Fordham International Law Journal* (2003) 1148-92 at 1151. See also C. Bell, 'Dealing with the Past in Northern Ireland', 26 *Fordham International Law Journal* (2003) 1095-1147 at 1105.

⁶⁵ Council of the European Union, Council Decision 2008/901/CFSP, 'Concerning an independent international fact-finding mission on the conflict in Georgia', 2 December 2008.

⁶⁶ Report of Independent International Fact-Finding Mission on the Conflict in Georgia, vol II, 1.

⁶⁷ Report of Independent International Fact-Finding Mission on the Conflict in Georgia, vol II, 429.

⁶⁸ Report of Independent International Fact-Finding Mission on the Conflict in Georgia, vol II, 437.

⁶⁹ UN Security Council Resolution 1595 (2005), 7 April 2005.

⁷⁰ Report of the Commission of Inquiry into Post-Election Violence ('Waki Commission'), 15 October 2008, available at <<http://www.usip.org/publications/truth-commission-kenya>>, 18.

⁷¹ International Criminal Court, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19.

⁷² Statement by Prosecutor Moreno-Ocampo in relation to the 18 February 2010 Pre-Trial Chamber II decision regarding the situation in Kenya, 18 February 2010, available at <<http://www.icc-cpi.int/nr/exeres/2386f5cb-b2a5-45dc-b66f-17e762f77b1f.htm>>.

⁷³ UN Security Council Resolution 1564, 18 September 2004.

⁷⁴ Report of the International Commission of Inquiry on Darfur to the Secretary-General, annexed to Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2005/60.

- ⁷⁵ UN Doc S/2005/60, 174, § 647.
- ⁷⁶ UN Security Council Resolution 1593 (2005), 31 March 2005.
- ⁷⁷ Office of the Prosecutor of the International Criminal Court, 'First Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)', 29 June 2005, 2.
- ⁷⁸ See Arts 2-5 of the Statute of the ICTY; Arts 2-4 of the Statute of the International Criminal Tribunal for Rwanda; Arts 2-5 of the Statute of the Special Court for Sierra Leone; Arts 3-7 of Cambodian Law NS/RKM/1004/006 with respect to the Extraordinary Chambers in the Courts of Cambodia; Arts 5-8 of the Statute of the International Criminal Court; Art 2 of the Statute of the Special Tribunal for Lebanon.
- ⁷⁹ Remarks by Prince Zeid Ra'ad Zeid Al Hussein (n 11), 366.
- ⁸⁰ Remarks by Prince Zeid Ra'ad Zeid Al Hussein (n 11), 363.
- ⁸¹ J. Lindenmann, 'Transitional Justice and the International Criminal Court: Some Reflections on the Role of the ICC in Conflict Transformation', in M. Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international. Liber Amicorum Lucius Caflisch* (Leiden: Koninklijke Brill, 2007), 315-38 at 325.
- ⁸² Report of the Commission of Inquiry into Post-Election Violence ('Waki Commission'), 15 October 2008, available at <<http://www.dialoguekenya.org/docs/PEV%20Report.pdf>>, 9.
- ⁸³ 'Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991', 7 August 2000, UN Docs A/55/273-S/2000/777, 29, § 184.
- ⁸⁴ UN Docs A/55/273-S/2000/777, 29, § 184.
- ⁸⁵ 'Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991', 4 September 2002, UN Docs A/57/379-S/2002/985, 40, § 230.
- ⁸⁶ UN Docs A/57/379-S/2002/985, 40, § 230.
- ⁸⁷ UN Docs A/57/379-S/2002/985, 40, § 230.
- ⁸⁸ 'Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991', 20 August 2003, UN Docs A/58/297-S/2003/829, 55, § 248.
- ⁸⁹ 'Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991', 4 September 2002, UN Docs A/57/379-S/2002/985, 40, § 230.
- ⁹⁰ Office of the Prosecutor of the International Criminal Court, 'First Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)', 29 June 2005, 2.
- ⁹¹ S. Opatow, 'Psychology of Impunity and Injustice: Implications for Social Reconciliation', in M. Cherif Bassiouni (ed), *Post-Conflict Justice* (Ardsey: Transnational Publishers, 2002), 201-16 at 202.
- ⁹² UN Security Council Resolution 1674 (2006), 'Protecting civilians in armed conflict', 28 April 2006, § 7.

93 It has even been argued that there is an emerging norm to end impunity for perpetrators of genocide, crimes against humanity, and war crimes: see *Nuremberg Declaration on Peace and Justice* (n 34), 4.

94 ICTY, established by UN Security Council Resolution 827 (1993) of 25 May 1993; ICTR, established by UN Security Council Resolution 955 (1994) of 8 November 1994; Special Court for Sierra Leone, established by an agreement between the United Nations Organization and the government of Sierra Leone of 16 January 2002; Extraordinary Chambers in the Courts of Cambodia, established by Cambodian law NS/RKM/1004/006, promulgated on 27 October 2004 by Cambodian law NS/RKM/0801/12 KRAM; Special Tribunal for Lebanon, established by an agreement between the United Nations Organization and Lebanon, the provisions of which entered into force by virtue of UN Security Council Resolution 1757 (2007).

95 Rome Statute of the International Criminal Court, 17 July 1998, entered into force on 1 July 2002.

96 J. Lindenmann, 'Transitional Justice and the International Criminal Court: Some Reflections on the Role of the ICC in Conflict Transformation', in M. Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international. Liber Amicorum Lucius Caflisch* (Leiden: Koninklijke Brill, 2007), 315–38 at 334 (original emphasis). See also remarks by Mr N. Michel, Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, UN Security Council, 5474th meeting, 22 June 2006, UN Doc S/PV.5474, 4.

97 Review Conference of the Rome Statute of the International Criminal Court, Resolution RC/Res 1, 'Complementarity', 8 June 2010, § 5 (adopted by consensus). See also International Center for Transitional Justice, 'Complementarity after Kampala: The Way Forward', Meeting Summary of the Retreat, 19 November 2010, available at <<http://ictj.org/publication/complementarity-after-kampala-meeting-summary>>.

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99 K. Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC', in K. Ambos, J. Large, and M. Wierda (eds), *Building a Future on Peace and Justice. Studies in Transitional Justice, Peace and Development. The Nuremberg Declaration on Peace and Justice* (Berlin/Heidelberg: Springer-Verlag, 2009), 19–103 at 30.

100 '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' annexed to UN General Assembly Resolution 60/147, 'Basic Principles and Guidelines on the Right to a Remedy', 21 March 2006, § 4.

101 UN Security Council Resolution 1674 (2006), 'Protecting civilians in armed conflict', 28 April 2006, § 8 (emphasis added). See also Statement by the President of the Security Council, 12 July 2005, UN Doc S/PRST/2005/30, 1; Statement by the President of the Security Council, 22 June 2006, UN Doc S/PRST/2006/28, 2.

102 Articles 5–8 of the Rome Statute of the International Criminal Court. For the definition of the crime of aggression, see Annex 1 'Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression' to Review Conference of the Rome Statute of the International Criminal Court, Resolution RC/Res 6, 11 June 2010 (adopted by consensus).

- 103** §§ 4 to 6 of the preamble to the Rome Statute of the International Criminal Court.
- 104** Article I of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, entered into force on 12 January 1951, 78 UNTS 277.
- 105** Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, entered into force on 12 January 1951, 78 UNTS 277.
- 106** *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep 158-9, § 442. For a critique of the Court's narrow reading of the obligation to prosecute and punish under the Genocide Convention, see O. Ben-Naftali, 'The Obligations to Prevent and to Punish Genocide', in P. Gaeta (ed), *The UN Genocide Convention. A Commentary* (Oxford: Oxford University Press, 2009), 27-57, at 46-52.
- 107** Article 49 of GC I; Art 50 of GC II; Art 129 of GC III; Art 146 of GC IV; Art 85 of AP I. See also J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol I (Cambridge: International Committee of the Red Cross/Cambridge University Press, 2005), 607 (Rule 158).
- 108** Commentary GC I, 365-6.
- 109** Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, entered into force on 26 June 1987, 1465 UNTS 85.
- 110** See generally M. Nowak and E. McArthur, *The United Nations Convention Against Torture. A Commentary* (Oxford: Oxford University Press, 2008), 344-67 (Article 7).
- 111** Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, entered into force on 11 November 1970, 754 UNTS 73.
- 112** J. Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions', in A. Cassese, P. Gaeta, and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 693-704 at 696.
- 113** L. Moreno Ocampo, 'Beyond Punishment: Justice in the Wake of Massive Crimes in Argentina', 52 *Journal of International Affairs* (1999) 669-89 at 670.
- 114** Statement by the President of the Security Council, 10 September 2004, UN Doc S/PRST/2004/32, 2.
- 115** A history of Amnesty International is available at <<http://www.amnesty.org/en/who-we-are/history>>.
- 116** Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, entered into force on 7 December 1978, 1125 UNTS 609.
- 117** See D. Momtaz, 'De l'incompatibilité des amnisties inconditionnelles avec le droit international', in M. Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international. Liber Amicorum Lucius Caflisch* (Leiden: Koninklijke Brill, 2007), 353-68.
- 118** Nuremberg Declaration on Peace and Justice, annexed to the letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany, and Jordan to the United Nations addressed to the Secretary-General, 19 June 2008, UN Doc A/62/885, 4.

- 119** F. Bugnion, 'L'amnistie entre l'exigence de justice et l'indispensable réconciliation: lorsque les armes se taisent, que faire des crimes qui ont été commis à l'occasion d'un conflit armé?', in W. Kälin, R. Kolb, C. Spenlé, and M.D. Voyaume (eds), *International Law, Conflict and Development. The Emergence of a Holistic Approach in International Affairs* (Leiden: Martinus Nijhoff, 2010), 385–409 at 403.
- 120** Nuremberg Declaration on Peace and Justice (n 34), recommendation 2.6 at 6. See also The Princeton Principles on Universal Jurisdiction (Princeton: Office of University Printing and Mailing, 2001), available at <http://lapa.princeton.edu/hosteddocs/unive_jur.pdf>, Principle 7(1), 31: 'Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law'.
- 121** Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution (1999), reproduced in *United Nations Juridical Yearbook* (2006), 495–7 at 497.
- 122** Report of the Secretary-General on the United Nations Observer Mission in El Salvador, 21 May 1993, UN Doc S/25812, 2, § 6.
- 123** Article 14 of the Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone ('Abidjan Peace Agreement'), 30 November 1996, annexed to Letter dated 11 December 1996 from the Permanent Representative of Sierra Leone to the United Nations addressed to the Secretary-General, 11 December 1996, UN Doc S/1996/1034.
- 124** UN Doc S/1996/1034, § 6.
- 125** UN General Assembly Resolution 47/133, 'Declaration on the Protection of All Persons from Enforced Disappearance', 18 December 1992, Art 18.
- 126** UN Security Council Resolution 827 (1993), 25 May 1993, § 2.
- 127** UN Security Council Resolution 955 (1994), 8 November 1994, § 1.
- 128** ICTY, *Prosecutor v Anto Furundžija*, Trial Chamber, Judgment of 10 December 1998, Case No IT-95-17/1-T, 60, § 155.
- 129** See UN Commission on Human Rights, Revised final report prepared by Mr Louis Joinet pursuant to Sub-Commission decision 1996/119, 'Question of the impunity of perpetrators of human rights violations (civil and political)', 2 October 1997, UN Doc E/CN.4/Sub.2/1997/20/Rev.1, § 32.
- 130** International Covenant on Civil and Political Rights, 19 December 1966, entered into force on 23 March 1976, 999 UNTS 171.
- 131** UN Human Rights Committee, General Comment No 20, Art 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1 (1994), § 15.
- 132** Article 11 of the Rome Statute of the International Criminal Court.
- 133** Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution (1999), reproduced in *United Nations Juridical Yearbook* (2006), 495–7 at 497.
- 134** This statement does not appear in Peace Agreement between the Government of Sierra Leone and the Revolutionary Front of Sierra Leone, 3 June 1999 (Lomé Peace Agreement), annexed to Letter dated 12 July 1999 from the Chargé d'affaires ad interim of the Permanent Mission of Togo to the United Nations addressed to the President of the Security

Council, 12 July 1999, UN Doc S/1999/777. It is reproduced in the fifth preambular paragraph to UN Security Council Resolution 1315 (2000), 14 August 2000.

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136 Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915, 5, § 22. The same year, the UN Security Council called on states to exclude amnesties and to prosecute those persons responsible for genocide, crimes against humanity, and war crimes in the context of the Democratic Republic of the Congo: UN Security Council Resolution 1325 (2000), 'Women, Peace and Security', 31 October 2000, § 11.

137 Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, 16 January 2002. See *Prosecutor v Morris Kallon and Brima Bazzy Kamara*, 'Decision on Challenge to Jurisdiction: Lomé Accord Amnesty', Special Court for Sierra Leone, Appeals Chamber, 13 March 2004, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E); *Prosecutor v Moinina Fofana*, 'Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone', Special Court for Sierra Leone, 25 May 2004, SCSL-2004-14-AR72(E); *Prosecutor v Augustine Gbao*, 'Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court', Special Court for Sierra Leone, 25 May 2004, SCSL-2004-15-AR72 (E); *Prosecutor v Allieu Kondewa*, 'Decision on lack of jurisdiction/abuse of process: Amnesty provided by the Lomé Accord', Special Court for Sierra Leone, 25 May 2004, SCSL-2004-14-AR72(E).

138 J. Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions', in A. Cassese, P. Gaeta, and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 693-704 at 698.

139 Remarks by N. Michel, Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, UN Security Council, 5474th meeting, 22 June 2006, UN Doc S/PV.5474, 4.

140 'Note to the Under-Secretary-General for Political Affairs regarding guidance on activities of the Special Envoy in [Rebel Group]-affected areas', Selected Legal Opinions of the Secretariat of the United Nations and Related Intergovernmental Organizations, 31 August 2006, *United Nations Juridical Yearbook* (2006), 493-7 at 494, § 7.

141 'Interoffice memorandum relating to the United Nations position on peace and justice in post-conflict societies', Selected Legal Opinions of the Secretariat of the United Nations and Related Intergovernmental Organizations, 25 September 2006, *United Nations Juridical Yearbook* (2006), 498-500 at 499.

142 UN Security Council Resolution 1820 (2008), 19 June 2008, § 4.

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145 S. Rosenberg, 'Responsibility to Protect: A Framework for Prevention', 1 *Global Responsibility to Protect* (2009) 442-77 at 450.

- 146** International Center for Transitional Justice, 'Complementarity after Kampala: The Way Forward' (n 97), § 13.
- 147** Office of the Prosecutor of the International Criminal Court, 'Report on Prosecutorial Strategy', 14 September 2006, 5 (emphasis added).
- 148** C. Stahn, 'Complementarity: A Tale of Two Notions', 19 *Criminal Law Forum* (2008) 87–113 at 113.
- 149** Review Conference of the Rome Statute of the International Criminal Court, Resolution RC/Res 1, 'Complementarity', 8 June 2010, § 5 (adopted by consensus).
- 150** W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice', 49(1) *Harvard International Law Journal* (2008) 53–108 at 56.
- 151** 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, 159, § 445.
- 152** UN Security Council Resolution 1593 (2005), 31 March 2005.
- 153** UN Security Council Resolution 1970 (2011), 26 February 2011, § 5.
- 154** Relationship Agreement between the United Nations and the International Criminal Court, 22 July 2004, entered into force on 4 October 2004.
- 155** 'Interoffice memorandum relating to the United Nations position on peace and justice in post-conflict societies', Selected Legal Opinions of the Secretariat of the United Nations and Related Intergovernmental Organizations, 25 September 2006, *United Nations Juridical Yearbook* (2006), 498–500 at 500.
- 156** *United Nations Juridical Yearbook* (2006), 498–500 at 500.
- 157** 'Note to the Under-Secretary-General for Political Affairs regarding guidance on activities of the Special Envoy in [Rebel Group]-affected areas', Selected Legal Opinions of the Secretariat of the United Nations and Related Intergovernmental Organizations, 31 August 2006, *United Nations Juridical Yearbook* (2006), 493–7 at 494, § 4 (original emphasis). See also 'Interoffice memorandum relating to the United Nations position on peace and justice in post-conflict societies', Selected Legal Opinions of the Secretariat of the United Nations and Related Intergovernmental Organizations, 25 September 2006, *United Nations Juridical Yearbook* (2006), 498–500 at 500.
- 158** J. Lindenmann, 'Transitional Justice and the International Criminal Court: Some Reflections on the Role of the ICC in Conflict Transformation', in M. Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international. Liber Amicorum Lucius Caflisch* (Leiden: Koninklijke Brill, 2007), 315–38 at 334.
- 159** *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, [2002] ICJ Rep, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 78–9, § 51.
- 160** The Princeton Principles on Universal Jurisdiction (n 120), Principle 1(1), at 28.
- 161** Universal criminal jurisdiction was an issue that arose in separate cases between the Republic of the Congo and Belgium, and between the Republic of the Congo and France, initiated by the former against the two latter states before the International Court of Justice. The case concerning *Certain Criminal Proceedings in France (Republic of the Congo v France)* was discontinued by the Republic of the Congo and removed from the List of cases by the Court on 16 November 2010 before hearings on the merits could be held.

Some aspects of the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* are discussed below.

162 A. Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality', in C. Romano, A. Nollkaemper, and J. Kleffner (eds), *Internationalized Criminal Courts. Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: Oxford University Press, 2004), 3–13 at 12.

163 D. Rothenberg, "'Let Justice Judge': An Interview with Judge Baltasar Garzón and Analysis of His Ideas', 24 *Human Rights Quarterly* (2002) 924–73 at 931.

164 Article 5(1)(a) of CAT. See generally M. Nowak and E. McArthur, *The United Nations Convention Against Torture. A Commentary* (Oxford: Oxford University Press, 2008), 253–327.

165 Article 5(1)(b) of CAT.

166 Article 5(1)(c) of CAT.

167 Article 5(2) of CAT.

168 *The Case of the S.S. 'Lotus'*, PCIJ Series A, No 10, Judgment, 7 September 1927.

169 *Arrest Warrant (n 159)*, 25, § 59.

170 *Arrest Warrant of 11 April 2000 (n 159)*, 25, § 60.

171 *Arrest Warrant of 11 April 2000 (n 159)*, 25, § 61. On whether 'acts committed during the period of office in a private capacity' encompass serious international crimes, see eg *R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte, (No 3)* [1999] 2 All ER 97, 119 ILR 135.

172 Permanent Court of International Justice, *Case concerning the Factory at Chorzów*, Series A, No 9, Judgment, 26 July 1927, 21.

173 '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' annexed to UN General Assembly Resolution 60/147, 'Basic Principles and Guidelines on the Right to a Remedy', 21 March 2006, § 15.

174 On collective reparation, see F. Rosenfeld, 'Collective Reparation for Victims of Armed Conflict', 92 *International Review of the Red Cross* (2010) 731–46.

175 In relation to the existence of a customary international law obligation to provide reparation to victims, Riccardo Pisillo Mazzeschi is cautious in noting that '[...] one could perhaps maintain that a customary rule is *slowly developing* in the field of human rights. In contrast, in the field of humanitarian law the conclusion should be more pessimistic because, at least for the time being, both international and domestic case law on reparation is still lacking' (R. Pisillo Mazzeschi, 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview', 1 *Journal of International Criminal Justice* (2003) 339–47 at 347 (original emphasis)).

176 Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, entered into force on 26 January 1910 (Art 3 provides: 'A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, entered into force on 7 December 1979, 1125 UNTS 3 (Art 91 provides: 'A Party to the conflict which violates the provisions of the Convention or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'). See eg International Court of Justice, *Armed*

Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment, [2005] ICJ Rep, 168.

177 R. Pisillo Mazzeschi, 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview', 1 *Journal of International Criminal Justice* (2003) 339-47 at 341.

178 For example, Eritrea and Ethiopia brought claims against one another before the Eritrea-Ethiopia Claims Commission for violations of international humanitarian law committed against their respective nationals.

179 Riccardo Pisillo Mazzeschi (n 177), 342.

180 See eg *Al-Adsani v United Kingdom*, 35763/97, European Court of Human Rights, 21 November 2001.

181 *Prefecture of Voiotia v Federal Republic of Germany*, Case No 137/1997, Court of First Instance of Leivadia, Greece, 30 October 1997, excerpts reprinted in M. Gavouneli, 'War Reparation Claims and State Immunity', 50 *Revue Hellénique de Droit International* (1997) 595-608; see also I. Bantekas, 'Case Report: Prefecture of Voiotia v. Federal Republic of Germany', 92 *American Journal of International Law* (1998) 765-8; *Prefecture of Voiotia v Federal Republic of Germany*, Case No 11/2000, Areios Pagos, 4 May 2000, 476. See M. Gavouneli and I. Bantekas, 'Case Report: Prefecture of Voiotia v. Federal Republic of Germany', 95 *American Journal of International Law* (2001) 198-204. However, following this judgment, the Greek Special Highest Court held that Germany enjoyed immunity: *Federal Republic of Germany v Miltiadia Margellos*, Special Highest Court of Greece, Case No 6/17-9-2002, 17 September 2002, discussed in K. Bartsch and B. Elberling, 'Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al. v. Greece and Germany Decision', 4(5) *German Law Journal* (2003) 477-91 at 481. *Ferrini v Federal Republic of Germany*, Cass. Sez. Un. 5044/04, reproduced in 87 *Rivista di diritto internazionale* (2004) 539. See A. Gattini, 'War Crimes and State Immunity in the Ferrini Decision', 3 *Journal of International Criminal Justice* (2005) 224-42.

182 International Court of Justice, *Case concerning Jurisdictional Immunities (Federal Republic of Germany v Italian Republic)*. See in this volume, C. Tomuschat, 'State Responsibility and the Individual Right to Compensation before National Courts'.

183 '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', annexed to United Nations General Assembly Resolution 60/147, 15 December 2005, § 15.

184 International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, entered into force on 4 January 1969, 660 UNTS 195.

185 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, entered into force on 26 June 1987, 1465 UNTS 85.

186 See C. Tomuschat, 'La protection internationale des droit des victimes', in J.-F. Flauss (ed), *La Protection internationale des droits de l'homme et les droits des victimes. International protection of human rights and victims' rights* (Brussels: Bruylant, 2009), 1-29 at 12-20.

187 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, entered into force on 3 August 1953, 213 UNTS 221.

188 American Convention on Human Rights, 22 November 1969, entered into force on 18 July 1978, 1144 UNTS 123.

189 This Chapter does not address the possibility for victims to bring claims against collectives of natural persons, such as non-state armed groups, or other legal persons, such as corporations. See A. Clapham, 'Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups', 6(5) *Journal of International Criminal Justice* (2008) 899-926; and articles in the Special Issue on transnational business and international criminal law in 8(3) *Journal of International Criminal Justice* (2010).

190 For an overview of the reparation framework of the International Criminal Court, see M. Henzelin, V. Heiskanen, and G. Mettraux, 'Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes', 17 *Criminal Law Forum* (2006) 317-44. See also C. Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations', 15 *Leiden Journal of International Law* (2002) 667-86.

191 28 USC § 1350 (1994).

192 P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda* (New York: Cambridge University Press, 2010), 254. See also L. Waldorf, 'Goats & Graves: Reparations in Rwanda's Community Courts', in C. Ferstman, M. Goetz, and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity. Systems in Place and Systems in the Making* (Leiden: Martinus Nijhoff, 2009), 515-39.

193 UN Commission on Human Rights, Final Report of the Special Rapporteur Mr M. Cherif Bassiouni, 'The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms', 18 January 2000, UN Doc E/CN.4/2000/62, 10, § 18 (emphasis added).

194 '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', annexed to United Nations General Assembly Resolution 60/147, 15 December 2005, § 16 (emphasis added).

Transitional Justice, *Jus Post Bellum* and International Criminal Law: Differentiating the Usages, History and Dynamics

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Abstract

This article argues that without an attempt to clarify the distinctions among transitional justice, *jus post bellum* and international criminal law, none of these concepts will reach its potential. If transitional justice is made so elastic as implicitly to absorb international criminal law and *jus post bellum*, this lessens the potential value of transitional justice as a discrete, focused practice. After providing an empirical analysis of the usage of the concepts and reviewing the historical foundations of the terms, the article analyses how each operates in practice over time. It then examines how the concepts could have been applied to work together in recent Cambodian history.

Keywords: international criminal law, *jus post bellum*, prosecutions, Cambodia, ECCC

The Use of Focused Definitions

Transitional justice (TJ) has proven to be a remarkably useful concept, improving lives and societies around the world.¹ It has attracted a tremendous amount of scholarly interest, with perhaps a sevenfold increase in published works referencing the term between 2000 and 2007.² Its success is not without risks, however, including the risk of overstretch. Once a specific practice of establishing systematic justice after mass human rights violations by a previous regime, TJ has begun to lose its original focus and is increasingly used to refer to all manner of ‘transitions,’ to the point where it is unclear if any substantial transition is required for the term to be applied. TJ is not best understood as a broad category that encompasses disparate concepts such as international criminal law (ICL) and

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¹ See, David Backer, ‘Cross-National Comparative Analysis,’ in *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, ed. Hugo van der Merwe, Victoria Baxter and Audrey R. Chapman (New York: United States Institute of Peace, 2009): 23–90.

² See Figure 1.

jus post bellum.³ Without a clear, generally shared conception of what the goals of TJ are, it is far less likely that TJ will achieve any specific goal as well as it could. Indeed, without an effort to clarify the distinctions among TJ, *jus post bellum* and ICL, none of these concepts will reach its potential in practice.

To distinguish among TJ, ICL (regarding the determination of individual criminal responsibility for conduct prohibited under international law) and *jus post bellum* (the third component of the 'just war' tradition that, unlike *jus ad bellum*⁴ and *jus in bello*,⁵ applies to the transition from armed conflict to peace), it is helpful to explore the history, usages and dynamics of each term. The approach used in this article – taking a closer look at the historical development of the ideas, their use and the dynamics of how they currently work in practice – is not aimed at finding a timeless essential for these terms. Rather, it is intended to examine the operation of the concepts in the real world.

Scholars and practitioners discuss the three concepts without necessarily realizing the potential for overlap and confusion. For example, in Cambodia, they were all in operation as the UN Transitional Authority in Cambodia (UNTAC) took and relinquished control and the Extraordinary Chambers in the Courts of Cambodia (ECCC) were founded. But precisely how and when did they operate, and what opportunities were missed as they interoperated? It is precisely because ICL, *jus post bellum* and TJ are often, but not always, practiced simultaneously, evaluated together and often confused that the need for a clear contrast among and definition of the three concepts is necessary.

If TJ is made so elastic as implicitly to absorb ICL and *jus post bellum*, this actually lessens the potential value of TJ as a discrete, focused concept. ICL and *jus post bellum* are less well situated than the original conception of TJ to critique the failure of a flourishing, human-rights-respecting democracy to take hold in Cambodia, for example. The presence of some criminal proceedings for international crimes and the establishment of an apparently durable peace in Cambodia may make it easier for apologists for the current regime to blunt the critique that the application of a more focused concept of TJ could have made, which points to the failure to establish a sufficient transition in terms of political power or ongoing accountability for the current regime. If one can have TJ without even-handed accountability and without establishing a regime that respects human rights, then why should TJ still merit respect? Why should it endure?

While there is a great deal of literature analysing the relationship of some combination of ICL, TJ and *jus post bellum*, no article or monograph has specifically focused on how their differing goals are reflected in their starting and

³ For a critique of a 'promiscuous collection of vaguely defined ideas,' see, Jonny Steinberg, 'A Truth Commission Goes Abroad: Liberian Transitional Justice in New York,' *African Affairs* 110(438) (2011): 35. Also see, Ruti Teitel, 'Rethinking Jus Post Bellum in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May,' *European Journal of International Law* 24(1) (2013): 335–342, regarding the broadening of TJ; Ruti Teitel, 'Transitional Justice Globalized,' *International Journal of Transitional Justice* 2(1) (2008): 1–4.

⁴ The body of law regarding the legitimate reasons a state may engage in war.

⁵ The body of law that governs the way in which warfare is conducted.

ending points and their internal processes, that is, in their operation over time. Time can be considered on a macro scale, in terms of broad developments and patterns of usage over historical periods, or on a micro scale, in terms of how a concept is applied over shorter periods.

The article focuses first on the historical foundations of each concept and then discusses the dynamics of each concept, taking a more detailed look at how the concepts operate in any particular instance. The article concludes by exploring how the concepts could have operated together in various historical periods in Cambodia.

Understanding the Concepts over Time

The historical foundations of TJ, *jus post bellum* and ICL all present certain opportunities according to their goals and contemporary meanings. ‘TJ,’ ‘*jus post bellum*’ and ‘ICL’ are (or were when they were established) neoterisms. Neoterisms, or innovations in language, such as a new word or term, are best understood as creatures of the historical moment of their origin and the tradition within which they emerge. Before the First World War, ‘*jus ad bellum*’ (or ‘*jus contra bellum*,’ regulating whether force can be used at all) and ‘*jus in bello*’ (regulating how armed force can be used) were unknown as terms, even though they drew upon an ancient ethical and legal tradition.⁶ ‘ICL’ (or, more rarely, ‘international criminal justice’) has a longer history as a phrase, but its contemporary use also represents a 20th-century innovation in law and terminology. Similarly, the concept of TJ emerged organically from the intense focus on transitions to democracy from the 1970s through the 1990s. The post-Cold War questions of transformative occupation, peacebuilding and international territorial administration set the stage for the emergence of the concept of *jus post bellum*. Now these terms are widely taught as though they are natural, inevitable and permanent. They are not. Their existence is historically bounded, and their meanings variable.

Historical Overview

The term ‘TJ’ is rooted in the political transitions of Latin America, South Africa and Eastern Europe of the late 1980s and early 1990s, with the term ‘transition’ emphasizing the change from authoritarian rule to democracy.⁷ Ruti Teitel links the withdrawal of support from the Soviet Union to guerilla forces in the late

⁶ Robert Kolb, ‘Origin of the Twin Terms *Jus ad Bellum*/*Jus in Bello*,’ *International Review of the Red Cross* 37(320) (1997): 553–562; Carsten Stahn, ‘*Jus Post Bellum*: Mapping the Discipline(s),’ *American University International Law Review* 23(2) (2007): 311–347.

⁷ International Center for Transitional Justice (ICTJ), ‘What Is Transitional Justice?’ <http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> (accessed 25 July 2013). See also, Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, MD: Johns Hopkins University Press, 1996); Guillermo O’Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore, MD: Johns Hopkins University Press, 1998).

1970s to the eventual end of military rule in Latin America.⁸ The transitions in Eastern Europe after 1989 were obviously tied to the collapse of the Soviet Union. TJ, as a concept, cannot be understood without reference to the domestic political transition. As a historical phenomenon, it cannot be understood without reference to international power politics and foreign relations. Teitel has written of three generations of TJ,⁹ while others have sought to identify others,¹⁰ but the historical root, as demonstrated by actual usage,¹¹ is clearly in the context of transitions to democracy.

Jus post bellum is arguably the oldest concept, if not the oldest term, as the 'just war' tradition and the history of legal scholarship on the transition from armed conflict to peace is extensive. St. Augustine linked the goal of establishing peace to the justice of fighting a war.¹² Hugo Grotius discussed justice in the context of transition to peace extensively.¹³ Immanuel Kant stated,

The Right of Nations in relation to the State of War may be divided into: 1. The Right of *going to War*; 2. Right *during War*; and 3. Right *after War*, the object of which is to constrain the nations mutually to pass from this state of war, and to found a common Constitution establishing Perpetual Peace.¹⁴

Jus post bellum is emerging as a subject of renewed interest in the areas of peace-keeping, peacebuilding, occupation and international involvement and administration of territories such as Cambodia, Bosnia and Herzegovina and Kosovo. This interest has only begun to take advantage of the rich just war tradition that has informed other regulation of entry into armed conflict and behaviour during armed conflict.

The plausible start of ICL in practice, meanwhile, may be located in the 1474 arrest, torture, prosecution and execution of Peter von Hagenbach by a panel of judges coming from arguably separate sovereigns.¹⁵ Prompted by Georg Schwarzenberger,¹⁶ Hagenbach's trial was referenced as a precedent at the

⁸ Ruti G. Teitel, 'Transitional Justice Genealogy,' *Harvard Human Rights Journal* 16 (2003): 69–94.

⁹ Ibid.

¹⁰ Dustin N. Sharp, 'Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice,' *Harvard Human Rights Journal* 26 (2013): 149–178; Dustin N. Sharp, 'Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice through the Lens of Critique,' *Chicago Journal of International Law* (forthcoming).

¹¹ See Figure 1.

¹² St. Augustine, *Concerning the City of God against the Pagans*, trans. Henry Bettenson (New York: Penguin, 1984).

¹³ Hugo Grotius, *De Jure Praedae Commentarius*, trans. Gwladys L. Williams (Oxford: Clarendon Press, 1950); Hugo Grotius, *De Jure Belli Ac Pacis*, trans. Francis W. Kelsey (Oxford: Clarendon Press, 1925).

¹⁴ Immanuel Kant, *Metaphysische Anfangsgründe der Rechtslehre* (The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right, originally published 1887, trans. William Hastie, Union, New Jersey The Lawbook Exchange 2002), 214.

¹⁵ Gregory S. Gordon, 'The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law,' Social Science Research Network, 16 February 2012, <http://ssrn.com/abstract=2006370> or <http://dx.doi.org/10.2139/ssrn.2006370> (accessed 15 July 2013).

¹⁶ George Schwarzenberger, 'A Forerunner of Nuremberg: The Breisach War Crime Trial of 1474,' *Manchester Guardian*, 28 September 1946, 4.

International Military Tribunal at Nuremberg. Subsequent to the Nuremberg and Tokyo trials, the history of international criminal tribunals is well known. Those include the UN-established *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda, whose institutional responsibilities will eventually be handled by the Mechanism for International Criminal Tribunals; the 'hybrid' or 'internationalized' tribunals generally set up through an agreement between the UN and a particular state, including the ECCC, the Special Tribunal for Lebanon, the Special Court for Sierra Leone and the Special Panels of the Dili District Court; and others such as the Court of Bosnia and Herzegovina, established by the national government and the High Representative for Bosnia and Herzegovina. The International Criminal Court (ICC) is the first permanent criminal court of an international nature.

Usage

One way to analyse time as a cross-cutting issue is to analyse empirically the uses of the relevant phrases in published literature. New technologies involving the massive scanning and computerized analysis of the majority of all published works allow the frequency of phrase usage to be examined over time.¹⁷ These phenomenal tools allow new insight into the development of a term. TJ has been a subject of increased interest over the past 15 years. *Jus post bellum* has also been a subject of rising interest in recent years, although not yet to the same degree as TJ. ICL has received an increasing amount of interest. This can be illustrated in Figure 1, showing usage of each phrase in a large corpus of printed work.

The durability of these concepts may vary. ICL at present seems to have a secure future as a concept but may have difficulty in practice if critical institutions lose state support. It is impossible to tell whether TJ and *jus post bellum* will endure or lose their purchase on the imaginations of practitioners and scholars and fade from use. Durability also may depend at least in part on the internal coherence of the body of concepts referenced by the term, and whether this coherence is maintained over time. Those invested in the success of a philosophy underlying a term have the most to gain from an effort to analyse closely the meanings of the term and, where necessary, to draw distinctions between related concepts.

Meanings of Transitional Justice

A number of meanings for TJ are in widespread usage. Teitel has defined TJ as 'the conception of justice associated with periods of political change, characterized

¹⁷ For more on the use of bigram analysis of a large corpus of scanned materials, see, Jean-Baptiste Michel, Yuan Kui Shen, Aviva Presser Aiden, Adrian Veres, Matthew K. Gray, Google Books Team, Joseph P. Pickett, Dale Hoiberg, Dan Clancy, Peter Norvig, Jon Orwant, Steven Pinker, Martin A. Nowak and Erez Lieberman Aiden, 'Quantitative Analysis of Culture Using Millions of Digitized Books,' *Science*, 16 December 2010.

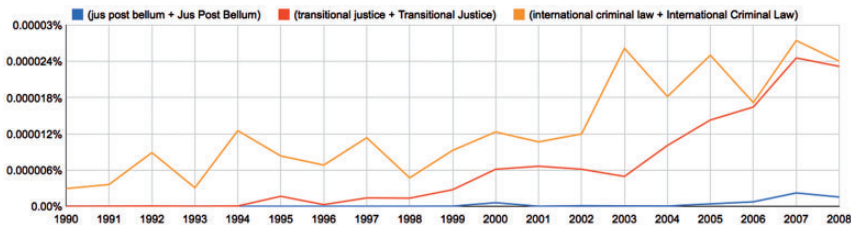


Figure 1.

Source: Google Books Ngram Viewer, dataset 20090715, http://books.google.com/ngrams/graph?content=jus+post+bellum%2BJus+Post+Bellum%2Ctransitional+justice%2BTransitional+Justice%2Cinternational+criminal+law%2BIInternational+Criminal+Law&year_start=1990&year_end=2008&corpus=15&smoothing=0&share=> (accessed 25 July 2013). This represents the comparative frequency of use of 'transitional justice,' 'jus post bellum' and 'international criminal law' in published works in English

by legal responses to confront the wrongdoings of repressive predecessor regimes.¹⁸ For the UN,

the notion of 'transitional justice' . . . comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.¹⁹

The International Center for Transitional Justice (ICTJ) takes pains to emphasize that TJ 'is not a "special" kind of justice, but an approach to achieving justice in times of transition from conflict and/or state repression.'²⁰

Of these definitions, only Teitel's emphasizes the original interest in transitions to democracy, associating TJ with 'political change' and a focus on 'predecessor regimes.' Teitel also hones in on 'legal responses,' rather than the 'full range of processes and mechanisms' included by the UN. The definition adopted by the UN secretary-general lacks any mention of political change, particularly regime change, and uses much softer language about 'coming to terms' with abuses rather than 'confront[ing]' wrongdoing. The ICTJ's definition broadens the term to include justice not only after state repression but also after 'conflict.' No longer is any political change needed (in the case of conflict), nor even large-scale abuse or wrongdoing (in the case of conflicts lacking these acts), for TJ to apply under the ICTJ's conception of the term.

If Teitel's original definition is too narrow while other definitions are too unfocused and broad, perhaps a useful middle ground can be found that retains the

¹⁸ Teitel, *supra* n 8 at 71.

¹⁹ UN Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,' UN Doc. S/2004/616 (2011), para. 8. See similar language in UN Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (March 2010).

²⁰ ICTJ, *supra* n 7.

emphasis on political change without requiring clear-cut regime change. Teitel's focus on legal responses can be usefully contrasted with Rama Mani's three dimensions of justice in peacebuilding, including 'rectificatory justice' (focusing on making victims whole) and 'distributive justice' (focusing on equitable distribution of political and economic resources), in addition to 'legal justice' (which Mani treats as equivalent to the 'rule of law').²¹

Mani's approach might represent a sort of synthesis of Teitel's original thesis and the UN's opposing thesis, emphasizing political reform beyond legal responses but not requiring regime change. This broad approach to justice arguably complements and refines Teitel's emphasis on the political dimension of TJ, as rectificatory justice and distributive justice will inevitably have political implications. Mani seeks not to define TJ but rather to describe the difficult intertwined challenges for those seeking justice after armed conflict. In contrast, the UN's later definition, perhaps predictably, deemphasizes political reform, allowing that vetting and dismissals may be among the range of processes applied but remaining sensitive to the 'political context,'²² a phrasing that may tamp down expectations of political reform. This 'evolution' towards applying the tools that were traditionally used in the context of regime change to situations where there is no real political transition has clouded the clarity of the concept of TJ.

The substantive emphasis of TJ should be on justice for human rights violations. Temporally, the primary emphasis should be on subjecting the acts that occurred during the predecessor regime to an array of responses within the time period of the successor regime. The term contains an aspirational element: that a transition towards justice is possible in line with the political shifts in the wake of a change in regime. There is no assumption of armed conflict, nor is there a denial of the possibility of armed conflict. Armed conflict has only a potential, secondary importance in TJ – an importance derived from the effects of armed conflict, not the thing itself. These potential effects, human rights violations and regime change, may each occur with or without armed conflict. The goals of TJ are fundamentally tied to the aspiration of transition, both towards justice for past violations and towards a cementing of a new political order that will prevent the old order, with its attendant violations, from returning.

An effort to contrast ICL with TJ can clarify TJ's meaning. ICL institutions may be created with political realities and societal transformation in mind, but the proceedings themselves cannot be politicized without degrading the effort and contradicting the basic purpose of ICL, which is to determine individual criminal responsibility under international law while protecting the rights of the accused. TJ has much more flexibility to focus on and address systematic, nonindividual

²¹ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002); Rama Mani, 'Balancing Peace with Justice in the Aftermath of Violent Conflict,' *Development* 48(3) (2005): 25–34.

²² UN Secretary-General, 2010, *supra* n 19 at 2.

problems. It can also legitimately address a wider range of human rights violations than the narrow set that may constitute international crimes.

That said, TJ is not simply 'ICL plus,' a view that might be encouraged by the perception of TJ as a collection of tools, with international criminal tribunals being just one of them. Some ICL violations may be discrete and small scale, and some ICL proceedings may not merit the appellation 'TJ.' While a case at the ICC requires the crimes alleged to be of a certain (as yet poorly defined) gravity, ICL in general does not, particularly if it is adjudicated in a domestic court. To take just one example, the military commissions established under the George W. Bush Administration may legitimately be attacked as poorly interpreting ICL, but the proper critique from a TJ perspective is not that they are 'poor' TJ but rather that they are not TJ mechanisms at all.

A few relevant contrasts between TJ and *jus post bellum* may also now be usefully described. *Jus post bellum* can apply without TJ or ICL being at issue. *Jus post bellum* is legitimately applied to any transition from armed conflict to peace.²³ Armed conflict may occur (certainly conceptually) without any clear violation of ICL or human rights norms. Technically, as a matter of law, states may enter a state of war and then transition to peace without the loss of life. In such situations, key issues of *jus post bellum*, such as questions as to the legality, morality, efficacy and sustainability of a peace agreement and steps taken to secure the peace will still come into play. Questions of distributive justice, particularly between states, that do not amount to human rights violations (including violations of economic rights) may tend to be more fully answered by *jus post bellum* than by TJ. Of course, without armed conflict, *jus post bellum* does not apply. In situations such as a largely nonviolent decolonization or peaceful regime change, the processes used to address (and prevent the recurrence of) previous mass human rights violations should be described as TJ, but should not be described as *jus post bellum* (regardless of whether the abuses amount to ICL violations).

Meanings of *Jus Post Bellum*

There is, as yet, no authoritative definition for *jus post bellum*, although many have been proffered. For the purposes of this article, for reasons that are explained below, *jus post bellum* is defined as the body of legal and prudential norms that apply to the entire process of the transition from armed conflict to a just and sustainable peace. There is an unrecognized split within the literature on *jus post bellum*, with some emphasizing the temporal limits of *jus post bellum* and others its functional dimensions. Those emphasizing the temporal limits essentially highlight the nexus to the previous armed conflict, while those emphasizing the functional dimensions tend to highlight the nexus to the future hoped-for just

²³ While *jus ad bellum* is traditionally regarded as only applying to international armed conflicts, the general approach taken by scholars of *jus post bellum* is that it applies to international and noninternational armed conflicts.

and sustainable peace. This article emphasizes the functional approach, which permits *jus post bellum* to play a unique role in tandem with TJ and ICL.

Both the temporal and functional approaches to *jus post bellum* involve an analysis that is cognizant of the passage of time. While the functional approach is not as focused on fixing the moment when war ends, it is still highly focused on the forward progression of events. With the functional approach, the focus is forward looking, with *post bellum* (after war) being an aspiration of the *jus* (body of law) rather than a description of it. The purpose or *telos* (ultimate object) of the law, *post bellum*, is embedded in the name with the functional approach.

The substantive emphasis of *jus post bellum* is broader than human rights violations. It also includes, *inter alia*, violations of the laws of armed conflict and the rights and privileges that spring from these laws, environmental law (including legal access to natural resources and regulating the toxic remnants of war), state responsibility outside of the realm of human rights, recognition of states and governments, laws and norms applicable to peace treaties and peace agreements, peacekeeping, occupation and postconflict peacebuilding.

Many of these issues are not discussed with sufficient reference to each other or with any reference to the rich intellectual heritage of the just war tradition. Recovering *jus post bellum*, the third element of this tradition, and applying it to modern problems provides the tools and the framework for more successful transitions from an armed conflict to a just and sustainable peace.

Meanings of ICL

In its current usage, ICL involves the application of international law to determine the individual criminal responsibility of defendants under that law while protecting the rights of the accused against the power of the state, regardless of how that power is institutionalized. The critical aspect of ICL is not the forum, whether it is international, domestic or hybrid, but rather the existence of international law that creates individual criminal responsibility.

The modern touchstone for the substantive content of ICL may be the four categories of crime identified in the ICC's Rome Statute: genocide, crimes against humanity, war crimes and the crime of aggression. A historical approach might tease out the criminalization of separate crimes (such as slavery, torture or forced marriage) now lumped together under general headings. The substantive portfolio of ICL is likely to continue to expand. For example, should the controversial Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights be adopted, pursuant to Article 28A, the International Criminal Law Section of the African Court would have power to try individuals for 14 crimes, not four.²⁴

²⁴ These crimes are genocide; crimes against humanity; war crimes; the crime of unconstitutional change of government; piracy; terrorism; mercenarism; corruption; money laundering; trafficking in persons; trafficking in drugs; trafficking in hazardous wastes; illicit exploitation of natural resources; and the crime of aggression. Draft Protocol on Amendments to the Protocol on the

The substance of ICL continues to change over time. Some developments, like the attempted criminalization as a matter of international law of unconstitutional change of government may tend to reinforce the status quo (keeping existing governments in power), putting it potentially at odds with other dynamics, such as the original conception of TJ that might tend to oppose any status quo not sufficiently protective of human rights (tending to support transitions from human-rights-abusing governments).

The Operation of the Three Concepts over Time

Discussing the phases of how a concept operates over time provides a more granular approach than a broad historical analysis, allowing for a discussion of the internal functioning of a concept. It also allows for a better possibility of understanding how the concepts can and should be integrated at different stages.

What roles TJ, *jus post bellum* and ICL can play depends in part on when one asks the question. TJ comes to the fore in consolidating a transition to a new, human-rights-centred regime or political order. *Jus post bellum* applies throughout the transition to peace, but will focus on different questions at different times. ICL on principle takes an unchanging stance with respect to determining criminal culpability, regardless of domestic regime or a state of war, but is particularly constrained with respect to *ex post facto* (after the fact) application of the law. Understanding the dynamics of each concept, how it works and orients itself over time, provides a more comprehensive guide to the role each concept can play and how they can be integrated in particular situations.

Dynamics of Transitional Justice

The Double Beginning of Transitional Justice

Due to the emphasis on responding to human rights violations of repressive predecessor regimes, TJ in practice largely begins after a change in regime, or at least after a dramatic political shift, and responds to the actions of a previous regime, which may or may not correspond to a period of armed conflict. TJ thus tends to have a double beginning: the subject matter (or referent) and the response to the subject matter. The first occurs during the repressive predecessor regime and the second begins during the succeeding, presumably nonrepressive, regime.

If one does not provide a clear definition that follows coherently from the definition given by practitioners, TJ may end up including all of ICL. This is, at a minimum, not helpful. ICL efforts can begin before a change in regime and are not necessarily predicated on a regime change. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICC have not necessarily

Statute of the African Court of Justice and Human Rights, revisions up to 15 May 2012, Exp/Min/IV/Rev. 7, on file with the author.

waited for a change in regime to proceed with trials, although regime change or at least changes in government have proven helpful.

When determining the temporal limits of TJ in terms of when it begins, it is important to specify whether the human rights violations or the reactions to those violations are being discussed. The human rights violations of the preceding regime may (or may not) stretch to the beginning of that regime. The reactions, as part of TJ, may begin with the new succeeding regime, or they may begin substantially later.

Immediacy and Sequencing

Once an iniquitous regime has fallen, one would expect that the subject matter of TJ – the human rights violations of the previous regime – would be over. There is, however, a complication to the idea of a double beginning of TJ that deserves mention, one that highlights the questions of immediacy and sequencing. Some patterns of human rights violations are considered ongoing as long as the information about the violations is withheld. This complicates the analysis of TJ because the work is entangled in the subject matter of TJ. Disclosing the truth about the initial act becomes a matter of immediate and pressing obligation for the successor regime to avoid participating in an ongoing human rights violation. In general, a successor regime using a model of TJ premised on political change will wish to maximize the perceived distance between it and the previous regime, but with a ‘composite act,’ such as forced disappearance, the successor regime may be considered responsible even if it did not initiate the wrongful act.²⁵

Sequencing is often discussed more prospectively than historically, with specialists suggesting, for example, that a country might try reconstituting judicial systems, followed by criminal prosecution.²⁶ What may be recommended for one situation may differ for another. The critical theoretical point when analysing the temporal dimension of TJ is that different tools may have different timelines, both by design and because of historical and social forces. Because of the various tools in the TJ ‘toolbox,’ determining the overall timeline in any particular instance of TJ can be very difficult. In practice, the timeline may not be a one-directional narrative of progress; it may involve reversals and pauses, sometimes repeatedly.

The question of the timeline in TJ is inherently tied to the question of political change. Teitel discusses the sequencing and immediacy in situations of diminished legitimacy, such as the responses to the Saddam Hussein regime after its fall in Iraq. She characterizes the application of criminal law as aimed at promoting

²⁵ See art. 15.1 of International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chap. IV.E.1, adopted by the General Assembly in Resolution 56/83 of 12 December 2001, corrected by A/56/49 (vol. I/corr. 4.): ‘The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.’

²⁶ Laurel E. Fletcher, Harvey M. Weinstein and Jamie Rowen, ‘Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective,’ *Human Rights Quarterly* 31(1) (2009): 163–220.

political transition, a process complicated by certain deficiencies of both the trials and the political transition itself. She suggests that the ICTY offers a cautionary tale of TJ causing a nationalist backlash, which may have hindered, in her view, political change.²⁷

One phenomenon that also must be noted in order to understand the dynamics of TJ is what has been called a 'justice cascade.'²⁸ This refers generally to how one legal proceeding, often abroad, can trigger subsequent domestic proceedings, and how the creation of a critical mass of efforts to prosecute can reach a tipping point so that prosecution is the norm, rather than impunity. There is renewed interest in tipping points in international law and politics.²⁹ The process of reaching a tipping point with respect to the fight against impunity that characterized a predecessor regime may not be a simple or linear one, but the idea of a tipping point may itself serve as an inspiration for practitioners facing particularly difficult TJ challenges.

The Unclear Ending of the Transition in Transitional Justice

Even in the case of seemingly immediate and unfettered instances of TJ, such as in post-World War II France, determining when TJ ends can be difficult. France has long wrestled with the issue of collaboration, producing an early wave of executions and humiliations, stretching and repeating through the relatively recent trial (1995–1998) of Maurice Papon.³⁰ Given Papon's alleged crimes in Algeria, was this trial for Vichy-era crimes TJ for Vichy or a proxy for TJ for the Fourth Republic?³¹ Unlike ICL, TJ must look to an analysis of the society and political system in transition to determine if TJ is 'over' – to see if the needed transition has actually occurred.

Applying Transitional Justice in Cambodia

In Cambodia, the question of justice in the context of political change is complex, in part because the question of the quality and degree of political change is contested. The current prime minister, Hun Sen, retained power through multiple putative regime changes. He was himself a member of the Khmer Rouge before rebelling. The particular political goal of a transition to democracy, or at least a

²⁷ Ruti Teitel, 'The Law and Politics of Contemporary Transitional Justice,' *Cornell International Law Journal* 38 (2005): 837–862.

²⁸ Ellen Lutz and Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America,' *Chicago Journal of International Law* 2(1) (2001): 1–34; Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W.W. Norton, 2011).

²⁹ See, Michael Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge: Cambridge University Press, 2013).

³⁰ See, Vivian Grosswald Curran, 'The Politics of Memory/Erinnerungspolitik and the Use and Propriety of Law in the Process of Memory Construction,' *Law and Critique* 14(3) (2003): 325–353.

³¹ The Fourth Republic (1946–1958), which succeeded the Vichy regime and preceded the current Fifth Republic, was destabilized by the Algerian war of independence.

regime with a greater degree of human rights protection, is made more problematic by Hun Sen's longevity in power and questionable human rights record.

The first TJ efforts³² in Cambodia may include the post-Khmer Rouge regime's efforts to memorialize the genocide, including the creation of what is commonly known as the Day of Hatred,³³ the gathering of the 'Renakse'/million documents petition, the transformation of Tuol Sleng into a genocide memorial and the trials *in absentia* of Pol Pot and Ieng Sary.³⁴ Of course, the new regime was widely seen as nondemocratic, nonhuman-rights-respecting and under domination, if not outright control, by Vietnam, whose army defeated the Khmer Rouge and occupied the country. Under Teitel's original definition of TJ, these problems allow criticism of Cambodia's efforts from a TJ perspective, allowing the coherent assertion that these did not constitute genuine TJ because they did not secure a democratic, human-rights-respecting regime. Under other, vaguer definitions of TJ, it would be more difficult to make this criticism.

Whether the proceedings at the ECCC amount to TJ depends in part on whether the political change implicated in the referent material is complete, or at least complete enough that the new political system is generally seen as legitimate. The contemporary practice of TJ should have a referent of arguably more than one regime in the past. This has not occurred in Cambodia, as the government is holding trials not with respect to what happened under the current regime, UNTAC, the period after occupation or the occupation, but for violations under the Democratic Kampuchea (Khmer Rouge) regime before the occupation.

After all, systematic human rights abuses did not end with the Democratic Kampuchea period,³⁵ although nothing has matched that horrific scale of violations. The 'TJ' mechanisms in Cambodia may help hold the top Khmer Rouge leadership responsible, while at the same time working against progress towards accountability for subsequent and ongoing human rights violations if these mechanisms are used comparatively to minimize the abuses of the current regime.

Dynamics of *Jus Post Bellum*

Beginning with the Effort to End Conflict, Not the End of Conflict

Despite the most facile reading of its name, *jus post bellum* should not be overly defined by reference to the time a conflict ends. The term may naturally lead to an

³² Given that this term is of recent coinage, this would be transitional justice *avant la lettre*, that is, before the term was coined.

³³ Or Day of Holding on to Anger, instituted in the aftermath of the first years of Vietnamese control (1979–1982).

³⁴ See, Jaya Ramji-Nogales and John D. Ciorciari, 'Lessons from the Cambodian Experience with Truth and Reconciliation,' *Buffalo Human Rights Law Review* 19 (2013); Stéphanie Benzaquen, 'Witnessing and Re-Enacting in Cambodia: Reflection on Shifting Testimonies,' *AI & Society* 27(1) (2012): 43–51.

³⁵ See, Eric Stover and Rae McGrath, *The Coward's War: Landmines in Cambodia* (New York: Human Rights Watch and Physicians for Human Rights, 1991); Human Rights Watch, 'Tell Them I Want to Kill Them': *Two Decades of Impunity in Hun Sen's Cambodia* (2012). Published by HRW in the USA. See http://www.hrw.org/sites/default/files/reports/cambodia1112webwcover_1.pdf.

emphasis on the temporal boundaries of the armed conflict, as though the question of whether the norms of *jus post bellum* can be applied can always be clearly demarcated by an event.³⁶ The proper study of *jus post bellum* should complicate and enrich this overly neat temporal picture by emphasizing the links between the areas of *jus post bellum* and *jus ad bellum* as well as between *jus post bellum* and *jus in bello*.

The question of whether demands for unconditional surrender are permissible,³⁷ for example, is asked of a period well before the guns are silenced. This is an issue that links the traditional criteria of *jus ad bellum* (e.g., just cause) to traditional concerns of *jus post bellum* or *jus victoriae*³⁸ as to the rights and responsibilities of the victors. Increased attention to *jus post bellum* should highlight that demarcating when a conflict terminates is frequently difficult, particularly when nonstate actors may splinter, transform or lie temporarily dormant. *Jus post bellum* should not be marked off and isolated from other bodies of legal norms on the basis of time, but rather seen as part of a comprehensive framework for managing an interconnected set of problems related to armed conflict.³⁹

Peace Agreement as a Process

A peace agreement is usually seen as a noun, a document created at a specific point that marks the temporal division between 'wartime' and 'peacetime'.⁴⁰ This division is extremely important, but it can be overstated. There are often periods that could be described as *status mixtus*,⁴¹ where the status and durability of a hoped-for peace is uncertain, particularly without the benefit of hindsight. What is of increased interest at those moments from a *jus post bellum* perspective is not whether a status of *post bellum* has technically been achieved but rather whether legal norms are being applied with *post bellum* as the goal. It is this orientation towards the creation of a just and sustainable peace that separates *jus post bellum*

³⁶ See, Inger Österdahl and Esther van Zadel, 'What Will Jus Post Bellum Mean? Of New Wine and Old Bottles,' *Journal of Conflict and Security Law* 14(2) (2009): 175–207.

³⁷ See, Brian Orend, 'Jus Post Bellum: A Just War Theory Perspective,' in *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace*, ed. Carsten Stahn and Jann K. Kleffner (The Hague: T.M.C. Asser Press, 2008). Also see, Brian Orend, 'Jus Post Bellum: The Perspective of a Just-War Theorist,' *Leiden Journal of International Law* 20 (2007): 579–580. Orend suggests that demands for surrender and the terms of those demands must be linked to the original just cause of those making the demand.

³⁸ See, Stephen C. Neff, 'Conflict Termination and Peace-Making in the Law of Nations: A Historical Perspective,' in *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace*, ed. Carsten Stahn and Jann K. Kleffner (The Hague: T.M.C. Asser Press, 2008).

³⁹ See, Orend, 2007, *supra* n 37.

⁴⁰ For a fascinating, in-depth analysis of the idea of 'wartime' as a legal and cultural construct, particularly with respect to the US, see, Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences* (New York: Oxford University Press, 2013). See also, Mary L. Dudziak, 'Law, War, and the History of Time,' *California Law Review* 98 (2010): 1669–1709.

⁴¹ Georg Schwarzenberger, 'Jus Pacis Ac Belli? Prolegomena to a Sociology of International Law,' *American Journal of International Law* 37 (1943): 460–479.

from other strands of just war theory. The law of making peace agreements, or the 'law of peacemakers' – what Christine Bell has called *lex pacificatoria*⁴² – is a crucial part of *jus post bellum*. In operation, it often spans periods of armed conflict and peace, because modern peace agreements often come in series, with preliminary agreements paving the way for 'comprehensive' peace agreements that often need to be followed by implementing steps.

Other crucial subject areas of *jus post bellum*, including environmental law and resource allocation issues during the transition to peace, recognition of states and governments, regulation of state responsibility and occupation law are often tied to agreements used to build a just and sustainable peace. Coming to lasting agreements about peace is better understood as a dynamic process rather than an equation that is solved a particular moment.

The Endpoint of *Jus Post Bellum*

As with TJ, the endpoint of *jus post bellum* defined as regulating a transition to a just and sustainable peace can be difficult to identify. While a situation may be analysed retrospectively to determine whether a peace is sustained, the law must be applied without the benefit of future hindsight. The question of whether the current situation is sustainable at a particular moment (as opposed to sustained as a matter of historical fact) is a matter of political science and other areas of social science besides law. The question of whether a peace is just may lie more in an ethical analysis, likely grounded in human rights and the just war tradition, as much as positive law.

While the focus of TJ is on the accomplishment of a particular conception of justice more than the realization of sustainable peace, the experience of TJ practitioners may be helpful in using various social sciences to analyse the result of applying an area of law or a legal approach to a particular instance, particularly as to the difficult question of whether there are objective indicators to predict whether a peace is sustainable and, under a more maximalist position, whether the quality of that peace is sufficiently just that the work of *jus post bellum* is complete.

Applying *Jus Post Bellum* in Cambodia

Jus post bellum in recent Cambodian history may be applied to at least three transitions from conflict to peace: the overt conflict between the Khmer Rouge and Vietnam beginning in 1979, the simmering civil war during the 1980s and the postelection violence in 1997. Some might point to the UN Advance Mission in Cambodia (UNAMIC) and UNTAC as successful *jus post bellum* initiatives, ending a lingering civil war and establishing a durable peace. While there is some merit to this suggestion, a *jus post bellum* analysis of recent Cambodian history should go much further, and is generally not so positive.

⁴² Christine Bell, 'Peace Agreements: Their Nature and Legal Status,' *American Journal of International Law* 100 (2006): 373–412.

If *jus post bellum* principles had been applied from the outset, the civil war that lasted throughout the 1980s might have been resolved more swiftly and successfully. *Jus post bellum* is directly concerned with issues of recognition of governments, for example. Its principles might have informed the scandalous decision by many in the international community to continue to recognize and support the Khmer Rouge as the putative government of Cambodia even after its ouster, leading to a lingering conflict.⁴³ Not only did that conflict linger, but after it was apparently ended under UNTAC it also flared up again when Hun Sen refused to step down in 1993 despite his party losing the election. Hun Sen muscled his way into the position of 'second prime minister' and then forced the 'first prime minister' out of office with armed force in 1997. Occupation law and the more general principle that 'no state shall by force interfere with either the constitution or government of another state'⁴⁴ would have applied to the early Vietnamese occupation, and arguably subsequent periods, perhaps lessening resentment and conspiracy theories regarding Vietnamese influence on the government.

Jus post bellum principles could have been applied to conduct such as the widespread use of landmines or the mismanagement of resource rights, conduct that may not have been criminal at the time but nonetheless hindered the creation of a just and sustainable peace. International attention might have built upon the partial success of the 1991 Paris Conference on Cambodia. Once a just and sustainable peace had been achieved, the remaining focus should have switched to any remaining TJ and ICL issues.

Dynamics of ICL

The temporal dimensions of ICL can be thought of in a variety of ways. This article addresses four: criminalization, institutionalization and creation of jurisdiction, evaluation of culpability and purposes.

Precriminalization and Criminalization

The law that constitutes contemporary ICL has extensive and varied historical roots, frequently prohibiting conduct (often collective, state conduct) as a matter of public international law before it specifically entailed individual criminal responsibility as a matter of international law. The 'precriminalization' roots of contemporary ICL should include the history of *jus contra bellum* with respect to

⁴³ See, Stephen J. Solarz, 'Cambodia and the International Community,' *Foreign Affairs* 69(2) (1990): 102. 'Thailand and China then conspired to redress the balance of power by an act of complete moral cynicism – the resurrection of the nearly devastated Khmer Rouge. Pol Pot's forces became the lever for removing Vietnam from Cambodia . . . The United States and the rest of ASEAN went along.' See also, Michael Wesley, 'The Cambodian Waltz: The Khmer Rouge and United Nations Intervention,' *Terrorism and Political Violence* 7(4) (1995): 60–81, noting the Khmer Rouge's ongoing international support and analysing the interaction between the UN and the Khmer Rouge in part through the latter's attempt to keep recognition and support.

⁴⁴ Art. V of the Preliminary Articles for Perpetual Peace among States. Immanuel Kant, 'Perpetual Peace,' in *Kant: Political Writing*, 2nd ed., ed. Hans Reiss, trans. H.B. Nisbet (New York: Cambridge University Press, 1991).

the crime of aggression. They should include a fuller understanding of the law of armed conflict, beyond grave breaches of the Geneva Conventions of 1949, to understand the international criminal prohibitions currently summarized as war crimes. The varied crimes now categorized as crimes against humanity often have their own separate and unique histories, with the prohibition of slavery having a distinct history from the prohibition of apartheid, for example. Often the international legal prohibition of particular state conduct would precede the establishment of individual criminal culpability for such conduct, which in turn would precede the establishment of an international forum to hold individuals accountable for violations of ICL. Prohibitions against violations of the law of armed conflict and aggression existed before they were criminalized and punished.

This is not merely a historical phenomenon. Nonpenal law may be continuing to lay the foundations for ICL. There are nonpenal regulations, domestic and international, that will be looked to as the ‘newer’ crimes proposed for the African Court – the crime of unconstitutional change of government, mercenarism, trafficking in hazardous wastes, illicit exploitation of natural resources⁴⁵ – are progressively defined and criminalized.

The application of ICL in a criminal case should not involve the creation of new law that criminalizes conduct. The point of discussing the temporal dimensions of ICL first is that unless criminalization of particular conduct comes before prosecution, it violates the human rights of the accused. The norm *nullum crimen, nulla poena sine praevia lege poenali*⁴⁶ serves to prohibit *ex post facto* criminalization of conduct. This served as a source of criticism of early international criminal prosecutions, but it is less likely to do so with respect to contemporary prosecutions of ‘core crimes.’

This prohibition on *ex post facto* laws that work to the disadvantage of the accused is worth noting because it contrasts with an *ex post facto* change in the law that benefits an accused, as well as with legal changes with respect to TJ and *jus post bellum*. While ICL often plays a role in TJ efforts, the emphasis for TJ practitioners has often been on the opposite end, focusing on the limits on pardons or other legal acts that might assist an accused and on legal changes that might improve the possibility of holding an accused accountable.⁴⁷ It is not clear that *nullum crimen sine lege* or *nullum poena sine lege* is a practical or legal bar to the noncriminal law tools in the TJ toolkit – the law can be changed so that certain members of a former regime cannot hold certain governmental positions, for example. Similarly, the attempt to build a just and sustainable peace at the heart of *jus post bellum* almost always requires new laws and often new legal characterizations of past acts and conditions. The relationship to legal

⁴⁵ Draft Protocol, art. 28A.

⁴⁶ Also rendered as *nullum crimen sine lege* and *nullum poena sine lege*, meaning no crime/no punishment without law.

⁴⁷ See, Lisa J. Laplante, ‘Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes,’ *Virginia Journal of International Law* 49 (2009): 915–984.

recharacterization of the past differs between ICL and the noncriminal law aspects of TJ and *jus post bellum*.

Institutionalization and Creation of Jurisdiction

The temporal dimension of ICL must also account for the institutionalization and the creation of jurisdiction for particular courts and tribunals. This must occur after the criminalization of a type of conduct, and can occur after the crime itself (as happened with regard to most of the hybrid tribunals, although crimes did continue to occur after the establishment of the ICTY). The institutionalization does not have to occur after the crime occurs, nor does the institution and the specific jurisdiction over the crime have to happen simultaneously. In the case of the ICC, the institution is by definition created on or before the conduct in question due to the temporal limit in its jurisdiction (1 July 2002), although the full preconditions for jurisdiction over the crime might be created later (for example in the case of a UN Security Council referral). In the case of the ECCC, the creation of a new chamber with particular jurisdiction over violations of ICL took place decades after the criminal conduct in question. Domestic courts may not require the creation of new chambers, but may require the establishment of jurisdiction over preexisting ICL violations, if not already provided for.

In practice, ICL can be tightly constrained by the effects of time passing. While statutes of limitation are generally not seen as bars to prosecution of ICL violations, the delay between criminal conduct and the creation of an institution with jurisdiction over the criminal conduct (with subsequent formal investigation and, if merited, prosecution) can create numerous practical and legal problems. Accused individuals and important surviving witnesses could die. Memories could fade. Evidence could be destroyed, become less reliable (often through lack of a reliable chain of custody) or lose probative value (e.g., if associated explanatory evidence or if potential testimony is degraded or lost). Preservation of evidence can be an important challenge for effective ICL. Efforts to collect and preserve evidence by intergovernmental organizations, states and nongovernmental organizations can be vital before a formal investigation is launched, but they can also cause difficulties if unprofessional methods lower the reliability of the evidence.

The delay between conduct and the evaluation of that conduct can pose problems for TJ and *jus post bellum* as well, but those problems may be particularly acute given the generally accepted required standard of proof in criminal cases – beyond a reasonable doubt with respect to every element of a charge. Truth commissions may issue reports, memorialization can occur and lustration can go forward without necessarily needing to meet these demanding criteria. Similarly, efforts to build a just and sustainable peace in noncriminal matters do not necessarily require proof beyond a reasonable doubt, and managing causes for previous conflicts may be made easier, not harder, with the passage of time.

Culpability Evaluation: Looking Back to Reconstruct Looking Forward

Once a type of conduct has been criminalized, the conduct has allegedly occurred and the court or tribunal has been created with proper jurisdiction, the conduct must generally be evaluated from the perspective of what was known (or in some cases should have been known) by the accused at the time of the alleged conduct. This can be a difficult challenge at times. For example, if an accused is charged with directing an attack at a legitimate military target that should have been expected to damage civilians or civilian structures disproportionately, it may be difficult for the finders of fact to place themselves in the situation of the commander. The finders of fact, after all, are generally presented with the results of the attack, which the accused may not know with certainty beforehand. This historical reconstruction of the mental state of a particular individual at a particular point may play a role in nonpenal TJ and *jus post bellum* analysis, but it may be less important and the criteria of proof may be less stringent.

Purposes: Forward-Looking and Retributive

ICL comes with the same varied assortment of purposes that domestic criminal law enjoys. While many of these purposes are forward-looking in nature, including specific and general deterrence, incapacitation and reconciliation, they are not all forward-looking. Retribution, or the widely accepted purpose of punishment known as ‘just deserts,’ is not principally concerned with the future additional consequences of a punishment, only that the punishment occurs. This criminal law emphasis strongly differs from the normal emphasis of TJ and *jus post bellum*, which are focused on setting up a system that protects human rights and achieving a just and sustainable peace, respectively.

Many Endings

Evaluating the ending of a process of ICL depends upon the unit of analysis used. From the perspective of the individual accused, the case ends when the extent of the accused’s criminal culpability (or lack thereof) is determined on final appeal, albeit with the possibility of a revision of a judgement under certain circumstances when a new fact is discovered. With respect to addressing an alleged crime in the common context where there are multiple potential accused, the prosecution of the crime can only be considered concluded when a final determination has been reached for all potentially prosecutable accused, given the lack of an applicable statute of limitations in most instances.⁴⁸ From an institutional perspective, international criminal tribunals can be closed or folded into new mechanisms (such as the Mechanism for International Criminal Tribunals). ‘Situations’ before the ICC may also be closed, although exactly how that will

⁴⁸ Indeed, from the perspective of survivors of international crimes, even when those potentially prosecutable from the prosecutor’s perspective have been prosecuted, the operation of ICL may not seem complete if they do not feel justice has been served.

occur is largely unknown at this point. The law itself may be amended, but it is intended to be enduring in application, not limited to any particular situation of peace or political system.

The lack of a statute of limitations allows for a role for ICL that may extend well beyond the application of TJ and *jus post bellum*. A new human-rights-respecting political regime may be established and normalized, a just peace may be secured, but that does not mean that new ICL cases may not be begun or completed. Indeed, ICL may be able to function more successfully posttransition, whether that transition is political, pacific or both. Questions of independence and impartiality may be lessened in this later phase. This is not to indicate that ICL should not be applied during a conflict, early peace or in the midst of political transition but only to note that those transitions may largely be complete but the application of ICL may and often should continue.

Applying ICL in Cambodia

While it may be legitimately criticized from the perspective of misapplying the law or selective justice, the ECCC is unquestionably an exercise in ICL. The value of ICL not being dependent on a TJ or *jus post bellum* timetable is evident. The argument that this does not necessarily contribute to a democratic transition or sustainable peace is arguably subsidiary to the principal demand for justice for international crimes.

More questionable is whether the *in absentia* trials of Pol Pot and Ieng Sary constitute an application of ICL. While *in absentia* hearings are not unknown to legitimate applications of ICL (an example is the cases thus far at the Special Tribunal for Lebanon), the *in absentia* trials of Pol Pot and Ieng Sary were arguably so deficient that they may not constitute legitimate legal trials, as opposed to public relations exercises by an occupying force.

From Theory to Practice in Cambodia

Practitioners and theorists of ICL, TJ and *jus post bellum* are subject to a natural inclination to universalize and 'naturalize' their fields in order to increase the legal authority of their field and the scope of their practice. This interpretive and rhetorical tendency, however, may mask the systematic effect of their fields upon the international legal system they inhabit. These concepts are very much creatures of their time. But in order for the potential of these concepts to be realized, they must be applied with clarity as to the history, goals, definitions and dynamics of each concept. Recent Cambodian history, with its complicated mix of failures and success, provides excellent examples for reflecting on the inter-relationship between these terms in operation.

During the Khmer Rouge regime, TJ, *jus post bellum* and ICL had little direct institutionalized application. That is not to say they could not have had application in some form. The idea of the double beginning of TJ discussed above indicates that TJ would have been limited mostly to collecting data and demanding

transition to a more democratic regime. The Khmer Rouge regime's grievances and paranoia regarding the previous Lon Nol regime and sense of unfettered power *post bellum* might have been answered rhetorically with a more developed sense of *jus post bellum*, but that would have had little influence on the ground during the regime. A stronger track record of institutionalizing ICL might have served as somewhat of a deterrent for the crimes of the Khmer Rouge, but the operation of ICL would have mainly been in the precriminalization and criminalization stage, given the difficulties of effective institutionalization at that point.

Between the Khmer Rouge regime and UNTAC, TJ, *jus post bellum* and ICL played a limited role, but had much greater potential. The demand for a new political system that not only was superior to the Khmer Rouge regime (the lowest of all possible bars) but also truly respected human rights and ended the ongoing trauma of not knowing what happened to the victims of the Khmer Rouge could have been given full throat by TJ advocates, reinforced by principles of *jus post bellum* citing the goal of a just and sustainable peace. Efforts to continue to support the Khmer Rouge, including recognition at the UN, might have been restricted. The dispute between Vietnam and Cambodia was 'solved' by a Vietnamese victory, but the underlying disputes rankle many Cambodians to this day. The gestures towards ICL in the form of *in absentia* trials could arguably have been strengthened by TJ and *jus post bellum* goals to encourage a more comprehensive approach to making an immediate break with the past, including a more extensive and even-handed application of the law as well as complementary vetting.

From UNTAC onwards, we see a greater degree of integration of TJ, *jus post bellum* and ICL. While far from ideal, the current regime is an improvement on the prior regime in terms of democracy and respect for human rights, bolstered in part by the end of the civil war. Internationalized ICL proceedings, while flawed, are also made more possible by establishing a regime with which the UN has been able to come to an agreement. One of the greatest difficulties has been the objective evaluation of the accused in the modern legal context and balancing the various purposes of ICL. One of the greatest strengths of applying ICL is that the question of the application of TJ or *jus post bellum* is not necessary for the operation of ICL cases. While the continuing relationship has been difficult, it could not have realistically existed at all without some success with respect to the goals of TJ and *jus post bellum*.

The tragedies and successes of modern Cambodian history were not simply the result of political will or lack thereof. The application of political will needs clear goals and frameworks to be effective. TJ, *jus post bellum* and ICL have increasingly supplied these goals and frameworks. The recent history of Cambodia is one of partial success; with *jus post bellum* applied in a somewhat successful peace agreement, some accountability through the application of ICL and some movement towards a political system that respects human rights. By differentiating the usage, history and dynamics of each concept, this article has sought to clarify how the three concepts can be used without confusion and with a greater possibility of achieving the varied goals driving TJ, ICL and *jus post bellum*.

Rethinking Jus Post Bellum in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May

Ruti Teitel*

Abstract

Taking Michael Walzer's and Larry May's reflections on jus post bellum as a point of departure, I explore here some of the limits of what might be called the inherited notion of jus post bellum. I then articulate a broader perspective for jus post bellum, influenced by thinking on transitional justice. I argue that, given the nature of modern warfare and the evident shift to wars of humanitarian intervention, the contemporary understanding is no longer limited to restorative ex post justice, but must also include forward-looking aims, and for this purpose the discourse of transitional justice is better suited.

Larry May involves Michael Walzer's *Just and Unjust Wars* to articulate a conception of justice at the end of war which is appropriate to our contemporary situation. Taking Walzer's and May's observations on these issues as a point of departure, I will here explore some of the limits of what might be called the inherited notion of *jus post bellum*. I will then articulate a broader perspective for *jus post bellum*, influenced by thinking on transitional justice. This perspective, like transitional justice itself, is both backward- and forward-looking. By contrast, the inherited notion of *jus post bellum* tends to view conflict as the interruption of a putatively just or stable *status quo ante*, which is to be restored to the fullest extent possible.¹ Given the nature of modern warfare and the evident shift to wars of liberal intervention, the contemporary understanding is no longer limited to restorative *ex post* justice, but must also include

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¹ See M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th edn, 2006); and Bass, 'Jus Post Bellum', 32 *Philosophy & Public Affairs* (2004) 384.

forward-looking aims, and for this purpose the discourse of transitional justice is better suited.

Wars are being waged within a highly developed set of constraints under human rights and international humanitarian law, as well as expectations of democratization. There is thus an extraordinarily high demand for *post bellum* justice, whilst the guiding principles and values for such remain controversial.

May observes that, in relation to the larger law of war, the issue of *jus post bellum* is under-theorized. He notes that ‘Walzer seems to subsume *jus post bellum* considerations under *jus ad bellum*’.² Of course, this is in and of itself a significant normative statement about the meaning of *jus post bellum*: i.e., there are limited post-war norms and, moreover, that these are most crucially connected to the principles which guide the initiation of war. Accordingly, the focus in the *post bellum* here is in response to aggressive war. The just aftermath is one that imposes constraints following such wars.

May draws from Walzer’s articulation of the just war tradition the guiding principle that there ought to be a thoroughgoing proportionality regarding *jus post bellum*. Moreover, he reasons that such a calculus might well lead to ‘contingent pacifism’.³ The application of the principle of proportionality, he argues, should move us in the direction of trying to avoid war altogether – a utopian direction.

On the 35th anniversary of Michael Walzer’s *Just and Unjust Wars*, there is a growing appreciation of the potential importance of the area of the law of war known as *jus post bellum*. Yet the relationship of law to conflict today is a complex one, and contemporary circumstances hardly reflect May’s utopianism. Rather, one might perhaps see the current legal panorama as constituting a new view of peace – in the just war analysis – namely one that moves away from that associated with inter-state conflict to a calculus which reconceives a just peace in terms of *human security*, with implications for a transformed understanding of the meaning and role of justice during such periods. I have discussed this framework at greater length elsewhere.⁴ Below, I outline some of the changes in *post bellum* expectations and the ways in which these are best captured by a more comprehensive concept and vocabulary associated with these periods of political flux: transitional justice.

1 Just and Unjust Wars – Half a Century On

To begin, post-conflict justice is, as Walzer himself would admit, hardly a central theme in *Just and Unjust Wars*. Insofar as he addresses *jus post bellum* at all, it is through the problem of ‘settlements’, as well as the question of responsibility, where he brings to bear other strands of the just war tradition, particularly those norms concerning the justification of war at the outset (*jus ad bellum*). As Walzer subsequently observed

² May, ‘*Jus Post Bellum* Proportionality and the Fog of War’, in this issue, at 315.

³ L. May, *After War Ends: A Philosophical Perspective* (2012), at 219 ff.

⁴ See R. Teitel, *Humanity’s Law* (2011).

in his most recent book, *Arguing about War*, written after the war in Iraq, *jus post bellum* was not a central concern until after World War II, and more recently with decolonization and later transitions.

What is owed to Iraq or to other peoples who are the 'beneficiaries' of wars of supposed liberation?⁵ This is the burning question of the last decade in Iraq, Afghanistan, and most recently Libya. Where a war is justified on humanitarian grounds, i.e., a *just* war, what are the implications of this justice in the *ad bellum* for *jus post bellum*? One might well pose the question: What is the relationship of *jus post bellum* to *jus ad bellum*? On the other hand, might the injustice of a war's beginning imply greater post-war duties? Or does the logic work the other way around? In the event that a war is initiated for humanitarian reasons might that well imply added duties, whether during or after the conflict?⁶ Just how does post-war justice relate to the broader questions concerning the meaning and direction of the justice of war? To what extent does the contemporary iteration of the just war tradition, its principles and values, help to guide the question of what must be done following a conflict? In his post-Iraq book, which elaborates upon the just war tradition in light of more recent wars, Walzer poses the problem of 'after-maths', in particular those following an unjust war. In his words, '[j]ust how is postwar justice related to the just war tradition', i.e., the justice of the war itself and the conduct of its battles?⁷

2 Getting Beyond the Restoration of the *Status Quo Ante*

With the end of the Cold War we have seen a return to wars of intervention, with implications for the scope and character of *jus post bellum*. There is a need to rethink the earlier classical approach to post-war justice as being fundamentally restorative. Posing the question today of what values and related principles regarding rights and duties should apply, *post bellum* inevitably constitutes a departure from a focus on restoration (which takes implicitly or explicitly the pre-war *status quo* as a decisive normative benchmark). Historically, this area was dominated by a preoccupation with unjust wars and the settlements that followed those wars, focusing on restraining or regulating the punishment of the aggressor for disrupting the *status quo ante*.

In this context, victors were free to punish, within determined constraints – limits on collective punishment, spoils of war, plunder, return of prisoners of war, occupied territory, etc. This was often complemented by amnesties and reparation schemes animated by restorative objectives. The post-World War I settlement at Versailles was widely regarded as an instance of failed justice and, even worse, as having the effect of promoting the return of war.⁸

⁵ See N. Feldman, *What We Owe Iraq: War and the Ethics of Nation Building* (2004).

⁶ See Teitel, 'The Wages of Just War', 39 *Cornell Int'l LJ* (2006) 689.

⁷ M. Walzer, *Arguing About War* (2004), at 164.

⁸ N. Ferguson, *The Pity of War: Explaining World War I* (1995).

For Walzer, even enemy nations guilty of aggression have a right to their continued existence.⁹ Building on Walzer,¹⁰ May offers proportionality as a ‘metanorm’.¹¹ One could conceive this view of *post bellum* in historical or retrospective terms – where what is at stake is responsibility in a backward-looking way, as guided by the justice of the war purpose itself and the goal of returning to the *pre bellum* or *status quo ante*.

Now, however, we can see that we are moving away from this traditional approach to *jus post bellum* in a number of ways: first, there is a move away from the dominant concern of *jus post bellum* conceived as a backward-looking enterprise, and as restraint, to a broader framework involving a host of duties that relate not just to the past but also to an often protracted present, as well as forward-looking goals for a peaceful future. The aegis or subject of *post bellum* norms has become greatly expanded.

Many questions today concerning what obligations attend aftermaths are being raised in the context of transition, sometimes following conflict, but just as often not. For a number of reasons, this view increasingly overlaps with conflict. At a time of persistent smaller conflicts, i.e., of pervasive violence, often of ongoing internal conflicts where there is no clear end,¹² and which are not even clearly about state-building or democratization, this inquiry leads to a questioning of the meaning of ‘*post bellum*’ in *jus post bellum*. As May concedes, the parameters of *post bellum* have become murky.¹³

Along similar lines, there has been a shift in our understanding of responsibility away from the state-centric view as the singularly relevant subject of *jus post bellum*, as the older view of restoration assumed the state to be the relevant object of restoration. At the same time, there has been a move away from collective sanctions levied upon a state or its people. Individualized punishment is clearly on the rise, most dramatically through international criminal justice.¹⁴

3 Towards an Alternative Paradigm: What Normative Framework Should Apply?

In the current context, justice considerations enter the picture from the outset, consider that humanitarian considerations have been invoked as a justification for war itself. In today’s wars of liberation internal ethnic conflicts are often involved; the issue is as much or more to do with settling scores with fellow citizens as punishing a foreign aggressor. Clearly, this brings transitional justice to the fore.

⁹ See Walzer, *supra* note 1, at 123.

¹⁰ See Walzer, *supra* note 1, at 119–120.

¹¹ See May, *supra* note 3, at 6.

¹² On the new wars see M. Kaldor, *New and Old Wars: Organized Violence in a Global Era* (2nd edn, 2007).

¹³ See May, *supra* note 3, at 2–3.

¹⁴ See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment (ICTY, 7 May 1997). The recent ICJ rulings in *Bosnia v. Serbia* and *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)* Judgment, 3 Feb. 2012, available at: www.icj-cij.org/docket/files/143/16883.pdf can be viewed as setting or reinforcing limits to post-war collective guilt or responsibility.

Insofar as the new wars are often conflicts animated by the values of liberalization, freedom, and so on, we can see ways in which the aegis of *jus post bellum* overlaps with the aims of transitional justice. Justice is not conceived as strictly punishment oriented, as assumed in the legalist paradigm. Nor is it confined to restitution and the restorative dimension implied by the earlier understanding of post-war justice. Indeed, it could well take in the full context and modalities of transition and transformation. The issue is being reconceived in terms of justice as security. Within the evolving framework, there is a concern to identify responsibility beyond the state to private actors as well. There are duties that follow even when a war is just.

Thus, '*post bellum*' seems too limited or inappropriate today because of the unstable or undetermined boundaries between conflict and post-conflict situations.¹⁵ Transitional justice is arguably more capacious because it allows for purposes beyond those associated with a war's beginning, such as transformation, namely purposes going beyond retributive or restorative justice.

Rethinking the regulation of conflict in contemporary circumstances entails the challenge of integrating and recalibrating the norms that were shaped traditionally by their strict association or co-relation with a defined point in the course of the conflict – *ad bellum*, *in bello*, *post bellum*. Today we see that international humanitarian law or *jus in bello* applies during armed conflict and beyond. At least one tribunal has declared that it extends beyond this point.¹⁶ While *jus ad bellum* was generally seen to relate to the beginning of conflict, and therefore to guide questions of the legitimacy of the use of force in international law, today we can see that the traditional inquiry regarding aggression has given way to a broader inquiry regarding the treatment of civilians, human security, etc. Moreover, the question of *jus ad bellum* – whether a war is unjust or just – evidently has ramifications for the duties of justice in the aftermath.

With the complexity of the new phenomena, one can see that multiple legal orders are arguably applicable in guiding the law of war, including *post bellum* and *in bello*, i.e., international humanitarian law, as well as occupation law and human rights law. This implies specific requirements associated with each of these areas, for instance, *jus in bello*, or the norms regarding the treatment of prisoners and other non-combatants set out in the Geneva Conventions. Occupation law, too, is generally the guiding principle for the protection of the *status quo* in occupied territories.¹⁷ Lastly, human rights law, while generally associated with the guarantees a state gives its citizens in peacetime, also now applies in situations of conflict along with the law of war.¹⁸ Other specific guarantees in certain situations may be in tension with one another.¹⁹ To what extent are there broader guiding values?

¹⁵ See UN Development Programme, *World Development Report 2011: Conflict, Security, and Development*, at 2–8 (discussing the 'challenge of repeated cycles of violence'). See I. Rangelov and M. Theros, *Field Notes from Afghanistan: Perceptions of Insecurity and Conflict Dynamics*, LSE Global Governance, Working Paper No. WP 01/2010, Apr. 2010.

¹⁶ See *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, at para. 69 (ICTY, 2 Oct. 1995).

¹⁷ See Ben-Naftali, Gross, and Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory', 23 *Berkeley J Int'l L* (2005) 551.

¹⁸ See App. No. 57950/00, *Isayeva v. Russia*, 41 ECHR (2005) 38.

¹⁹ *Ibid.* (discussing the tensions involved in applying human rights law in occupied territories).

For Walzer, '[d]emocratic political theory ... provides the central principles of the account'.²⁰ Yet one is inclined to suggest that the values ultimately underpinning Walzer's proposal are broader, namely those of human protection and security. He thus elaborates, 'What determines the overall justice of a military occupation is less its planning or its length than its political direction and the distribution of the benefits it provides.'²¹ The question becomes: To what extent are people's lives improved? Consider in this regard the significance of various measures such as de-baathification (in Iraq) and the equal treatment of various groups, which involve commitments beyond pure or simple democracy.

I employed the term 'transitional justice' in 1991 to represent a move away from the discourse that associated such phenomena purely with the law of conflict.²² The idea was that the aims of such processes were in part forward-looking – involving democratization – and not backward-looking and associated with war. Moreover, the use of the term 'transitional justice' also addressed the central issue of the time: the extent to which the relevant democratization processes seemed less revolutionary and more gradual, more *transitional*, often taking decades, for example in post-dirty war Latin America. We now have a rich set of illustrations from the post-Soviet bloc, Asia, and the Middle East.

4 The Peace v. Justice Debate

By contrast, it is in the dynamic contemporary context that questions of conflict-related justice are being confronted today; namely, situations in which conflict has not completely ceased and where there are multiple actors and aims. Let us return now to May's proposal that the *post bellum* context be guided by the principle of proportionality.²³ What does it mean to apply the principle of proportionality in *jus post bellum*? Today this question has gained in traction. Applying the proportionality principle requires thinking through the likely effects of *jus post bellum* strategies in periods of substantial flux. What is the likely impact of criminal justice on the consolidation of human rights protection in a given society? The first rule is that it should do no harm: '[w]hatever is required by the application of other *jus post bellum* principles must not impose more harm on the peoples of the world than is alleviated by the application of these principles'.²⁴

The respective roles of trials and amnesties in the transition from war to peace have been examined by political scientists within an instrumentalist framework that understands proportionality in terms of trade-offs. For Jack Snyder and Leslie Vinjamuri,²⁵ the inquiry regarding proportionality is essentially about the extent to which justice

²⁰ See Walzer, *supra* note 7, at 164.

²¹ *Ibid.*, at 165.

²² See Luban, 'Reviewing John Ester, Closing the Books. Transitional Justice in Historical Perspective (2004)', 116 *Ethics* (2006) 409; and R. Teitel, *Transitional Justice* (2000).

²³ May, *supra* note 2, at 324–325.

²⁴ See May, *supra* note 3, at 14.

²⁵ See Snyder and Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice', 28 *International Security* (2003/04).5.

advances or undermines peace, where the critical variable or objective is peace; marshalling for the primacy of peace considerations over justice.²⁶ Some analysts are simply sceptical about criminal trials, and see them as threatening the objective of peace, while Leigh Payne, based on an empirical study of transitional justice outcomes in a wide range of situations, views a mix or balance of trials, truth commissions, and amnesties as more likely to produce outcomes supportive of the rule of law and peaceful democratic transition.²⁷

5 *Jus post bellum* as Transitional Justice

The increasingly pervasive involvement of courts and tribunals in matters of post-conflict justice demands a conception of proportionality that is not simply political but also jurisprudential. This is far from being limited to criminal trials. One also thinks of Alien Torts Claims actions in the United States and the role of the Inter-American Court of Human Rights and the European Court of Human Rights in post-conflict accountability. We can see that justice has gone from a prerogative of the victor, which needs restraining, to a shared international obligation. This development in and of itself informs the meaning of the new proportionality.

The constitutive instruments of the *ad hoc* criminal tribunals and the International Criminal Court reflect this change. Their preambles assert that their purpose includes guarding the peace. Meanwhile they also function in a more traditional way, offering constraints on victors' justice – because the many rules as to the scope and jurisdiction of tribunals and offences are fixed – thereby defining the very parameters of the offence. Through these tribunals we have moved away from traditional post-war judgments which were expressly disconnected from the end of war, and away from the focus on the accountability of any one state, i.e. the victor. This was made very clear by the International Criminal Tribunal for the former Yugoslavia, as it was established during wartime and contemplated prosecution of actors on all sides of the conflict, with evenhandedness with respect to nationality and ethnicity.²⁸ This move depoliticizes and entrenches a timeless approach to *jus post bellum*. The response is punitive, but the punishment is individualized not collective. This is the fundamental challenge of *jus post bellum* as criminal justice: How can individualized punishment address the systematic wrongs of war waged between collectivities?

Increasingly, the normative regime pertaining to war is also peace-related. It has become heavily regulated by a new area of law – international criminal law – and institutionalized via the new tribunals. The *ad hoc* criminal tribunals, beginning with the ICTY, were instituted to 'maintain or restore international peace and security',²⁹

²⁶ *Ibid.*

²⁷ T.D. Olsen, L.A. Payne and A.G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (2010).

²⁸ See ICTY, Office of the Prosecutor, press release, 25 July 1995, at 3; see also 'Statement by Justice Richard Goldstone', 24 Apr. 1995.

²⁹ See Statute of the ICTY.

i.e., to manage war. The tribunals were intended to operate – and did operate – during the course of the conflict, but with a view to facilitating its end. Here the controversy is not about victor's justice but about justice being imposed by the 'international community' on the region. The approach of the tribunals, reflected in the purposes stated in their constitutive instruments, suggests that there are no tragic choices or trade-offs between peace and justice, but only positive synergies. There is thus clearly a tension between this legal project of international criminal accountability and the perspective of pragmatic peace-building in the work of the political scientists discussed above.

6 Conclusion

There is a new relationship between the three strands of the law of war. The justification for war, especially where humanitarian justice considerations are prominent, sets the stage for higher expectations of humanitarianism, both in relation to how war is waged and the responsibilities of the victors post-conflict. If one understands humanitarianism in terms of the demand or aspiration for human security, then there is indeed a potential to evolve a notion of proportionality that navigates, so to speak, between the legalist and pragmatist perspectives. Going to war for the purposes of countering or preventing violations of humanitarian norms is normatively incoherent from both of these perspectives if the ultimate result is a reduction rather than an increase in human security, either because of the inherent impossibility of achieving the humanitarian goals through methods that themselves are adequately respectful of humanitarian norms or because of the exorbitant costs of establishing human security in the post-conflict environment (for instance, Iraq). This notion of proportionality demands a consonance of purposes, means, and consequences that straddles *jus ad bellum*, *jus in bello*, and *jus post bellum*.

With renewed demands for military intervention, interest in *post bellum* justice has never been greater. Given the human rights revolution, interventions are both justified on human security grounds but also waged in the context of new constraints, of human rights and international humanitarian law, as well as expectations of democratization. This goes some way to explaining the extraordinarily high demands for *post bellum* justice, which has now transcended its earlier limits to cover a larger period associated with conflict and to address the security, not just of states, but of persons and peoples.